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Curbing Cultural Appropriation in the Fashion Industry

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Executive

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About the Author

Brigitte Vézina is a fellow with CIGI's International Law Research Program. At CIGI, she analyzes the key challenges in the ongoing efforts to develop an international system of protection for traditional cultural expressions (TCEs). Her research aims to present ways of protecting TCEs on both the domestic and international levels. She is currently an international law consultant at Brigitte Vézina – Law & Culture, where she advises clients on legal and policy issues related to copyright and cultural heritage. From 2006 to 2016, Brigitte worked at the World Intellectual Property Organization in Geneva, Switzerland, as a legal officer in the Traditional Knowledge Division, dealing with intellectual property issues related to TCEs. Brigitte also worked in the Cultural Enterprise and Copyright Section at the United Nations Educational, Scientific and Cultural Organization in Paris, France, and with the Montreal-based intellectual property law firm, Robic. Brigitte holds an LL.B. from the University of Montreal (2002) and an LL.M. from Georgetown University (2005, with distinction). She has been a member of the Quebec Bar since 2003.

About the ILRP

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

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Executive Summary

The fashion industry has faced several accusations of cultural appropriation over the past decade. For example, American clothing retailer Urban Outfitters made headlines in 2011 when it issued Navajo-themed items, including underwear with traditional patterns, much to the discontent of the Navajo Nation. Likewise, French designer Isabel Marant was criticized in 2015 for designing a dress similar to a traditional blouse that has been made for centuries by the Mixe people, an Indigenous community in Mexico. Cultural appropriation may be summarily described as the taking, by a member of a dominant culture, of a cultural element from a minority culture, without consent, attribution or compensation.

Cultural appropriation cases spark passionate debate because while fashion's borrowing of stylistic elements from other cultures is common practice, it can, in reality, be offensive to the holders of traditional cultures. Misinterpretation or disregard for the cultural significance of a traditional cultural expression (TCE), even if unintentional, can have drastic consequences, both culturally and economically. Calls for action to curb appropriation emphasize a need for Indigenous peoples to have better control over their TCEs, including through the intellectual property (IP) system and in line with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[1]

Cultural appropriation may be explained, in part, by the jarring relationship between TCEs and IP, in particular copyright. While TCEs, such as traditional designs or motifs, are a product of the human mind, extant copyright law fails to provide adequate protection to TCEs, casting most of them into the public domain and thus making them vulnerable to appropriation. For instance, protection remains unavailable for TCEs that have been passed down the generations and thus fail to meet the originality criterion.

Drawing from actual cases of cultural appropriation in the fashion industry and relying on IP laws and principles, in particular moral rights, a number of recommendations may guide fashion designers into adopting respectful behaviour in relation to the use of TCEs in their creations.

Centrally, several concrete policy, legal and practical solutions can be developed at the international level to put an end to cultural appropriation: the IP system can be adapted to offer adequate protection for TCEs; awareness can be raised among fashion designers and consumers alike so as to deter cultural appropriation; and initiatives can be carried out to strategically support Indigenous fashion designers.

Cultural appropriation is not confined to the world of fashion but manifests itself in other sectors, such as film, music and art. Furthermore, from an Indigenous, holistic viewpoint, TCEs are intrinsically linked to traditional knowledge, and developments in the protection of TCEs can positively impact the protection of traditional knowledge.

Introduction

Over the last two decades, the fashion industry — ranging from luxury designers to mainstream retailers — has developed a noticeable appetite for all things traditional, ethnic, folkloric or Indigenous. Flipping through the pages of fashion magazines or navigating the fashion blogosphere, one cannot avoid noticing the craze.

Many of the fashion designers partaking in this trend source their inspiration from the diverse cultures of Indigenous peoples from around the world and incorporate stylistic elements, such as patterns, motifs or design features, into their creations. These elements often fall under the concept of TCEs developed by the World Intellectual Property Organization (WIPO). Unfortunately, fashion designers sometimes use TCEs from foreign cultures in ways that disregard the cultural significance for their holders[2] and cause them

1 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007).

2 The term "holder" is used in this paper to overcome a lack of agreed terminology on the legal status of the communities that create, hold, develop and transmit TCEs down the generations. In some contexts, holders could more appropriately be referred to as "guardians," "stewards" or "owners."

profound cultural, social and economic harm. This phenomenon translates as cultural appropriation.

Cultural appropriation in the realm of fashion sparks passionate debate owing to the complex legal issues at stake. On the one side, the way the fashion industry operates is such that designers freely integrate elements from other cultures into their own creations. Some designers even reject the concept of cultural appropriation and refer instead to "cultural appreciation," claiming that drawing inspiration is an homage to difference and diversity.[3] In that sense, a diversity of cultural influences is one of the engines behind a dynamic fashion industry; it is what makes fashion evolve, thrive and constantly reinvent itself.

On the other side, calls for action to curb cultural appropriation emphasize a need for communities to have control over their TCEs to prevent unauthorized uses. These claims are set against the backdrop of an international recognition of the human rights of Indigenous peoples in UNDRIP[4] and of attempts to ascertain IP rights in TCEs within the WIPO Intergovernmental Committee (IGC).[5]

As contrasted as they may appear at first blush, these opposing views are not entirely irreconcilable, and the challenges of addressing cultural appropriation are not insurmountable. This paper offers a brief introductory analysis to the questions that connect international IP law, the global fashion industry and TCEs, and is structured according to the following outline: first, this paper describes two selected cases of uses of TCEs in the fashion industry that have been tagged as cultural appropriation. It then presents the jarring relationship between IP and TCEs. Next, it attempts to establish clarity on the characteristics of cultural appropriation. The paper then tries to understand what might explain the prevalence of cultural appropriation and highlights its harmful consequences. Drawing from actual cases and applying IP laws and principles, the paper offers a number of recommendations to guide fashion designers into adopting respectful behaviour in relation to the use of TCEs in their creations. Centrally, the paper outlines some proposals for concrete policy, legal and practical solutions to put an end to cultural appropriation. It concludes by drawing bridges between cultural appropriation in the world of fashion and the use of TCEs in other cultural industries, such as music, film and art, as well as misappropriation of traditional knowledge and genetic resources.

Setting the Scene: Cases of Cultural Appropriation in Fashion

Isabel Marant and the Mixe *Huipil*

In 2015, French fashion designer Isabel Marant marketed a dress bearing remarkable resemblance to the traditional costume of the Mixe people, an Indigenous people from Santa María Tlahuitoltepec, Oaxaca, in southwestern Mexico. The dress, part of her Spring/Summer 2015 Étoile line, incorporated embroidery elements strikingly similar to those applied on the Mixe's traditional blouse, known as a *huipil*, whose origins date back 600 years.[6]

While an authentic *huipil* might cost around 300 Mexican pesos in Tlahuitoltepec, the Marant dress retailed for US$365, the equivalent of 4,500 pesos. Marant had neither asked the Mixe for permission to copy the *huipil*, nor had she acknowledged the traditional blouse as the origin for her dress's design, pointing instead to the dress's "bohemian appeal."[7]

3 Minh-Ha T Pham, "Fashion's Cultural-Appropriation Debate: Pointless", *The Atlantic* (15 May 2014) [Pham, "Fashion's Cultural-Appropriation Debate], online: <www.theatlantic.com/entertainment/archive/2014/05/cultural-appropriation-in-fashion-stop-talking-about-it/370826/>.

4 *UNDRIP*, *supra* note 1.

5 For an overview of the state of negotiations in the IGC on TCEs in 2018, see Brigitte Vézina, "Traditional Cultural Expressions: Laying Blocks for an International Agreement" CIGI, CIGI Papers No 169, 12 April 2018, online: <www.cigionline.org/publications/traditional-cultural-expressions-laying-blocks-international-agreement>. For more information on the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore, visit WIPO, "Intergovernmental Committee", online: <www.wipo.int/tk/en/igc/>.

6 Naomi Larsson, "Inspiration or plagiarism? Mexicans seek reparations for French designer's look-alike blouse", *The Guardian*, (17 June 2015), online: <www.theguardian.com/global-development-professionals-network/2015/jun/17/mexican-mixe-blouse-isabel-marant>.

7 Theresa Avila, "Indigenous Women are Fighting Back after a Famous Fashion Designer Stole their Culture", *Mic* (19 June 2015), online: <https://mic.com/articles/121008/this-designer-s-mexican-dress-is-a-lesson-in-cultural-appropriation#.GfqhuQnbU>.

The Mixe community brought their discontent to Marant's attention, asserting that the *huipil* is a symbol of their identity. They specifically asked for recognition that the dress was an imitation of the traditional patterns that were part of their heritage, for removal of the blouse from the collection and for reparation damages. They also issued an official declaration inviting the French designer to meet the Mixe artisan women who had been creating the *huipil* for generations, so as to appreciate how important the blouse was to their history. Outside of the community, the case elicited social media outcry and even protests outside Marant's New York flagship store.[8]

In a surprising turn of events, the same Marant dress became the focus of another dispute in the district court of Paris, France. Isabel Marant was sued by French fashion label Antik Batik, which accused her of copying its design, over which it claimed copyright. Ironically, in her defence, Marant presented submissions that expressly stated that the designs came from the village of Santa María Tlahuitoltepec and officially declared that she was not the author of the designs. In December 2015, the court ruled that neither Isabel Marant nor Antik Batik could hold copyright in huipil-like designs because *huipils* were a cultural product of the Mixe people.[9]

Later in 2015, Marant eventually pulled the controversial dress from sale. Yet, in response to accusations of plagiarism, she claimed her designs were merely inspired by the Mixe community's *huipil*.[10]

In March 2016, in what could qualify as a semblance of justice for the Mixe people, the congress of the province of Oaxaca issued a cultural heritage declaration proclaiming the Mixe people's traditional designs, embroidery and language as intangible cultural heritage in accordance with the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Safeguarding of the Intangible Heritage.[11] The declaration makes reference to specific protection of Indigenous handicraft and, in particular, the Mixe *huipil*.[12] While the declaration is not legally binding, it is symbolically valuable, for it reaffirms that the designs are unique and original to the Mixe culture as well as avows the identity of the Mixe people.[13]

Urban Outfitters and the Navajo Name

In 2011, American apparel retailer Urban Outfitters was caught in a flurry of criticism when it launched its line of Navajo-themed clothing and accessories, including a "staring at stars skull native headdress" T-shirt and a "Navajo hipster panty."[14]

The Navajo Nation, a Native American group living in the US states of Arizona, Utah and New Mexico, sent a letter to Urban Outfitters demanding that the company remove the Navajo name from its products, which it considered distasteful and making a mockery of Indigenous identity and unique cultures. Urban Outfitters did remove the Navajo name from the products on its website after acknowledging receipt of the letter. Yet, products with the Navajo name were still being sold through other company brands, such as Free People, in catalogues and retail outlets. This prompted the Navajo Nation

8 Julianne Escobedo Shepherd, "Court Rules High-End French Label Doesn't Own Rights to Indigenous Oaxacan Design", *The Muse* (12 July 2015), online: <https://themuse.jezebel.com/court-rules-high-end-french-label-doesnt-own-rights-to-1746670361>.

9 *Ibid*.

10 *Ibid*.

11 *Convention for the Safeguarding of the Intangible Cultural Heritage*, 17 October 2003, (entered into force 20 April 2006), online: <http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

12 "Declaran patrimonio cultural e inmaterial vestimentas regionals de Oaxaca" (in Spanish), ADN (2 March 2016), online: <http://adnsureste.info/declaran-patrimonio-cultural-e-inmaterial-vestimentas-regionales-de-oaxaca-1910-h/>.

13 Marion Heathcote & Aparna Watal, "Creative solutions to cultural appropriation – fashion industry", *House Marques* (June 2016), online: <www.marques.org/Newsletters/Newsletter/Default.asp?NewsletterID=55&art=4#4>.

14 Noel Lyn Smith, "Navajo Nation, Urban Outfitters reach settlement", *Farmington Daily Times* (17 November 2016), online: <www.daily-times.com/story/news/local/navajo-nation/2016/11/17/navajo-nation-urban-outfitters-reach-settlement/94029162/>.

to file a federal lawsuit against Urban Outfitters in the US District Court of New Mexico in 2012.[15]

In their lawsuit, the Navajo alleged violation of federal and state trademark laws and claimed that a connection with the Navajo Nation was falsely presumed when the names "Navajo" or "Navaho" were used in connection with the Urban Outfitters goods. The Navajo Nation owns several registered trademarks on the Navajo name, covering clothing, footwear, online retail sales, household products and textiles. The Navajo consider their trademarks as some of their most valuable assets, which are licensed to other businesses. The tribe also claimed violations of the US Indian Arts and Crafts Act (1990).[16] This act makes it illegal to produce and sell products in a way that falsely suggests that they have been made by Native Americans. The tribe additionally objected to the use of traditional patterns as applied on products (such as underwear) as well as to traditionally styled beaded earrings, among others.

The lawsuit sought monetary compensation based on the trademark infringement claims stemming from Navajo-themed products sold by Urban Outfitters and its subsidiaries dating back to 2008. It also sought injunctive relief, an order permanently enjoining Urban Outfitters and its subsidiaries from manufacturing, selling and marketing goods with the "Navajo" name or variations thereof on its products.

Urban Outfitters disputed such claims, arguing that "Navajo" was a generic term for a style or design, thereby making its use of the term legally permissible. The company contended that, like many other fashion brands, it interpreted trends, and that the Native American-inspired trend and specifically the term "Navajo" had been cycling through fashion, fine art and design for at least a decade. Urban Outfitters sought a declaratory judgment to the effect that it had not infringed upon the tribe's rights and to cancel the tribe's federal trademark registrations that covered the word "Navajo."

In September 2016, the Navajo Nation and Urban Outfitters reached an undisclosed settlement.[17] In a press release, Navajo Nation President Russell Bagaye applauded Urban Outfitters for acknowledging the validity of the Navajo Nation trademarks and stated that anyone considering using commercially the Navajo name, designs or motifs should ask the Navajo Nation for permission.[18] As part of the settlement, the parties entered into a supply and licence agreement outlining their joint plan to collaborate on a line of Native American jewelry.

IP and TCEs

TCEs are understood as the tangible or intangible forms in which traditional cultures are expressed or embodied and can include such expressions as designs, patterns, signs, symbols, artworks, artifacts, rituals, songs, stories, dances, names and so forth. They are passed down from generation to generation, are linked to an Indigenous or local community and are often the creation of authors unknown.[19]

As creations of the human mind, TCEs are undeniably forms of IP. Still, many Indigenous people face substantive barriers when trying to use the mechanisms available under existing IP laws, such as copyright, trademark, patent, design or geographical indications (GI) law to protect their TCEs.[20] The international IP system largely excludes TCEs from protection, casting them into the public domain — and even when

15 *Navajo Nation v Urban Outfitters, Inc*, 1:12-cv-00195 (DNM filed 28 February 2012); *Navajo Nation v Urban Outfitters, Inc*, 935 F Supp 2d 1147 (DNM 2013). For a legal analysis of the case, see Angela R Riley & Kristen A Carpenter, "Owning Red: A Theory of Indian (Cultural) Appropriation" (2016) 94:5 Tex L Rev 859 at 903; see also "Urban Outfitters, Navajo Nation Settle 4 Year Long Lawsuit", *The Fashion Law* (21 November 2016), online: <www.thefashionlaw.com/home/urban-outfitters-navajo-nation-settle-4-year-long-lawsuit>; "What to Know about the Navajo Nation v. Urban Outfitters Legal Dispute", *The Fashion Law* (3 February 2016), online: <www.thefashionlaw.com/home/what-to-know-about-the-ongoing-navajo-nation-urban-outfitters-legal-dispute?rq=navajo>.

16 *The Indian Arts and Crafts Act of 1990* (PL 101-644).

17 Nicky Woolf, "Urban Outfitters settles with Navajo Nation after illegally using tribe's name", *The Guardian* (19 November 2016), online: <www.theguardian.com/us-news/2016/nov/18/urban-outfitters-navajo-nation-settlement>.

18 Navajo Nation, News Release, "The Navajo Nation and Urban Outfitters, Inc. Announce a Settlement Agreement" (17 November 2016), online: <www.navajo-nsn.gov/News%20Releases/OPVP/2016/nov/The%20Navajo%20Nation%20and%20Urban%20Outfitters_Inc_Announce%20a%20Settlement%20Agreement.pdf>.

19 For a working description of TCEs, see WIPO, "Traditional Cultural Expressions", online: <www.wipo.int/tk/en/folklore/>.

20 Sari Sharoni, "The Mark of a Culture: The Efficacy and Propriety of Using Trademark Law to Deter Cultural Appropriation" (2017) 26 Fed Cir BJ 407 at 408, 418, 420; Riley & Carpenter, *supra* note 14 at 892 (citations omitted); Artists in the Black, "Indigenous Cultural and Intellectual Property (ICIP)", Arts Law Centre of Australia Information Sheet, online: <www.aitb.com.au/information-sheets/entry/indigenous-cultural-and-intellectual-property-icip>.

it does offer protection, it is often imperfect and limited.[21] This paper does not discuss in depth the substantive gaps in IP regimes for the protection of TCEs but highlights a few salient issues.[22]

To take the example of copyright, the law requires works to be original, a criterion that is hard to meet for TCEs that have been passed down from one generation to another. The legal concepts of authorship and term of protection (contingent on the author's date of passing) are challenging when one considers that TCEs often have no identified author and may be collectively held in perpetuity. Not atypically, TCEs exist separately from their material expression, which struggles to find accordance with the fixation requirement under copyright law.

Similarly, trademark protection extends to uses in commerce and might fall short of protecting TCEs outside a commercial context. Despite this drawback, trademarks are perhaps the most suitable IP tool to which an Indigenous community can resort in order to prevent cultural appropriation, to exercise control over the use of its TCEs by others and to promote its own TCEs commercially. The Maasai, an Indigenous group living in Kenya and Tanzania, own trademarks whose licensing revenue was, by 2013, as high as US$10 million a year within a decade, according to the Maasai IP Initiative.[23] Using a trademark in connection with TCE-based fashion creations, for instance, can enhance the creation's reputation as part of a marketing strategy to promote its distinctiveness and authenticity and to prevent others from using the trademark in connection with competing products. As the Navajo case illustrates, the tribe was able to rely on its registered trademarks to support its case against Urban Outfitters. Still, the Navajo success story is quite exceptional, as most Indigenous peoples lack resources to acquire and manage trademark rights as well as to monitor infringement. Furthermore, trademarks do not provide perfect control against any and all forms of cultural appropriation. Indeed, appropriation of Maasai TCEs continues in spite of the enforcement of their trademark rights. Furthermore, trademark protection only extends to the use of the distinctive sign and does not necessarily shield the underlying cultural expressions "as such" from appropriation.[24]

Another hurdle that TCE holders face with regard to the IP system is the fact that outsiders might acquire and exercise IP rights over TCEs. For example, a stylized teepee design was registered as a copyright work by designer duo Feral Childe with the United States Copyright Office.[25] The prevention of such misuse is termed defensive protection, whereby measures aim to prevent the acquisition and/or exercise of IP rights over TCEs by people or entities from outside the community. The New Zealand trademark law, for example, prevents the registration of trademarks that are offensive to the Māori people.[26]

21 Vézina, *supra* note 5; for a discussion of the relationship between the concept of the public domain and TCEs, see Brigitte Vézina, "Are they in or are they out? Traditional cultural expressions and the public domain: implications for trade" in Christoph B Graber, Karolina Kuprecht & Jessica C Lai, eds, *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues* (Cheltenham, UK: Edward Elgar, 2012); Terri Janke, "Beware of Bogus Boomerangs: Should we protect Traditional Cultural Expression that is deemed to be in the public domain?" Terri Janke and Company (31 August 2017), online: <www.terrijanke.com.au/single-post/2017/08/31/Beware-of-Bogus-Boomerangs-Should-TCE-laws-only-protect-those-things-that-are-not-already-publicly-available>; Minh-Ha T Pham, "Feeling Appropriately: On Fashion Copyright Talk and Copynorms" (2016) 34:3(128) Social Text 51 at 60 [Pham, "Feeling Appropriately"].

22 WIPO, *The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis*, 37th Sess, WIPO/GRTKF/IC/37/7 (2018), online: <www.wipo.int/meetings/en/doc_details.jsp?doc_id=410365>.

23 For more information on the Maasai IP Initiative, see Light Years IP, "The Maasai Cultural Brand", online: <lightyearsip.net/the-maasai/>.

24 "The Tanzania People That Have Been Copied by DVF, Land Rover & More", *The Fashion Law* (18 July 2017), online: <www.thefashionlaw.com/home/tanzania-tribe-has-been-copied-by-dvf-land-rover-more> [*The Fashion Law*, "The Tanzania People"]; Eleonora Rosati, "Protection of traditional knowledge and cultural expressions: the case of 'Maasai IP'", The IP Kat (30 January 2018), online: <http://ipkitten.blogspot.nl/2018/01/protection-of-traditional-knowledge-and.html>; David Pilling, "Warrior tribe enlists lawyers in battle for Maasai 'brand'", *Financial Times* (19 January 2018), online: <www.ft.com/content/999ad344-fcff-11e7-9b32-d7d59aace167>.

25 See United States Copyright Office, "Teepees", online: <https://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?v1=8&ti=1,8&Search%5FArg=feral%20childe&Search%5FCode=NALL&CNT=25&PID=f9_uW-HruQtVr29fKxqzwQtZ&SEQ=20181115051437&SID=1>.

26 *Trade Marks Act 2002* (NZ), 2002/49, s 17(1)(c).

What Is Cultural Appropriation?

Characteristics of Cultural Appropriation

Although one can trace the origins of cultural appropriation back to the times of European colonization in the sixteenth and seventeenth centuries, the term "cultural appropriation" was only added to the *Oxford English Dictionary* in 2017.[27] There are multiple definitions of cultural appropriation, yet for the purposes of this paper, it can be succinctly described as the act by a member of a dominant culture of taking a TCE whose holders belong to a minority culture and repurposing it in a different context, without the authorization, acknowledgement and/or compensation of the TCE holder(s).[28]

Looking at the elements of the definition, three characteristics emerge: a change of cultural context; a power imbalance between the taker and the holder; and the absence of the holder's involvement. These characteristics are explained below.

The first characteristic consists of the dislocation of the TCE from its meaning and context.[29] Cultural appropriation is a distortion, dilution or misrepresentation of the meaning of a TCE and a loss of control by its holders over that meaning.[30] For example, the incorporation of a Native American feathered headdress (war bonnet) — a TCE imbued with spiritual meaning — into a fashion creation can deprive that TCE of its symbolic significance and strip it of its sacredness. American musician Pharrell Williams apologized for wearing a headdress on the cover of *Elle UK* magazine, and Swedish fast-fashion retail giant H&M withdrew a headdress from sale after complaints over cultural insensitivity.[31]

Similarly, in 2013, Polynesian designs were used on workout leggings by American sports giant Nike.[32] In this case, the leggings intended to be worn by women were adorned with *pe'a*, the traditional male tattoo of Samoa, which many found disparaging and insensitive. Following a petition, Nike pulled the leggings from sale and apologized, claiming that no offence had been intended.

According to the second characteristic, cultural appropriation is a manifestation of a power imbalance that is already present between the appropriator and the appropriated, the latter often being a minority population or one that is less powerful economically, culturally or politically.[33] This frequently arises in the context of colonization, where one culture exercises control over or oppresses an Indigenous culture. Cultural appropriation is said to widen existing divisions "between haves and have-nots, who's in and who's out, who has power and who doesn't."[34] The Navajo case opposed an American company, Urban Outfitters, against a Native American tribe, the Navajo Nation. In another case, Australian Aboriginal cultural elements were used by high-fashion American designer duo Rodarte in their

27 The dictionary entry reads: "the unacknowledged or inappropriate adoption of the customs, practices, ideas, etc. of one people or society by members of another and typically more dominant people or society" (*The Oxford English Dictionary*, *sub verbo* "cultural appropriation", online: <https://en.oxforddictionaries.com/definition/cultural_appropriation>). Peter Shand, "Scenes from the Colonial Catwalk: Cultural Appropriation, Intellectual Property Rights, and Fashion" (2002) 3 Cultural Analysis 47 at 52.

28 See Sharoni, *supra* note 20 at 408–10.

29 Rosemary J Coombe & Nicole Aylwin, "The Evolution of Cultural Heritage Ethics via Human Rights Norms" in Rosemary J Coombe, Darren Wershler & Martin Zeilinger, eds, *Dynamic Fair Dealing: Creating Canadian Culture Online* (Toronto: University of Toronto Press, 2014) 201 at 201–02; Connie Wang, "Who You're Insulting When You Buy 'Native American'-Inspired Things", *Refinery* 29 (25 November 2015), online: <www.refinery29.com/native-american-fashion>.

30 Rosemary J Coombe, "Cultural and Intellectual Properties: Occupying the Colonial Imagination" (1993) 16:1 PoLAR 8 at 11.

31 Jon Blistein, "Pharrell Apologizes for Wearing Headdress on Magazine Cover", *Rolling Stone* (5 June 2014), online: <www.rollingstone.com/music/news/pharrell-apologizes-for-wearing-headdress-on-magazine-cover-20140605>; Madeline Boardman, "Pharrell Williams Covers Elle UK in Native American Headdress, Incites Backlash, Controversy", *US Magazine* (4 June 2014), online: <www.usmagazine.com/celebrity-news/news/pharrell-williams-covers-elle-uk-in-native-american-headdress-201446/>; Julee Wilson, "Not Everyone Is Happy About Pharrell Williams' Elle UK Cover", *Huffington Post* (4 June 2014, updated 12 June 2017), online: <www.huffingtonpost.com/2014/06/04/pharrell-williams-elle-uk-cover_n_5444351.html>.

32 "Nike Tattoo Leggings Pulled After Deemed Exploitative of Samoan Culture", *Huffington Post* (15 August 2013, updated 6 December 2017), online: <www.huffingtonpost.com/2013/08/15/nike-tattoo-leggings_n_3763591.html>.

33 Riley & Carpenter, *supra* note 15 at 864; Rebecca Tsosie, "Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights" (2002) 34 Ariz St LJ 299 at 300, 310.

34 Pham, "Fashion's Cultural-Appropriation Debate", *supra* note 3.

Fall 2013 collection.[35] Speaking about the Rodarte clothes, Megan Davis, an Aboriginal law professor and member of the United Nations Permanent Forum on Indigenous Issues, said the prints that the designers had reproduced represented "a clan's songlines, story, life and very essence, with responsibilities and reciprocal obligations to land and kin," and their use out of context was "completely insensitive to Aboriginal art and spirituality and land and how they are inextricably linked."[36] In contrast, hardly anyone would criticize foreigners for wearing Bavarian lederhosen or traditional dresses (called dirndls), for these traditional costumes were never used to oppress or demean Germanic people.[37]

The third characteristic entails the lack of source community involvement, either through granting authorization, receiving attribution or obtaining compensation. Stated otherwise, the use of a TCE is likely not to be considered as appropriation if it is done with the proper and voluntary permission, consent or approval of its holders. In the case of the Maasai blanket, numerous fashion designers such as French fashion behemoth Louis Vuitton as well as American designers Ralph Lauren and Diane von Furstenberg have lifted the typical red-and-blue checkered patterns and applied them onto various items of clothing and jewelry, without the permission of the Maasai people.[38]

Moreover, appropriation occurs when the user of the TCE fails to acknowledge or attribute the source community from whence the TCE originates. In the *huipil* case, Isabel Marant did not proactively attribute her "inspiration" to the Mixe people when her collection came out, but did so only after it was in her interest to do so, in order to invalidate the claim that Antik Batik could own copyright in the designs.

While appropriators tend to capitalize on the commercial value of TCEs to sell their fashion products for monetary gain, the appropriated often decry the absence of compensation or sharing of the benefits.[39] For instance, in 2015, a traditional Inuit design was copied on a sweater by UK fashion label KTZ.[40] Following complaints, the KTZ sweater (retailing at around CDN$900) was pulled from stores and removed from KTZ's website. KTZ also apologized to Salome Awa, an Inuit woman from Nunavut, for copying her great-grandfather's sacred shaman robe without permission. In an email to Awa, the company stated, "We sincerely apologize to you and anyone who felt offended by our work as it certainly wasn't our intention."[41] Nevertheless, KTZ did not offer any monetary compensation or sharing of proceeds from the sale of the sweater before it was discontinued.

In Defence of Cultural Exchange

While cultural appropriation is incontestably harmful, not all forms of cultural borrowing, inspiration, influence or taking are undesirable. Indeed, reinterpreting elements from different cultures can be enriching for both the source and the destination cultures. As interactions among various cultures intensify around the globe, cultural mixing and blending become inevitable. In fact, cross-pollination of cultures is an essential feature of multicultural and non-segregated societies.[42] Generally, there are some benefits for society as a whole, including

35 Nicky Champ, "Is it wrong to wear clothing from another culture?", *Mamamia* (2 September 2013), online: <www.mamamia.com.au/misappropriation-a-concept-the-fashion-industry-is-yet-to-grasp/>; "Rodarte Fall 2012 RTW" (15 February 2012), *All Things Major* (blog), online: <https://allthingsmajor.wordpress.com/2012/02/15/rodarte-fall-2012-rtw/>.

36 As quoted in Champ, *supra* note 35.

37 Rachel Hosie, "Cultural Appropriation: When Does Appreciation Cross the Line?", *The Independent* (2 May 2018), online: <www.independent.co.uk/life-style/fashion/cultural-appropriation-appreciation-difference-meaning-fashion-examples-chinese-prom-dress-a8332176.html>.

38 *The Fashion Law*, "The Tanzania People", *supra* note 24; Jessica Mitei, "Were These Designs By Louis Vuitton 'Stolen' From Maasai Culture?", *Zumi* (18 November 2016), online: <www.zumi.co.ke/fashion/louis-vuitton-and-the-maasai-shuka-a-continuing-scandal/>; Mayeni Jones, "When does cultural borrowing turn into cultural appropriation?", BBC News (28 September 2017), online: <www.bbc.com/news/world-africa-41430748>.

39 Sharoni, *supra* note 20 at 408; Pham, "Feeling Appropriately", *supra* note 21 at 51; Shand, *supra* note 27 at 75.

40 "KTZ Issues Interesting Apology for Copied Garment", *The Fashion Law* (30 November 2015), online: <www.thefashionlaw.com/home/ktz-issues-interesting-apology-for-copied-garment>; Sima Sahar Zerehi, "KTZ fashion under fire for using Inuit design without family's consent", *CBC News* (25 November 2015), online: <www.cbc.ca/news/canada/north/ktz-fashion-inuit-design-1.3337047>.

41 "U.K. fashion house pulls copied Inuit design, here's their apology", CBC *Radio* (27 November 2015), online: <www.cbc.ca/radio/asithappens/as-it-happens-friday-edition-1.3339772/u-k-fashion-house-pulls-copied-inuit-design-here-s-their-apology-1.3339779>.

42 Jenni Avins, "In fashion, cultural appropriation is either very wrong or very right", *Quartz* (19 October 2015), online: <https://qz.com/520363/borrowing-from-other-cultures-is-not-inherently-racist/>; Laia Garcia, "A Global Community Needs a Free Exchange of Cultures", Opinion, Whose Culture Is It, Anyhow?, *The New York Times* (26 October 2015), online: <www.nytimes.com/roomfordebate/2015/08/04/whose-culture-is-it-anyhow/a-global-community-needs-a-free-exchange-of-cultures>.

creative progress, human growth and societal advancement, such as, in some respects, the emancipation of women. More specifically, global trends increase demand for authentic designs originating from source communities, spurring the local economy and raising their cultural profile.[43]

Therefore, curbing cultural appropriation does not mean putting all TCEs off-limits and preventing any kind of intercultural communication in fashion design.[44] Total and unnuanced restriction of cultural appropriation would likely be counterproductive for Indigenous peoples, by limiting their own freedom to build on ancient traditions.[45] In short, curbing cultural appropriation does not amount to eradicating all forms of cultural influences across the board. After all, cultures are fluid and to restrain their free flow would be to negate their very essence.

Cultural Appropriation: Origins and Consequences

Cultural Appropriation: Forces at Play

A Culture of Copying in the Fashion Industry

Fashion is an important cultural, social and economic activity, and the fashion industry has a truly global reach.[46] Although it is an industry that thrives on designers' creativity, it is also marked by an impressive culture of copying and imitation. Fashion designers often indulge in taking from one another and poaching various other cultures to such an extent that this is one of the major driving forces behind the design process.[47] This practice makes up the "piracy paradox," whereby rampant copying is considered the fuel for further cycles of creativity and for renewed consumer demand. This is particularly visible in fast fashion, where high-fashion designs are hastily copied immediately upon their release to be offered by mass retailers at a fraction of the price to fashion-savvy yet budget-conscious consumers. The piracy paradox is sometimes put forward to justify current fashion's fraught relationship with copyright and design protection, especially in the United States, recognizing nevertheless that trademarks are no strangers in the world of fashion.[48] Hence, from that perspective, cultural appropriation appears as but one manifestation of fashion's incorrigible tendency to help itself to cultural elements left, right and centre.

Fashion's Penchant for the "Ethnic"

The fashion industry's breakneck pace of innovation and overwhelming appetite for novelty and difference often push designers to look further away to foreign cultures in order to appear fresh and novel.[49] TCEs are used in various ways to achieve these ends for specific markets, as embodiments of the ethnic, folkloric or tribal trends.[50] TCEs are coveted by designers not only because of the appeal of Indigenous aesthetics on a visual level but also because of the values that these might evoke in the fashion psyche: uniqueness and authenticity,

43 Susan Scafidi, "When Native American Appropriation Is Appropriate", *Time* (6 June 2014), online: <http://time.com/2840461/pharrell-native-american-headdress/>.

44 Riley & Carpenter, *supra* note 15 at 868.

45 Sharoni, *supra* note 20 at 419; Riley & Carpenter, *supra* note 15 at 917.

46 Global fashion was worth US$2.5 trillion in 2017. See Imran Amed et al, *The State of Fashion 2019: A year of awakening* (McKinsey & Company, 2018), online: <www.mckinsey.com/industries/retail/our-insights/the-state-of-fashion-2019-a-year-of-awakening>; Lynsey Blackmon, "The Devil Wears Prado: A Look at the Design Piracy Prohibition Act and the Extension of Copyright Protection to the World of Fashion" (2008) 35 Pepp L Rev 1.

47 Madhavi Sunder, "Intellectual Property and Identity Politics: Playing with Fire" (2000) 4:1 J Gender Race & Just 69 at 91; Veronique Pouillard & Tereza Kuldova, "Interrogating Intellectual Property Rights in Post-war Fashion and Design" (2017) 30:4 J Design History 343–55.

48 Kal Raustiala & Christopher Sprigman, "The Piracy Paradox: Innovation and Intellectual Property in Fashion Design" (2006) 92:8 Virginia L Rev 1687; Kal Raustiala & Christopher Sprigman, *The Knockoff Economy: How Imitation Sparks Innovation* (New York: Oxford University Press, 2012) at 21.

49 Scafidi, *supra* note 43; Krithika Varagur, "Is This The Right Way For Fashion To Do Cultural Appropriation?", *Huffington Post* (5 November 2015, updated 17 January 2017), online: <www.huffingtonpost.com/entry/fashion-cultural-appropriation_us_5632295ce4b00aa54a4ce639>.

50 Some have criticized the term "trend" in this context, as it likely implies a reduction of value when TCEs are deployed for mere commercial advantage. See Abaki RF Beck, "Miss Appropriation: Why Do We Keep Talking About Her?" (2013) 3:1 Tapestries: Interwoven voices of local and global identities, online: <http://digitalcommons.macalester.edu/tapestries/vol3/iss1/2>; Jessica R Metcalfe, "The Tribal Trend: 'It'd Be Truer To Call It Colonial'", *Beyond Buckskin: About Native American Fashion* (10 May 2011), online: <www.beyondbuckskin.com/2011/05/tribal-trend-itd-be-truer-to-call-it.html>.

as well as a sense of ethics and respect for the environment in the clothes-making process.[51]

In the past 100 years, many designers have helped themselves to hefty portions at the rich buffet of world cultures. Historical examples range from French designer Paul Poiret's harem pants and tunics in the 1910s, inspired by the cultures of the Middle East and Turkey, to Yves Saint Laurent's beaded and feathered African collection in 1967, inspired by African handicrafts, among others. Even Coco Chanel applied traditional Russian embroideries on tunics in her early collections in the 1920s.[52] The ethnic influence became more widespread at the end of the 1990s and beginning of the 2000s. For instance, French fashion house Hermès featured stylized Indian saris and jodhpurs in its Spring/Summer 2008 collection,[53] Belgian designer Dries van Noten unswervingly creates colourful, print-rich clothing with an "exotic" touch[54] and Italian fashion brand Etro is well known for elevating an "ethnic" look to high fashion — the house described its Fall 2018 collection, replete with Peruvian, Patagonian, Navajo and paisley designs, as "ethnic futurism."[55]

Traditional Cultural Expressions and the Public Domain

As this paper has outlined, most TCEs are, from an IP perspective, currently considered to be in the public domain. That does not mean that they are free for anyone to use without any limitation, but it does make them vulnerable to increased access, use and appropriation. In the fashion world, TCEs are frequently perceived as forming a vast reservoir of raw materials into which designers can freely dip.[56] For example, in a case involving a stylized teepee, Minh-Ha T. Pham, an assistant professor at the Pratt Institute, who writes about the politics of race, gender and class in fashion, states: "[T]here was a tacit agreement that the general teepee design itself was public property. The publicness of the teepee, the idea that it existed in the public domain, belonging to no one and so was freely available to be manipulated, refined, and transformed into fashion for the use and profit of the Western author, was a belief that literally went without saying."[57]

The Grey Zone between Inspiration and Appropriation

The blurry conceptual and practical divide between impermissible appropriation and permissible inspiration creates a grey zone that is an ideal breeding ground for cultural appropriation.[58] In many cases, fashion industry players who use TCEs in their work without permission believe — or justify their actions under the guise — that they were simply drawing inspiration from TCEs or that they were unaware of the offensive nature of their action.[59] The example of the feathered headdress is telling: as already noted, Native American people view them as spiritually and culturally significant and find inconsiderate uses disheartening.[60] Fashion celebrities who have donned the sacred ornament have later publicly apologized for it, claiming an "honest mistake."

Consequences: Cultural, Social and Economic Harm

Social, Political and Cultural Harm

TCEs are not relics of the past; they are part and parcel of vibrant, contemporary cultures. When TCEs are uncaringly imitated, stereotyped and demeaned, so is the very cultural integrity of

51 Marisa Wood, "Cultural Appropriation and the Plains' Indian Headdress" (2017) Auctus, The Journal of Undergraduate Research and Creative Scholarship, Social Sciences, Virginia Commonwealth University, online: <https://scholarscompass.vcu.edu/cgi/viewcontent.cgi?referer=https://www.google.nl/&httpsredir=1&article=1042&context=auctus>; Pham, "Feeling Appropriately", *supra* note 21 at 62; Srikant Manchiraju & Amrut Sadachar, "Personal values and ethical fashion consumption" (2014) 18:3 J Fashion Marketing & Management 357–74, DOI: <10.1108/JFMM-02-2013-0013>.

52 Megan McAuley, "Russian Francophiles: Paris, fashion, and Coco Chanel", *My French Life* (17 October 2017), online: <www.myfrenchlife.org/2017/10/17/russian-francophiles-paris-chanel/>.

53 Varagur, *supra* note 49.

54 Dries van Noten, *Touches d'exotisme, XIVe–XXe siècles* at 203.

55 Luke Leitch, "Etro", *Vogue* (23 February 2018), online, <www.vogue.com/fashion-shows/fall-2018-ready-to-wear/etro>.

56 Paul Hiebert, "A Native American Expert on No Doubt's Controversial Video and Cultural Appropriation", *Flavorwire* (12 November 2012), online: <http://flavorwire.com/344807/what-a-native-american-expert-thinks-about-that-controversial-no-doubt-music-video>.

57 Pham, "Feeling Appropriately", *supra* note 21 at 64.

58 Larsson, *supra* note 6.

59 See Sarah Mower, "Valentino: Spring 2016 Ready-to-Wear", *Vogue* (6 October 2015), online: <www.vogue.com/fashion-shows/spring-2016-ready-to-wear/valentino#review>.

60 Scafidi, *supra* note 43.

their holders.[61] The day that a culture's TCEs are no longer associated with that culture might be the day that that culture has ceased to exist.

On a socio-political level, TCEs are inherent to the identity, dignity, autonomy and self-determination of Indigenous communities and help define their relationships with others, especially in the aftermath of conquest and colonization.[62] As cultural appropriation impedes Indigenous peoples' efforts to define themselves and establish their own identity, it can produce a feeling of "erasure" of identity and can be experienced as a form of colonization.[63] Acts of appropriation foster humiliation and discrimination through insensitive stereotypes and perpetuate the histories of brutality to which Indigenous peoples were subjected. Appropriation has been described as an equivalent of colonial occupation of Indigenous art and design.[64] It also negatively impacts TCE holders' well-being, health and welfare, both individually and collectively.[65] For example, the Milan-based fashion brand DSquared, designed by Canadian brothers Dean and Dan Caten, presented in 2015 a collection featuring designs taken from Indigenous cultures in Canada. The collection was entitled "DSquaw" — squaw is a derogatory name for North American Indigenous women.[66]

Economic Harm

TCEs, especially handicrafts, can be a source of income for their holders, sometimes the only one. Yet, outsiders appropriating TCEs without proper compensation to the source communities are materially profiting at the expense of their holders, who cannot participate in the profits made on the sale of the products incorporating their TCEs.[67]

The fashion products that appropriate TCEs are also, for some consumers, substitution goods for authentic products and might unfairly heighten competition and potentially deprive the communities of the sales of their own authentic TCE-based fashion items.[68] Consumers might prefer either a garment stamped with the brand of a Western fashion designer over its original source or a more affordable, poorly made imitation. This is not economically insignificant. In the case of the Maasai, the numbers are mind-boggling (however, they also relate to products outside of fashion). According to some estimates, more than 1,000 companies have used Maasai imagery or iconography without permission, including well-known fashion brands, six of which, including Diane von Furstenberg, Ralph Lauren and Calvin Klein, have allegedly each made more than US$100 million in annual sales using the Maasai name and visual culture.[69]

In addition, TCE holders might even be hindered from using their own cultural product in commerce, where, for example, one of their designs would be trademarked or copyrighted by a third party.[70] For instance, had Antik Batik succeeded in its copyright claim over *huipil*-like designs, this protection could have barred the Mixe people from using their own designs, lest they would be infringing Antik Batik's protected work.

All in all, given the consequences of cultural appropriation for TCE holders, one can see that although one should not prevent the free flows of cultural exchange, there are some acts that cannot be tolerated and some lines that cannot be crossed. But how can one tell whether an act is one of offensive appropriation or appropriate appreciation? The following section attempts to answer that very question.

61 Bruce Ziff & Pratima V Rao, "Introduction to Cultural Appropriation: A Framework for Analysis" in Bruce Ziff & Pratima V Rao, eds, *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick, NJ: Rutgers University Press, 1997) 1 at 8; Sharoni, *supra* note 20 at 413.

62 Sharoni, *supra* note 20 at 414; Riley & Carpenter, *supra* note 15 at 892; Shand, *supra* note 27 at 58.

63 Riley & Carpenter, *supra* note 15 at 917.

64 Shand, *supra* note 27 at 54.

65 Ziff & Rao, *supra* note 61 at 8; Riley & Carpenter, *supra* note 15 at 930.

66 See Shelagh Hartford, "On DSquared2's Racist and Extraordinarily Offensive FW15 Line 'DSquaw'", *The Muse* (3 May 2015), online: <https://themuse.jezebel.com/on-dsquared2-s-racist-and-extraordinarily-offensive-fw1-1689649757>; "Dsquared2 under fire for #Dsquaw women's fashion collection", *CBC News* (4 March 2015), online: <www.cbc.ca/news/indigenous/dsquared2-under-fire-for-dsquaw-women-s-fashion-collection-1.2980136>.

67 William J Hapiuk, Jr, "Of Kitsch and Kachinas: A Critical Analysis of the 'Indians Arts and Crafts Act of 1990'" (2001) 53:4 Stan L Rev 1009 at 1017.

68 See Intellectual Property Issues in Cultural Heritage Project, "Think Before You Appropriate: Things to know and questions to ask in order to avoid misappropriating Indigenous cultural heritage" (Vancouver: Simon Fraser University, 2015), online: <www.sfu.ca/ipinch/resources/teaching-resources/think-before-you-appropriate/>.

69 Rosati, *supra* note 24; *The Fashion Law*, "The Tanzania People", *supra* note 24.

70 Sharoni, *supra* note 20 at 413; Ziff & Rao, *supra* note 61 at 8.

Principles for Using TCEs in an Appropriate Fashion

This paper presents a set of principles designed to inform and shape the way fashion industry players and the public in general interact with TCEs in ways that do not amount to cultural appropriation. As such, through these recommended principles, the paper tries to draw the line between permissible cultural influence and impermissible cultural appropriation. The principles are based on an original analysis of the various cases of alleged cultural appropriation reported in the media and alluded to throughout the paper. They also draw on IP regimes and on laws, customs and practices of TCE holders. The latter constitute useful sources for devising the principles. They contain elements regarding such matters as permissible and forbidden uses, conditions for such uses, types of TCEs available for use and people who can perform such use, as well as remedies and forms of redress in case of breach.[71] For example, in the Tlingit culture in Canada, punishment for using a design takes the form of a public apology (as part of a potlatch) together with compensation, monetary or not, such as the gifting of a song.[72]

Understanding and Respecting Indigenous Cultures

TCE holders seek respect and understanding from fashion designers partaking in their culture, especially when the TCEs have a religious, sacred or spiritual significance.[73] Designers are thus encouraged to research directly into the designs and the community or communities that hold the TCEs in question.[74] For instance, before using a traditional pattern, one should ask the following questions: Where does it come from? What does it mean for those who have created and transmitted it over generations? Will its use in fashion contradict its traditional meaning or cause harm to those who hold it? Finding the answers to these questions is a first step in understanding that TCEs are not free for anyone to use, even if the IP system might often cast them as such; rather, they are deeply rooted in the cultures and identities of their holders. Going back to the *huipil* example, Isabel Marant should have approached the Mixe people before using their design in her own creations and ensured that its use would not cause harm. For the same reason, IP laws should prevent others from acquiring or exercising rights in TCEs that would be disrespectful to their owners.

Transformation, Not Replication

Cultural appropriation is sometimes a case of blatant copying (a literal knock-off, a head-to-toe copy) or close similarity, where the appropriator simply recycles Indigenous stereotypes, does not make his or her own contribution to come up with an original creation or fails to make the designs look any different.[75] In some cases, however, there might not be direct copying, making the appropriation more difficult to discern. It might be hard to tell when a use stops being impermissible and becomes permissible based on the degree of similarity alone. It has been suggested that transformative inspiration, i.e., an attempt to turn a TCE into something new, to give it a new spin or to revisit it, might lessen the likelihood of cultural appropriation.[76] Arguably, this greatly depends on what the "something new" is and in what context it operates. Indeed, the arguments of originality and departure from the source should not become safe havens to justify insensitive usage.

71 Indigenous notions can define which individuals, families and clans, for example, can utilize certain designs in tipi [teepee] adornment. See Candance S Greene & Thomas D Drescher, "The Tipi with Battle Pictures: the Kiowa Tradition of Intangible Property Rights" (1994) 84 Trademark Rep 418 at 431–32; Riley & Carpenter, *supra* note 15 at 927.

72 Hilary Bird, "Indigenous culture not protected in Canadian law, lawyers and academics say", *CBC News* (31 May 2017), online: <www.cbc.ca/news/canada/north/indigenous-culture-not-protected-in-canadian-law-lawyers-and-academics-say-1.4138794>.

73 Riley & Carpenter, *supra* note 15 at 915; Scafidi, *supra* note 43; Jaja Grays, "The Blurred Lines of Cultural Appropriation" (2016) City University of New York Academic Works, online: <https://academicworks.cuny.edu/gj_etds/181>; Garcia, *supra* note 42; Wood, *supra* note 51.

74 There is, however, a risk of "approval shopping" – asking around until someone approves the intended use. This risk can be mitigated by ensuring that fashion designers behave ethically, according to codes of ethics, as is discussed below.

75 Scafidi, *supra* note 43; Pham, "Feeling Appropriately", *supra* note 21 at 51; Jessica R Metcalfe, "Oh No, Valentino | Appropriation and the Case of the Stolen Beadwork", *Beyond Buckskin: About Native American Fashion* (25 April 2017), online: <www.beyondbuckskin.com/2017/04/oh-no-valentino-appropriation-and-case.html>; "Hey Fashion, Not Everything That is Similar is 'Copied'", *The Fashion Law* (24 May 2017), online: <www.thefashionlaw.com/home/hey-fashion-not-everything-that-is-similar-is-copied>.

76 Scafidi, *supra* note 43.

Therefore, transformation should be analyzed on a case-by-case basis, following copyright law principles for determining similarity, by comparing shapes, colours and arrangements.[77] Importantly, this principle is not, on its own, sufficient to draw conclusions in borderline cases and should be read in conjunction with other principles.

Acknowledgment and Attribution

Some instances of appropriation occur when the use of TCEs is done without mentioning, recognizing or acknowledging the community that served as inspiration. In the 2015 case of the Isabel Marant dress, the online caption on the company's website failed to mention the Mixe people, the region of Oaxaca or the *huipil* and relied instead on the vague phrase "bohemian appeal" to describe the garment.[78] Accurately acknowledging the TCE holder, just like one would attribute an author under copyright law, can allow better engagement with members of Indigenous communities and shows respect for the community.[79] Many Indigenous communities might find a sense of pride in seeing their cultural elements being borrowed by others, but would like to see themselves associated with those elements and not severed from them as soon as they have been integrated in a fashion product. The process of acknowledgement may or may not involve the community, but surely this needs to lead to a more formal relationship between TCE users and owners.

Authorization, Involvement, Participation and Collaboration

There may be an even better way to respectfully use other cultures' designs, and it starts with asking for authorization. Outsiders wishing to incorporate TCEs in their fashion creations should, where possible,[80] ask the relevant interlocutor[81] of the source community or communities if they wish to share this aspect of their culture and how they want it shared, i.e., ask for free, prior and informed consent (FPIC).[82] Failing to obtain permission should result in desisting from using the TCE.[83] The precise mechanisms of authorization and consent could be determined at the community level, based on Indigenous law or practice. Individual decisions about whether to grant consent should be done on a case-by-case basis. Indeed, the goal is not to prohibit any kind of use, but to call for greater respect for TCE holders and their cultures.[84]

Sometimes, asking for permission is a stepping stone toward building a deeper relationship between a TCE's user and its holders. As South African designer Maria McCloy stated: "We are angry because we feel exploited. It's not just that they are inspired by us. That's a compliment, but you need to take it a bit further and involve us, otherwise it is theft."[85] Involvement and participation of the source community can take place in many ways. Some designers enter into expansive collaboration agreements and involve the community in the consultation, creation and production processes; the agreements also address compensation and IP ownership. For instance, Mexican designer Carla Fernández has agreements in place whereby

77 In the United States, see e.g. *Star Fabrics, Inc v Cost Plus, Inc,* Case 2:18-cv-06245 (CD Cal 2018).

78 Avila, *supra* note 7.

79 Garcia, *supra* note 42.

80 Consent or authorization might be difficult to obtain in practice and might set too rigid a framework. Criteria should be developed to create a "due diligence" obligation.

81 In the case of the Brazilian flip-flop manufacturer Havaianas, the agreement between the company and an individual member of an Indigenous community was deemed invalid for failing to represent the views of the community as a whole. See Sabine Grandadam, "Brésil. La tong de la discorde entre Havaianas et des chefs tribaux" (in French), *Courrier International* (24 February 2015), online: <www.courrierinternational.com/article/2015/02/18/la-tong-de-la-discorde-entre-havaianas-et-des-chefs-tribaux>; JuliaK, "Buzz mode : le nouveau motif Havaianas crée la polémique par rapport à une tribu indienne" (in French), *Shoko*, online: <www.shoko.fr/buzz-mode-le-nouveau-motif-havaianas-cree-la-polemique-par-rapport-a-une-tribu-indienne-a382959.html>.

82 This principle is contained in several provisions throughout the WIPO draft instrument, *The Protection of Traditional Cultural Expressions: Draft Articles*, WIPO Doc WIPO/GRTKF/IC/34/8.

83 Shand, *supra* note 27 at 71.

84 Hiebert, *supra* note 56.

85 *The Fashion Law*, "The Tanzania People", *supra* note 24.

the community of artisans working for her label own the IP in the designs they create.[86]

Australian Indigenous lawyer Terri Janke offers advice on how to establish genuine, positive collaborations through licence and consent agreements as well as protocols.[87] These agreements could cover such issues as clear authorization, manner of involvement and compensation (for example, a lump sum, sharing profits or royalties, or non-monetary compensation, such as environmental preservation support). As noted, the Navajo Nation and Urban Outfitters agreed to enter into a supply and licence agreement and to collaborate on authentic American Indian jewelry.[88]

Successful collaboration examples abound, but one that stands out in particular is the high-fashion Brazilian label Osklen.[89] Osklen's founder and creative director Oskar Metsavaht[90] showed an innovative solution to the problem of cultural appropriation. The designer sourced his inspiration for his Spring 2016 collection in the designs of the tattoos and traditional fabrics of the Asháninka people, an Indigenous people living in the Amazonian rainforest of Brazil and Peru.

Metsavaht asked the Asháninka for permission to adapt the designs and paid the tribe a one-off payment for the equivalent of US$50,000, in accordance with the Asháninka's wishes. The money was used, among other projects, to build a new school and to buy a piece of land in a nearby city, where the tribe installed a store to sell their artisanal products such as jewelry and clothing. In addition, Metsavaht is supporting the Asháninka in promoting their traditional knowledge and practices on forest preservation to fight environmental damage.

With this kind of success, Osklen's groundbreaking take on cultural exchange and responsible borrowing from other cultures can be seen as a model for other designers to emulate. Along that path, fashion industry players can be proactive and reach out and engage with TCEs holders with requests for permission and/or proposals for fair collaboration arrangements. These best practices could encourage local self-sustaining economic initiatives and enable the protection, preservation and diversity of Indigenous cultures. Nevertheless, discrete negotiated agreements are not a cure-all against cultural appropriation, for they are all too dependent on the goodwill of individual actors and can be tainted by the inequitable balance of power between large fashion corporations and Indigenous peoples. Hence policy and legal measures need to be put in place to address the challenges of cultural appropriation on a global scale.

Policy, Legal and Practical Solutions to Curb Cultural Appropriation

Policy and Legal Solutions: Codification of Principles

Because of existing laws' failure to grapple with issues of cultural appropriation, a lot is left to common sense or morals, thereby increasing the confusion around the notion of appropriation.[91] There is thus a need to address it headfirst through policy and legal means and reinscribe fundamental, inherent principles in the law to specifically enhance the protection of TCEs against appropriation. Boosted by the adoption of UNDRIP, Indigenous rights continue to develop at both the national and international level — albeit slowly. In New Zealand, the landmark 2011 Waitangi Tribunal report on the Wai 262 claim on Māori knowledge and expression provides an example of contemporary consideration of issues

86 Mayo Martin, "Indigenous communities inspire Mexican fashion designer", Channel News Asia (17 June 2016), online: <www.channelnewsasia.com/news/lifestyle/indigenous-communities-inspire-mexican-fashion-designer-7962832>; "Carla Fernández", *Not Just a Label*, online: <www.notjustalabel.com/designer/carla-fernandez>; Design Indaba, "Carla Fernandez: Working with heritage to make a fashion statement" (21 June 2013), online: vimeo <https://vimeo.com/68856955>; "Carla Fernández: The Barefoot Designer", Isabella Stewart Gardner Museum, online: <www.gardnermuseum.org/experience/carla-fernandez-barefoot-designer#chapter2>.

87 Terri Janke, "Protocols for working with Indigenous Artists", Terri Janke and Company, online: <www.terrijanke.com.au/indigenous-art-protocols>.

88 Navajo Nation, News Release, *supra* note 18.

89 Lígia Carvalho Abreu, "Fashion and the Rights of Indigenous and Local Communities", *Fashion Law* (2017), online: <www.fashionmeetsrights.com/page/home/77>; Avins, *supra* note 42.

90 Metsavaht was declared "Brazil's first global luxury brand" by Forbes in 2012 and has been a UNESCO Goodwill Ambassador since 2011.

91 Riley & Carpenter, *supra* note 15; Pham, "Feeling Appropriately", *supra* note 21 at 6.

in the field of art and design, trademarking of language, and insulting or demeaning treatment of Indigenous knowledge and expression.[92] At the international level, the WIPO IGC is negotiating an international legal instrument that would ensure effective protection of TCEs. Importantly, the IGC could take cognizance of principles such as those presented in this paper and discuss them in relation to the creation of a new *sui generis* legal regime for the protection of TCEs.

Codification in IP and Cultural Heritage Law

As it currently exists, copyright law fails to protect TCEs in a way that effectively prevents their appropriation. Given the importance of respect and acknowledgment and the perception for TCE holders that appropriation is a form of distortion of their culture, as identified in the definition and principles above, it is worth considering the role that moral rights might play in the face of cultural appropriation. At the international level, the Berne Convention for the Protection of Literary and Artistic Works (article 6bis) requires its parties to grant authors the right to claim authorship of a work (the right of paternity of attribution) and the right to object to any distortion or modification of a work that may be prejudicial to the author's honour or reputation (the right of integrity). Nationally, different jurisdictions implement those rights with some variation — in particular whether they may be transferred or waived and whether they are perpetual or expire. Be that as it may, the two prongs of moral rights find a direct echo in the claims of TCE holders regarding failure to acknowledge them as the source as well as regarding disparaging, inconsiderate use, respectively. However, while moral rights show potential to address some of the concerns expressed by TCE holders, existing law only applies to those TCEs that are eligible for copyright protection. Additional challenges concerning individual authorship might also arise, as TCEs are generally collectively held. This paper thus lays the foundation for a proposal to broaden moral rights in copyright regimes to preserve the reputation and ensure the attribution to TCE holders.[93] As such, it proposes to develop a moral rights-like regime specifically designed for TCEs, thereby overcoming the challenges posed by the authorship and duration conditions under existing copyright law.

Similarly, GI legislation from around the world also has the potential to offer legal protection to TCEs. For example, in Mexico, Talavera de Puebla pottery was granted an Appellation of Origin, a designation that comes with specific conditions under which the traditional pottery may be crafted.[94] GIs are especially useful in protecting TCEs, since they are granted for products that have a relationship with the land, local resources or the environment. Specific GIs for non-agricultural products could be expanded to apply to TCEs, as is under discussion in the European Union.

Cultural heritage legislation was resorted to in Mexico (after the Isabel Marant *huipil* case) and in Guatemala, in response to several cases of cultural appropriation. For instance, in 2011, many were outraged when Miss Guatemala wore the traditional clothing of the male spiritual leaders of the K'iche' Maya highland town of Chichicastenango in the Miss Universe beauty pageant. As a result, since 2017, Legislative Initiative 5247 states that the use by third parties of Mayan traditional weavings and designs requires consultation with and authorization from the weavers.[95] Consultations are facilitated through the International Labour Organization Convention 169 on the Rights of Indigenous and Tribal Peoples, which calls for the "full realization of the social, economic and cultural rights of these peoples with

92 The outcomes of the Wai 262 report are under consideration in a review of New Zealand copyright law. See Ministry of Business, Innovation & Employment, "Review of the Copyright Act 1994", online: <www.mbie.govt.nz/info-services/business/intellectual-property/copyright/review-copyright-act-1994>.

93 Peter Jaszi, "Protecting traditional cultural expressions – some questions for lawmakers", *WIPO Magazine* (August 2017), online: <www.wipo.int/wipo_magazine/en/2017/04/article_0002.html>; Samantha Joseph & Erin Mackay, "Moral Rights and Indigenous Communities", Arts Law Centre of Australia (30 September 2006), online: <www.artslaw.com.au/articles/entry/moral-rights-and-indigenous-communities/>.

94 WIPO, *General Declaration on the Protection of the Appellation of Origin "Talavera"*, 10 September 1997, (entered into force 11 September 1997), online: <www.wipo.int/wipolex/en/details.jsp?id=9321>.

95 Iniciativa 5247, "Iniciativa que dispone aprobar reformas a los decretos números 33-98 y 57-2000 ambos del congreso de la república, ley de derecho de autor y derechos"; see also Rick Kearns, "Mayan Weavers Seek Legal Protection of Their Designs", *Indian Country Today* (11 June 2017), online: <https://indiancountrymedianetwork.com/news/indigenous-peoples/mayan-weavers-seek-legal-protection-designs/>; Gabe Fernandez, "Maya Women Fight to Protect Indigenous Textiles from Appropriation", *Law Street* (14 July 2017), online: <https://lawstreetmedia.com/blogs/ip-copyright/maya-women-fight-protect-indigenous-textiles-appropriation/>.

respect for their social and cultural identity, their customs and traditions and their institutions."[96]

Codification into Self-regulation Mechanisms

Fashion designers should recognize and proactively address the problem of cultural appropriation by developing self-regulation mechanisms, such as an internal industry standard accompanied with a certification or labelling process. Implementing codes of ethics, norms, charters or guidelines for the fashion industry would encourage designers who use Indigenous cultural elements to clearly and openly reveal their sources of inspiration, acknowledge their holders, enter into collaboration agreements and obtain the FPIC of TCE holders. Moreover, consumers might be willing to pay a premium for certified fashion products, thereby leading to an increase in revenues.

Practical Solutions: Awareness and Support

Awareness-raising and Education Campaigns

Fashion designers do not necessarily know much about the Indigenous cultures that inspire them, and they are not always fully aware of the significance of the traditions they may be appropriating.[97] Raising awareness through social media or education programs, as well as the development and sharing of best practices, could be quite successful in addressing cultural appropriation by providing information to both appropriators and holders.[98] Such initiatives should focus on finding ways to make designers shift their ethics about using TCEs and adopting more respectful behaviour when sourcing inspiration from other cultures. Campaigns could also be targeted at consumers, promoting consumption of authentic clothing, jewelry and accessories directly from Indigenous fashion designers or from Indigenous-approved collaborations.

Business Support for Indigenous Fashion Players

Indigenous designers, endowed with a deep understanding of their own artistic traditions, are connected to their communities and are keenly aware of what it means for a product to be authentic. In rejecting stereotypes, they often present a new, innovative vision of Indigenous fashion. Many are tapping into the potential of their TCEs as fashion items and are gradually becoming genuine players in the fashion industry.[99] It is worth noting that Indigenous fashion design enterprises are habitually different from mainstream models in respect of design methodology, brand identity, scale, production and market. Cree-Métis designer Angela DeMontigny, for example, creates designs that fuse "traditional and contemporary elements rooted in culture,"[100] and often creates one-of-a-kind, limited-edition clothing and jewelry. While industrial fashion is characterized by high speed and relatively low quality, traditional garments are often custom-made and the result of months-long painstaking work. British cultural theorist Angela McRobbie has noted the pertinence of micro-businesses in non-industrialized nations as providing sustainable employment options for women and an escape from industrialized labour and dreadful factory conditions.[101]

Providing Indigenous creators with access to design, marketing and IP management training, business support mechanisms, access to financial resources and other forms of assistance and capacity-building programs would allow Indigenous creators to represent themselves and their cultures and to participate directly in the fashion industry. Fashion has the immense potential to serve as a way to preserve and safeguard the world's Indigenous cultural traditions, and Indigenous fashion designers can become their cultures'

96 *Indigenous and Tribal Peoples Convention, 1989* (No 169), 27 June 1989, C169, art 2(2)(b) (entered into force 5 September 1991).

97 Nevertheless, it would seem that in the digital age, the availability of clear information compromises claims of not knowing or being unaware.

98 Irina Oberman Khagi, "Who's Afraid of Forever 21?: Combating Copycatting Through Extralegal Enforcement of Moral Rights in Fashion Designs" (2016) 27:1 Fordham IP Media & Ent LJ 67; Wood, *supra* note 51.

99 Leah Collins, "How Indigenous artists are taking back what the fashion industry stole", *CBC Arts* (17 June 2016), online: <www.cbc.ca/arts/how-indigenous-artists-are-taking-back-what-the-fashion-industry-stole-1.3641237>.

100 Angela DeMontigny, online: <www.angelademontigny.com/home>.

101 Angela McRobbie, "Bridging the Gap: Feminism, Fashion and Consumption" (1997) 55:1 Feminist Review at 73–89; Angela McRobbie, "Fashion Culture: Creative Work, Female Individualization" (2002) 71 Feminist Rev at 52–62.

most powerful voice.[102] Many initiatives aimed at promoting Indigenous fashion design are emerging around the world, from small labels to full-fledged industry support in the form of fashion weeks or associations of Indigenous designers.

Conclusion: Looking beyond Fashion

It is hoped that this paper serves as a useful primer on the vast and complex issues lying at the intersection of IP law, fashion and TCEs, with a specific focus on the concept of cultural appropriation. While IP laws could theoretically contribute to a workable solution, given that TCEs are a form of IP, it remains difficult to find a response to cultural appropriation with the legal tools available, partly because Indigenous peoples' claims surpass and defy established legal categories of IP laws. This paper thus calls for an in-depth study of how IP laws and principles could be adapted to meet the needs of TCE holders. In particular, it would be worth exploring in greater detail how moral rights, as well as GI regimes, could be recast to offer effective protection to TCEs against cultural appropriation. Furthermore, TCEs are a modern legal concept that do not necessarily coincide with the understanding that Indigenous peoples have of their own cultural heritage. In fact, in most Indigenous worldviews, TCEs are not just aesthetic or ornamental cultural elements but are intimately linked to the identity of their holders and their way of life, as well as their lands and natural environment. Copying the aesthetic or ornamental aspects of TCEs in fashion products may have deeper implications.

Putting an end to cultural appropriation in fashion through policy, legal and practical measures would positively impact efforts to protect TCEs in other cultural industries, such as music, film or art. In addition, those efforts are not unrelated to those aimed at protecting other forms of Indigenous heritage, such as traditional knowledge, genetic resources and Indigenous lifestyles. In the end, to have control over one's TCEs is to have control over one's identity. Eradicating cultural appropriation by repurposing IP principles to offer adequate protection to TCEs would allow Indigenous peoples to define themselves and determine their lives, free from domination and external exploitation.

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102 Miguel Angel Gardetti & Shams Rahman, "Sustainable Luxury Fashion: A Vehicle for Salvaging and Revaluing Indigenous Culture" in Miguel Angel Gardetti & Subramanian Senthilkannan Muthu, eds, *Ethnic Fashion: Environmental Footprints and Eco-design of Products and Processes* (Singapore: Springer, 2016).

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