



## *Fashion Law, Italian Style - Symposium*

### **Heritage-Shaking in an Activated Archive: The Emilio Pucci Heritage Hub and the Vivara Print Between Copyright and Cultural Property Law**

Felicia Caponigri and Lucrezia Palandri\*

#### **Abstract**

In this essay, we explore fashion brands' archives and how, relatedly, copying from a brand's past contained in these archives is paradoxically good for fashion and, by extension, for Fashion Law as a field. Using the Pucci Archive and the Pucci Heritage Hub as our case study, we look to Italian law to explore how we might deal with our cultural interest in fashion through fashion archives. Arguing that *Fashion Law, American Style* has been relatively unable to parse the cultural meaning of fashion outside of the legal language of copyright as a legal discipline, we emphasize that *Fashion Law, Italian Style* gives us the important additional tool of Italian cultural heritage law. In applying Italian cultural heritage law to the Pucci Archive we coin a new term: activated archive. An activated archive, as we term it, is always acting in a way which defies traditional notions of gathering, inventorying, and conserving. An activated archive may have the characteristics of authenticity, reliability, integrity, and usability, but it does not preserve fashion as a document in the traditional sense. Rather, it uses the fashion it preserves in unexpected and dynamic ways that can add to the history of the fashion it preserves and the story of the brand. Activated archives, we argue, can play an important role in our applications of originality, artistic value, and creative character to fashion designs under both US and Italian copyright law. Activated archives can help to set up a comparison between past and present works. Activated archives can help to define the meaning ascribed to each design, and what weight to assign such meanings in a comparison. We call this process in which activated archives engage and which creatives

\* Felicia Caponigri is a Guest Scholar at IMT School for Advanced Studies Lucca and the Founder of Fashion by Felicia, LLC. Lucrezia Palandri is a Research Fellow at the University of Insubria and Adjunct Professor at the University of Florence. The authors wish to especially thank Laudomia Pucci and the staff at the Emilio Pucci Heritage Hub, including Dylan Colussi, Cristiana Stramare, and Giulia Ammannati for their generosity, including by providing information and access to the Pucci Archive, as well as an extensive tour. Facts and information about the Pucci Heritage Hub, the Pucci Archive, and these institutions' management and missions have been taken from interviews with Laudomia Pucci and her staff. Thanks also to Jennifer Celani, and to Pier Luigi Roncaglia. While this article is a joint effort, in the following pages, Lucrezia Palandri primarily wrote Sections II.2.; III.1; III.3; III.4; IV.2; IV.3; V, while Felicia Caponigri primarily wrote Sections I; II.1.; III.2.; III.5; III.6; IV; IV.1. While the authors propose the term activated archive and the process of heritage-shaking, this academic article should not be construed as legal advice. Nor should observations made in this academic article about the management of the Pucci Heritage Hub or the administration of works by Emilio Pucci be construed as statements about any rights, duties, or obligations related to LVMH. This publication is part of the project NODES which has received funding from the MUR – M4C2 1.5 of PNRR funded by the European Union - NextGenerationEU (Grant agreement no. ECS00000036).

deploy to create their designs ‘heritage-shaking’. Heritage-shaking is a process in which a design in the contents of an activated archive is revisited and blended together with contemporary creativity to produce designs of the present, notwithstanding their reference to the past. We suggest that courts might more fully work with activated archives and recognize this heritage-shaking process as part of infringement tests within copyright law.

## I. Setting the Pucci Stage: Fashion Between Heritage and Creativity

In 1965 Emilio Pucci, the Florentine aristocrat known for his ready to wear designs in vibrant prints marrying an ‘Italian sensibility...with American sportswear’<sup>1</sup> launched a perfume, Vivara.<sup>2</sup> Inspired by the eponymously named island off the coast of Naples, the launch of the perfume was accompanied by the launch of an original print motif, also called Vivara.<sup>3</sup> Abstract in a blue palette, the print

‘represent(ed) the Mediterranean island....as seen from above. The shape at the center of the motif represent (ed) the island, the waves at its left, and on the right the rising moon (above) and the setting sun (below)’.<sup>4</sup>

Since its creation by Emilio Pucci in 1965, the Vivara print has been ‘reproduced and reworked’ in ‘more than ninety variations’ by various creative directors who worked for the brand after Emilio Pucci’s passing.<sup>5</sup>



**Figure 1** - The original ‘Vivara’ motif from 1965, preserved as part of the Emilio Pucci Heritage Hub

The reproduction and reworking of the Vivara print raises questions about the boundary between a brand’s heritage and its contemporary creativity. In other words, the Vivara case highlights a process of creation that is frequently used by brands’ creative directors and creative teams. These creative directors and creative teams create new designs and new collections by taking inspiration. Often these new designs and new collections are perceived as copying outright from their brands’, or another brands’, past designs. These new designs that rely on the brand’s heritage might be considered as creative and original as new designs created independently. On the

other hand, they raise questions about what is creative and what is original. At the moment, creative designers and creative teams do not have clear guidance

<sup>1</sup> V. Friedman, ‘Aristocratic Design’, in Id et al eds, *Pucci* (Köln: Taschen, 2021), 22.

<sup>2</sup> Vivara slides, Emilio Pucci Heritage Hub (on file with the authors).

<sup>3</sup> *ibid* 22.

<sup>4</sup> *ibid*

<sup>5</sup> *ibid*

about how to effectively use a brand's heritage as an asset while still producing original and innovative designs. In a greater context of naming and shaming from consumers, fashion commentary, and even legal standards producing different results in application, the level of creativity and originality required of designs inspired by heritage is unclear. Designs inspired by heritage raise the question of how to use a brands' heritage as an asset while still producing innovative and original designs.

Fashion journalist Angelo Flaccavento has commented on what he perceives as a current imbalance between using a brand's past and creating original designs.

‘...the industry has entered the age of the imposture: designers who feel entitled to blatantly steal – pieces, tropes, collections, entire identities – from other designers and houses and claim everything as their own without the slightest shame. Of course, the creative process often begins with a reference. But it's the inability to push these starting points forward that's offensive...’<sup>6</sup>

Flaccavento's critique in fact identifies a well-discussed paradox in fashion:<sup>7</sup> that copying is part of the creative process and, yet, that contemporary creativity requires some new addition. The creative process can use the past but that same creative process still needs to move that past forward for the present. The requirement of a new addition which Flaccavento calls out from a fashion point of view is also legally relevant. Originality under copyright law, for example, is defined by changes. A copyright requires new additions, a spark of originality under the law<sup>8</sup> or even artistic components. Originality and artistry are often evaluated by identifying personal contributions of a creative or by identifying new interpretations of a work.

We might call such contemporary fashion that references the past but adds something of the moment, succeeding in its originality, to be a ‘parallel creation’. In other words, a fashion which does not negate the past, does not embody the past, but translates or interprets the past with new additions for the present moment. Past and history cannot be repeated in fashion, no matter how much we would like to dress similar bodies in similar clothing or copy past designs to re-embody historic moments.<sup>9</sup> Rather, referencing the past, is still seen with eyes from the present

<sup>6</sup> A. Flaccavento, ‘In Paris, Creators and Imposters’ *The Business of Fashion*, available at <https://tinyurl.com/yndafdma> (last visited 20 September 2023).

<sup>7</sup> For a discussion of the paradox that copying is good for fashion see: C.B. Sprigman and K. Raustiala, ‘The Piracy Paradox: Innovation and Intellectual Property in Fashion Design’ 92(8) *Virginia Law Review*, 1687 (2006).

<sup>8</sup> 17 USC §102; Art 2(10), legge 22 April 1941 no 633.

<sup>9</sup> F. Caponigri, ‘Fashion's Brand Heritage, Cultural Heritage, and the Piracy Paradox’ 39(2) *Cardozo Arts & Entertainment Law Journal*, 557, 568 (2021), arguing ‘Because brand heritage links individual fashion designs to a brand's past and history, the reproduction of the heritage embodied in these designs is hard-pressed to be copied, no matter the segment of the fashion industry at issue’. Arguments in fashion that outline the importance of imitation might be seen as contrary to this statement, especially since they highlight how people from different social classes can approximate each other's social identity through dress. See, for example, G. Simmel, ‘Fashion’

moment: the past affects the present as much as the present affects the past.

Because of the nature of the fashion zeitgeist<sup>10</sup> – the collective process from which fashion emerges – we may not be able to predict with certainty *ex ante* when heritage is interpreted or translated with success. We may not be able to predict when a reference is, in fact, pushed forward to meet modernity and our contemporary times until, in fact, it meets those times, and its consumers. But notwithstanding the *x* factor nature of fashion, heritage, the complex of facets of the past which we recognize for their cultural value,<sup>11</sup> is, in fact, always crucial to the success of fashion. A brand's own heritage is the lynchpin of the dialogue between past and present that takes place within fashion. Pucci's Vivara example represents this. Reproductions and reworkings of the print in later collections use a design of the past which is of significance within the story of Pucci. These designs change the print, shake it up, and interpret it for the present. Given the fact that a brand's heritage cannot be negated<sup>12</sup> or ignored, how are we to find an effective equilibrium between fashion's past and present? This is, effectively, our overarching, macro research question in this essay.

As we are legal scholars, and not fashion historians or ethicists, we primarily look to the law to answer our research question. The law that applies to fashion's past – cultural heritage law – and the law that applies to fashion's present – copyright law – are our primary tools and instruments. Our methodology is also influenced by the field of Fashion Law itself and the goals of this Symposium. Our essay squarely addresses the fact that Fashion Law, in its predominantly American style, has been uniquely informed by discussions of how fashion is copyrightable subject matter. Our essay also sees, however, that Fashion Law, American Style has been relatively unable to parse the cultural meaning of fashion outside of the legal language of copyright as a legal discipline.<sup>13</sup> We see Italian law as offering a

62(6) *The American Journal of Sociology*, 541, 542 (1957) (reprinted from the *International Quarterly*, October 1904). At the same time, even Simmel notes that imitation cannot completely reproduce the factors that brought about the original in the first place ('(Imitation) affords the pregnant possibility of continually extending the greatest creations of the human spirit, without the aid of the forces which were originally the very condition of their birth'). Although discussing change in fashion from a social distinction perspective, Simmel seems to admit that the change inherent in the contents of fashion always gives it 'an individual stamp as opposed to that of yesterday and of tomorrow', notwithstanding its existence at the heart of the tension between imitation and differentiation. *ibid* 543-544. Other work also seems to emphasize the inability of repeated fashion to be the same as the past design it uses by emphasizing the importance of the 'material turn' for Fashion Studies. See I. Maldini and L. Manz Ragna, 'From "Things of Imitation" to "Devices of Differentiation": Uncovering a Paradoxical History of Clothing (1950–2015)' 22(1) *Fashion Theory*, 69 (2018) (citing to Woodward and Fisher and also exploring Borgmann's philosophy of technology).

<sup>10</sup> C. Scott Hemphill and J. Suk Gersen, 'The Law, Culture, and Economics of Fashion' 61(5) *Stanford Law Review*, 1147, 1157-1159 (2010).

<sup>11</sup> We might generally abstract this macro definition from the definition of cultural property in the Italian Cultural Property Code. Art 10(1), decreto legislativo 22 January 2004 no 42.

<sup>12</sup> F. Caponigri, 'Fashion's Brand Heritage' n 9 above at 568.

<sup>13</sup> Fashion as cultural communication and fashion as a cultural product have been hallmarks of arguments for increased protection of American fashion under US intellectual property law since

solution. This Italian turn, if you will, is not surprising, as the United States has overwhelmingly resisted regulating the movement, circulation, and exchange of movable properties representative of ‘American history’ beyond real property rights extended to private persons or to public entities.<sup>14</sup> Properties of cultural interest, including fashion, are, in the United States, classified as part of the container in which they are located- most often museum collections. Fashion’s legal cultural interest, therefore, is most often discussed in terms of museum exhibitions, and museum ethics and guidelines in addition to any *sui generis* laws.<sup>15</sup> By contrast,

Fashion Law’s advent. S. Scafidi, ‘F.I.T.: Fashion as Information Technology’ 59 *Syracuse Law Review*, 69 (2008); Id, ‘Intellectual Property and Cultural Products’ 81(4) *Boston University Law Review*, 793 (2001). See also Id, *Who owns Culture?: Appropriation and authenticity in American law* (New Brunswick, N.J.: Rutgers University Press: 2005). But scholars working within the field of Fashion Law in the United States have only recently begun to expressly consider fashion as part of cultural heritage, and cultural property, often thanks to a comparative perspective. See the work of Felicia Caponigri, *supra* in addition to F. Caponigri, ‘Problematizing Fashion’s Legal Categorization as Cultural Property’ *Giornale dell’Arte e del Diritto Online* (2017). At times cultural appropriation explores how fashion itself is part of cultural heritage, although most literature explores how fashion brands *infringe* on culture. For the latter see F. Caponigri, ‘An Italian Style of Cultural Appropriation?’ *Notre Dame Journal of International & Comparative Law’s Online Symposium Continuing the Conversation: The Law and Ethics of Cultural Appropriation*, (2021). See also J. Janewa Osei-Tutu, ‘Protecting Culturally Identifiable Fashion: What Role for GIs?’ 14(3) *Florida International University Law Review*, 571 (2021) (which explores how culturally identifiable fashion may be protected under the law, building on fashion as cultural heritage and on the cultural appropriation of traditional craftsmanship which may be classified as part of fashion). On the other hand, cultural property scholars and those working in the cultural space have also recently begun to consider fashion as an express part of cultural heritage. Consider D. Calanca, ‘Italian Fashion History and Cultural Heritage: Data for a Tourist Guide’ *Almatourism: Journal of tourism, culture and territorial development*, 29 (2012) (proposing Italian fashion as an Italian cultural heritage that can be promoted for tourism with an excellent overview of the fashion museums and archives in Italy and contextualizing the proposal with reference to the 2003 Convention for the Safeguarding of Intangible Cultural Heritage); R.M Andrade et al, ‘Fashion and Cultural Heritage Perspective: 1<sup>st</sup> Seminar on History and Historiography of Fashion and Dress University of São Paulo (USP)/Federal University of Goiás (UFG) June 2013’ *Almatourism: Journal of tourism, culture and territorial development*, 157 (2013) (also discussing the contribution of Daniela Calanca at the University of Bologna to the presentation of fashion as of historical significance and therefore as cultural heritage); A.S. Hjemdahl, ‘Fashion Time: Enacting Fashion as Cultural Heritage and as an Industry at the Museum of Decorative Arts and Design in Oslo’ 8(1) *Fashion Practice*, 98 (2016) (a historical analysis of how the fashion industry and fashion museums developed their relationships, ‘help(ing) to legitimize each other’, using the case study of a 1933 ‘dress event at the Museum of Decorative Arts and Design in Oslo’).

<sup>14</sup> Gerstenblith casts this uniqueness of US historic preservation law and cultural property protections, which were relatively late to protect objects belonging to indigenous communities, as related to the colonists ‘almost exclusive (focus) on their Mediterranean and European cultural ancestry and on the question of whether a legitimate North American but European-derived culture with its own style of art, architecture and literature could develop’. P. Gerstenblith, ‘Identity and Cultural Property: The Protection of Cultural Property in the United States’ 75 *Boston University Law Review*, 559 (1995).

<sup>15</sup> Such as, in addition to Native American Graves and Protection Act, a recent law requiring museums to disclose when objects in their collection were looted by Nazis. See N. O’Donnell, ‘New Law Requires Museums in New York to Display Information About Nazi Art Looting, May be More Complicated than it Looks’ *The Art Law Report* (2022), available at <https://tinyurl.com/bdh4uujs> (last visited 20 September 2023). The Museum at FIT’s exemplary work to present the cultural

Italy has a complex and historic body of statutory law regulating objects even outside of cultural institutions under a specific legal notion: cultural property.

In this essay, we find an effective equilibrium between fashion's past and present in the activities of brand archives. More specifically, we see a brand's heritage and its present iterations as relevant to the boundaries drawn between the contents of an archive as cultural property and the contents of an archive as part of copyrightable works under the law. We argue that cultural property law has a role in enabling parallel creations in contemporary fashion. But we observe that the role of archives in the contemporary creative process of fashion design depends on how a fashion archive and its contents are identified, and how past and present within an archive is parsed. Making our argument requires two steps. First, we need to examine how cultural property law applies to some fashion archives and not to others. Second, we need to examine how copyright law, and its findings of originality and the comparison of works in infringement cases, already include references to fashion archives or to the brand heritage which fashion archives are meant to preserve and communicate. Central to our analysis is understanding how an archive supports recognitions and translations of the cultural value of fashion designs and what impact that support can have on the identification and parsing of later reworkings or reproductions of fashion designs.

Part II of the essay is devoted to setting the Pucci stage. We trace a dual *fil rouge* of references to heritage and instances of contemporary creativity within Emilio Pucci's own designs, beginning in the 1950s. We continue to see this *fil rouge* in designs created after Emilio Pucci's death. More specifically, we identify heritage and contemporary creativity in the cataloging of Pucci's legacy by his daughter, Laudomia Pucci, the organization of the Pucci Archive, and the founding of the Heritage Hub. In essence, Part II sets out the facts to be analyzed under the two different legal regimes – cultural heritage law and copyright law – which we respectively discuss in Part III and Part IV. Part II also identifies the tension produced between a strong brand heritage and the creativity within contemporary fashion design. This tension shows that contemporary fashion design both requires the past embodied in brand heritage and yet needs something original that is of the present.

Part III of the essay is dedicated to the first prong of our analysis: cultural heritage law and the fashion archive. In this section, we outline how classifying a fashion archive as cultural property requires documenting what is in a fashion archive, identifying a historic nucleus, and linking it to the cultural interests (historic, artistic, to name just a few) that are relevant under cultural property law. For the Pucci Archive, this requires identifying its contents, its historic nucleus, and the cultural relevance of the Pucci Archive. In applying cultural property law to the Pucci Archive in this section, it soon becomes clear that we need to consider the dynamic role which the more recently founded Emilio Pucci Heritage Hub has in

heritage aspects of fashion is also worth noting here. See *The Museum at FIT*, available at <https://tinyurl.com/44szfvft> (last visited 20 September 2023).

the archive's contents, historic nucleus, and cultural relevance. Indeed, as we outline, dynamic classifications and uses of a fashion archive might frustrate a fashion archive's classification as cultural property under the law. And this, as we see it, is not necessarily a bad thing. Cultural property law might more appropriately apply to some fashion archives, and not others. This lack of protection under cultural property law, in our view, does not necessarily compromise the heritage that is contained within the Pucci Archive. Indeed, we propose a new term for these fashion archives that preserve brand heritage, operate as mediators between fashion's past and present, and provide a procedural equilibrium for the creation of fashion designs that are properly parallel creations. This term is 'activated archive'. An activated archive, as we term it, is always acting in a way which defies traditional notions of gathering, inventorying, and conserving. An activated archive may have the characteristics of authenticity, reliability, integrity, and usability,<sup>16</sup> but it does not preserve fashion as a document in the traditional sense. Rather, it uses the fashion it preserves in unexpected and dynamic ways that can add to the history of the fashion it preserves and the story of the brand. These uses and additive functions, however, do not mean that an activated archive serves the purely commercial ends of an active fashion brand. Indeed, an active fashion brand that seeks to use an activated fashion archive might find itself needing to follow more stringent procedures and more historically-oriented considerations than it would in other settings. These procedures and considerations might be at odds with the goals, objectives, and needs of a current Creative Director and a brand's bottom line. Essentially, we see activated archives in a negative space of cultural property law. But we see this negative space<sup>17</sup> outside of the law and other forms of regulation as offering great opportunities and possibilities for brand heritage and our collective recognition of fashion as part of cultural heritage.

In Part IV we turn to the second prong of our analysis: copyright law. We take what we have observed to be the dynamic nature of an activated archive and ask how it might be relevant to current challenges in copyright infringement cases. The stealing or copying that Angelo Flaccavento identifies from a fashion commentator's perspective is often litigated in copyright infringement cases. There are different standards for fashion designs to be copyrightable subject matter under US copyright law (originality and independent creation, idea/expression doctrine) and Italian copyright law (creative character and artistic value). Notwithstanding this, however, we observe how, in both the US and in Italy, infringement tests (substantial similarity in the US and other freer form tests in Italy) might benefit from considering heritage as seen through the eyes of an archive. Depending on how copyright law identifies past designs in present creations, contemporary fashion

<sup>16</sup> Characteristics of an archive that are emphasized by the International Council of Archives: see 'What are archives?', available at <https://tinyurl.com/yze6hsnp> (last visited 20 September 2023).

<sup>17</sup> This phrase is borrowed from intellectual property legal scholarship which explores a low IP regime applied to fashion and copyright's negative spaces as applied to fashion. See C.B. Sprigman and K. Raustiala, n 7 above.



may be more or less a parallel creation, more or less copyrightable. Activated archives can help to set up a comparison between past and present works. Activated archives can help to define the meaning ascribed to each design, and what weight to assign such meanings in a comparison. We call this process in which activated archives engage 'heritage-shaking'. Heritage-shaking is a process in which a design in the contents of an activated archive is revisited and blended together with contemporary creativity to produce designs of the present, notwithstanding their reference to the past. We suggest that courts might more fully work with activated archives and recognize this heritage-shaking process as part of infringement tests within copyright law. Our Vivara example is helpful here. Depending on how we recognize or identify parts of the 1965 Vivara print in later reworkings or reproductions of the Vivara, we may be more apt to identify later reworkings or reproductions as copyrightable, and, by extension, as parallel creations. Understanding how an activated archive supports recognitions and translations of the form and cultural value of fashion designs can have an impact on the identification and parsing of later reworkings or reproductions.

In Part V we call for a greater consideration of these terms, activated archive and heritage-shaking, in Fashion Law as a field, both in the US and in Italy. We also emphasize that this essay is just the beginning of greater work on the relationship between cultural heritage law and copyright law and look forward to further opportunities to outline the initial ideas presented in this essay.

## **II. Emilio Pucci: Highlights of a Brand, Its Archive, and the Links Between Heritage and Creativity**

### **1. The Beginnings of Pucci Between Florentine Heritage and Creativity**

Born in 1914 in Naples, the Marchese Emilio Pucci di Barsento was an Italian aristocrat whose early life exhibited close links with the American lifestyle that would later inform his modern collections.<sup>18</sup> A skier with the Italian Olympic team during the 1932 Winter Olympics in Lake Placid and a participant in the Berlin Olympics, the Marchese Pucci received a Masters' degree in Social Science from Reed College in Oregon before World War II. While at Reed College, he was Captain of the Ski Team and designed the team's uniforms.<sup>19</sup> The same manufacturer who produced Emilio Pucci's designs for the ski team would later produce his first ski designs for Lord & Taylor in 1948.<sup>20</sup> He served in the Italian Air Force beginning in 1938 and, following World War II, spent a period of time

<sup>18</sup> The majority of the following biographical notes and timeline are taken from 'Timeline' *Emilio Pucci Heritage Hub*, available at <https://tinyurl.com/fucvupze> (last visited 20 September 2023).

<sup>19</sup> V. Friedman et al eds, *Pucci* n 1 above, 8.

<sup>20</sup> *ibid* 8.

in Switzerland.<sup>21</sup> Wanting a grey ski outfit inspired by his military outfit, he designed custom ski uniforms for himself and a friend as they took to the slopes in Zermatt. Photographed by a US photographer, the images ended up on Diana Vreeland's desk and in Harper's Bazaar. In response to requests from American manufacturers for the ski suit he sported, the Marchese, sensing an opportunity, decided to enter himself into the ready to wear ski clothing market, which was nonexistent at that time.<sup>22</sup> Made in vibrant iterations of blue, pink, orange, yellow, green, purple, and still more shades, Pucci's looks were immediately recognizable.<sup>23</sup> The Marchese designed with a vision. In the words of his daughter Laudomia Pucci

‘(The magic of the Pucci brand) is rooted in my fathers’ uncompromising – and unprecedented – view of elegance, femininity, and chic. He was a minimalist before minimalism; a jet-setter before jets were flying; a scientist before fabric technology became a discipline; provocative in his modernity and sartorial daring. For him, prints were rhythm and movement, and in prints he expressed a message of contagious happiness’.<sup>24</sup>

Pucci's foray into the American market began with a collection for Lord & Taylor in 1948.<sup>25</sup> Embracing a sport aesthetic which was characteristic of American fashion, this collection ‘included his skiwear designs and featured wool knits that were hand woven in Capri’.<sup>26</sup> As Andrew Bolton has observed of the importance of Pucci's contribution to fashion, ‘The genius of the clothes...was rooted in the fact that Emilio Pucci married an Italian sensibility... to an American philosophy of sportswear’.<sup>27</sup> An inventor as much as a designer, Pucci followed this with the development of a synthetic jersey fabric, named Emilioform.<sup>28</sup> The ease of the jersey fabric and its fit reflected future changes to womens' lifestyles which allowed for ‘a life of freedom where you didn't have to travel with a maid to iron your clothes every night’.<sup>29</sup> While Emilio Pucci's start in fashion began in the mountains, his first boutique opened by the sea. In 1950, his boutique in Capri started what soon became a trend amongst the international jet set throughout the 1950s and in the early 1960s.<sup>30</sup> Showing his collection at the first Italian fashion show, organized by

<sup>21</sup> B. Morris, ‘Emilio Pucci, Designer of Bright Prints, Dies at 78’ *The New York Times*, available at <https://tinyurl.com/mrku8x2t> (last visited 20 September 2023).

<sup>22</sup> *ibid* and ‘Timeline’ n 18 above.

<sup>23</sup> This use of vibrant colors, in fact, later inspired Laudomia Pucci's own choices of turquoise and fuchsia for the rooms of the Palazzo Pucci and the Heritage Hub. Interview with Laudomia Pucci, 14 February 2023.

<sup>24</sup> L. Pucci, ‘Foreword’, in V. Friedman et al eds, *Pucci* n 1 above, 7.

<sup>25</sup> ‘Evening Dress 1966 Emilio Pucci’ *The Metropolitan Museum of Art*, available at <https://tinyurl.com/pyvsn8z3> (last visited 20 September 2023).

<sup>26</sup> *ibid*

<sup>27</sup> V. Friedman, ‘Aristocratic Design’ n 1 above, 22.

<sup>28</sup> n 25 above.

<sup>29</sup> V. Friedman, ‘Aristocratic Design’ n 1 above at 26.

<sup>30</sup> *ibid* 26; ‘Emilio Pucci’ *FIDM Museum*, available at <https://tinyurl.com/2p86c2d9> (last

Giovanni Battista Giorgini at his mansion in Florence's *Oltrarno*, *Villa Torrigiani*, in 1951, Pucci soon became part of the birth of Italian fashion. In July 1952, Giorgini decided to relocate the shows to the famed *Sala Bianca* of *Palazzo Pitti*. Pucci would be a constant presence at the prestigious Florentine event until 1967, when he preferred to continue to present his works in his own *Sala Bianca* in his headquarters on *Via de' Pucci*. Fashion scholars who discuss the famed *Sala Bianca* fashion shows at *Palazzo Pitti* touch on how the fashion at the shows exhibited a continuity with the Italian past and complex relationships between Italian craftsmanship and Italian fashion, in addition to Giorgini's implementation of a new presentation model primarily for American buyers.

Central to the presentation of Italian fashion to American buyers, and Italian fashion's ability to compete with Paris in the minds of American consumers, was Italian culture.<sup>31</sup> As fashion's past has been increasingly analyzed by academics, the importance of these early links between Italian history, especially the Renaissance, and Italian culture has been cast as a *fil rouge* that still informs Italian fashion brands' activities today.<sup>32</sup> Literal references to Italian culture in early Italian fashions have even been cast as having a 'souvenir effect', connecting the Italian fashion a consumer bought with memories of Italy itself.<sup>33</sup> Matteo Augello in his recent book on *Curating Italian Fashion*, has pointed to Pucci as an example of an Italian fashion designer who made formal references to Italy's artistic and cultural heritage and, by extension, gained recognition on the market, while participating in the Italian fashion industry's attempts to define Italian fashion at that time.<sup>34</sup> The DNA of the Pucci brand is, in fact, founded on a combination of Italian cultural heritage and Pucci's own creativity. Emilio Pucci's success derived in great part from his production of patterns 'with the help of craftsmen from Capri'<sup>35</sup> in addition to his development of new materials like Emilioform and the creativity with which he interpreted historic parts of Italian heritage in new colors and compositions. Pucci regularly drew inspiration from what we now term intangible cultural heritage under the law,<sup>36</sup> and from what Italian cultural property law defines as tangible

visited 20 September 2023).

<sup>31</sup> N. White, *Reconstructing Italian Fashion: America and the Development of the Italian Fashion Industry* (Oxford: Berg Publishing, 2000); V. Steele, *Fashion: Italian Style* (New York: Fashion Institute of Technology, 2003).

<sup>32</sup> M. Augello, *Curating Italian Fashion: Heritage, Industry, Institutions* (London: Bloomsbury, 2022), 15.

<sup>33</sup> *ibid* 14.

<sup>34</sup> *ibid* 13-14.

<sup>35</sup> L. Settembrini, 'From Haute Couture to Prêt-à-Porter', in G. Celant ed, *The Italian Metamorphosis 1943- 1968* (New York: Guggenheim Museum, 1994), 486-487. For a more in-depth analysis of the history of Italian fashion by an author who has separately written on fashion as part of cultural heritage from a fashion studies perspective see D. Calanca, *La storia sociale della moda contemporanea* (Bologna: Bononia University Press, 2014).

<sup>36</sup> Art 2(1) United Nations' Convention for the Safeguarding of the Intangible Cultural Heritage (2003), October 17, 2003, 2368 U.N.T.S. 42671.

cultural properties.<sup>37</sup> In 1955 the *La Siciliana* collection drew inspiration from mosaics; in 1957 the *Palio* collection drew inspiration from that Sieneese horserace amongst the competing neighborhoods in the city; in 1959 works by the Renaissance painter Sandro Botticelli; and in 1964 the Santa Maria del Fiore dome by Filippo Brunelleschi.<sup>38</sup>



**Figure 2** - Palio di Siena Scarf from 1960s in Pucci



**Figure 3** – Renaissance inspired outfit from 1957/1958 collections in Pucci



**Figure 4** - Strapless dress from the Palio Collection Spring/Summer 1957 in Pucci

As Pucci created, he also archived. Emilio Pucci conserved, in an unsystematic way, thousands of drawings, designs, scarves, clothing, textiles, press releases, and other ephemera during his time at the helm of Pucci.<sup>39</sup> While balancing Italy's cultural heritage within his own creativity to create contemporary fashion, Pucci also preserved the heritage of his own brand. In 1992, after his death, these collected items became part of a structured heritage project. Laudomia Pucci, Emilio Pucci's daughter and in turn the former CEO, Image Director, and, later, Vice President and Deputy Chairman of Emilio Pucci,<sup>40</sup> recounts finding piles and piles of fabric and other ephemera in closets around the Palazzo Pucci.<sup>41</sup> The privately-owned Palazzo Pucci, the historic home of the Pucci family in Florence dating back to the 16<sup>th</sup> century,<sup>42</sup> was, in fact, the headquarters of the Pucci brand and contained its

<sup>37</sup> Art 10, decreto legislativo 22 January 2004 no 42.

<sup>38</sup> 'Of Country and Culture' and 'Timeline' n 18 above. See also V. Friedman et al, 'Pucci' n 1 above.

<sup>39</sup> Interview with Laudomia Pucci and Dylan Colussi, 18 October 2022.

<sup>40</sup> When, at the time, LVMH owned sixty-seven per cent of Pucci. See M. Socha and L. Zargani, 'LVMH Takes Full Control of Emilio Pucci' *Women's Wear Daily*, available at <https://tinyurl.com/3cx587ct> (last visited 20 September 2023).

<sup>41</sup> Interview with Laudomia Pucci and Dylan Colussi, 18 October 2022.

<sup>42</sup> For a historical vignette about how Pandolfo de' Pucci in 1559 plotted a failed assassination attempt of Cosimo I, resulting in a bricked in wall still visible on the Palazzo today, see 'Città di Firenze' Facebook, available at <https://tinyurl.com/2bb6d7u5> (last visited 20 September 2023).

showroom, as well as living quarters. Over the years, the Marquise Cristina Pucci, Emilio Pucci's widow, and Laudomia Pucci restored the building.<sup>43</sup> Alongside striking frescoes as well as adorned ceilings dating to the 17<sup>th</sup> century, today the Palazzo Pucci contains the rich archive of past designs and ephemera from past Pucci collections. These past designs originate both from collections designed by Emilio Pucci during his lifetime and are more recent clothing from Pucci collections designed under the direction of other designers. In this sense, the heritage within the archive is stratified. Individual items within the archive include examples of Emilio Pucci's colorful designs on mannequins; an organized and accessible, upon request, archive of Pucci scarves, accessories, and fabrics; as well as books and *sui generis* Pucci products, including houseware.<sup>44</sup> As the former atelier and showroom of the Emilio Pucci brand, and as the historic family home of the Pucci family, the link between the movable objects in the archive and the immovable historic property is keenly felt. The second floor contains a renovated version of the historic Pucci boutique, with the fitting rooms' original mirrors.<sup>45</sup>

## 2. Pucci's Past and Present Between Family, Brand, Archive, and Heritage Hub

While the archive has had a permanent home in the Palazzo Pucci since 2000, Laudomia Pucci founded the Emilio Pucci Heritage Hub more recently in 2018.<sup>46</sup> Described as 'a site dedicated to nurturing brand culture and history by celebrating the Pucci brand and its iconic heritage',<sup>47</sup> the Emilio Pucci Heritage Hub at Palazzo Pucci embraces the link between the past lived in the building and the past preserved in displays and cabinets. The link between the past lived in the building and the present has often permeated Pucci events as well. As Vanessa Friedman noted while observing the party celebrating the 60<sup>th</sup> anniversary of the brand in the Palazzo, 'It was a night when the past melded seamlessly into the present and the present snuggled up to the future, and they all relaxed together and had a drink'.<sup>48</sup> This collapse of and playfulness with time is carried on in other parts of the building. The Hubs' atmosphere provides 'a memorable experience where the archive space becomes an expression of the brand codes through the creative lenses of

<sup>43</sup> J. Giovannini, 'Emilio Pucci's Widow Refreshes Their Ancestral Home in Florence' *Architectural Digest*, available at <https://tinyurl.com/23b369bs> (last visited 20 September 2023).

<sup>44</sup> Observations in this contribution are the result of a private tour generously given to the authors by Laudomia Pucci, Cristina Fasone, and other members of the Heritage Hub in September 2022.

<sup>45</sup> Tour of the Emilio Pucci Heritage Hub, 13 September 2022.

<sup>46</sup> *Emilio Pucci Heritage Hub Palazzo Pucci N6 Handout* (on file with the authors). It was in 2016, when LVMH decided to transfer Emilio Pucci headquarters and all employees from Florence to Milan, that Laudomia Pucci started to envision a different role for the *Palazzo*.

<sup>47</sup> 'Palazzo Pucci' *Emilio Pucci Heritage Hub*, available at <https://tinyurl.com/fucvupze> (last visited 20 September 2023).

<sup>48</sup> V. Friedman, 'Aristocratic Design' n 1 above at 11.

Laudomia Pucci and her past and present collaborations'.<sup>49</sup> Innovative uses of the archive were, in fact, a key piece of Pucci's activities as LVMH increased its share in the brand. In 2011 Laudomia Pucci founded a private museum at the *Villa di Granaiolo*, another historic property of the Pucci family in the Florentine countryside.<sup>50</sup> Villa di Granaiolo has hosted exhibitions featuring objects from the Pucci archive, and also houses a Talent Center where fashion students have worked with pieces from the archive as Flaccavento's so-named reference points.<sup>51</sup> In these exhibits, and in other activities inspired by the archives' contents, the curation of the Pucci story followed the increasing importance of heritage marketing in fashion. Heritage marketing presented a constructivist approach to a fashion brand's history, one characterized by interpretation, creating value on the market and emphasizing the wider role which fashion brands play in culture.<sup>52</sup> These new practices of presenting fashion brands' heritage were embraced from the start in the Pucci archive, which sought to strike a balance between

'historical-documentary and conservation ... critical and cultural readings of the "visual", iconic, stylistic, and creative registers and those of the strategic use of artifacts'.<sup>53</sup>

On the private/public spectrum of fashion brand archives, the Emilio Pucci Heritage Hub presents a hybrid format in the spectrum's middle. At the two opposite ends of the spectrum of fashion and luxury archives we might think of the Fondazione Ferragamo and the Gucci Archive.<sup>54</sup> The *Fondazione Ferragamo* is on the 'public' end of the spectrum. As a not-for-profit legal institution with members of the Ferragamo family on its board, the Fondazione is legally separate from the Ferragamo brand and corporation. It pursues a distinct public mission and purpose with a museum and accompanying public programming.<sup>55</sup> While

<sup>49</sup> Emilio Pucci Handout at 1 (on file with authors).

<sup>50</sup> *Emilio Pucci Heritage Hub*, available at <https://tinyurl.com/fucvupze> (last visited 20 September 2023); L. Zargani, 'World of Pucci on Display' *Women's Wear Daily*, available at <https://tinyurl.com/2euzyk37> (last visited 30 September 2023).

<sup>51</sup> 'Polimoda at Les Journées Particulières LVMH', available at <https://tinyurl.com/2p9cyfe7> (last visited 20 September 2023). It is also worth mentioning that fashion schools are playing an increased role in the Pucci Heritage Hub's activities. In March 2023 it was announced that IED Firenze would take up residence in the Palazzo. Elisa Pervinca Bellini, 'Anche l'aula è una musa' *Vogue Italia*, 136 (2023).

<sup>52</sup> M. Augello, n 32 above, 20-21 (also mentioning how Maria Luisa Frisa's approach to fashion curation embodies this constructivist approach). Maria Luisa Frisa curated Pucci's 2016 exhibit at Pucci's Villa di Granaiolo as part of LVMH's *Les Journées Particulières*. See A. Masetti, 'Les Journées Particulières 2016: l'Archivio Emilio Pucci a Granaiolo' *The Fashion Commentator*, available at <https://tinyurl.com/ycx5u4mv> (last visited 20 September 2023).

<sup>53</sup> M. Augello, n 32 above, 47 (citing to comments made by Alessandra Arezzi Boza, who formerly helped to manage the Fondazione Archivio Pucci).

<sup>54</sup> See *ibid* 15 for a recent publication on fashion archives in Italy from a fashion studies perspective, spotlighting the Fondazione Ferragamo and Gucci.

<sup>55</sup> The Museum is, in fact, a member of the International Council of Museums. See 'Museum

collaboration consistently happens between the *Fondazione* and the brand, and while the collections of both may even be housed and created at the same place,<sup>56</sup> the *Fondazione* and the brand are linked by family members in both entities, but technically separate from a legal point of view. The Gucci Archive,<sup>57</sup> by contrast, is on the ‘private’ end of the spectrum. The contents of the Gucci Archive and access to it are fully controlled by Guccio Gucci, SpA as a company. There is no public programming associated with the archive nor is there public access. Indeed, the Gucci Archive is seen as a precursor to commercial activities like Gucci Vault,<sup>58</sup> which sells drops of archival fashion to the public online. The Emilio Pucci Heritage Hub, with its archive, sits between these two poles. The Hub is characterized by management by members of a family who were active in and are the descendants of the fashion brands’ founders, but the management of the archive itself is firmly outside the brand. The Emilio Pucci brand, currently fully owned and controlled by LVMH,<sup>59</sup> is a separate entity from the archive and the Emilio Pucci Heritage Hub. The Hub has served as a reference for current designers at the Pucci brand.<sup>60</sup> At the same time, with full control of the archive under the direction of Laudomia Pucci and with Laudomia Pucci’s full private ownership of individual objects in the archive, access to the archive is mediated, at the very least, through Laudomia Pucci’s management. Access is also contextualized within the Hub’s mission and evolution. This mission and evolution seek to move away from the traditional role of a brand archive as a ‘well of research for future collections, as well as a storytelling vehicle for the marketing and communications of the collections’.<sup>61</sup> Control and access, and decisions about how to display and use the tangible ephemera, are characterized as outside of brand communications and strategy. At the same time, the Hub is not meant to be a museum space nor to live in ‘museum-like confines’.<sup>62</sup> It is not a space for the general public; it is not a cultural space *per se*. ‘There are 69 museums in Florence, there is no need for 70’, explained Laudomia Pucci in an interview for the opening of the Hub,

‘I toyed with the idea of a museum, but then I felt we should translate all the richness of the Palazzo and our history into something that will be attractive, drawing young people in ... a space for young professional(s) to

History’, available at <https://tinyurl.com/2p8ua8p6> (last visited 20 September 2023).

<sup>56</sup> The *Fondazione Ferragamo* and *Salvatore Ferragamo SpA*’s current designs are both created at the *Osmannoro* location outside of the center of Florence.

<sup>57</sup> ‘A New Home for the Gucci Archive’, available at <https://tinyurl.com/bdbpburt> (last visited 20 September 2023).

<sup>58</sup> ‘Vault Gucci’, available at <https://tinyurl.com/mr259nz3> (last visited 20 September 2023).

<sup>59</sup> M. Socha and L. Zargani, ‘LVMH Takes Full Control’ n 40 above.

<sup>60</sup> ‘Emilio Pucci embarks on a new journey in Capri’ *LVMH*, available at <https://tinyurl.com/5ysu2u6f> (last visited 20 September 2023).

<sup>61</sup> Emilio Pucci Handout at 1 (on file with authors).

<sup>62</sup> *ibid*

prosper and grow'.<sup>63</sup>

Even though the Hub still displays a connection to the fashion brand from which it is separate and has historic connections to public fashion museums in Florence<sup>64</sup> (unlike other luxury and fashion initiatives, such as the Fondazione Prada)<sup>65</sup> the Hub is neither in the model of the Fondazione Ferragamo or the Gucci Archive.

When a current designer of the Pucci brand consults the archive, therefore, contemporary creativity is mediated by brand heritage that is contained in a new type of space. At the moment, the Pucci brand and its Creative Director Camille Miceli continue to take inspiration from the origins and the past of Pucci, staging, for example, the brand's 'new journey' with a focus on resort in Capri in May 2022.<sup>66</sup> At the moment, these references may not yet include reworkings of the Vivara print, but the new goals of the Hub, and its placement outside of Pucci's current corporate structure, raise questions. How does the Hub, with its preservation of the Vivara print, inspire impactful parallel creations? Does cultural property law in its current form enable a cross-pollination between heritage and contemporary design for parallel creations? How should we apply cultural property law to the Pucci Heritage Hub, and to the fashion archive within it, to preserve the dynamic nature of heritage and creativity? Does the Pucci Heritage Hub offer an innovative procedure outside of cultural property law which uniquely enables parallel creations, bypassing Flaccavento's critiques?

### III. The Pucci Fashion Archive as an Activated Archive Outside of Cultural Property

#### 1. Some Background on Archives as Cultural Property Under the Law

In the current fashion industry, brand heritage is most often managed through an archive. At its most broad, we might understand an archive as

‘a complex of documents produced or acquired by a subject in the course of the development of its own activities’ and as ‘an institution in

<sup>63</sup> L. Zargani, 'Palazzo Pucci's New Chapter Highlights History' *Women's Wear Daily*, available at <https://tinyurl.com/3tjkg6cy> (last visited 20 September 2023). Laudomia Pucci has worked on putting together the Heritage team, young professionals scouted from partnerships with Central Saint Martins and Polimoda, to turn Palazzo Pucci into a center capable of revitalizing the history of the Pucci brand and Made in Italy itself. See also comments from current Archive Manager Dylan Colussi, hired in 2018, Interview with Laudomia Pucci and Dylan Colussi, 18 October 2022.

<sup>64</sup> Emilio Pucci Handout at 1 (noting the archive's donation of Pucci pieces to the Museum of Fashion and Costume of Palazzo Pitti in 1992) (on file with authors).

<sup>65</sup> Which concentrates its collecting and display activities on contemporary art and not fashion. See *Fondazione Prada* available at <https://tinyurl.com/2uepv8dp> (last visited 20 September 2023).

<sup>66</sup> 'Emilio Pucci embarks on a new journey in Capri' n 60 above.



which archives of various provenance are gathered”'.<sup>67</sup>

This word, archive, is traditionally thought of as a dusty repository of old documents and books. These documents and books may or may not be of interest to the present at all. They are primarily kept for their testamentary and reference value, or what might be termed their historic and educational value. Indeed, this need for preservation is the fundamentally animating reason for a whole legal system – cultural property law.<sup>68</sup>

The current Code of Cultural Property in Italy was enacted into law at the beginning of the 21<sup>st</sup> century but is an inheritance from its earliest codifications in the early 20<sup>th</sup> century. Cultural property<sup>69</sup> is generally defined in Art 2 as

‘... *le cose immobili e mobili che, ai sensi degli articoli 10 e 11, presentano interesse artistico, storico, archeologico, etnoantropologico, archivistico e bibliografico e le altre cose individuate dalla legge o in base alla legge quali testimonianze aventi valore di civiltà*’.<sup>70</sup> (Translated: of immovable and movable things which, pursuant to articles 10 and 11, present artistic, historical, archaeological, ethnoanthropological, archival and bibliographical interest, and of any other thing identified by law or in accordance with the law as testifying to the values of civilisation’)

Art 10 names specific categories of cultural property by operation of law or by a declaration of the State.<sup>71</sup> Art 11 includes specific regulations for certain categories of these cultural properties which take specific facets of their existence in the wider cultural context into account.<sup>72</sup> Public archives are mentioned in Art 10(2)(b). Under this article, archives owned by the State, by regions and by other public entities are cultural property by operation of law.<sup>73</sup> Similarly, under Art

<sup>67</sup> G. Sciallo, ‘Gli archivi come elementi costitutivi del patrimonio culturale: missione e organizzazione giuridica’ *Giornale dell’arte e del diritto online* (2020), noting the presence of these definitions in articles 10(2)(b) and 101(2)(c) of the Italian Code of Cultural Property.

<sup>68</sup> For an overview of the preservation ethos in various cultural property laws throughout history see A. Emiliani, *Leggi, bandi e provvedimenti per la tutela dei beni artistici e culturali negli antichi stati italiani 1571- 1869* (Bologna: Nuova Alfa Editoriale, 1996); L. Casini, *Ereditare il Futuro* (Bologna: il Mulino, 2014), 27; T. Alibrandi and P.G. Ferri, *I beni culturali e ambientali* (Milano: Giuffrè, 2001).

<sup>69</sup> Cultural objects are, in this sense, defined more based on their function (‘beni di fruizione’) than on their status of possession or ownership (‘beni di appartenenza’), M.S. Giannini, ‘I beni culturali’ *Rivista trimestrale di diritto pubblico*, I, 3 (1976); see also A. Sandulli, ‘Beni pubblici’ *Enciclopedia del Diritto* (Milano: Giuffrè, 1959), V, 277; S. Cassese, *I beni pubblici. Circolazione e tutela* (Milano: Giuffrè, 1969).

<sup>70</sup> Art 2 decreto legislativo 22 January 2004 no 42.

<sup>71</sup> Art 10 decreto legislativo 22 January 2004 no 42.

<sup>72</sup> Art 11 decreto legislativo 22 January 2004 no 42.

<sup>73</sup> Art 10(2)(b) decreto legislativo 22 January 2004 no 42. Cultural property that is so by operation of law only needs a simple cultural interest. This simple cultural interest is presumed, and is evaluated *ex post* in the rare circumstances when a cultural property is removed from the complex of cultural heritage under a separate administrative procedure, known as a ‘verifica’. Art 12 decreto

10(2)(a), public museum collections are also cultural property, and the objects within them are therefore presumed to be cultural property by operation of law.<sup>74</sup> This is important: many fashion brands have donated products they have designed and offered on the market to public museums.<sup>75</sup> At times, this leads to a legal fiction: Pucci objects, for example, that are donated to the *Museo della Moda e del Costume* across the Arno,<sup>76</sup> are presumed to be of historical interest and to be cultural property, while the objects preserved in the Pucci Archive in the Palazzo Pucci itself, are not so presumed. The historic interest that is at once recognized in one cultural institution – a public museum – does not automatically translate, under the law, to another place – the private archive. Private archives fall under Art 10(3)(b), allowing privately owned properties of a particularly important historic interest to be declared cultural property in an administrative procedure begun by the Superintendency and adopted by the Italian Ministry of Culture.<sup>77</sup> Art 10(3)(a) and Art 10(3)(e) allow individual properties or collections or series of objects in private hands, respectively, to be declared cultural property when they are of particularly important cultural interest or of exceptional cultural interest. Art 10(3)(d) goes even further, allowing for the declaration of cultural properties, whether in public or private hands, that exhibit

...a particularly important interest because of their reference to political, military, literary, artistic, scientific, technical, industrial or general history.... (or even) an identifying or civic link of exceptional distinctive significance....

In practice, these civic links have included the history of a city, such as Florence. The stakes of such a declaration are high for the management of a private archive. This is so even for private archives which simply contain individual objects declared to be cultural property. As a result of the procedure of declaration of cultural interest of a certain object, the Superintendent's Office issues a special protective measure that is called '*vincolo*', literally 'constraint.' This constraint places restrictions on how the protected object can be used or modified, bringing the object declared to be

legislativo 22 January 2004 no 42. A US audience might compare this to deaccessioning. Museums in Italy, however, are not allowed to deaccession *per se*, and the process of declaring a cultural property by operation of law to be without cultural interest is an exceptional, if not almost completely unforeseen, circumstance. For a deeper comparison of deaccessioning in the US in the Italian context see S. Settis, *Italia, SpA* (Turin: Einaudi, 2007).

<sup>74</sup> Art 10(2)(a) decreto legislativo 22 January 2004 no 42.

<sup>75</sup> The legal relevance of the fact that some fashion objects are in public museum collections is an aspect which is overlooked by Augello in his otherwise excellent study of private archiving, which also touches on fashion in private hands as cultural property. Analyzing the fact that fashion in private hands requires particularly important or exceptional interests soon brings home the legal fiction of cultural interests in different fashion objects, based on who possesses or owns them. It is points to how modes of *fruizione* are still shaped by property rights. M. Augello, n 32 above.

<sup>76</sup> 'Galleria del costume di Palazzo Pitti. Abiti e accessori' *Sistema Informativo Unificato per le Soprintendenze Archivistiche*, available at <https://tinyurl.com/jtavpv6r> (last visited 20 September 2023); S. Ricci, *La Donazione Emilio Pucci: colore e fantasia* (Firenze: Centro Di, 1992).

<sup>77</sup> Arts 13 and 14 decreto legislativo 22 January 2004 no 42.

cultural property under the protection of cultural property law on a permanent basis. The cultural property regime requires private owners and possessors of declared cultural property to preserve their cultural property.<sup>78</sup> The acts of preservation required by law may include conservation plans. Cultural properties cannot be

‘destroyed, allowed to deteriorate, damaged or designated for uses that are not compatible with their historic or artistic character, or for uses that would be of detriment to their conservation’.<sup>79</sup>

Moreover, Art 21(d) requires that documents in private archives may not be discarded without the Ministry’s permission.<sup>80</sup> A declaration of cultural property would provide administrative roadblocks to any reorganization of a private archive that would require, in comparative American terms, acts of deaccessioning.<sup>81</sup> Similarly, the broad prohibition on ‘uses that are not compatible with (an archive’s) historic or artistic character’<sup>82</sup> begs the question of what is compatible.<sup>83</sup> This notion of compatibility would be directly connected to the nature of a private archive’s particularly important historic interest.

How a private fashion archive, and its contents, exhibit the necessary degree of historic interest is a crucial question, especially for the officers of each Superintendency who are responsible for gathering the evidence and explaining ‘why’ its preservation requires an intervention by cultural property law.<sup>84</sup>

## 2. The Material Consistency and Historic Nucleus of an Archive

The nature of drawing these lines has become even more crucial as Italian cultural property law has incorporated intangible cultural heritage into its Code.

<sup>78</sup> See ‘Capo 3, Protezione e Conservazione’ decreto legislativo 22 January 2004 no 42.

<sup>79</sup> Art 20(1) decreto legislativo, 22 January 2004, no 42.

<sup>80</sup> Art 21(d) decreto legislativo, 22 January 2004, no 42.

<sup>81</sup> Deaccessioning refers to an internal administrative process by which American museums decide to remove objects from their collection, prior to selling those objects. Reasons for deaccessioning can include an object being a multiple, no longer of relevance to a museum’s collecting mission. For a discussion of deaccessioning in US case law see *Rockwell v Trs. of the Berkshire Museum* 1176 US 00253 (2017). Similarly, collections and series of objects, recognized under a different clause of Art 10, are declared to be cultural property because they are of exceptional interest and are not to be separated without the permission of the Ministry. Art 21(c) decreto legislativo 22 January 2004 no 42.

<sup>82</sup> Art 20(1) decreto legislativo 22 January 2004 no 42.

<sup>83</sup> This provision, even if it is vague and undetermined, might be justified for concessions of the use of originals. But consider the debate on reproductions of cultural property in which the wide and ambiguous notion of *decoro* guides decisions about the appropriateness of a cultural property’s reuses. Cultural institutions which own an object of cultural property deploy ‘decoro’ to effectively regulate reproductions, whether the object is in public domain in copyright terms or not. The idea of an elite group of gatekeepers managing and controlling cultural property remains a peculiar trait of the Italian legal system of cultural heritage protection, despite recent trends towards a more open notion of access to culture, starting from the Faro Convention at EU level and the Art Bonus legislation at the national level.

<sup>84</sup> Interview with Jennifer Celani, 10 November 2022.

In Art 7-*bis*, the Italian Code incorporates Italy's implementation of the Convention for the Safeguarding of Intangible Cultural Heritage:

The expressions of the collective cultural identity contemplated by the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage and by the (Convention) for the Protection and Promotion of the Diversity of Cultural Expressions...are subject to the rules of this Code when they are represented by tangible testaments and when the requirements and conditions for the application of art 10 are present.

Material consistency – that is, physical objects, including the number of objects – is crucial to read Art 7-*bis* into Art 10. That is, tangible objects are needed to identify historic importance, as a first matter, but they are even more necessary when the law seeks to identify and preserve intangible traditions, like artisanship or traditional craftsmanship.<sup>85</sup> Identifying the relationship between a tangible object and a cultural interest requires evidence, and the material consistency of an archive, meaning the presence of tangible objects as well as the identification of how many and what exactly they are (documents, textile, finished product, design sketch), is crucial. Identifying a historic nucleus is also important when multiple objects are present in an archive. This historic nucleus is understood as the fundamental group of objects that link to the history the objects embody. Cultural property law's time thresholds are extremely relevant here. Indeed, while archives do not necessarily need to be of a specific age under cultural property law, age (*vetustà*) is relevant in practice. Moreover, properties under Arts 10(3)(a) and 10(3)(e), those solely in private hands, cannot be declared to be cultural property, even if they are of cultural interest, unless they are older than seventy years old and by non-living authors.<sup>86</sup> Art 10(3)(d), applying to objects that reference to political, military, literary, artistic, scientific, technical, industrial or general history or have a civic link, contains no such age requirement. An example to elucidate the differences between these various categories of cultural property, especially for how they relate to Pucci, may be helpful.

Currently, the Superintendency of Florence is cataloguing the costumes used in Florence's '*calcio storico*' or, historic soccer, which also includes a procession on the feast of Saint John the Baptist.<sup>87</sup> The result of a tripartite agreement between the Superintendency, the University of Florence, and the municipality of Florence, this gathering of evidence includes creating an inventory of the paper documents, audiovisual evidence, events, the game plays, and the costumes that have all been

<sup>85</sup> Art 2 United Nations' Convention for the Safeguarding of the Intangible Cultural Heritage (2003), 17 October 2003, 2368 U.N.T.S..

<sup>86</sup> Art 10(5) decreto legislativo 22 January 2004 no 42.

<sup>87</sup> '*Calcio storico fiorentino*' *Wikipedia*, available at <https://tinyurl.com/5btddvfe> (last visited 20 September 2023); Comune di Firenze, '*Calcio storico fiorentino*', available at <https://tinyurl.com/ymvpv5ed> (last visited 20 September 2023).

associated with this traditional hybrid soccer/rugby game over the years.<sup>88</sup> *Calcio storico* is seen as part a local Florentine tradition, and the cataloguing and inventorying process is part of the building of evidence and information-gathering necessary to document *calcio storico*'s particularly important cultural interest.<sup>89</sup> While the inventory contains costumes, or uniforms worn in the game of *calcio storico* and not fashion, Emilio Pucci himself was very active in *calcio storico*.<sup>90</sup> A portrait painted in 1993 by André Durand shows the Marquis in his full Renaissance-era costume, with a breastplate, voluminously sleeved coat, and a hat, astride his horse in the procession.<sup>91</sup> Emilio Pucci's *calcio storico* uniform is, in fact, connected to the history of this tradition in Florence. Pucci's uniform is, therefore, part of the inventorying of this tradition, an inventorying which is meant to show the cultural links which will ground a declaration that the physical objects used over time as part of *calcio storico* are cultural property. Pucci's *calcio storico* uniform has been described as part of the proverbial reliquary that is representative of collective identity, as a costume that embodies this collective identity. It is also within the date range to which the Superintendency has limited its study: 1930 to 1970. In many ways, creating an inventory and cataloguing is a way to gather facts, to craft a narrative that will objectively show *calcio storico*'s historic value and connection to the history of the city of Florence. Lawyers are familiar with this fact-gathering, as is any historian. But just as lawyers and historians are familiar with the process, and follow specific procedures when presenting facts, so questions naturally arise about this process. Do we weigh place as most important, or actual wearing of the costumes? Does the presence of a costume in a portrait present sufficient evidence to include it as part of a group of physical objects embodying collective identity? In the cultural heritage sphere, questions about how one links a tangible property to an intangible cultural interest are charged with the practical implications of such a connection. This includes how to connect objects to the story of a place, like Florence, or even to a practice, like traditional craftsmanship. For fashion, these questions of 'how' one links physical objects, or a repository, like an archive, to cultural interest are crucial. Fashion archives often serve business purposes, informing the creation of the parallel creations Flaccavento mentions. Fashion archives also contain many if not more of the intangibles mentioned in the *calcio storico* example. Fashion design itself, as we've seen in Flaccavento's comments, travels. Fashion is a reference that is at once time-locked and time-free; timely and timeless. How can we link the tangible dresses and scarves to such a changeable, intangible activity? Is such a changeable, intangible activity, even as presented in the Pucci Archive, sufficiently linked to Florentine history? Moreover, if we did,

<sup>88</sup> Comune di Firenze, 'Il Corteo Storico del Calcio storico diventa "patrimonio di Firenze"', available at <https://tinyurl.com/4ab4zzj9> (last visited 20 September 2023).

<sup>89</sup> *ibid*

<sup>90</sup> Interview with Jennifer Celani, 10 November 2022.

<sup>91</sup> The portrait commemorates Emilio Pucci's twenty-five years of participation in the *Calcio Storico* *Alamy*, available at <https://tinyurl.com/2kva82ap> (last visited 20 September 2023).

who would be responsible for the continued preservation and valorization of the Pucci Archive, especially under new constraints?

The nature of the declaration of a particularly important historic interest for a private archive might help us answer these questions. The declaration, which is the counterpart to the presumption for public archives or museum collections, is the springboard for the application of the concept of cultural property to a private archive. The purpose of this declaration is grounded in the protection of cultural property which is enshrined in the Italian Constitution.<sup>92</sup> The increased level of cultural interest that is needed for private archives to be declared cultural property is rooted in the need for a limit, to respect the rights of private property owners to enjoy their property.<sup>93</sup> There has been some discussion in Italian doctrine about the legal nature of this declaration – whether the declaration is required for the very existence of an archive’s cultural interest or whether this declaration is a triggering recognition that gives legal relevance to a cultural interest that was always there.<sup>94</sup> Currently, case law in Italy has recognized the latter.<sup>95</sup> A declaration effectively means that an archive may be of cultural interest to us and yet simply not have gone through the administrative process to make that cultural interest so particularly important to trigger a legally relevant definition and associated protection. In other words, a privately-owned fashion archive can be of cultural interest, fashion itself can be of cultural interest, without necessarily being a cultural property, without a legal intervention. This recognition of a cultural interest that is outside of a legally relevant one is important. It implies that, at certain moments, fashion’s cultural interest can exist (and successfully inspire and operate) outside of the cultural property regime, in a negative space of it.<sup>96</sup>

### 3. Fashion Archives as Cultural Property: From Brioni to Balestra

Of course, not all private fashion archives need be in this negative space of cultural property law. There are two examples of the Italian public administration declaring a fashion archive to be of particularly important historic interest.<sup>97</sup> In 2009

<sup>92</sup> V. Cazzato, ‘Disegno di legge: “Tutela delle cose d’interesse artistico e storico” (n. 154), La normativa, La legge sulla tutela delle cose di interesse artistico e storico’, in Id ed, *Istituzioni e politiche culturali in Italia negli anni trenta* (Roma: Istituto Poligrafico e Zecca dello Stato, 2001) I, 334, 408-409. Art 42 costituzione italiana (noting in part ‘Private property is recognized and guaranteed by the law, which prescribes the ways it is acquired, enjoyed and its limitations so as to ensure its social function and make it accessible to all. In the cases provided for by the law and with provisions for compensation, private property may be expropriated for reasons of general interest’).

<sup>93</sup> G. Famiglietti et al, *Codice dei beni culturali ragionato* (Molfetta: Nel Diritto Editore, 2018), 133.

<sup>94</sup> *ibid*

<sup>95</sup> *ibid*, citing to Consiglio di Stato 11 March 2015 no 1257; Tribunale Amministrativo Regionale Puglia 4 May 2017 no 476; Consiglio di Stato 8 February 2000 no 4667.

<sup>96</sup> We borrow this phrase from intellectual property legal scholarship which explores copyright’s negative spaces as applied to fashion. See C.B. Sprigman and K. Raustiala, n 7 above.

<sup>97</sup> For an overview of the description of the Brioni archive see ‘Brioni, s.p.a.’ *Sistema Informativo Unificato per le Soprintendenze Archivistiche*, available at <https://tinyurl.com/cj8zpwmmn>

the *Brioni* Archive was declared to be a cultural property by the Superintendency of the Lazio Region. Its collection includes clothing, recordings of runway shows, corporate ephemera, promotional materials, and designs. In 1952 *Brioni* participated in the fashion show in *Palazzo Pitti's Sala Bianca*,<sup>98</sup> and this is mentioned in the description of the archive's importance. *Brioni* is also a global fashion brand prized for the quality of its clothing and its innovative communications strategy.<sup>99</sup> The description of the archive on the website of the Superintendency for Archives notes that the company which owns the archive is still active. The description also places emphasis on the 50<sup>th</sup> anniversary of *Brioni's* operations and an exhibition that accompanied this anniversary, effectively historicizing the facts. The description notes the end date of objects in the archive as 2006. Similarly, in 2019, ten years after the declaration of *Brioni's* archive as cultural property, Renato Balestra's archive, which has been the foundation of the recent relaunch of his brand by his grand-daughter, Sofia Bertolli Balestra, was also declared of historical interest and a cultural property.<sup>100</sup> The explanatory statement issued by the Superintendency identifies the Balestra archive as a paramount resource that catalogues and chronicles the history of the brand, but that also catalogues the history of Italian costume and Made in Italy.

‘The archive, in its consistency and heterogeneity, has a great historical interest for the knowledge and detailed study of the style and creativity of the designer Renato Balestra, a historic label of Italy's Alta Moda. But (the archive is also of great historical interest) for the history of costume and Made in Italy, a mixture of technical tradition and artisanship, in which the sartorial construction of the suits is married with the wise use of textiles and embroidery’.<sup>101</sup>

The key factor that supports and gives strong evidence of the historical importance of the Balestra archive is definitely the tradition of craftsmanship combined with the technically skillful use of fabrics and embroidery which have characterized Balestra's work. The collection, spanning from the early 1950s to the first decade of

(last visited 20 September 2023).

<sup>98</sup> *ibid*

<sup>99</sup> *ibid*

<sup>100</sup> ‘Balestra. Re\_Launching an Icon’ *Brand Oasi*, available at <https://tinyurl.com/46y9dxhz> (last visited 20 September 2023); L. Zargani, ‘Balestra to Present New Brand Course’ *Women's Wear Daily*, available at <https://tinyurl.com/2s3sww22> (last visited 20 September 2023); L. Zargani, ‘Couturier Renato Balestra dies at 98’ *Women's Wear Daily*, available at <https://tinyurl.com/2p8ppjtr> (last visited 20 September 2023); Redazione Ansa, ‘Archivio Balestra di interesse storico’ *Ansa*, April 5, 2019, available at <https://tinyurl.com/3rk7tf27> (last visited 20 September 2023).

<sup>101</sup> *ibid* ‘L'archivio, nella sua unitarietà ed eterogeneità, riveste un grande interesse storico per la conoscenza e l'approfondimento dello stile e della creatività dello stilista Renato Balestra, firma storica dell'Alta moda italiana. Ma anche della storia del costume e del made in Italy, mistura di tradizione tecnica ed artigianale, in cui la costruzione sartoriale degli abiti si sposa con il sapiente uso dei tessuti e dei ricami’.

the 2000s, features over forty-thousand sketches and drawings, including drawings of uniforms designed for Alitalia, Agip Petroli, Philippine Airlines, Avianca Airlines, Compagnie Internationale des Wagon-Lits, sketches of dresses commissioned by clients, drawings for operas and ballets, such as Swan Lake, Cinderella, Turandot, paper patterns, embroidery and fabric samples. It also includes ten iconic dresses made between the 1960s and the 2000s, and the two wedding dresses expressly made for the daughter of the former president of the Philippines, Imelda Marcos. The archive includes photographs and videos of Haute Couture shows, Italian and foreign publications, prestigious awards, and prizes received by the designer. Following the death of its founder last November 2022, the archive remains privately owned by Fabiana and Federica Balestra, Renato's daughters, as well as Sofia, his granddaughter. The family is also managing the relaunched fashion house, for which Fabiana Balestra serves as CEO.

This leads us back to the Pucci Archive. Can we identify a relevant historic nucleus, with accompanying material testaments, as in the Brioni example? Can we think of the Pucci Archive as like *calcio storico*, as intangible cultural heritage linked to the history of the city of Florence with sufficient material consistency? Or as an intangible cultural heritage related to craftsmanship? Or, conversely, can we *not* sufficiently identify the nature and material consistency of the Pucci Archive, and a historical nucleus, to ground the declaration of it as cultural property? Is the Pucci Archive of cultural interest, but not of a sufficiently particularly important cultural interest? Or, does it not fulfill the requirements of cultural property law for specific reasons related to its dynamic role in the Heritage Hub?

#### **4. The Pucci Archive as an Activated Fashion Archive of Cultural Interest**

There are a number of motifs present throughout the Pucci Archive, the *Palazzo Pucci*, and the Heritage Hub. These motifs are contained within its collection of dresses, textiles, Pucci-designed housewares and ephemera, including sketches. These motifs showcase the intangibility of what might particularly matter to us about the Pucci heritage. In this sense, identifying a historic nucleus, or even linking the Pucci Archive to other histories, might be more fraught than first expected. The very references Flaccavento describes in his fashion report are present throughout the Pucci Archive. The Pucci Archive might fit broad conceptions of an archive by preserving thousands of drawings, designs, scarves, clothing, textiles, press releases, and other ephemera during Emilio Pucci's lifetime and after it. However, the Pucci Archive also fails a more specific definition of archives under the cultural property legal system, one that seeks to preserve archives for their public cultural interest. This is so because of the very specific role of the Pucci Archive in acting as the facilitator of the comparison between past and present at the heart of fashion, thereby eliding conceptions of time and history. The Pucci Archive is not just a container from which to be drawn, nor is it a tool for marketing ends. The



fundamental idea behind the Pucci brand has been described as both general and specific: ‘general enough (engaged with the liberty of the body and soul) to evolve over time’ and specific as it is ‘composed of certain immutable values (ease, color, lifestyle references)’.<sup>102</sup> This general and specific nature has had an effect on the timelessness and timeliness of Pucci’s designs, which ‘is ever-present in (women’s) quotidian life just as much as it is in their memories of the past’.<sup>103</sup> At other times Pucci has been described as ‘an emotional and social idea: one that can be reinterpreted and refined as necessary, and that can be seen through multiple imaginations’.<sup>104</sup> This makes the Pucci Archive an activated space that facilitates access to a permeable heritage.

For example, the Pucci Heritage Hub’s decoration references Pucci’s characteristic colors. The 2018 remodeling project designed by Laudomia Pucci and implemented by architect Piero Lissoni opts for colors that are all from Emilio Pucci’s own original numbered and trademarked hues, and makes deliberate use of them throughout the building, even beyond the display of Pucci ephemera and clothing present in the archive.<sup>105</sup> The choice to include Pucci colors as part of the Heritage Hub also embodies how familial ties can positively complement the historicization and memory of creative choices.<sup>106</sup> At the same time these choices are also circumscribed by administrative burdens. The Palazzo Pucci’s status as an immovable cultural property already imposes administrative burdens on the Heritage Hub under cultural property law. Throughout the first floor, a bright pink carpet covers the floors of rooms where Emilio Pucci had his office and where the brand’s showroom welcomed guests and customers. On the ‘*piano nobile*’, where the Pucci boutique used to be and where Laudomia Pucci’s offices are now, a bright blue carpet lines the hallways. The privately-owned Palazzo Pucci, the historic home of the Pucci family in Florence, dating back to the 16<sup>th</sup> century, has been declared a cultural property by the Italian government.<sup>107</sup> It contains striking frescoes as well as adorned ceilings dating to the 17<sup>th</sup> century. A laying of the pink carpet that would affect the floors would likely be an addition needing approval of

<sup>102</sup> V. Friedman, ‘Aristocratic Design’ n 1 above at 15.

<sup>103</sup> *ibid*

<sup>104</sup> *ibid* 16.

<sup>105</sup> The dual role of color as indicative of a trend and as indicative of a brand is also an important theme in Fashion Law. It is one which we are not addressing here, but which one of us addresses in future work. See F. Caponigri, *Valentino Pink PP: Culture, Law, and Creativity in Color* (manuscript on file with the author). As Laudomia Pucci has noted, Emilio Pucci’s use of vibrant colors beginning in the 1950s preceded the Valentino Pink PP collection and the use of turquoise, for example, in Balenciaga’s boutiques. For the purposes of this paper, we do not address the nuanced issue of trademarks in certain colors as applied to fashion items and the limited monopolies associated therein.

<sup>106</sup> Indeed, just as Laudomia Pucci’s experiential knowledge of her father’s creative process and choices has enabled the Pucci Heritage Hub’s take on Pucci heritage and the organization of the Pucci Archive, so fashion families in other contexts can also uniquely support the management of fashion firms. For more on this, see Caponigri and Landreth’s article in this Symposium.

<sup>107</sup> Interview with Laudomia Pucci, Tour of the Emilio Pucci Heritage Hub, 13 September 2022.

the Superintendency. Questions as part of the evaluation may include whether the pink carpet would tangibly alter or affect a part of the building and, therefore, the historic interest for which it is recognized. The frescoes themselves might also have their own complementary artistic interest. Even simple acts such as laying a hot pink carpet as part of the activities of the Heritage Hub are relevant to the administrative functions of conservation and preservation at the heart of Italian cultural property law, providing some bureaucratic burdens on the Heritage Hubs' activities already. At the same time, decorating the Palazzo with a carpet in these Pucci hues is not an activity that can be divorced from the expansive nature of Emilio Pucci's creativity. In 1969 in fact, Emilio Pucci collaborated with the Argentinian company *Dandolo y Primi* in Buenos Aires on a series of rugs with his Vivara print.<sup>108</sup> Today, one of the rugs, first displayed in the *Museo Nacional de Arte Decorativo* in Buenos Aires, is on the '*piano nobile*' of the Palazzo, in a room where it dialogues with other Pucci objects, including the installation 'Bonaveri, a Fan of Pucci'. Running throughout Pitti Uomo 2018 to celebrate the opening of the Hub, the Bonaveri mannequin was created after Emilio Pucci's death but inspired by the *Birth of Venus* and Pucci's pearl bikinis and Pucci prints.<sup>109</sup> These creative links alone, which are showcased within the Palazzo and are relevant to the Palazzo's historical relevance as Pucci's atelier and showroom show the practical challenges of harnessing, for traditional preservation ends, the use and invention behind the objects imagined by Pucci the designer and, later, by Pucci the brand. An object in the Pucci Archive such as the rug or a dress could easily be presented as integral to a collective historic interest in the Palazzo, as much as it is of interest to a contemporary fashion public.



**Figure 5** - A 2018 image of a room on the first floor of the Palazzo Pucci, now staged as part of the Heritage Hub. Image from Blue Studio Trading.

<sup>108</sup> 'Art for Home', in 'Timeline' n 18 above.

<sup>109</sup> 'A Venus in Pucci Virtual Tour' *Emilio Pucci Heritage Hub* n 50 above.

As an activated space, the archive falls between conceptions of interests traditionally associated with the archive under cultural property law. As part of its purpose to facilitate access to a permeable heritage, the Pucci Archive is the opposite of a space with a fixed heritage. It is not a historic nucleus that is engaged in absolute truth-telling or cultural testimony.<sup>110</sup> In a complex societal structure where 'old' fashion becomes new again in its tangible as well as intangible iterations, fashion archives like the Pucci Archive can increasingly become divorced from a clear boundary between past and present. The Pucci Archive embodies all these contradictions. Laudomia Pucci, Emilio Pucci's daughter, feels connected to the Pucci Archive not as a closed past but as a living, breathing memory of her father and his creativity.<sup>111</sup>

'All the codes and elements of the brand are there, presented in a playful and ironic way. It's unexpected and it may seem strange, but when you look at it, you understand my father's inspiration',

she explains.<sup>112</sup> The Pucci Archive, while separate from the Pucci brand as it is owned and operated by LVMH now,<sup>113</sup> is not a corporate archive in the traditional sense. Nor, however, is it easily a private archive testifying to a past activity, like the Brioni Archive. Rather, the Pucci Archive contains prints, such as the 1965 Vivara print that are embodied across tangible objects, in dresses, clothing, and in Rosenthal ceramics and rugs.<sup>114</sup> The Vivara print lives on as inspiration for

<sup>110</sup> These conceptions stem from the traditional approach of cultural property scholarship that assigns an absolute value to cultural property rather than a relational value, see M. Modolo, 'La riproduzione del bene culturale pubblico tra norme di tutela, diritto d'autore e diritto al patrimonio' *Aedon* (2021), available at <https://tinyurl.com/3s5wuvvcu> (last visited 20 September 2023); P. Petrarola, 'Valorization as a relational dimension of protection', in G. Negri-Clementi and S. Stabile eds, *Il diritto dell'arte. The protection of artistic heritage* (Milano: Skira, 2014), 41-49. A key concept underlying fashion archives is a relationship that is beyond the relationship between the public and individual objects in archives under cultural property law. Fashion archives are a permeable heritage that builds relationships between different kinds of contents, between past, present and future, between different interpretations of the same object.

<sup>111</sup> Interview with Laudomia Pucci n 107 above.

<sup>112</sup> L. Zargani, 'Palazzo Pucci's New Chapter Highlights History' n 63 above.

<sup>113</sup> The information regarding the ownership of the Pucci Archive is taken from interviews with Laudomia Pucci and her staff. The statements in the interviews are substantiated by other statements Laudomia Pucci has made in the press. K. Chitrakorn, 'The fight for the fashion archive: Brands, collectors and Gen Z face off' *VOGUE Business*, available at <https://tinyurl.com/3bem96ea> (last visited 20 September 2023) ('For Laudomia Pucci, the founders' daughter and president of the Emilio Pucci Heritage Hub, archives play a bigger role beyond marketing. While the LVMH group assumed full ownership of the Emilio Pucci brand in June 2021, the archive has always and will continue to belong to the family, Pucci says via a call from the Tuscan countryside at the Villa Granaiolo, where she decided to transfer a part of the brand's archives, creating a private museum in 2011'.) While our analysis mentions examples of Pucci design objects from as late as 2016, we do not delve into any possible arrangements or agreements between Emilio Pucci, srl, the Creative Directors hired after Emilio Pucci, and Laudomia Pucci with regards to the display of these design objects created after Emilio Pucci's death in the Pucci Archive or Heritage Hub.

<sup>114</sup> 'Object Voices/Emilio Pucci's 'Vivara' *European Fashion Heritage Association*, available at

current designers who visit the Pucci archives to consult the archives. As one of Marchese Pucci's most famous prints, the Vivara has also been given a dedicated space within the Palazzo which features a wallpaper installation.<sup>115</sup> Certainly the Vivara print is historically relevant. We might say the same about Pucci's other designs that represent intangible cultural heritage (like Siena's Palio) and tangible cultural properties (including Florence's Baptistery, reimaged in a Pucci universe). These designs, even more than the Vivara, reference intangible cultural heritage and might be seen as linked to their modern iterations through the representation on the scarf. But these designs are intangible objects. We might say that, in their first tangible forms, any of these objects are a testament to Emilio Pucci's creativity. And that, by extension, there is a link between the objects that are catalogued and stored following archival guidelines in the Pucci Archive and the evolution of creativity in fashion in the 1960s in Florence. But is this enough of a historically relevant cultural interest? Is this even a sufficient link to the city of Florence or intangible cultural heritage for a recognition that the design is part of intangible cultural heritage? The constant evolution and change at the heart of the Pucci Archive, the emphasis on colors, design tropes, and even creativity itself, seem to undermine the identification of a fixed historic nucleus and links to a specific historical moment or even place. Notwithstanding the importance of Pucci in Italian fashion history, the importance of Emilio Pucci as a designer, and even the strong links between the city of Florence, Emilio Pucci, and Pucci's designs, the items in the Pucci Archive are open and communicate a cross-cutting narrative. What is of cultural interest to us is also, relatedly, therefore too intangible to ground an application of the notion of cultural property to the archive itself.

### **5. The Impact of an Activated Archive Outside the Boundary of Cultural Property Law**

The Pucci Archive allows itself to be activated by both research and fashion production, and still more outside stakeholders. It is not a passive institution nor is it a commercial instrument or tool. Indeed, as part of a Heritage Hub in search of new opportunities and partnerships, it is in perhaps uncharted archival territory. Students have participated in valorization activities that use the Pucci Archive as a starting point for projects, but that constantly re-interpret and read anew the archive's primary contents. These include virtual reality and digital tours.<sup>116</sup>

<https://tinyurl.com/3cwsxp26> (last visited 20 September 2023)

<sup>115</sup> 'Emilio Pucci Virtual Tour', available at <https://tinyurl.com/525xh9t4> (last visited 20 September 2023) (showcasing wallpaper inspired by the *Vivara* print on the *piano nobile*). We do not make any statements or observations in this article about agreements between Emilio Pucci International, BV, Emilio Pucci, srl and Laudomia Pucci about the continued display or reproduction of the *Vivara* print, given Emilio Pucci International, BV's ownership of the copyright. See n 196 below.

<sup>116</sup> 'Emilio Pucci Virtual Tour' n 115 above. The Talent Center at Granaiole Villa has been already mentioned. Another example of the variety of projects undertaken regards the skateboard

Indeed, the archives' very organization supports such creativity and research, beyond a strict horizontal timeline. The Pucci Archive, both in its contents as an institution, collapses time beyond commercial needs and historical facts with its collection. While old, the pieces are also modern, both in their links to current fashion trends and in their modernity. The management of the Pucci Archive builds on this time capsule. Objects are not presented, nor preserved, with explanatory text captions or commentary meant to freeze the meaning of Emilio Pucci's designs and objects, or even of the more recent items from Pucci collections dating to as late as 2016. Rather, objects and ephemera from the archive are recontextualized next to each other in spaces in which the objects are meant to be in dialogue with each other and with the room itself, considering Pucci's work within it. In other words, the Pucci Archive has an evergreen aspect,<sup>117</sup> a characteristic that is linked to sportswear, to Italian inspiration, and to artistic inspiration, but one that is not necessarily defined by any one of the themes. The recontextualization and innovative displays organized by the Pucci Archive's managers within the Heritage Hub collapse time and build on codes like color, prints, and other categories, beyond a strict timeline. In videos showcasing parts of the Heritage Hub displaying dresses within the Pucci Archive, Laudomia Pucci herself emphasizes tropes and design choices that are used and incorporated over the course of Emilio Pucci's designs, and within the designs of various Guest Creatives or Creative Directors of the brand after Emilio Pucci's death.<sup>118</sup> Fringe, for example, is present in 1960s designs and in early 21<sup>st</sup> century looks.<sup>119</sup> This macro reading of Pucci emphasizes Pucci's modern and evergreen nature as a first matter. If the function of declaring private archives cultural property under Italian law is to assure their preservation, why declare the Pucci Archive a cultural property if there is nothing to preserve in the traditional sense? The current notion of cultural interest which triggers preservation, and the traditional notion of preservation itself under Italian cultural property law, seems at cross purposes with the Pucci Archive. The Pucci Archive is without fixed

collection and the virtual reality experience called Pianeta Pucci, both developed by students from University of Art and Design of Lausanne (Ecal), inspired by a week-long workshop to study Pucci Archive prints. Interview with Laudomia. See also LVMH, 'Pucci collabora con Nowness e lancia la prima collezione di skateboard' *LVMH*, available at <https://tinyurl.com/2p88cavw> (last visited 20 September 2023); 'Pianeta Pucci' *Écal*, available at <https://tinyurl.com/2p9468ss> (last visited 20 September 2023).

<sup>117</sup> Interview with Laudomia Pucci, Tour of the Emilio Pucci Heritage Hub, 18 October 2022.

<sup>118</sup> After changing different Creative Directors since the death of its founder, in 2020 the Pucci brand decided to implement a new strategy, engaging guest collaborators rather than a full-time Creative Director. Starting with Christelle Kocher, whose Fall 2020 sportswear collection opened the iconic 1956 Palio designs to new interpretations, many creatives were invited to enter the rich Pucci Archive and produce new creations inspired by Pucci designs, prints and styles. Interview with Laudomia Pucci and Dylan Colussi, 18 October 2022. See also M. Socha, 'Emilio Pucci Switches Creative Gears' *Women's Wear Daily*, available at <https://tinyurl.com/3z29ubxa> (last visited 20 September 2023).

<sup>119</sup> 'Emilio Pucci Virtual Tour' n 115 above (in which Laudomia Pucci presents gowns in the great room of the piano nobile).

meanings, a mediator between the past and present, and a space where the Pucci story continues to evolve. As a mediator, it fulfills the important function of continuing to give life to the Pucci story both for and outside of the Pucci brand. The administrative burdens that would accompany the declaration of the Pucci Archive as cultural property could frustrate the very interests of diverse stakeholders who participate in the Pucci Archive's activities and function.

The time element of declaring an archive to be cultural property is also an important issue in the Pucci case. Recall that for individual objects or series or collections in private collections to be declared cultural property, objects need to be by non-living authors. While archives do not have this cut-off time or a strict time threshold, in practice a most relevant timeframe is applied to evaluate an archive's cultural interest. We might be able to identify Emilio Pucci as the one designer whose life should serve as the measure for objects in the Pucci Archive. Consider, however, that many clothing items are created by more than one individual designer and may have the traces of a workshop. Depending on whether we interpret the notion of an author narrowly or broadly, items in the Heritage Hub may be more, or less, eligible as cultural property today. The concept of age may also be relative for fashion in the Heritage Hub. Paintings and other similar cultural properties are dated according to their tangible completion. But fashion is often created as a design and then made concrete in individual objects. Because cultural property is a real property regime that operates on a tangible object, it might be most reasonable to consider the date of the creation of tangible iterations of designs as part of cultural property law's time threshold. But Emilio Pucci began his brand after World War II, making only the earliest of the Pucci fashion items, from the early 1950s, eligible to be declared cultural property, even as a series of objects or as a collection. Does it make sense to place an arbitrary timeframe on the Pucci Archive to evaluate its historic significance, its links to the history of the Italian fashion industry, even a link of distinctive significance to the city of Florence, if Pucci, as a creative and as a brand, is still evolving? Archives that preserve collections on a frontier of fashion where past and present collapse, and where ideas are not seen as finite, might be best left outside the cultural property regime.

A devil's advocate argument might say that these instances in which Pucci designs seem to travel across tangible objects, is just an example of valorization. That it is possible to preserve a nucleus of Pucci-designed objects designed by Emilio Pucci himself as cultural property because the instances of reproduction we see are just ways to promote one, fixed cultural interest present in a *Vivara* scarf, for example. But consider that the Pucci Archive does not fit the definition of an archive for the purpose of valorization under Italian cultural property law. Art 101 defines an archive for the purposes of the use of cultural properties as

‘a permanent structure which gathers, inventories, and conserves original documents of historic interest and which assures their consultation for the

purposes of study and research'.<sup>120</sup>

Valorization is defined as

'the exercise of functions and activities meant to promote the knowledge of cultural heritage and to assure the best conditions for the public use and fruition of that heritage, in order to support the development of culture'.<sup>121</sup>

While the legal notion of valorization of cultural properties is an open notion, there is a fundamental tension identified in treatments of it in legal scholarship. While valorization is meant to promote and disseminate the cultural values inherent to cultural property, it is not meant to change these same cultural values or the interest of the relevant publics.<sup>122</sup> Some might argue that the Pucci Archive meets an atypical definition of valorization. But the Pucci Archive's role in allowing the meanings of its works to be in constant evolution, even as it respects the connections to Emilio Pucci's life and his legacy, defies even the rule that valorization is not meant to amplify cultural interests, in addition to frustrating a recognition of a particularly important historic interest.

A further example of how the Pucci Archive is activated by multiple stakeholders and facilitates comparison between the past and present through Emilio Pucci's evergreen themes is evidenced by the example of the wrapping of Florence's Baptistery in an Emilio Pucci print in 2014. Billed as 'Monumental Pucci', this art installation saw Florence's Baptistery, a publicly owned cultural property decidedly in the *demanio pubblico*,<sup>123</sup> wrapped in a 1957 print created by Emilio Pucci that rendered the Baptistery 'in vibrant colors of the Mediterranean landscapes: lemon yellow, orange, fuchsia and the emblematic Emilio pink'.<sup>124</sup> The wrapping of the Baptistery with the 1957 print, itself titled 'Battistero', was described in the following way:

The apse side of the Baptistery is clad in the original 'Battistero' print, reproduced in its entirety, while the remaining seven sides of the octagonal building are covered in almost 2,000 sq mt of printed canvas depicting a

<sup>120</sup> See Art 101(c) decreto legislativo 22 January 2004 no 42.

<sup>121</sup> L. Casini, 'Beni Culturali' *Enciclopedia giuridica del Sole 24 Ore* (Milano: Il Sole 24 Ore, 2007) (citing to Art 6, comma 1 decreto legislativo 22 January 2004 no 42)

<sup>122</sup> *ibid* ('La valorizzazione dei beni culturali, quindi, non consiste nell'accrescere i valori di cui i beni sono testimonianza (valori che sono una realtà indipendente e preesistente alle forme di governo dei beni stessi) ... Le difficoltà che spesso si hanno nel dare un contenuto preciso alla valorizzazione discendono, allora, dalle caratteristiche stesse di questa funzione, la cui nozione è aperta, perché comprensiva di ogni possibile iniziativa diretta ad incrementare la fruizione dei beni culturali, e dinamica, in quanto espressione di un processo di trasformazione delle modalità di godimento dei valori di cui i beni stessi sono portatori'.)

<sup>123</sup> See Art 53 decreto legislativo 22 January 2004 no 42 (defining the *demanio pubblico*).

<sup>124</sup> 'Monumental Pucci: dressing the Battistero' *LVMH*, available at <https://tinyurl.com/yc7bxjyz> (last visited 20 September 2023).



close-up of the ‘Battistero’ design, blown up to life size, faithfully following the building’s contours.<sup>125</sup>



**Figure 6** - An image of Pucci's *Battistero* print wrapping the Baptistry in Florence in 2014

The wrapping was a public/private partnership between the city of Florence, the Italian Ministry for Economic Development, the Italian Trade Agency, the French luxury conglomerate LVMH and Laudomia Pucci, as shareholders and managers of the Pucci brand, and the Pucci Archive which contained the *Battistero* print. The art installation raised unique questions related to the preservation of the Baptistry and the purpose and role of adding Pucci's own Florentine legacy to it. Under the Italian Code of Cultural Property, offices of the Ministry are called to evaluate the appropriateness of commercial and other activities that use an immovable cultural property.<sup>126</sup> The purposes of these evaluations, which are also part of the contractual stipulation of sponsorships of the restoration of cultural properties,<sup>127</sup> is to assure cultural properties' *decoro*. *Decoro* is understood as integrity or authenticity<sup>128</sup> – in other words, these cultural properties' ability to continuously embody and fulfill the historical interests of the collective. Wrapping the Baptistry in the *Battistero* print needed to be determined to be an act that did

<sup>125</sup> *ibid*

<sup>126</sup> Art 52 (1-ter) decreto legislativo 22 January 2004 no 42.

<sup>127</sup> L. Casini, 'Valorizzazione e gestione', in C. Barbati et al eds, *Diritto del Patrimonio culturale* (Bologna: il Mulino, 2020), 243.

<sup>128</sup> *ibid* 197-198. (discussing tutela del decoro); M.S. Giannini, 'Review of Mario Grisolia's La tutela delle cose d'arte' *Rivista trimestrale di diritto pubblico*, 171-172 (1953) (describing the vagueness of decoro, 'Il massimo di potere dispositivo che la legge riconosce allo Stato è il divieto, che può imporsi, di utilizzare il bene in modi incompatibili con 'il carattere' storico o artistico: divieto, peraltro, di rilievo marginale, e di contenuto piuttosto confuso e incerto').



not compromise the preservation of the Baptistry nor its historic nature. The Pucci Archive played a critical role in the positive outcome of that determination by placing the *Battistero* print in a broader context of Emilio Pucci's familial and inspirational connection to the city of Florence. Moreover, by strategically matching parts of the print with the parts of the Baptistry from which it was inspired, the Pucci Archive, as an institution, seemed to visually translate the Baptistry into the Pucci lexicon and into a contemporary fashion narrative that was still grounded in heritage. In this case, the Pucci Archive was activated both by the history of the city of Florence and its cultural property, the marketing and commercial goals of Pucci as a contemporary fashion brand, and by the archive's own contents and links to a cultural property, a creative industry, and an individual designer. Far from the actions of a traditional archive, the Pucci Archive's actions indicate a dynamic institution whose contents are still evolving. As a result, the Pucci Archive seems hard-pressed to meet the requirements to declare it a cultural property under Italian law. The archive's continuously evolving cultural interest exists between the past and the present, the cultural and the commercial.

The Pucci Archive might best be considered an activated archive. An activated archive pushes traditional notions of cultural property and yet it also does not purely serve the commercial or even brand heritage ends of a fashion company. An activated archive, as we term it, meets the public's cultural interest in its objects halfway and yet is always acting in a way which defies traditional notions of gathering, inventorying, and conserving. The Pucci Archive is an activated archive that falls outside of the legal notion of a private archive of sufficient particularly important historic interest to be declared cultural property. The Pucci Archive's actions seem to make it more than a preserver of the past and even more than a promoter of specific cultural interest contained in certain heritage. As an 'activated archive' it seems to fall outside or, at the very least, on a frontier, of the definition of an archive as a cultural property. Its relationship with the Heritage Hub makes its use beyond museum-like confines even more susceptible to being perceived outside the definition of cultural property.

## **6. Activated Archives in a Negative Space of Cultural Property Law**

Activated archives do not seem to match current definitions of archives under cultural property law. Why, might we ask? Why does cultural property law have certain boundaries around it, and what can that tell us as fashion increasingly enters the heritage universe, in Italy and even, perhaps, in the United States?

The positive implications of allowing a negative space of cultural property to exist have been in the minds of Italian scholars, legislators,<sup>129</sup> and even judges,<sup>130</sup>

<sup>129</sup> V. Cazzato, 'Disegno di legge' n 92 above, 408-409 (exploring the need for time thresholds for cultural property).

<sup>130</sup> Consiglio di Stato 14 June 2017 no 2920, available at [www.dejure.it](http://www.dejure.it) (exploring why Cinema America should not have been classified as a cultural property under Art 10, clause 3(d)).

albeit in words other than ‘negative space’, throughout time. Massimo Severo Giannini perhaps said it best when exploring various iterations of Petrarch’s Sonnets.

*Approfondendo e spiegando: le ‘Rime’ di Petrarca appartengono al patrimonio culturale letterario del mondo; le tante edizioni di libri che di esse sono state fatte le riproducono e ne permettono la conoscenza diffusa, ossia sono moltiplicatori di circolazione materiale. A meno che non presentino particolari caratteri, quando al soggetto o all’oggetto, per cui possano divenire beni librari, i libri delle ‘Rime’ sono cose costituenti supporto di beni patrimoniali, le ‘Rime’ bene immateriale letterario: tra essi non vi è relazione diretta, ma solo la relazione indiretta che sorge allorché si ha una vicenda qualsiasi di riproduzione documentale. I manoscritti delle ‘Rime’ sono invece una cosa contenente gli enunciati immediati della creazione letteraria, e per essere testimonianza materiale avente valore di civiltà, sono bene culturale (non importa come classificato o classificabile), ma in quanto cosa sono altresì supporto di un bene patrimoniale, oltretutto di presumibile elevatissimo valore. Se non esistessero, il patrimonio culturale sarebbe privo del manoscritto di un’opera letteraria eccelsa; ciò sarebbe un impoverimento ma non una mancanza irreparabile, poiché di tante grandi creazioni letterarie mancano i manoscritti. Peraltro, esistendo, sono un bene immateriale a sé e in più; bene che – si rilevi – è distinto dal bene immateriale letterario “Rime.” ...gli ordinamenti positivi [pubblici] si occupino solo di alcune, di quelle cioè per le quali si pongono ragioni pratiche di tutela pubblica...Per i beni delle altre specie può non porsi alcun problema di tutela (non è necessario, p. es. tutelare l’Iliade o le Partite di J.S. Bach), oppure possono porsi problemi di tutela privata o interprivata (ed è in questo il caput delle normazioni sulla proprietà letteraria, artistica, scientifica). È chiaro che il giorno in cui si ponessero, per volgersi di eventi della nostra società, problemi di tutela pubblica di altre specie di beni culturali oltre quelle per le quali già vi è una normazione apposita, occorrerebbe provvedere.<sup>131</sup>*

Cultural property law, at its heart, serves a practical preservation purpose. There is no reason to impose a duty of preservation when the cultural value is not in danger. This danger exists when, as Giannini says for manuscripts, there might be a loss. There might be a loss if the Pucci Archive were destroyed by a fire, perhaps, but it might not be an irreparable loss to merit the archive’s declaration as cultural property.<sup>132</sup> Especially when the archive itself is in constant evolution and facilitates the ever-evolving meaning of its contents.

<sup>131</sup> M.S. Giannini, ‘Beni Culturali’ n 69 above, 33-34.

<sup>132</sup> Interview with Jennifer Celani, 10 November 2022. Administrative agencies should look at objects to be declared cultural property with the eye of the historian who detects a cultural interest: that is, with the understanding that without that object Italian knowledge would be impoverished.

#### IV. Heritage-Shaking the *Vivara* Print: Copyright Lessons for Parallel Creations

The Italian cultural property law scholar Giannini in the excerpt above, notes that copyright, in comparison to the public cultural property regime, serves a purpose of ‘private’ or ‘inter-private’ protection. That is, copyright serves the purpose of an author to ‘protect’ (in a broad, even economic, sense) their own literary, artistic, or scientific works. This could, of course, encompass moral rights,<sup>133</sup> which in Italy consist of a vast array of perpetual and unwaivable rights, including the right of attribution and the right of integrity of the work, in contrast with the United States where moral rights are far less extensive, in a number of ways.<sup>134</sup> At the same time, Giannini’s examples of texts, which are theoretically reproducible no matter where they are placed, like many fashion designs, point to the regulation of copies in copyright law. Is there a reason for copyright law to ‘protect’ a Pucci print, like the *Vivara*, to regulate its reproductions and reworkings, its parallel creations, in Flaccavento’s words? Is this reason supported or nuanced in light of the Pucci Archives’ status as an activated archive, one with a cultural meaning that seems to still be evolving, that is meeting the public halfway to create new moments and forms of heritage? Can copyright help us to parse the differences between the 1965 *Vivara* print, and other reworkings? Can copyright help us identify the parallel creations which Flaccavento hopes exist, designs that move initial references from a brands’ heritage forward?

Both US and Italian copyright law would likely answer these questions with a classic ‘it depends’. This is because, while copyright can apply to fashion designs like the *Vivara*, copyright protection for such prints is not all encompassing. As a first matter, copyright is meant to facilitate authors’ (or their assignees’) regulation of the copies of their works. The reasons for this regulation are primarily economic,<sup>135</sup> although some moral undertones related to an author’s inherent right to control their work are present, especially in the Italian regime. As a second matter, copyright law, to extend a right to control copies, answers the question – what constitutes a

<sup>133</sup> In Italy moral rights law include, besides the right of attribution (Art 20, Legge 22 April 1941 no 633) and the right of integrity (Art 20, Legge 22 April 1941 no 633), the right of withdrawal (Art 142, Legge 22 April 1941 no 633 and Art 2582, Italian Civil Code), and the right of disclosure (implied in Art 142, Legge 22 April 1941 no 633). For the purposes of this article, we do not delve into whether Laudomia Pucci has inherited moral rights in the designs created by her father, Emilio Pucci, and what effects those moral rights, if any, may have on the use of the *Vivara* print by Emilio Pucci International, BV and Emilio Pucci, s.r.l.

<sup>134</sup> In the US, after the relatively recent ratification of the Berne Convention in 1989, explicitly moral rights are attributed ‘only to the author of a work of visual art’ (VARA, 17 USC § 106A(b)) and excluded for the category of applied art (17 USC §101: ‘A work of visual art does not include— (A)(i) [...] applied art’).

<sup>135</sup> Especially in the US, where the reason for copyright lies almost entirely in its utilitarian function. See also the Copyright Clause, US Constitution, art I, § 8, cl 8. For a comment against the dominance of the utilitarian, economic incentive-driven model for copyright protection, see A. Adler, ‘Why Art Does Not Need Copyright’ 86 (2) *The George Washington Law Review*, 313 (2018).

copy? In other words, copyright law takes Flaccavento's critiques about designers' 'theft' from other designers and makes it legally relevant. However, the contours of 'theft' under copyright can be thinly drawn. Central to the question of whether a 'theft', in Flaccavento's terms, has occurred is an evaluation of the two works in question: a comparison of the, at the best of times, parallel creations. This comparison requires a slicing of what is past heritage, and what are newer creative additions. It also requires an evaluation of whether these additions matter, whether they, in Flaccavento's terms 'move the starting point forward'.<sup>136</sup> Laudomia Pucci has analogized the process of creation to a blender (*frullatore*).<sup>137</sup> The process is made of specific ingredients: the time one takes to consult the archive, the number of objects one looks at, the care with which one examines past and present contexts, and even authorization from the copyright holder, if the work is not in the public domain.<sup>138</sup> We term this process heritage-shaking: a process in which a design in the contents of an activated archive, used by many different stakeholders and collapsing past and present, is revisited and blended together with contemporary creativity to produce designs of the present, notwithstanding their reference to the past. Heritage-shaking is a process which should tell stakeholders, including courts comparing these designs, 'where to look',<sup>139</sup> to help them identify what is heritage, and what is added-on creativity. At times, heritage-shaking might emphasize the need to seek permission from the creator of the reference. At other times it might support a more free, unrestricted process of creation. In both instances, however, heritage-shaking promotes acknowledgement: an acknowledgment of the brand, or wider cultural, heritage that a designer is taking.

### 1. Lessons for Heritage-Shaking from the United States

In the United States, copyright infringement is defined by the 'substantial similarity' test. Under this test, courts in different jurisdictions will look at a work and analyze it, identifying in the newer creation the creative additions with respect to what we might call the reference. In doing so the court will evaluate whether there is enough creativity, enough difference, to remove some or all control from the author of the reference. In essence, the substantial similarity test questions, without aesthetic judgment,<sup>140</sup> whether the creation using the reference 'moves the

<sup>136</sup> A. Flaccavento, 'In Paris, Creators and Imposters' n 6 above.

<sup>137</sup> Interview with Laudomia Pucci and Dylan Colussi, 18 October 2022.

<sup>138</sup> L. Pucci, for example, points to some designs which would not be proper to use as inspiration and place into commerce today in light of our current sensibility towards cultural appropriation. Interview with Laudomia Pucci, 13 September 2022.

<sup>139</sup> V. Friedman et al, 'Pucci' n 1 above, 39.

<sup>140</sup> But see G. Cheng, 'The Aesthetic of Copyright Adjudication' 19(1) *UCLA Entertainment Law Review*, 113 (2012); A.C. Yen, 'Copyright Opinions and Aesthetic Theory' 71 *Southern California Law Review*, 247 (1998). See also, on the approach towards aesthetic judgment in US courts dealing with cases involving art-related issues, L. Palandri, *Giudicare l'arte. Le corti degli Stati Uniti e la libertà di espressione artistica* (Firenze: Firenze University Press, 2016).

reference forward'. Central to applying this test is the notion that only expressions, and not ideas, are copyrightable. That even references themselves have built on previous ideas but that the references' expression is what was (or still is) original.<sup>141</sup> There is only so much, under US copyright law, that a second creation can take from that expression. An allowed taking can be classified as permissible under the fair use test, a test which recognizes that there are certain uses of references which their author would never allow.<sup>142</sup> By contrast, if the reference is still in the term limits of copyright and the taking is deemed a step too far, and not even a fair use, the parallel creation might need to receive a license to use the reference.<sup>143</sup> This, in essence, undermines the theft Flaccavento identifies. The layered copyright infringement test supports some sort of recognition that what we are looking at is a parallel creation. This recognition is most often gained through licensed collaborations and even the awareness-raising facets of copyright infringement cases.

Identification, however, is one of the challenges with applying the substantial similarity test. Complicating matters further is how much copyright law leaves on the proverbial cutting room floor in the fashion industry for fashion's very continuation and survival. Many styles are left in the public domain and are classified as uncopyrightable as any other idea.<sup>144</sup> This may also be the case for historic designs made long ago, which have aged out of copyright, if they could ever access it. How are judges to, in fact, draw lines between idea and expression in a specific work of fashion? How are they to identify differences between a reference and a later creation which is inspired by or reworks the reference? How are judges to compare any similarities between fashion expressions, and similarities outside of the differences?

Under US copyright law, the identification part of the test has been categorized into different components in the Second Circuit and in the Ninth Circuit, respectively. In the Second Circuit a court first engages in abstraction, identifying the ideas and expression and then defining the work's (in this case we can consider a print's) structure. The court then applies filtration, a 'filtering method'<sup>145</sup> which is meant to, building on the levels of abstraction the court has decided upon, factor out non-copyrightable subject matter, including ideas, stock or standard tropes which are needed for any print of its kind, and public domain works, including those that have aged out of copyright's term.<sup>146</sup> In the Ninth Circuit, abstraction and filtration are called by different names: extrinsic and intrinsic analysis. Often using experts,

<sup>141</sup> *Leibovitz v Paramount Pictures Corp*, 137 F.3d 109 (2d Cir 1998).

<sup>142</sup> As of this writing the scope of this test is currently under review at the US Supreme Court. See *Andy Warhol Found for the Visual Arts, Inc. v Goldsmith*, 992 F.3d 99 (2d Cir 2021), and holding modified by *Andy Warhol Found for Visual Arts, Inc v Goldsmith*, 11 F.4<sup>th</sup> 26 (2d Cir. 2021).

<sup>143</sup> *ibid.* As was the case in the Warhol case, which used an artist's reference and not a public domain work.

<sup>144</sup> *Star Athletica, L.L.C. v Varsity Brands, Inc*, 580 U.S. 405 (2017).

<sup>145</sup> *Computer Associates International v Altai, Inc* 982 F.2d 693 (2d Cir. 1992).

<sup>146</sup> 17 USC §302 (life of the author and 70 years thereafter, or longer for a work for hire).

a court will identify ‘objective manifestations of expression’.<sup>147</sup> This is a way to objectively identify the ideas versus expressions in the work. After this, the judges explore, subjectively, the ‘total look and feel’<sup>148</sup> of the two works, asking whether ordinary and even more relevant observers would identify the works, in their expressive qualities, as similar.<sup>149</sup>

Central to what remains after this filtration in both circuits is a work’s ability to also be ‘original’- the *sine qua non* of copyright. Works as a whole must be

‘independently created by (their) author...not copied from pre-existing works, and a work that comes from the exercise of the creative powers of the author’s mind, in other words, ‘the fruits of (the author’s) intellectual labor’.<sup>150</sup>

In some sense, through originality, copyright law is seeking a proxy for the intellectual honesty which Flaccavento desires: a forward movement of the conversation.<sup>151</sup>

Courts finally, after these abstraction/filtration and extrinsic/intrinsic tests then engage in a comparison of the ‘reference’ and the later work. Central to Flaccavento’s critique is that he *knows* today’s designers are stealing from past collections and designers. Courts often do not have evidence of actual copying. What this means is that courts often do not have evidence that an author downloaded a work, sat in front of it to copy, or otherwise copied in fact. As a result, comparison often leads to the assumption that the author of the second work *must have* looked at the reference.<sup>152</sup> This emphasizes the importance that we often place on our own eyes, on our knowledge of the connections between works. Just as Flaccavento *knows* that designers are taking and using references from other fashion designers, whether they tell him or not, so copyright law seems to *know* that we will *know* copying took place when we see similar works. As Laudomia

<sup>147</sup> J.C. Fromer and C.J. Sprigman, *Copyright Law: Cases and Materials* (2022), 251 (with excerpts from *Wanda A. Cavalier v Random House, Inc* 297 F.3d 815 (9th Cir. 2002)).

<sup>148</sup> *ibid* 244.

<sup>149</sup> *ibid* 244 et 251.

<sup>150</sup> *Boisson v Banian, Ltd*, 273 F.3d 262, 268 (2d Cir 2001).

<sup>151</sup> It is worth noting that originality and the public domain have been thought of as two sides of the same coin, given what might be termed a ‘legal fiction’ of originality. Jessica Litman has argued that originality is ‘inherently unascertainable, and it is not the battleground on which infringement suits are in fact decided. Because authors necessarily reshape the prior works of others, a vision of authorship as original creation from nothing – and of authors as casting up truly new creations from their innermost being – is both flawed and misleading’. J. Litman, ‘The Public Domain’ 39 *Emory Law Journal*, 968-969 (1990). In some ways we agree with Litman, recognizing that identifying originality is unascertainable given the practice of using references and copying in the fashion industry. Our process of ‘heritage-shaking’ seeks to find a balance between the necessary partners of the public domain and originality which Litman identifies, and the manner in which we now resort to the public domain to support the fiction of originality.

<sup>152</sup> C.J. Buccafusco, ‘There’s No Such Thing as Independent Creation, and It’s a Good Thing, Too’ *William & Mary Law Review*, 2022.

Pucci has even said, ‘All fashion design is some sort of theft’.<sup>153</sup> At least one example might help to elucidate how a US court in the Second Circuit would apply the substantial similarity test to a print like the one we find in the Pucci Archive, and why the process of ‘heritage-shaking’ may help.

In *Boisson v Banian, Ltd*, Judi Boisson, who created and designed quilts through her company, sued another quilt manufacturer for illegally copying quilt designs which Boisson had registered at the Copyright Office. Much like the Vivara print and unlike more simpler fashion prints,<sup>154</sup> Boissons’ quilt design was a patchwork of color, shapes, and strategically placed repeating patterns. Boisson had, in fact, begun her business by reselling ‘antique American quilts – in particular, Amish quilts – she purchased in various states throughout the country’.<sup>155</sup> When Boisson could no longer find antique quilts, she began designing and making her own for sale,

‘work(ing) on these quilts at home where she drew the letters by hand, decid(ing) on their placement in the quilts, pick[ing] out the color combinations and cho(osing) the quilting patterns’.<sup>156</sup>

This Boisson did for the two quilts she alleged were infringed, ‘School Days I’ and ‘School Days II’,<sup>157</sup> which consisted

of square blocks containing the capital letters of the alphabet, displayed in order. The blocks are set in horizontal rows and vertical columns, with the last row filled by blocks containing various pictures or icons. The letters and blocks are made up of different colors, set off by a white border and colored edging.<sup>158</sup>

The allegedly infringing quilt designs, which were imported from India,<sup>159</sup> were described as having capital letters, icons, with

‘(a)ll three quilts us(ing) a combination of contrasting solid color fabrics or a combination of solid and polka-dotted fabrics to represent the blocks

<sup>153</sup> Interview with Laudomia Pucci and Dylan Colussi, 18 October 2022.

<sup>154</sup> The Vivara print is, in fact, very different from the chevrons, stripes, and zig zags that were at issue in the *Star Athletica L.L.C. v Varsity Brands Inc.*, 580 US 405 (2017). Compare images of Vivara in L. Pucci et al, *Unexpected Pucci* (New York: Rizzoli, 2019), 10-11, 24- 29 with images of the cheerleading uniforms in *Star Athletica, L.L.C. v Varsity Brands Inc.*, 580 US 405 (2017).

<sup>155</sup> *Boisson v Banian Ltd*, 273 F.3d 262, 266 (2d Cir 2001).

<sup>156</sup> *ibid*

<sup>157</sup> *ibid*

<sup>158</sup> *ibid*

<sup>159</sup> ‘Defendant Vijay Rao is the president and sole shareholder of defendant Banian Ltd., incorporated in November 1991. Rao is an electrical engineer in the telecommunications industry who became interested in selling quilts in February 1992. To that end, he imported from India each of the three alphabet quilts at issue in this case. He sold them through boutique stores and catalog companies.’ *Boisson v Banian, Ltd*, 273 F.3d 262, 266 (2d Cir. 2001).

and letters'.<sup>160</sup>

At the District Court level, the court had found no copyright infringement. The Court of Appeals in the Second Circuit, however, reversed, expanding what was covered by copyright in Boisson's quilt and expanding the application of the substantial similarity test, emphasizing the importance of the 'total look and feel' of Boisson's quilt design. As part of its reasoning, the Court, although addressing quilts and not fashion *per se*, observed that

'Copying the creative works of others is an old story, one often accomplished by the copyist changing or disfiguring the copied work to pass it off as his own. Stealing the particular expression of another's ideas is rightly condemned in the law because pirating the expression of the author's creative ideas risks diminishing the author's exclusive rights to her work, or as a poet said, taking all that she may be or all that she has been'.<sup>161</sup>

But central to the application of the court's identification of a theft of a particular expression was parsing what was Boisson's expression, especially given the public domain<sup>162</sup> and the tradition of quilt-making.<sup>163</sup> The court also had to identify what was infringing about Bannian's quilts by comparison. While the Second Circuit agreed with the district court that the alphabet, and 'familiar symbols or designs' or 'mere variations of ... lettering'<sup>164</sup> are in the public domain, it emphasized the copyrightability of Boisson's layout because the

'alphabetical arrangement of the letters in the five-by-six block format required some minimum degree of creativity, which is all that is required for copyrightability'.<sup>165</sup>

Similarly, while the court recognized that color itself is not copyrightable, '(a)n original combination or arrangement of colors should be regarded as an artistic

<sup>160</sup> *ibid*

<sup>161</sup> *ibid*

<sup>162</sup> Some material is unprotectible because it is in the public domain, which means that it 'is free for the taking and cannot be appropriated by a single author even though it is included in a copyrighted work'. *Computer Assocs. v. Altai Inc.*, 982 F.2d 693, 710 (2d Cir 1992). *Boisson v Banian, Ltd.*, 273 F.3d 262, 268–69 (2d Cir 2001).

<sup>163</sup> 'To support its finding that the layouts of plaintiffs' quilts were not protected by copyright, the district court relied upon evidence submitted by defendants showing that alphabet quilts have been in existence for over a century, suggesting that such layouts were also in the public domain. One circa 1900 quilt displayed letters and icons in blocks arranged in the same format used in 'School Days I'. From this evidence the court reasoned that such formation belonged to the public domain. Although it made specific findings only as to the block formation in 'School Days I', we presume for purposes of our discussion that, in the absence of a specific finding as to the 'School Days II' format, the trial court intended its findings on unprotectibility to extend to the layouts of both of plaintiffs' quilts'. *Boisson v Banian Ltd.*, 273 F.3d 262, 269 (2d Cir 2001).

<sup>164</sup> *Boisson v Banian Ltd.*, 273 F.3d 262, 269 (2d Cir 2001).

<sup>165</sup> n 56 above.



creation capable of copyright protection'.<sup>166</sup> The court put emphasis on the fact that alphabet quilts were not present in the historic examples of quilts which Boisson had previously collected, or in proffered publications about quilts.<sup>167</sup> The court noted that there was also disagreement in scholarship as to how much weight circumstantial access to the public domain should have in the parsing of protectable elements.<sup>168</sup> With this reasoning, the Second Circuit parsed the heritage in the public domain to which Boisson had access from her quilt designs. The court recognized that the layout of Boisson's quilt was original expression sufficient to form the basis of a comparison to find whether Bannian's quilts had copied Boisson's layout.

At the same time as this parsing might have been in Boisson's favor, it is also a far cry from a detailed identification of the stratified layers of heritage within a quilt design. Compared to other cases, like *Leibovitz v Paramount Pictures Corp*, where the Second Circuit parsed the scope of Leibovitz's copyright with reference to the work of previous painters and sculptors and the recognition of the form as the

<sup>166</sup> *ibid*

<sup>167</sup> 'Defendants proffered no evidence that Boisson owned an alphabet quilt prior to designing 'School Days I' or 'School Days II'. Instead they point to Boisson's affirmative answer when asked at her deposition whether she had "seen an alphabet design in any other quilts'. Boisson was not asked what these quilts looked like or when she saw them relative to designing her own quilts, or whether they bore any resemblance to her own designs. Moreover, having seen an alphabet design would not conclusively establish that Boisson saw one from which she copied the arrangement of letters for her 'School Days' quilts. As defendants' own proof reveals, alphabet quilts are not limited to the formations found in either the 1900 quilt or plaintiffs' quilts. Some quilts display letters out of order; some display three letters in the first and last rows with five letters in each of the middle rows; one has six letters in rows with icons placed in the border; another has varying numbers of letters in each row with icons or quilting designs in the remaining blocks; while still others have five rows of five letters with the 'Z' by itself in a corner or followed by numbers representing the year the quilt was made. Nor are all letters of the alphabet always displayed or even displayed with each letter in its own block. Defendants also failed to show that quilts with layouts similar to the 'School Days' quilts were so widely disseminated or known as to infer that Boisson reasonably would have seen one before designing her own works. In particular, bearing in mind that Boisson testified as to her specialty in Amish quilts, among the books submitted by defendants into evidence for purposes of showing copying on the part of plaintiffs, only two pertained specifically to Amish designs – Rachel & Kenneth Pellman, *The World of Amish Quilts* (1998) and Rachel & Kenneth Pellman, *A Treasury of Amish Quilts* (1998). Neither book, however, contains an alphabet quilt, although they do contain photographs of other quilts owned by Boisson. Further, Boisson testified at her deposition that she was unaware of any Amish alphabet quilts and had never seen one. Absent evidence of copying, an author is entitled to copyright protection for an independently produced original work despite its identical nature to a prior work, because it is independent creation, and not novelty that is required'. *Boisson v Banian Ltd*, 273 F.3d 262, 270 (2d Cir 2001).

<sup>168</sup> 'Scholars disagree as to whether a defendant may also rely upon circumstantial evidence to show that a plaintiff copied from the public domain. Compare J. Litman, *The Public Domain* 39 *Emory Law Journal* 965, 1002–1003 (1990) (explaining that a defendant is not entitled to any inference that a plaintiff copied from the public domain simply by showing access and substantial similarity to the public domain work), with R. VerSteege, 'Rethinking Originality' 34 *William & Mary Law Review*, 801, 874–875 (1993) (permitting a defendant to show copying on the part of the plaintiff through circumstantial evidence that the plaintiff had access and created a work substantially similar to a public domain work). Assuming arguendo that an inference is allowable, defendants in the case at hand nevertheless fall short of proving Boisson copied from the public domain'. *Boisson v Banian Ltd*, 273 F.3d 262, 269–270 (2d Cir 2001).

‘Venus Pudica’,<sup>169</sup> the Second Circuit’s identification of protectable and unprotectable elements is less detailed, and, we might say, even less informed by the knowledge surrounding quilts. It begs the question of what role an archive dedicated to an American quilt, or what role an archive affiliated with Boisson or even with Bannian’s company, might have had in the determination.

The lack of a more detailed stratification of Boisson’s quilts carried over into the comparison between Boisson and Bannian’s quilts and the application of the substantial similarity test. In this sense, parsing the references and stratifying the heritage elements of an author’s work has a direct effect on what we identify as infringing, or as an unsuccessful parallel creation, without its own originality. Works that have both protectable and unprotectable elements, because they draw from the public domain, or what we might term part of the heritage space,<sup>170</sup> require, as the Second Circuit noted, a ‘more discerning observer’ test,<sup>171</sup> a test that is still guided by the ‘total concept and feel’ of the works at issue.<sup>172</sup> To follow this test, the Second

<sup>169</sup> ‘Even though the basic pose of a nude, pregnant body and the position of the hands, if ever protectable, were placed into the public domain by painters and sculptors long before Botticelli, Leibovitz is entitled to protection for such artistic elements as the particular lighting, the resulting skin tone of the subject, and the camera angle that she selected’. *Leibovitz v Paramount Pictures Corp*, 137 F.3d 109, 111 (2d Cir 1998). As discussed in F. Caponigri ed, *Images of “Italian” Cultural Properties: Some Thoughts on the Italian Code of Cultural Heritage Law’s Articles 107 and 108 for an American Audience* (forthcoming, Conference Proceedings for The Italian Law of Cultural Heritage: A Dialogue with the United States).

<sup>170</sup> If we differentiate between cultural heritage and brand heritage, recognizing that brand heritage may not yet be cultural heritage. See n 9 above.

<sup>171</sup> ‘...part of the plaintiff’s fabric was not original and therefore not protectible. We articulated the need for an ordinary observer to be ‘more discerning’ in such circumstances. [T]he ordinary observer would compare the finished product that the fabric designs were intended to grace (women’s dresses), and would be inclined to view the entire dress – consisting of protectible and unprotectible elements – as one whole. Here, since only some of the design enjoys copyright protection, the observer’s inspection must be more discerning. *ibid* 765-766. Shortly after *Folio Impressions* was decided, we reiterated that a ‘more refined analysis’ is required where a plaintiff’s work is not ‘wholly original’, but rather incorporates elements from the public domain. *Key Publ’ns Inc v Chinatown Today Publ’g Enters Inc*, 945 F.2d 509, 514 (2d Cir 1991). In these instances, ‘[w]hat must be shown is substantial similarity between those elements, and only those elements, that provide copyrightability to the allegedly infringed compilation’. In contrast, where the plaintiff’s work contains no material imported from the public domain, the ‘more discerning’ test is unnecessary. *Hamil Am Inc v GFI*, 193 F.3d 92, 101-102 (2d Cir 1999), cert denied, 528 US 1160, 120 S Ct 1171, 145 L.Ed.2d 1080 (2000). In the case at hand, because the alphabet was taken from the public domain, we must apply the ‘more discerning’ ordinary observer test’. *Boisson v Banian Ltd*, 273 F.3d 262, 272 (2d Cir 2001).

<sup>172</sup> ‘Although the ‘more discerning’ test has not always been identified by name in our case law, we have nevertheless always recognized that the test is guided by comparing the ‘total concept and feel’ of the contested works. *Knitwaves*, 71 F.3d at 1003. For example, in *Streetwise Maps*, 159 F.3d at 748, we found no infringement – not because the plaintiff’s map consisted of public domain facts such as street locations, landmasses, bodies of water and landmarks, as well as color – but rather ‘because the total concept and overall feel created by the two works may not be said to be substantially similar’. In *Nihon \*273 Keizai Shimbun*, 166 F.3d, 70-71, we conducted a side-by-side comparison of the articles and abstracts at issue to determine whether a copyright infringement had occurred. Looking beyond the unprotected facts, we analyzed how alike or different the abstracts were in their structure and organization of the facts. *Id* 71’. *Boisson v Banian, Ltd*,

### Circuit compared

‘the arrangement and shapes of the letters, the colors chosen to represent the letters and other parts of the quilts, the quilting patterns, the particular icons chosen and their placement’<sup>173</sup>

in their ‘total concept and feel’, ‘as instructed by ‘common sense’’.<sup>174</sup> The court went on, however, to call out similarities between specific letters and their backgrounds, different icons, and both of their arrangement in the quilt design.<sup>175</sup> Because of ‘this enormous amount of sameness’<sup>176</sup> including ‘the overwhelming similarities in color choices’,<sup>177</sup> Banian’s ‘ABC Green’ Versions were found to infringe Boisson’s ‘School Days I’.<sup>178</sup> On the other hand, however, the court declined to find infringement for other quilts by Banian that did not share Boisson’s color combinations,<sup>179</sup> or similar combinations of letters or icons,<sup>180</sup> and even implemented a ‘zig-zag’ design instead of a ‘wavy’ design.<sup>181</sup>

273 F.3d 262, 272–73 (2d Cir 2001).

<sup>173</sup> n 156 above.

<sup>174</sup> *ibid* ‘Our analysis of the ‘total concept and feel’ of these works should be instructed by common sense. Cf *Hamil Am*, 193 F.3d at 102 (noting that the ordinary observer test involves an examination of ‘total concept and feel’, which in turn can be guided by ‘good eyes and common sense’).

<sup>175</sup> ‘A’ is dark blue on a light blue background; ‘B’ is red on a white background; ‘D’ is made of polka-dot fabric on a light blue background; ‘F’ on plaintiffs’ ‘School Days I’ is white on a pink background, while the ‘F’ on defendants’ ‘ABC Green’ versions is pink on a white background; ‘G’ has a green background; ‘H’ and ‘L’ are each a shade of blue on a white background; ‘M’ in each quilt is a shade of yellow on a \*274 white background. ‘N’ is green on a white background; ‘O’ is blue on a polka-dot background; ‘P’ is polka-dot fabric on a yellow background; ‘Q’ is brown on a light background; ‘R’ is pink on a gray/purple background. ‘S’ is white on a red background; ‘T’ is blue on a white background; ‘U’ is gray on a white background; ‘V’ is white on a gray background; ‘W’ is pink on a white background; ‘X’ is purple in all quilts, albeit in different shades, on a light background; ‘Y’ is a shade of yellow on the same light background; and ‘Z’ is navy blue or black, in all the quilts’. *Boisson v Banian, Ltd*, 273 F.3d 262, 273–74 (2d Cir 2001).

<sup>176</sup> *Boisson v Banian Ltd*, 273 F.3d 262, 274 (2d Cir 2001).

<sup>177</sup> *ibid*

<sup>178</sup> *ibid*. Others were also found infringing based on similar comparisons.

<sup>179</sup> *ibid* 275 ‘ABC Navy’ quilt does not share the same color combinations as ‘School Days I’. Defendants’ quilt is therefore different from ‘School Days II’ in this regard as well. Combined with the varying number of rows and blocks, the placement of icons, the different use and color of rectangular borders around the blocks and the choice of quilting patterns, we agree with the district court that defendants have committed no copyright infringement in their design of ‘ABC Navy’ when compared to plaintiffs’ ‘School Days II’. The similarity in letter design and the use of a blue edge are so trivial in the overall look of the two quilts that defendants did not infringe on plaintiffs’ copyright’.

<sup>180</sup> ‘While both quilts utilize an arrangement of six horizontal rows of five blocks each, ‘ABC Navy’ does not have its four icons in the last row. Rather, the teddy bear with the flag vest is placed after the ‘A’ in the first row, the cow jumping over the moon is placed after the ‘L’ in the third row, the star is placed after the ‘S’ in the fifth row, and the sailboat is placed after the ‘Z’ in the last row.’ n 174 above.

<sup>181</sup> *ibid* ‘The quilting pattern in the plain white border is changed to a ‘zig-zag’ in ‘ABC Navy’, as opposed to plaintiffs’ ‘wavy’ design. Finally, although defendants use a binding around the edge of their quilt, in this instance it is blue instead of green’).

Scholars have criticized the application of total look (or concept) and feel as undermining the idea/expression distinction in US copyright law.<sup>182</sup> This rule embodies the notion that ideas are not copyrightable (ie the idea of an abstract blue scarf) but that expressions (ie the specific expression of the *Vivara* print, utilizing blue and specific forms) are. Total concept and feel, in these arguments, seems in fact to extend protection to style-infused elements and even to other parts of works that should be in a negative space of copyright law.<sup>183</sup> And these same scholars see the *Boisson* case as diminishing the weight of the idea/expression doctrine by eliding the total concept and feel test with the more discerning observer test.<sup>184</sup> In these cases, turning towards an institution which holds the public domain work, or even the work that is supposedly infringed, might help to further focus the difference between the total concept and feel and a more discerning observer. Consider the *Vivara* print and its reworkings - while a court might, as with the



**Figure 7** - From L to R: The 1965 *Vivara*; Spring 2020 reworking of *Vivara*

aforementioned quilts, factor out the color blue from the *Vivara* print, it might consider the blue color combination background in the 2020 reworking as reflecting a similar ‘total concept and feel’, or it might not. A fashion archive like the Pucci Archive, which is separate from the copyright holder or claimant, could effectively act as a guide for the courts’ common sense in this circumstance, highlighting aspects of the *Vivara* print in its collection that carry over into the

2020 reworking and those that do not. Effectively, an archive like the Pucci Archive could act as a more discerning observer, and partner, to the court.

## 2. Lessons for Heritage-Shaking from Italy

While the US substantial similarity test is by no means perfect, it does give us some sort of framework with which to compare a reference and its later work, to identify parallel creations. Italian copyright law, by contrast, has no specific framework that it applies across copyright infringement cases. The Moon Boots case can provide us with an example.<sup>185</sup> The IP specialized section of the Milan Court, first in 2016 and then in 2021, addressed two cases of alleged copyright infringement brought by *Tecnica* group, the company producing Moon Boots, the popular après-ski designed in 1970 by Giancarlo Zanatta.<sup>186</sup> Prior to determining

<sup>182</sup> C.J. Sprigman with S. Fink Hedrick, ‘The Filtration Problem in Copyright’s ‘Substantial Similarity’ Infringement Test’ 23 *Lewis & Clark Law Review*, 571, 582-584 (2019).

<sup>183</sup> *ibid* 581 (‘For example, a painting’s ‘look’ might be determined in part by the work’s genre; many abstract geometric works look at least somewhat alike’).

<sup>184</sup> *ibid* 584.

<sup>185</sup> L. Palandri, ‘Fashion as Art: Rights and Remedies in the Age of Social Media’, in B. Pozzo, R. Cerchia eds, *The new frontiers of fashion law. Special Issue* (MDPI, 2020).

<sup>186</sup> *Tecnica group spa v Anniel group spa*, Tribunale di Milano 12 July 2016 no 8628,

copyright infringement, the Court had to first decide for the copyrightability of Zanatta's design. Italian copyright law explicitly accords copyright protection to industrial design objects when the two requirements of a creative character and inherent artistic value are met.<sup>187</sup> Since this case, Italian courts have been playing a crucial role in trying to define the broad criterion of 'artistic value'. In order to maintain a high threshold of protection and prevent industrial design objects of daily use from obtaining an indiscriminate access to the strong monopolistic protection afforded by copyright, 'artistic value per se' has been conceived to reserve the special copyright protection for the most valuable, high-end designs.<sup>188</sup> In order for a design to be recognized as above-average, courts have set out an objective standard, to be measured by several indicators. Among others, these indicators include the display in contemporary art or design museums' collections, the reproduction of the work in art or design publications, experts' opinions, technical consultants' reports, the achievement of designs' awards, the authors' fame, the affiliation to a well-known artistic movement, but also commercial success, willingness of consumers to pay high prices for the work, and exclusive distribution channels.<sup>189</sup> Inspired by the Apollo 11 moon landing in 1969 and very much in vogue at that time, prior to resurfacing as a fashion trend in the early 2000s, the Moon Boot is considered an 'icon of the Italian design and a symbol of its capacity to guide the taste of an era as far as daily use objects are concerned.'<sup>190</sup> Published in numerous important specialized reviews, chosen 'as one of the newest symbols of 20<sup>th</sup> century design by the Louvre Museum', the Court decided in 2016 that the Moon Boot can be protected under copyright law. While the 'creative character' condition is easily interpreted as 'any expression of the authors' personality,' the identification of artistic value requires a particularly rigorous assessment to be made on a case-by-case basis.<sup>191</sup> The 2021 case,<sup>192</sup> which was brought against a number of shoe manufacturers who produced boots in the style of Moon Boots, including manufacturers working for the Chiara Ferragni brand, took up exactly the same

available at [www.dejure.it](http://www.dejure.it).

<sup>187</sup> Art 2(10) legge 22 April 1941 no 633, as amended.

<sup>188</sup> For a discussion of the evolution of this test, and various cases, see F. Morri, 'Le Opere dell'Industrial Design tra Diritto d'Autore e Tutela come Modelli Industriali: Deve Cambiare Tutto Perché (quasi) nulla cambi?' *Rivista di diritto industriale*, 177 (2013).

<sup>189</sup> Immediately after the decision on the subject-matter by the IP Milan Court, the Court of Cassation confirmed the same reasoning and identified the same objective criteria for interpreting the requirement of artistic value, see *Thun spa v Egan srl*, Corte di Cassazione 23 March 2017 no 7477, available at [www.dejure.it](http://www.dejure.it).

<sup>190</sup> *Tecnica group spa v Diana srl, Mofra Shoes srl, Serendipity srl*, Tribunale di Milano 25 January 2021 no 493, available at [www.dejure.it](http://www.dejure.it).

<sup>191</sup> But see C- 683/17 *Cofemel–Sociedade de Vestuario sa v G-Star Raw cv*, Judgement of 12 September 2019, available at <https://curia.europa.eu/>, establishing that copyright may be granted to 'any original subject matter constituting the expression of its author's own intellectual creation'. No extra requirement must be fulfilled. However, as of this writing, this decision has had no impact so far on subsequent decisions in Italy.

<sup>192</sup> *Tecnica group spa v Diana srl* n 190 above.

arguments of its predecessor. Citing its 2016 opinion as precedent, the court in 2021 summarized the general rule that, to be copyrightable, the perception of the design in question must have been consolidated among the community, in particular in cultural spheres.<sup>193</sup> In that case, the judges expressly noted that the appreciation of the design has to be contextualized within the historic and cultural moment in which it was created. Such contextualization serves to assess whether the design has assumed an iconic value, which requires some sort of critical and cultural setting.

Following the recognition that the Moon Boots were a work to be protected under copyright law, the Court compared the Moon Boot design to the allegedly infringing design to determine infringement. Unlike in the United States, there is no clear test. Infringement determinations are simply

‘(t)he visual comparison between these models (that) plainly confirms the substantial identity of the forms – including in the details highlighted above<sup>194</sup> –, which is in no way compromised by the fact that the contested products have a particular coloring (glitter)’.

The Court defined copyright infringement as

‘the substantial reproduction of the original work, with minor differences, that are not the result of a creative effort, but rather of the attempt to disguise an infringement’... ‘What matters, therefore, is (...) the unlawful reproduction of an original work, albeit disguised in such a way not to be immediately recognizable’.<sup>195</sup>

This leads us back to our heritage-shaking process. As fashion brands compare past and present designs in their archives as parallel creations, it seems to us that US and Italian copyright law regimes might, together, teach brands two useful lessons. Our premise is that copying is an essential part of the creative process. Better yet, taking inspiration rather than blatantly stealing an original work is fundamental. Referencing in the fashion industry, then, should be allowed when, first, the later work is ‘independently created..., and comes’ ... ‘from the exercise

<sup>193</sup> The Court only added further subsequent recognitions, such as the inclusion of Moon Boots in the Triennale Design Museum in Milan as well as in the permanent collection of the Museum of Modern Art in New York in 2018.

<sup>194</sup> In the 2016 case, the Court described the peculiar aspects of Moon Boots having ‘massive’ forms: ‘*il modello Moon Boots è contraddistinto sostanzialmente da una suola ambidestra a cui è raccordata, senza cuciture a vista, una tomaia che presenta un fascione di elevata altezza avvolgente la zona della punta e quella laterale del piede sino circa in corrispondenza della zona antistante i malleoli, in tale zona essendovi un raccordo con un contrafforte che si sviluppa maggiormente in altezza ad avvolgere parte dell’estremità posteriore del piede. Sono inoltre presenti dei lacci risvoltati su tre coppie di occhielli associate, due in corrispondenza del bordo superiore del fascione ed una del contrafforte; inferiormente la suola presenta una forma ambidestra*’.

<sup>195</sup> *Tecnica group spa v Diana srl* n 192 above. To an American audience, this might inappropriately smack of trademark law in its references to recognition.

of a creative effort of the author's mind' (combining the phrasing of the Second Circuit and the Milan Court judges). Parallel creations require some new addition, a moving forward of the past for the present. This does not mean that independent creation requires *not* consulting the archive, but it does mean that an independent process of creation should be more akin to recalling a work of heritage in the public domain as part of an act of creation than copying the work of heritage in person line by line. Second: copying is accepted when there is transparency and intellectual honesty. The fashion brand should be explicit in its recourse to materials from the archive. Indeed, these materials should be used as a strength to enhance the brands' history and generate affection in the public. Consumers love storytelling and appreciate the feeling of being part of a wider, long-standing endeavor. In no consumer category is the price for violating consumer trust so high as in the fashion and luxury sector, where the brands' elevated value lies primarily in its reputation. 'The age of imposture', to quote Flaccavento, with its 'attempts to disguise infringements', is over. Certain factors, such as reputation and recognition, and the potential loss of trust and loyalty of consumers, play a decisive role in the fashion industry. In practice, the norms of reputation and authenticity,<sup>196</sup> which underlie the market, should make the application of copyright law unnecessary. At the same time, comparison tests within copyright law that draw on archival sources can further inform comparisons across instances of copying in the fashion industry, acting as a partner to reputation and authenticity for brands when copying occurs.

### 3. Heritage-Shaking and Acknowledgement

At the outset of our article we asked, what is a balanced way to engage with heritage and create in the present? The heritage-shaking process may provide an extra-legal solution, outside of cultural property law and of copyright law, to answer this question. As legal scholars, we also feel that heritage-shaking can be an extra-legal reference for judges themselves as they decide 'where to look' in copyright infringement cases. Essentially, through the heritage-shaking process we are calling for a greater role for visual provenance in copyright infringement cases. Heritage-shaking might also be useful beyond copyright infringement cases, for evaluations of cultural interest of individual fashion designs and objects.

The first *Vivara* print created by Emilio Pucci in 1965 is still subject to copyright law and its copyright is owned by Emilio Pucci srl.<sup>197</sup> While the copyright is owned

<sup>196</sup> A. Adler, n 135 above.

<sup>197</sup> A search in the records of the US Copyright Office indicates that 'Emilio Pucci, S.R.L. of Italy' was listed as the author of the visual work *Vivara*, an 'art reproduction' in a 2004 filing. The listed date of publication of the art reproduction matches the Heritage Hub's dating of the creation of the *Vivara* – 1965. See US Copyright Office, Registration Number VA0001261496, Date of registration: 2004-07-02, 'Copyright Catalog (1978 to present)', available at <https://tinyurl.com/3k7tr8m9> (last visited 20 September 2023). Notwithstanding the author, the copyright claimant – the current owner of the work- is listed as Emilio Pucci International, BV. Special thanks to Pierluigi Roncaglia for calling the authors' attention to nuances of ownership in the *Vivara* copyright.

by companies controlling the Pucci brand, examples of the copyright's first uses in designs are included in the collections of the Emilio Pucci Heritage Hub.<sup>198</sup> The 'colorful, alluring' design may be seen as 'figurative...a readable abstract'.<sup>199</sup>



**Figure 8** - From L to R: The 1965 Vivara; Fall 2022 reworking of Vivara; Spring 2020 reworking of Vivara

At the same time as the Pucci Archive offers us a model of an activated archive, it also has something to contribute in response to calls for 'a culture of acknowledgment' in fashion.<sup>200</sup> What is crucial in the creation of these parallel creations is not control – of the copyright or other intellectual property rights, specific meanings,<sup>201</sup> or determined results, but process and procedure. The ability to read the archives' contents in multiple ways and the opportunity and openness to new connections and links between objects allows for the creation of new designs that are parallel creations. But how much time one spends in the archive, how much time one spends engaging with Pucci's history and the richness of Emilio Pucci's modern designs from another century may determine the success of a parallel creation. No matter who owns the copyright, looking at first instances of

<sup>198</sup> Email from Dylan Colussi, 22 December 2022 (on file with the authors).

<sup>199</sup> V. Friedman, 'Aristocratic Design' n 1 above at 29.

<sup>200</sup> V. Friedman 'The Curious Case of the Alexander McQueen Graffiti Skirt', *The New York Times*, available at <https://tinyurl.com/mry2m6yu> (last visited 20 September 2023) ('Consumers love to know the story behind a product', said Dirk Standen, the dean of the School of Fashion at SCAD Ms Scafidi agreed. 'We need to develop a culture of acknowledgment', she said. 'It would be good for the brand and good for the source and good for the consumer').

<sup>201</sup> Which would follow a traditional idea of tracing and respecting an author's original meaning and message. This is, in many ways, out-of-date, and not the purpose of fashion at all. See interview with L. Pucci, 18 October 2022. A Creative Director re-uses the original message for the very reason that it tells something of its own viewpoint and can also be translated to today's world. In activated archives, meaning as such is never fixed once and for all, but is something that occurs as re-enactment, re-interpretations, re-use, and re-editions are activated by different stakeholders. Each activation leaves fingerprints that are attributes to the archive's infinite meaning in an endless process of stratification.



a work's use on tangible fabric and finding nuances in the design over time can play a crucial role in identifying original additions, derivative works, and the related scope of a copyright. This is where 'heritage-shaking' comes in. 'Heritage-shaking', as a process, can help to call courts' attention to pieces of heritage used in a current design, it can help the courts identify parallel creations. 'Heritage-shaking' can also, when heritage is interpreted almost beyond recognition or is firmly in the public domain, help to create a culture of attribution within the important tradition of referencing in the fashion industry.

## V. Conclusion: Activated Archives and Heritage-Shaking in Fashion Law

The Pucci Archive embodies a model of a dynamic institution, whose contents are ever-evolving in an ongoing process of heritage-shaking. The Pucci Archive cannot be properly defined as a corporate archive to be exploited for commercial and heritage marketing purposes, nor as a self-celebratory museum-like space that preserves an immutable historic nucleus of particularly important interest under cultural property law. The archive, rather, even as a privately owned entity, represents a living heritage. The archive is continuously integrated in the production and design process, thus contributing to construct and strengthen the brand history and identity.<sup>202</sup> Such an activated archive, as we term it, acts in a way which defies traditional notions of cultural interest, cultural property, preservation, and valorization. As a result, such archives, we argue, best operate in a negative space of cultural property law, where they can define their own guidelines, operations, and partnerships.

Activated archives safeguard objects and stories, but they do so as open spaces, able to welcome and involve different stakeholders that can constantly transform them and be inspired by their contents. Activated archives allow for the weaving of many other possible narratives and help to produce new impactful parallel creations. Heritage needs to constantly regenerate itself. The narrative of the past should be filtered through the lenses of the present and, at the same time, be placed in a larger value system. New connections with new stakeholders must be created, but in the bed of a river that has been flowing underneath these connections for decades. Cultural property law serves the public purpose of preserving our common heritage. Copyright law serves the private interest of protecting our own work. While at first opposite, there is an opportunity to refine and expand the traditional notions of preservation and protection in examples and case studies like the Pucci Archive. But how should we craft a set of rules that strikes the proper balance between the conflicting interests of preservation and protection for innovation?

<sup>202</sup> P. Bertola et al, 'The Cultural Dimension of Design Driven Innovation. A Perspective from the Fashion Industry' 19 *The Design Journal*, 237-251 (2016); M. Augello, n 32 above.

Parallel creations should be able to move the reference forward, thus creating innovation in continuity with the past. A re-enacted product is the result of a complex process of stratification, of multiple reinterpretations starting from an original creation that serves as an anchor from which to leap towards the future. Fashion consumers are still driven by a desire for distinction, and brand value is realized through authenticity and originality.

The Pucci Archive's ways of cataloguing and displaying its brand heritage follow house codes and evergreen aspects featuring the DNA of the brand. These codes and evergreen aspects are strengthened by constantly confronting archival materials in order to revise them, re-examine them, and re-work them through contemporary sensibility and changing fashion scenarios. The Vivara print is a unique work, part of our shared cultural history, with an aura that persists even in this age of mechanical reproduction.<sup>203</sup> The standard rationale would be to preserve such an iconic work, and its related works, in order to protect their value. But parallel creations are what, in fact, today contribute to building, strengthening, and disseminating such an iconic value. Preservation mechanisms which would undercut or frustrate this continued evolution and recognition of a design's iconic nature should be, in our opinion, thoughtfully applied and, if necessary, revisited.

Our article has also sought, in its analysis, to contribute to the academic debate on the proliferation of re-issues/re-editions, to add an academic legal voice to the contemporary practice of referencing archives among fashion brands. In this article we have termed these re-issues, re-editions, and referencing parallel creations. While other scholarship has developed critiques or theories of parallel creations in the field of curatorial studies and fashion studies,<sup>204</sup> our aim has been to help fill a

<sup>203</sup> W. Benjamin, 'The Work of Art in the Age of Mechanical Reproduction', in Hanna Arendt ed, *Illuminations* (New York: Schocken Books, 1969).

<sup>204</sup> M.L. Frisa deems many of her fashion displays, in both museum-like and store settings as 'reenactments.' See M. Augello, n 32 above. In the exhibition 2020 'Memos' Judith Clark explored 'a series of reflections on contemporary fashion, its qualities and its attributes, taking as its starting point Italo Calvino's Six Memos for the Next Millennium'. 'MEMOS. On fashion in this millenium' *UAL*, available at <https://tinyurl.com/3xwvu6kx> (last visited 20 September 2023). See also N. Borriaud, *Postproduction Culture as Screenplay: how Art Reprograms the World* (Santa Monica: Ram Publications & Dist, 2005) ('discuss (ing) how, since the early nineties, an ever increasing number of artworks have been created on the basis of preexisting works; more and more artists interpret, reproduce, re-exhibit, or use works made by others or available cultural products'). P. Bertola et al, n 202 above (exploring innovation as reappropriation and tracing back to the origins, and as an 'inverse process'); M. Montemaggi and F. Severino, *Heritage marketing. La storia dell'impresa italiana come vantaggio competitivo* (Milano: FrancoAngeli, 2007) (exploring the concept of 'temporal reversability'). These analyses challenge the notions of nowness and newness that are traditionally used to define the intrinsic nature of fashion. Nowness and newness are not synonyms of now and new in a narrow sense. They are, rather, associated with change and transformation, and this can often take the form of reconstruction of the past. On the relationships between fashion and time, see W. Benjamin, *The Arcades Project* (Cambridge: Belknap Press, 2002). But also C. Evans and A. Vaccari, *Il tempo della moda* (Sesto San Giovanni: Mimesis, 2019) (presenting business archives, especially in fashion, as dynamic entities, through which objects re-emerge from the past to be continuously re-edited in the present design practice and projected towards the future). Vaccari and Evans identify the categories of industrial time (which pertains

doctrinal gap by providing the legal perspective on this subject matter.

Copying is at the foundation of the fashion industry (and human knowledge). Fashion Law as both an academic and professional field has traditionally focused the most on intellectual property laws and scholarship to protect originals from infringement. Its main concern has been the regulation of copies. But copying is, at the same time, paradoxically good for fashion and, by extension, for Fashion Law as a field.<sup>205</sup> The heritage-shaking process can profoundly affect the way in which we think of and deal with copyright infringement in the fashion industry from now on. Heritage-shaking can be of help to all stakeholders as it tells us ‘where to look’:<sup>206</sup> it is open and honest about the past reference, whether in copyright or not, and no matter who holds the copyright. Heritage-shaking builds relationships. It cares for attribution. Heritage-shaking is an ongoing process that reflects the need for awareness, engagement, transparency in the fashion industry. Activated archives and the process of heritage shaking can work together. Activated archives can establish procedures and deadlines that make attribution more obvious, or that support greater intellectual honesty in the fashion industry. To use the archive as a reference should not be a license to engage in superficial heritage-shaking. And, as a partner, activated archives outside the traditional bounds of cultural property law can only support deeper, more thoughtful engagement with references of the past to move fashion forward.

We see this essay as an initial exploration of a broader analysis. As such, the ideas we propose here are meant to support further dialogue and conversations around the procedures which brands and their associated archives might put into place, both in Italy and in the United States, to better frame the referencing at the heart of fashion creation. And on this note, we look forward to continuing *Fashion Law, Italian Style*.

to the time of production), antilinear time (which subverts the linearity of time and in which fashion design becomes a process of citation and reconstruction, in which nostalgia and revival are at play, exemplified by postmodernism and fashion) and uchronic time (the fashion imaginary, prone to the construction of myths, a kind of ‘alternative history’, as is the case with fashion brand histories, subjected to continuous rewriting, mythologizing the founders or reinventing traditions). According to this reading, fashion can concern both antilinear and uchronic time: antilinear because it revives past designs through forms of revivalism and recycling; uchronic since it inevitably involves processes of reinvention and reconstruction of the past.

<sup>205</sup> C.B. Sprigman and K. Raustiala, n 7 above.

<sup>206</sup> V. Friedman et al, ‘Pucci’ n 1 above, 39.