

Felicia Caponigri

Problematizing fashion's legal categorization as cultural property

(doi: 10.7390/87054)

Aedon (ISSN 1127-1345)

Fascicolo 2, maggio-agosto 2017

Ente di afferenza:

()

Copyright © by Società editrice il Mulino, Bologna. Tutti i diritti sono riservati.
Per altre informazioni si veda <https://www.rivisteweb.it>

Licenza d'uso

Questo articolo è reso disponibile con licenza CC BY NC ND. Per altre informazioni si veda <https://www.rivisteweb.it/>



Oltre i confini del patrimonio culturale

Problematizing fashion's legal categorization as cultural property

di [Felicia Caponigri](#)

Sommario: [1. Introduction](#). - [2. Some challenges and nuances of Italian cultural property law revealed through fashion objects](#). - 2.1. Tangible or intangible. - 2.2. Cultural property or intellectual property. - 2.3. Fashion, art or luxury. - 2.4. Public or private. - [3. Conclusion](#).

May a fashion object be cultural property under Italian law? This short essay uses fashion as a case study to explore challenges and nuances of Italian cultural property law, calling attention to the increasing number of historically culturally significant fashion objects in Italy.

Keywords: Fashion; Moda; Cultural property.

1. Introduction

Often, an individual will acquire a garment or a piece of clothing for themselves: perhaps it is a bracelet bought with friends, a pair of shoes to carry them into their first interview and resulting career, or a dress or suit made for a special occasion. Whether the garment or piece of clothing is considered fashionable or not, it may be kept, treasured and passed down to family or friends; it may even be donated to a museum. Over time, the value we associate with garments or pieces of clothing evolves. These values are different for different groups of people: an individual may assign a value based on personal memories, family and friends based on memories of the gift-giver and their guidance, museums on the value of the memory of an important individual in their community or the society to which that individual belonged. The meaning of these objects and their physical location naturally evolve, even when grounded in personal reasons for fame, notoriety, or social status.

Just as individual attitudes evolve towards garments and clothing, so institutional attitudes towards garments and clothing as fashion objects evolve. Today, consumers find fashion objects [1] in boutiques, flagship or department stores and in art galleries, exhibition spaces, established and newly-christened museums. Boundaries and expectations are consistently and constantly blurred. Orchestrated in many cases by fashion and luxury brand goods companies and members of the art world, the growing appearance of fashion objects outside their points of sale may or may not be organic: these placements of fashion objects may be motivated by marketing and profit as much as by a genuine belief that these products have a cultural value that is relevant to the public at large.

Despite the ever-evolving values associated with fashion objects, the majority of these objects are meant for practical purposes. Real world actions accompany their creation, dissemination, and display. To facilitate these practical purposes, society normally draws legal distinctions in order to properly regulate and facilitate their creation, dissemination, and display. In regulating donations and sales, initial creation and false advertising, and even perhaps the perpetual preservation of a fashion object, the law mandates rules and standards that depend on common definitions. When the value associated with fashion objects is constantly evolving, however, the lines between tangible and intangible, cultural and intellectual property, art, fashion, and luxury, public and private are crossed, re-drawn, and crossed once again. Can the law adequately address this evolution of value and this proliferation of fashion objects outside traditional commercial venues in order to properly protect fashion objects and the actions that surround them as they now occur in our contemporary times?

The law protects and encourages the progress of fashion from its very inception: designers and companies regularly seek to protect and exploit their work through copyright, trademark, and patent [2]. After these protections, however, and in certain cases even concurrently, fashion objects may become keepers of a flame of a certain cultural value and reveal a public interest that may also be protected through cultural property law [3]. Can fashion objects fall within this category of protected objects? In other words, might fashion objects be legally considered cultural property?

Italy, more than perhaps any other territory, provides an excellent landscape for this discussion. As a country renowned for its historic and artistic patrimony, Italy has a long-standing and intricately crafted body of cultural property law currently in effect. This body of law mandates ways to ascertain whether or not an object is a piece of cultural property and imposes strict statutory protections for designated cultural property objects. Italy's ties to the fashion system and community are part of its very identity: *Made in Italy*, individual Italian brands, and the exemplary nature of Italian design throughout history are regularly emphasized as important parts of Italy's economy and culture. Italy has also seen a surge in "fashion museums" and exhibits of costume and dress since the turn of the 21st century. Traditional costume collections are exhibited in public museums, such as the *Galleria del Costume* in *Palazzo Pitti*, newly renamed the *Museo della Moda e del Costume*. Exhibitions of private costume collections are displayed alongside public art treasures, as in the case of the blockbuster fashion exhibit *Couture-Sculpture: Azzedine Alaïa in the History of Fashion* at the *Galleria Borghese* in Rome [4]. Private "fashion museums", including the *Museo Salvatore Ferragamo*, the *Gucci Museo*, and *Armani/Silos*, are founded, run, and curated by fashion and luxury brand goods companies to present a company's brand and its history to the public at large.

Currently, Italian cultural property law does not specifically apply to fashion objects. Fashion objects are, however, continually identified as exhibiting a cultural value and their presence outside commercial points of sale throughout the Italian territory is proliferating. It seems only a matter of time until Italian cultural property law must address how it will (or will not) recognize the evolving nature and increasing presence of fashion objects.

2. Some challenges and nuances of Italian cultural property law revealed through fashion objects

2.1. Tangible or intangible

When a visitor enters the *Gucci Museo* in Florence they embark on a path through floor to ceiling glass displays behind which stand *Gucci* objects classified according to specific themes in specific rooms [5]. These themed rooms are devoted to the famous *Flora* print made for Grace Kelly, the *Guccissimo* logo, the famous *Gucci* bamboo handle, and equestrian inspiration through the use of the horse bit, among others [6]. Entering a *Gucci* store on *Via Tornabuoni* in the same city, a visitor sees similar, almost identical objects: scarves with the *Flora* pattern are offered for sale, and a consumer who buys a *Flora* scarf with it quickly learns that such a scarf is both tangible and intangible. The scarf is prized for its silk content, its softness and the care and skill with which it has been made. It also represents the absolute highest quality of the Italian craftsman who has woven each of the scarf's silk threads and has hand painted its decoration [7]. For which, however, do we truly value this *Flora* scarf? Do we value it for its ability to testify through its materiality to the importance of Italian craftsmanship, or do we value it as a simple example of Italian craftsmanship itself?

Such a distinction matters under Italian cultural property law. Apart from the law's age requirement that a moveable object of cultural property be more than fifty years old, an object of cultural property must be just that- an object, a thing, a *cosa* [8]. Italian cultural property law places importance on the materiality of the object: it views the physical object as protectable and as a testament for civilization. The understanding of an object of cultural property as a testament having value for civilization was one of the key changes made during the law's codification [9], arguably moving Italian cultural property law away from a limiting aesthetically-oriented understanding of cultural property present in its earliest inceptions, and into a broader historically-oriented, or *storicizzata*, understanding of cultural property [10]. While only protecting an object in its material aspects might at first seem to be a limiting concept, in reality the concept of *cosa* allows for a broader understanding of cultural property. Indeed, legal scholars today admit that the general understanding of the term "beni culturali" should be understood as a *nozione aperta*, or *liminale*, which looks to other disciplines for its definition [11]. Central to an appreciation of the historical importance of a *cosa's* value as a testament for civilization are the opinions of experts in the field, which may even include art historians [12].

Furthermore, as the scholar Giannini has explained, the cultural property value of a *cosa* does not actually reside in its physical properties, but rather in a *cosa's* value as a keeper of the flame of the certain cultural value and interest connected to the object [13]. While Giannini's conception of cultural property implies the notion of intangible cultural heritage [14], it situates the legal understanding of a *bene culturale*, of an object that is a testament having value for civilization, securely in the realm of the physical, while acknowledging that there is something "immaterial" (or intangible) [15] - the metaphorical flame of value or interest. It is this flame that provides the foundation for the legal understanding of an object of cultural property- not the thing or object itself [16]. As Lorenzo Casini has explained,

[immateriality] relates to the value that cultural objects provide over and beyond their material existence. [Cultural objects] transmit something that cannot be touched, such as the terrific emotion that visitors may feel once they enter the Colosseum in Rome: "relics excite a special emotion, even though they have no religious significance." Such value, although in some circumstances it can be treated separately (think of catalogues, photos, postcards), is necessarily tied up with the material support that conveys it; that is the difference between cultural property and intellectual property [17].

At the heart of the Italian legal understanding of cultural property, therefore, is a material object, containing an untouchable value and whose preservation is justified by a public interest. As a result, no object, no matter how much it is generally celebrated as culturally significant, can be legally understood as cultural property unless it is a material object that contains an untouchable value and is an "instrument of culture, civilization, and education" [18].

It is not always an obvious decision, however, that a physical object has this untouchable value and that the public has an interest in that object's preservation. This is especially true for fashion objects whose value as objects of historical

interest is relatively new. Without delving into the complicated framework of *discrezionalità tecnica* and the ways in which objects are declared or verified as cultural property in the Italian legal system, suffice it to say that, like other objects previously underappreciated or simply unappreciated, the passing of time plays a crucial role in ascertaining these objects' value and the public interest [19]. When combined with the characterization of *bene culturale* as a *nozione aperta* or *liminale* it is possible to see how the legal category of *beni culturali* may potentially include any and all objects, thereby potentially even rendering the term itself meaningless.

The objects in the *Gucci Museo* might be understood as cultural property under Italian law: the celebrated bamboo handle affixed to the majority of *Gucci* handbags, while indelibly tied to a particular Italian craftsmanship, does fit an independent historical narrative. As an innovative response to the material deprivations of World War II and the availability of imported bamboo from Japan, its craftsmanship and historical significance is indelibly tied to its material form [20]. Like the original *Catcher in the Rye* manuscript, one of or the first bamboo handles produced by *Gucci* in 1947 might be a material testament to an innovative Italian design response to the deprivations and sacrifices of World War II [21]. The value of other objects in the *Gucci Museo*, however, may or may not be wrapped up in the very object itself. The *Flora* design for example may not need to be on a scarf or otherwise tied to its materiality to communicate its cultural importance.

2.2. Cultural property or intellectual property

The *Flora* design is an example of the potential overlap between cultural property law and intellectual property law and the debate over which should apply to fashion objects. When consumers see the *Flora* scarf, they recognize the motif and associate it with the *Gucci* brand. These consumers immediately know that the owner of the particular *Flora* scarf can afford to buy *Gucci* products and ascribe to a certain type of style. These contemporary consumers are now part of a certain heritage- that of the *Gucci* brand imaginary. A *Flora* scarf still performs all these same functions of fashion communication no matter its age or location. The *Flora* design- whether on a scarf, a bag, or a dress [22] - is a symbol of the *Gucci* brand. As time has passed, however, the value tied to an actual *Gucci Flora* scarf has become cultural and of a historical interest.

Here we see a connection between intellectual property protections and cultural property protections which is not easily undone. Much as design patent protection in the U.S. may lead to the secondary meaning required for potentially infinite trade dress protection [23], the possession of intellectual property rights in the object often allows the successful promotion of a fashion object as heritage during its commercial life. These intellectual property rights allow for the exclusive use of the fashion object in commerce accompanied by marketing campaigns and other business initiatives which emphasize the heritage of the brand [24]. This combination of intellectual property rights and smart business decisions often seems to lead to the acceptance of an object as part of a common cultural heritage, and therefore potentially to the protection of the actual fashion object as cultural property. Just as the boundaries between tangible and intangible are not as clear as they first appear, so are the very boundaries between legal categorizations: while intellectual property law and cultural property law might protect two different activities, the objects to which they are applied in practice might potentially be the same [25].

2.3. Fashion, art or luxury

Fashion objects themselves are not easily classifiable. Many contest whether the increasing presence of fashion objects in museums makes them 'museum-worthy' [26], and the most impassioned debates focus on whether fashion is art [27]. Of course, there are and always will be certain key differences between fashion and art: one of the oft cited ones is that fashion serves a purpose or function, while art, especially today, is considered *l'art pour art* (for its own sake with no practical purpose or function) [28]. While the category of cultural property may seem to be the common denominator between fashion and art, it by no means resolves the debate regarding the differences and similarities between the two categories. Moreover, art's protection under the Italian cultural property regime already enjoys its own hierarchy and bifurcation of sorts: article 10(5) of the [Codice dei Beni Culturali](#) states that items of cultural property may not be moveable objects made by a living author nor may they be more than fifty years old [29]. Most fashion objects for sale are created by living designers, as are some fashion objects that are put on display in museums and as part of private collections or archives [30]. Other fashion objects, however, have been made by designers who have passed away and these objects are more than fifty years old. In the *Museo Ferragamo* the *Invisible Shoe* from 1947, made with nylon threads and so named because of the invisible effect it produces on the wearer's foot, was designed by Salvatore Ferragamo who passed away in 1960. The shoe is seemingly consistently displayed in the museum for its ability to reflect a value over and above the shoe through its' materiality: the historic and cultural significance of Ferragamo as an Italian innovator and creative genius [31]. Fashion objects, therefore, display temporal similarities with both contemporary art and masterpieces.

Fashion and art also seem to display similarities in their substance: like the art world, the fashion world regularly attempts to craft separate definitions and categories to create a hierarchy of fashion objects. Fashion has been characterized by its changeable social purpose: one season shorter skirts symbolize a liberation from strict societal norms, another season they symbolize vulgarity and moral laxity [32]. Other objects in the fashion sphere are characterized as luxury: while they may have once or still do perform a social purpose, these objects are now fashion that has become timeless. It is luxury, and not fashion, whose social purpose has remained consistent throughout time [33]. Luxury brands, and therefore by extension the products they produce, are commonly described as exhibiting a "cultural presence" [34]. It might be said that like contemporary art, which is strongly tied to commerce and not

always to the museum [35], fashion speaks to everyday pressing needs and issues in society. And it might be said that luxury items, on the other hand, are like art objects that have withstood the test of time and are pointed to as examples of timeless genius, creativity, and artistic merit. Yet, despite the disassociation of luxury items from contemporary art, some luxury items are still accompanied by requirements also made of contemporary art in the *Codice dei Beni Culturali e del Paesaggio* (hereinafter "the Code"): certificates of authenticity. Article 64 of the Code mandates that the seller of a work of sculpture, painting, or of historical interest, no matter its age, must make certain disclosures of authenticity and provenance [36], and article 11 specifically states that contemporary art is subject to these requirements of authenticity and provenance [37]. Contemporary reproductions of Salvatore Ferragamo's original shoes displayed in the *Museo Ferragamo* are sold under the label *Ferragamo Creations* with an accompanying certificate of authenticity [38].

2.4. Public or private

Complicating matters further is the fact that fashion objects are owned by both public institutions and private individuals. While private ownership by no means negates the classification of an object as cultural property [39], it certainly hints at the complexity that a public interest in these fashion objects might entail [40]. Indeed, such complexity is visible in the specifically categorized framework presented in Article 10 of the Code. Article 10 mandates different processes for determining cultural property based on whether an object is (1) the property of the state or a non-profit organization, or (2) if it is private property [41]. Moreover, Article 10 also describes what kinds of classes of objects qualify for such determinations based in part on to whom they belong. Objects that are privately owned must, in addition to fulfilling the age and creation by a non-living author requirement, display a particularly important historical interest, or be of particular interest due to their reference to art or cultural history [42]. Still other classifications of objects in Article 10, including series or collections of objects which do not already form part of the gathered collection of a museum, or gallery, must be the keepers of an even higher level of interest in order to be declared cultural property: an interest that is exceptional and related to a historical relevance [43]. Article 10 includes an exemplary list of items to help identify when an object possesses this cultural nature [44], but this list does not include any item of dress, costume, clothing, or fashion. Of course, notwithstanding an identification and later judicial determination that an object in private property is cultural property, not every private owner or fashion brand might be willing to open their archive as a museum for the public [45].

And even when fashion enters the museum, understandings of what is public and what is private still converge. The museum space itself is generally seen as a space of public trust [46]. No matter the conception of what kind of space it proffers, however, the bottom line is that such a museum space needs to be managed properly. What this proper management looks like depends a great deal on the territory in which the museum finds itself and that territory's history. In the United States, for example, where private funding of museums is not only commonplace but historically rooted in the Gilded Age [47], 501(c)(3) not for profit corporations usually form the basis of museum governance structures [48]. Federally run museums in the United States are the exception to the general rule, with the Smithsonian Museums being the primary example of government intervention in this area and most state run museums being devoted to a territory's history and not to a universal survey of art [49]. In this sense, private stakeholders have a generally strong voice in choosing, displaying and then promoting objects in a U.S. museum. In the process, these private stakeholders help to decide what is perceived as cultural property by the public [50]. The U.S. government, however, still exerts a strong presence over museums, their founding and even in certain circumstances over their programming [51] through indirect means: providing tax benefits [52] which some have argued unfairly facilitate the opening of private museums by private collectors that are rarely open to a larger public [53].

Other countries with strong traditions of princely collections and royal palaces later opened to and annexed for the public are not accustomed to such a strong presence of private stakeholders and their accompanying interests. Indeed, Italy's state run museums were not even considered legal entities separate from the government offices of the Ministry of Cultural Heritage until a recent 2014 reform endowed them with some autonomous rights to manage their collections [54]. Moreover the gridlock that has characterized the majority of Italian state run museums has led even a legal system like Italy's, traditionally opposed to private interference in the cultural heritage sphere, to facilitate private activity, as exemplified by the recently implemented *ArtBonus*, a legislative initiative which encourages private investment in the restoration of works of cultural heritage and donations to cultural institutions by providing tax incentives [55]. Alongside these large and treasured public museums and their administrative webs smaller private museums structured as foundations or private corporations have appeared [56]. To make things more complex, private corporations are regularly hired by public state run Italian museums to mount exhibitions- giving private stakeholders a direct hold over substantive artistic decisions, notwithstanding the original purely governmental management model. While private management might at first be characterized as the more efficient option in Italy, the matter is far from clear [57].

Most fashion objects cannot lose their association with private organizations even when they enter the museum space because they are still identified with the fashion house or luxury brand that produced them. While there might seem to be some semblance of objectivity when a fashion object finds itself in a museum in which a fashion house or luxury brand has no stake [58], this objectivity soon breaks down. Not only do fashion houses and luxury brands regularly sponsor exhibits in both private and public museums [59], but they also found their own private museums that may be an actual department of their own corporation [60]. Fashion houses also participate in staging exhibitions of their own products in other museums [61]. Can we really expect a fashion brand or luxury brand goods corporation to remain objective when an emphasis on heritage in their own museum or another serves, even if remotely [62], their bottom

line? Moreover, can the public truly appreciate a fashion object as cultural property if there is an underlying marketing motivation? Does the motivation even matter? In reality institutions, governments, and individuals regularly exploit historically treasured and preserved objects for their enhancement through commercial venues. Moreover, and perhaps most importantly, commercial use or promotion of these treasured objects located in spaces of public trust fund the very preservation of these objects. Is there really such a difference between printing Botticelli's Venus on a t-shirt and reproductions of historic *Salvatore Ferragamo* shoes?

3. Conclusion

Fashion objects reveal the complexities of Italian cultural property law by calling attention to its nuances. These nuances often complicate understandings of what is cultural property, rather than clarifying them. Italian cultural property law emphasizes the immaterial interest that it wishes to protect through the preservation and enhancement of an object's materiality. Such protection, however, raises similarities with intangible cultural heritage protection and a potential overlap with the intellectual property regime. In seeking to strictly categorize objects through age requirements, Italian cultural property law seems to exhibit an interest in protecting certain well accepted and well recognized objects as cultural property. At the same time, however, it purports to legislate requirements for objects of contemporary art that it would rather not be within its scope. Lastly, Italian cultural property law seeks a balance between public and private, but too often compromises one or the other, leading to questions as to who owns what and whose responsibility it is to actually manage, preserve and enhance treasured objects of cultural property.

Applying Italian cultural property law to fashion objects makes these complexities more relevant and in need of clarification. Fashion objects may be prized as examples of Italian craftsmanship, for the skill of Italian craftsmanship tied up with their materiality or for the very cultural significance of their design. As part of the world of commerce, fashion objects are both commercial objects ready to be exploited and objects of cultural heritage- two things which may not necessarily be mutually exclusive. Fashion objects may be seasonal or timeless, but that does not mean that they easily map onto Art categories and hierarchies. Lastly, fashion objects are both private and public- worn by individuals and prized as objects of fashion communication and public interest.

Solving these issues and discovering where fashion objects fit is not necessarily obvious or easy, but it is certainly a legal road which is worthy of being traveled, given fashion objects evolving value and increased presence in our contemporary times.

Note

[1] Note that in this essay I define fashion according to Ingrid Loschek's work (defining fashion as clothing that has a social purpose above and beyond function or aesthetics, see I. Loschek, *When Clothes Become Fashion: Design and Innovation Systems*, Oxford, Berg Publishers, 2009, pp. 134-9 and Stefania Saviolo and Erica Corbellini's work ("the concept of fashion has to do with something that changes" and "(fashion) is a system of innovation engineered to meet and encourage seasonal consumer demand, fulfilling a cultural requirement to define ever-shifting social identities and relationships", see E. Corbellini, S. Saviolo, *Managing Fashion and Luxury Companies*, Milano, Rizzoli, 2009, at 19.

[2] For a general discussion of the types of intellectual property protection afforded to fashion designs and the potential pitfalls of these regimes see generally *An Introduction to Intellectual Property Protection in Fashion* in G.C. Jimenez and B. Kolsun (eds.), *Fashion Law: A Guide For Designers, Fashion Executives, and Attorneys*, Fairchild Books, 2010 and S. Scafidi, *Intellectual Property and Fashion Design*, in P.K. Yu (eds.) *Intellectual Property And Information Wealth*, Praeger Publishers, 2007, at. 115. For a description of the Italian legal regime of copyright, reformed to follow the 2002 European Directive, which extends copyright protection to certain works of industrial design that exhibit a certain artistic value, see F. Morri, *Le opere dell'industrial design tra diritto d'autore e tutela come modelli industriali: deve cambiare tutto perché (quasi) nulla cambi?*, in *Rivista di Diritto Industriale*, LXII/ 4-5, pp. 177-208, 2013.

[3] For the identification of cultural value and public interest as inherent characteristics of the cultural property legal regime see D. Vaiano, *La Valorizzazione dei Beni Culturali*, Torino, Giappichelli, 2011; L. Casini, "Todo es Peregrino e Raro...": Massimo Severo Giannini e I Beni Culturali, in *Rivista Trimestrale di Diritto Pubblico*, 65/3, 2015.

[4] For conflicting opinions about this exhibit see [V. Friedman, Azzedine Alaïa: Blending Fashion and Art in 'Couture/Sculpture'](#), The New York Times, July 15, 2015 (praising the exhibit, noting "What is striking is the way the clothes sneak up on you, processed in the grand scheme of the panorama not as foreign objects but rather objects that have earned inclusion on their own merits.") versus [M. Pettinau, Montanari senza censure sulla mostra di moda alla Galleria Borghese. E Anna Detheridge gli risponde con una lettera aperta: "Sono d'accordo con te, ma..."](#) [*Artribune*, August 9, 2015 (describing readers' debate: "Ha senso che sia un'istituzione culturale ad affermare che tra un marmo di Bernini e una maglia di Alaïa non ci sarebbe differenza?").

[5] Note that the museum glass in the *Museo Gucci* is deliberately left open in some spaces in order to emphasize its dual nature as a physical product and important artifact. Hence inspiring people to theoretically feel as though they may touch the object where there is no glass, and yet gaze at the object as an important, separate item to be revered. See Interview of Alessandro Gori by the author, *Gucci Museo*, March 13, 2017, Florence, Italy. The museum installation this article discusses was on display in the *Gucci Museo* from its 2011 opening until mid-April 2017, when the *Gucci Museo* temporarily closed to begin a re-installation of its collection. Images of the collection taken by visitors are still available online, in addition to images taken by and on file with the author.

[6] For an example of these rooms see the visual description of the *flora* room at *Gucci Archive*, Museo Gucci, available at <http://www.guccimuseo.com/en/gucci-archive/flora/> (last accessed May 5 2016). See also, *Flora* in GUCCI MUSEUM BOOKLET and generally, *GUCCI: THE MAKING OF* (Frida Giannini et al., eds., 2011).

- [7] For a video of how the *Flora* scarf is hand painted see S. Hirschmiller, *Gucci in Bloom*, The Telegraph Luxury, May 19, 2014 (noting that "silk artisans would be on hand at the Gucci Sloane Street store for the duration of the Chelsea Flower Show, (20-24 May 2014), to customise any Gucci *Flora* scarves purchased with initials of their choice [to celebrate Gucci's collaboration with garden designer Sarah Eberle and her creation of a garden with the flowers depicted in the *Flora* design]").
- [8] D. Vaiano, *op. cit.*, at 5-6.
- [9] As doctrinal texts have noted the inclusion of this specific language in art 2, clause 2 of d.lgs. 22 gennaio 2004, n. 42, [Codice dei Beni Culturali e del Paesaggio](#) definitively transferred one of the earliest understandings of the definition of cultural property crafted by the *Commissione Franceschini* into Italy's normative framework. See D. Vaiano, *op. cit.*, at 1-2. See also M.A. Sandulli (ed.), artt. 1-2, in *Codice dei Beni Culturali e del Paesaggio*, Milano, Giuffrè, 2012.
- [10] See D. Vaiano, *op. cit.*, at 3. For a historical description of the development of the cultural property code addressing the definition of cultural property see M.A. Sandulli (ed.), *op. cit.*, Art. 10. See also Casini, "*Todo es Peregrino e Raro...*", *cit.*, at 993.
- [11] See Sandulli's description of Giannini's scholarship: M.A. Sandulli (ed.), *op. cit.*, at 22-23. See also Casini's development of Giannini in L. Casini, "*Todo es Peregrino e Raro...*", *cit.*, at 992.
- [12] Although note that this does not necessarily mean that in evaluating whether a *cosa* is cultural property Italian cultural property law evaluates what a *cosa* is. See M.A. Sandulli, *op. cit.*, at 1256: "d'altra parte la nozione di bene culturale è per definizione aperta nel senso che il suo inveroimento risente della evoluzione della nozione di ciò che è cultura per non dire di ciò che è arte (sarebbe tedioso ricordare in questa sede tutto il dibattito che v'è stato e che v'è circa la nozione di arte: basti evocare il saggio di L. Tolstoj)... si è ormai affermata una nozione che fa leva sul suolo di testimonianza del tempo e dell'ambiente in cui è sorta o si è formata".
- [13] See D. Vaiano, *op. cit.*, at 5. See also generally L. Casini, "*Todo es Peregrino e Raro...*", *cit.*, at 992, 995.
- [14] Scholars such as Sabino Cassese and Lorenzo Casini, while keeping the legal notions separate, have noted the connection between intangibility and Giannini's understanding of the legal notion of *bene culturale*, a providential development on Giannini's part, given the recent acceptance of the importance of intangible cultural heritage in [UNESCO's Convention for the Safeguarding of the Intangible Cultural Heritage](#) (2003). See L. Casini, "*Todo es Peregrino e Raro...*", *cit.*, at 995.
- [15] Note that in Italian law the words *materiale* and *immateriale* are used for tangible and intangible. The Italian title for UNESCO's *Convention for the Safeguarding of the Intangible Cultural Heritage* (2003) is *Convenzione per la salvaguardia del patrimonio culturale immateriale*. See [Official Italian Translation](#). In attempting to stay close to the text of Italian law and doctrine, I have chosen to use tangible and intangible and material and immaterial somewhat interchangeably, but consistently, in the text.
- [16] In answering what it is that makes the Palazzo Pitti and a private building both cultural property, Giannini responds that it is both *immaterialità* and *pubblicità*, where immaterialità is (in Lorenzo Casini's words) "il valore culturale, ossia il 'valore tipico' di cui è portatrice ogni testimonianza materiale avente valore civica." Casini, *op. cit.*, at 993. Casini further quotes Giannini's explanation: "il bene culturale abbia supporto una cosa, ma non si identifichi nella cosa medesima, bensì, come bene, si aggettivi in quel valore culturale inerente alla cosa." *Id.* The other part of the foundation, *pubblicità* (publicness) is defined as a derivation of "the public interest that justifies [the object's] preservation, protection, and special regulation." L. Casini, "*Italian Hours*" *The Globalization of cultural property law*, in *International Journal of Constitutional Law*, 9/2, pp. 363-393, 2011, at 375.
- [17] L. Casini, *Italian Hours*, *cit.*, at 375 (Casini gives an enlightening example "...the novel *Catcher in the Rye* is not a cultural property, but the original manuscript by J.D. Salinger is.").
- [18] *Ibid.* at 375.
- [19] See the discussion of the newfound appreciation for "*l'architettura riconducibile alla scuola razionalista moderna*" in M.A. Sandulli, *op. cit.*, at 168- 169.
- [20] For a description, see *Bamboo* in Gucci Museo Booklet, Gucci Museo, 2016.
- [21] It is interesting to note that, perhaps as an example of their own inability to classify the bamboo handle as of tangible or intangible importance, the *Gucci Museo* exhibits some contradictions in its own labels: it first classifies the bamboo handle with other post World War II materials as part of its general "Innovative Materials" room, and then proceeds to emphasize the importance of the bamboo handle's "design [as] an iconic example of the acumen of Gucci's craftsmen who were pushed to invent clever solutions to war-time rationing or materials", dating the first bamboo handle to 1947. See Museum Labels, Gucci Museo, Field Notes, March 2, 2016 (unpublished).
- [22] For images of the *Flora* design on all these articles see *Flora*, GUCCI MUSEO, available at <http://www.guccimuseo.com/en/gucci-archive/flora> (last accessed June 13 2016). See also *supra* n. 7.
- [23] The connections between the U.S. design patent and trademark legal regimes has been explained by Professor Mark McKenna of Notre Dame Law School. See M. McKenna, *Lecture, Trade Dress and Design*, Notre Dame Law School, Spring 2015 (unpublished).
- [24] Indeed, while objects and their designs may be copied or imitated, a brand's story and unique heritage cannot be. This fact has been used by many fashion houses and luxury brand goods companies, including by the Gucci creative director Frida Giannini in her creation of the *Forever Now* campaign for Gucci. See *Forever Now*, in F. Giannini et al. (eds.), *Gucci: the Making of*, Rizzoli, New York, at 368.
- [25] For a sampling of the discussion of how protections may overlap see K. Toshiyuki, *Intangible Cultural Heritage and Intellectual Property: Communities, Cultural Diversity, and Sustainable Development*, Intersentia, Cambridge, 2009. See also M. McKenna, *Lecture, Trade Dress and Design*, Notre Dame Law School, Spring 2015 (unpublished) (noting individual intellectual property protections such as copyright, trademark, trade dress and design patent, usually work together to protect one object of design). Although most overlaps are discussed in terms of intangible heritage and intellectual property, there seems to be no

reason why protection of an object as a cultural good might not also overlap with protection by the intellectual property regime, such as copyright. To take Professor Casini's example of J.D. Salinger's original *Catcher in the Rye* manuscript, if the manuscript is more than fifty years old it will qualify for protection as cultural property under Italian law, but given that J.D. Salinger only passed away in 2010, the words contained in that manuscript are still protected by copyright, given the general international term is life of the author plus seventy years.

[26] For a sampling of discussions implying fashion's museum-worthiness, see [R. Tashjan, Andrew Bolton, Star of the First Monday in May, thinks it's time to stop asking whether Fashion is Art](#), Vanity Fair, April 15, 2016; [A. Rossi, Fashion vs. Art](#), The New York Times, April 15, 2016; [J. Noveck, Met curator Andrew Bolton, quiet defender of fashion as art](#), BOF, July 24, 2017 ("Is fashion art, or is it commerce? And if it's both, can they happily co-exist? Clearly Bolton's answer to that last question is yes.").

[27] An example of two exhibitions that engage with this issue are the exhibition at the Museo Salvatore Ferragamo, *Across Art and Fashion*, open until April 7, 2017 and *Il Tempo e La Moda* held during the first Florence Biennale in 1996. Of course, exhibitions put on by the Costume Institute at the Metropolitan Museum of Art regularly engage with this question, as Andrew Bolton discussed at length prior to the opening of the 2016 exhibition *Manus x Machina*: "I've always said that not all fashion is art, but then not all art is art!...Contemporary art is deeply, deeply rooted in commerce. And the fact that those criticisms are launched at fashion and not at art I find extraordinary, in this day and age." J. Noveck, *Met curator Andrew Bolton, quiet defender of fashion as art*, cit. Perhaps one of the best examples of conflicting public opinion about the appropriateness of displaying fashion alongside art as its equal is evidenced in discussions about the exhibition of Azzedine Alaïa dresses *Couture/Sculpture* at the Villa Borghese in Rome in 2015. See V. Friedman, *Azzedine Alaïa: Blending Fashion and Art in 'Couture/Sculpture'*, supra n. 5. versus Marta Pettinau, *Montanari senza censure sulla mostra di moda alla Galleria Borghese. E Anna Detheridge gli risponde con una lettera aperta: "Sono d'accordo con te, ma..."*, cit.

[28] The author is grateful to Professor Stefano Baia Curioni for clarifying the importance of distinguishing design's adherence to format and contemporary art's freedom from that format. Of course, on this point, decoration is not, in the author's view, understood as a "purpose" of art (as some intellectual property legal cases seem to highlight, see generally *Varsity Brands et al v. Star Athletica*, No. 14-527, slip. op (6th Cir., August 19, 2015)).

[29] "Salvo quanto disposto dagli articoli 64 e 178, non sono soggette alla disciplina del presente Titolo le cose indicate al comma 1 che siano opera di autore vivente o la cui esecuzione non risalga ad oltre cinquanta anni, se mobili, o ad oltre settanta anni, se immobili, nonché le cose indicate al comma 3, lettere a) ed e), che siano opera di autore vivente o la cui esecuzione non risalga ad oltre cinquanta anni." Art. 10, in M.A. Sandulli, *op. cit.*, at 124. Note that there is talk of extending this limit to seventy years for moveable objects.

[30] For an upcoming example of a prominent museum's display of the designs of a living fashion designer see [M. Schneier, A Sneak Peek at the Met's Rei Kawakubo/Comme des Garçons Show](#), The New York Times, March 6, 2017, ("Ms. Kawakubo, 74, is the first living designer to be so recognized since Yves Saint Laurent in 1983.")

[31] This presentation is deliberately made apart from Ferragamo's receipt of a patent for the design. See [Brevetti e Invenzioni](#), Museo Salvatore Ferragamo.

[32] See I. Loschek, *op. cit.*, at 134. ("Fashion extends far beyond the objective aspect of the product, clothing. It gives this clothing a social purpose, above and beyond those of function and aesthetics.")

[33] What are deemed "luxury brands and their products" are those that are associated with mythological, dream factory imaginary; they are originality associated with creativity and innovation. Fashion, by contrast, is "forward looking", not timeless. "[Fashion] is a system of innovation engineered to meet and encourage seasonal consumer demand, fulfilling a cultural requirement to define ever-shifting social identities and relationship" E. Corbellini, S. Saviolo, *op. cit.*. See also J. Sherry et al, *The aesthetics of luxury, fashion, body, and identity formation*, in *Journal of Consumer Psychology*, 20/4, pp. 459-470, 2010, at 464 (although note the authors use the terms fashion and luxury fashion when referring to seasonal and timeless ("While fashions go through a life cycle, luxury fashion is portrayed as "timeless.")).

[34] E. Corbellini, S. Saviolo, *op. cit.*, at 28.

[35] See Noveck, *Met curator Andrew Bolton, quiet defender of fashion as art*, cit. (quoting Andrew Bolton).

[36] "Chiunque esercita l'attività di vendita al pubblico, di esposizione a fini di commercio o di intermediazione finalizzata alla vendita di opere di pittura, di scultura, di grafica ovvero di oggetti d'antichità o di interesse storico od archeologico, o comunque abitualmente vende le opere o gli oggetti medesimi, ha l'obbligo di consegnare all'acquirente la documentazione che ne attesti l'autenticità o almeno la probabile attribuzione e la provenienza delle opere medesime; ovvero, in mancanza, di rilasciare, con le modalità previste dalle disposizioni legislative e regolamentari in materia di documentazione amministrativa, una dichiarazione recante tutte le informazioni disponibili sull'autenticità o la probabile attribuzione e la provenienza. Tale dichiarazione, ove possibile in relazione alla natura dell'opera o dell'oggetto, è apposta su copia fotografica degli stessi." See [Articolo 64, Codice dei Beni Culturali e del Paesaggio](#). The scope of the Code's application to contemporary art is also noted in M. Ragozzino, *Arte pubblica, bene comune*, in G. Ajani, A. Donati (eds.) *I Diritti dell'Arte Contemporanea*, Torino, Allemandi, 2011, pp.161- 171, at 164.

[37] "Sono assoggettate alle disposizioni espressamente richiamate le seguenti tipologie di cose: ... le opere di pittura, di scultura, di grafica e qualsiasi oggetto d'arte di autore vivente o la cui esecuzione non risalga ad oltre cinquanta anni, a termini degli articoli 64 e 65, comma 4..." See Articolo 11, clause 1(d), *Codice dei Beni Culturali e del Paesaggio*.

[38] There is a plaque prominently displaying this information in the *Salvatore Ferragamo* Milan store on Via Montenapoleone, last visited on February 21, 2017.

[39] L. Casini, "*Todo es Peregrino e Raro...*", *cit.*, at 994.

[40] *Ibid.*

[41] See Art. 10, in M.A. Sandulli, *op. cit.*, at 123-4.

[42] Artt. 10, clause 3(1)(a) and clause 3(1)(d), *id.*, at 123.

[43] "[L]e collezioni o serie di oggetti, a chiunque appartenenti, che non siano ricomprese fra quelle indicate al comma 2 e che, per tradizione, fama e particolari caratteristiche ambientali, ovvero per rilevanza artistica, storica, archeologica, numismatica o etnoantropologica, rivestano come complesso un eccezionale interesse." Art. 10, clause 3(e), d.lgs., *Codice dei Beni Culturali e del Paesaggio*.

[44] M.A. Sandulli, *op. cit.*, at 126.

[45] Note that in the case of the *Museo Gucci*, while the museum is open to the public, the vast majority of items are housed in the archive which is considered a private space not open to the public and the distinct property of the Gucci corporation. See Interview with Alessandro Gori by author, *Museo Gucci*, March 13, 2017, Florence, Italy.

[46] For a discussion of museums' representation of and relationship with the public trust see J. Cuno (ed.) *Whose Muse? Art Museums and the Public Trust*, Princeton, Princeton University Press, 2006.

[47] See A. McClellan, *The Art Museum from Boullée to Bilbao*, Oakland, University of California Press, 2008, at 28.

[48] The Metropolitan Museum of Art, for example, cited as an exemplary American example for museums around the world, is a 501(c)(3) not for profit corporation. See Form 990, *Return of Organization Exempt from Income Tax*, 2013, Public Disclosure Copy, available at <http://www.metmuseum.org/about-the-met/policies-and-documents/annual-reports>. For a description of Museums and not for profit governance structures see M.A. Phelan, *Museum Law*, 19- 19 (4th ed., 2014).

[49] For a non-exhaustive and general list of U.S. state museums, see [List of U.S. state historical societies and museums](#), Wikipedia.

[50] It is for this reason that conflicts of interests may arise (as, for example, a collector who is also a member of the board of directors has his works of art displayed in the very same museum). For a discussion of conflicts of interest issues as applied to the display of fashion objects in museums, see F. Caponigri, *The Ethics of the International Display of Fashion in the Museum*, forthcoming in *Case Western Reserve J. Of Int'l Law*.

[51] Perhaps the most cited clash of opinions on programming between state officials and museums is the example of the Mapplethorpe exhibit at the Cleveland Museum of Art. For a description of the case see J.H. Merryman et al., *Law, Ethics and the Visual Arts*, 2007, at 692-697 (2007).

[52] The characterization of indirect and direct means of government support for the arts is detailed in Yesim Tonga Uriarte's recent lecture *What is Contemporary in the Museums of Contemporary Art?*, IMT School for Advanced Studies Lucca, March 1, 2017 (unpublished).

[53] See [P. Cohen. Writing Off the Warhol Next Door: Art Collectors Gain Tax Benefits From Private Museums](#), The New York Times, January 10, 2015.

[54] L. Casini, *Ereditare Il Futuro: Dilemmi Sul Patrimonio Culturale*, 2015, at 176 -187.

[55] See L. Casini *Il tempo ritrovato: mecenatismo e artbonus*, in L. Casini (ed.), *op. cit.*, at 97-104.

[56] For a description of the nuances between private museums and public museums prior to the 2014 reform see [G. Severini. Musei pubblici e musei privati: un genere, due specie](#), in *Aedon*, 2003, 2.

[57] Paola Dubini discusses this at length in her work. See for example, in regards to the private and public relationships in managing "built heritage", P. Dubini, L. Leone and L. Forti, *Role Distribution in Public-Private Partnerships: The Case of Heritage Management in Italy*, in *International Studies of Management and Organization*, 42/2, pp. 57, (Summer 2012). See also P. Dubini, *Lecture, Models of Organization of Cultural Institutions*, IMT School for Advanced Studies Lucca, Spring 2017 (unpublished).

[58] The concept of stake here does not include donation.

[59] Although these sponsorships are generally not of exhibits of a fashion company's own products, although the separation between sponsorship and benefactor is debated. See [Carol Vogel. Armani Gift to the Guggenheim Revives Issue of Art and Commerce](#), The New York Times, December 15, 1999, (discussing Armani gift to Guggenheim prior to an Armani retrospective at the museum) and Press Release, [Alexander McQueen's Iconic Designs in Costume Institute Retrospective at Metropolitan Museum](#), The Metropolitan Museum of Art, (where the exhibition of the designer Alexander McQueen's work was made possible by his eponymous fashion house ("The exhibition is made possible by Alexander McQueen™") after his death).

[60] As in the case of the *Museo Gucci*. See e-mail from Alessandro Gori, Coordinator of the *Gucci Museo* (September 13, 2016 19:20). Note that the *Museo Gucci* is, in all aspects, an effective department of the Gucci Group itself: museum tour guides and volunteers seem to be regularly taken from across departments and the Gucci Group Press Office helps to facilitate the communication and dissemination of events at the *Gucci Museo*. See Interview with Alessandro Gori by author, *Gucci Museo*, March 13, 2017, Florence, Italy.

[61] [S. Menkes. Gone Global: Fashion as Art?](#), The New York Times, July 4, 2011, (giving an excellent overview of the proliferation of fashion exhibitions at the beginning of their popularity in 2011). For a recent exhibit of fashion objects orchestrated in part by a fashion designer and their fashion brand see *Manolo Blahnik: The Art of Shoes*, Palazzo Morando, Milan, Italy, January 26 - April 9 2017.

[62] Note that while the *Gucci Museo* seems to admit to a clear link between the store visual, the lack of a difference between display at the point of sale and at the museum, and a clear emphasis on the product in all its forms (past, present, and future), it also emphasizes that the *Museo* engages in many activities that do not envision aspirational clients or customers as its audience- especially when it organizes workshops for children and other events with the local community. See Interview with Alessandro Gori by the author, *Museo Gucci*, March 13, 2017, Florence, Italy.

copyright 2017 by [Società editrice il Mulino](#)
[Licenza d'uso](#)

[inizio pagina](#)