

CULTURAL APPROPRIATION IN THE FASHION INDUSTRY: A CRITICAL STUDY INTO THE LEGAL ISSUES SURROUNDING IT

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ABSTRACT

The past century has been riddled with instances of cultural appropriation, where brands and businesses have engaged in the brutal thievery of significant cultural expressions without giving due credit or compensation. The alarming rise in cases of cultural appropriation has simultaneously paved the way for rising protests, backlash, and boycotts of brands and their products. The 21st century is a witness to activists, watchdog, and advocacy groups using social media platforms to spread awareness and necessarily blacklist brands that have a faulty moral compass, in the best interests of indigenous and minority groups who are seen to be the victims in most cases.

This paper analyzes the nuances of cultural appropriation in the context of the intellectual property rights surrounding it, the concept of TCEs, and the essence of the Piracy Paradox in the fashion industry with a special focus on indigenous fashion, this paper also studies in detail the various ways in which businesses can practice the clear demarcation between inspiration and illegal appropriation. Emphasis is laid on past examples and the expensive, legal lessons businesses have learned by illegally appropriating from different groups and cultures. An analysis of the different avenues of legal relief and resolution is also conducted, in addition to the different principles businesses must adapt to meet the expectations of both the source communities as well as the public when incorporating inspired expressions and elements. In a nutshell, this paper serves as a critical guide to the history, landmark cases, and evolution of cultural appropriation and its associated legal issues and remedies.

Keywords: Intellectual Property Law, Cultural Appropriation, Traditional Cultural Expressions, Piracy Paradox, Fashion industry, non-appropriating principles.

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1. INTRODUCTION

The fashion industry has often been criticized for its cultural appropriation practices, which have a significant impact on source communities, particularly indigenous and local groups. This research aims to understand the extent and impact of cultural appropriation in the fashion industry and the effect it has on source communities. The research also aims to identify the inadequacies of the existing intellectual property laws in protecting Traditional Cultural Expressions (TCEs) and to analyze the various measures businesses and brands can adopt to avoid cultural appropriation. Through various case studies, the research will explore the remedies available to source communities and how they can be implemented. The study will address crucial research questions, including the thin line between cultural appropriation and appreciation, the acceptability of borrowing from a culture, and how brands can avoid cultural appropriation and offending source communities. By answering these questions, this research will provide valuable insights into cultural appropriation in the fashion industry and how it can be addressed through legal and ethical means.

1.1 The Global Incidence of Cultural Appropriation

It was in the twentieth century that the term ‘cultural appropriation’ was first coined and used in the context of debates and dialogues over multiculturalism and globalism. However, the problem had been identified decades earlier in the United States when Harlem Renaissance writers criticized the caricature of African-American voices, traditions, and culture in entertainment such as minstrel shows.¹ Elvis Presley, a famous cultural appropriation case study, whom the world knows as “The King of Rock and Roll” had his bestowed title challenged in 1977 by the ‘Chicago Defender’, an African- American newspaper, which declared American singer and songwriter, and ‘Rock and Roll’ pioneer Chuck Berry² to be the King of Rock. The newspaper strongly believed and accused Elvis Presley and some of his peers of taking forms of black music, passing it off as their own, and profiting from it,³ in a segregated, racist world. Another infamous incident was when British multinational retailer Marks & Spencer 2019 faced immense criticism and had been accused of cultural appropriation after it labelled its vegan wrap as biryani, while completely disparaging the key authentic elements of the traditional Indian dish and even detestably

¹ Brittany Kiefer, ‘Cultural Appropriation: Don’t be an invader’, (*Campaign*, 19 February 2020) <<https://www.campaignlive.co.uk/article/cultural-appropriation-dont-invader/1672978>> accessed 27 November, 2021.

² Jon Pareles, ‘Chuck Berry, Rock ‘n’ Roll Pioneer, dies at 90’, (*The New York Times*, 18 March 2017) <<https://www.nytimes.com/2017/03/18/arts/chuck-berry-dead.html>> accessed 05 December 2021.

³ Brittany, (n 1).

misspelling it as ‘biryani’.⁴ Even the famous ‘Hakuna Matata’ often quoted by Disney’s Timon and Pumba is believed to be a culturally appropriated Swahili phrase. Years after Disney was granted the trademark for this phrase, thousands of netizens in 2018 signed an online petition condemning this grant as an act of cultural appropriation and accused Disney of “colonialism and robbery”⁵. Even though there were no legal consequences for Disney in this incident, many activists believed that the trademark was “an assault on the Swahili people and Africa as a whole”.⁶ Here, even though the trademark didn’t essentially bar anyone else from using the phrase (except to sell t-shirts) and is justified under trademark law, the act was seen as a form of pillaging and profiting off of authentic African culture and art.

What has been observed is that the IP laws in most countries do not recognize this emerging problem of cultural appropriation as IP infringement. In the Indian scenario, the legislation at present is quite ill-equipped to extend protection to TCEs and solely depends on existing IP laws for the protection of the same, which is proving to be insufficient. India's tribal and non-tribal communities are a treasure trove of cultural expressions and folklore, adding to the country's unique identity. However, these cultural expressions and folklore have not received the attention they deserve, and this is evident by numerous instances of foreign companies, brands, and individuals misappropriating Indian culture. This not only deprives the source community of its rightful benefits but also paves the way for perpetuating negative stereotypes.⁷ For instance, in the case of *People Tree v. Dior* in 2018, the world witnessed Christian Dior, one of the top leading brands globally, plagiarize the design and work of a small, Indian art collective store named ‘People Tree’ entailing a block print design featured on an Indian actress on the Indian edition of Elle magazine.⁸ For this blatant plagiarism to seek IP remedies and to make out an infringement case, ‘People Tree’ would have to establish that their artistic work and creation is an expression of an idea. Following that, they’d have to prove that there has been an instance of substantial copying

⁴ Dan Whitehead, ‘M&S accused of cultural appropriation over ‘biryani’ wrap’, (*Sky News*, 30 January 2019) <<https://news.sky.com/story/m-s-accused-of-cultural-appropriation-over-biryani-wrap-11622691>> accessed 05 December 2021.

⁵ Rebecca Ratcliffe, ‘Disney accused of colonialism over ‘hakuna matata’ trademark’, (*The Guardian*, 19 December 2018) <<https://www.theguardian.com/global-development/2018/dec/19/colonialism-accusations-hakuna-matata-disney-far-from-problem-free-lion-king-remake>> accessed 09 December 2021.

⁶ Kyle Jahner, ‘No (legal) worries for Disney in ‘Hakuna Matata’ Trademark row’, (*Bloomberg Law*, 07 January 2019) <<https://news.bloomberglaw.com/ip-law/no-legal-worries-for-disney-in-hakuna-matata-trademark-row>> accessed 11 December 2021.

⁷ Parul Sehgal, ‘Is cultural appropriation always wrong?’, (*The New York Times*, 29 September, 2015) <<https://www.nytimes.com/2015/10/04/magazine/is-cultural-appropriation-always-wrong.html>> accessed 20 February, 2022.

⁸ Harshita Murarka, ‘Dior and People Tree reach settlement after plagiarism row’, (*The Quint*, 29 May 2018) <<https://www.thequint.com/lifestyle/fashion/delhi-based-people-tree-accuses-dior-of-plagiarism>> accessed 11 December 2021.

of that original artistic creation which ultimately amounts to infringement of their exclusive economic rights assured under Copyright law.

2. THE LINK BETWEEN IP AND THE PROTECTION OF CULTURAL EXPRESSIONS

The best way to protect cultural expressions and imagery would be to protect them as Traditional Cultural Expressions (TCEs). TCEs can be defined as “tangible and intangible forms in which traditional knowledge and cultures are expressed, communicated or manifested”.⁹ TCEs can be dances, songs, designs, handicrafts, tales, ceremonies, or any other artistic or cultural expression.¹⁰ This definition was drafted by the WIPO’s Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore, which further established two kinds of protection for TCEs. The first is, ‘Positive Protection’ which helps prevent others from illegally accessing traditional knowledge and the second is ‘Defensive Protection’ which provides for a set of strategies that help prevent third parties from gaining illegitimate intellectual property rights over cultural expressions.¹¹ The nature of protection recognized and provided under the ambit of TCEs is unambiguous and according to WIPO, TCEs command a separate sphere in intellectual property law concerning legal and policy-related concerns.¹²

At present, the world is witnessing several countries in transition to create a protective sphere and framework for TCEs, apart from what generic IP law provides. There is a broad consensus that the exclusive rights granted by IP laws are insufficient to protect traditional forms, expressions, and depictions. Creative fields have the right to protect their creations and work by existing IP laws such as copyrights (as long as they are creative, original, and separable from the creation’s function) and trademarks (as long as they are non-functional and distinctive). However, it has been observed quite often that the features of TCEs do not fit into the definitions and scope of various forms of IP, which raises concerns regarding the adequacy of the existing IP laws to safeguard TCEs. This paper aims to identify the gaps in the existing IP laws which will help analyze the practice of appropriation in the fashion industry.

⁹ ‘Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore’, (WIPO, 12 March 2019) <https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_39/wipo_grtkf_ic_39_5.pdf> accessed 13 December 2021.

¹⁰ ‘Frequently Asked Questions, what are Traditional Cultural Expressions?’, (WIPO) <<https://www.wipo.int/tk/en/resources/faqs.html#a3>> accessed 11 December, 2021.

¹¹ ‘Intellectual Property, Traditional Knowledge, and Traditional Cultural Expressions/ Folklore: A guide for countries in transition’, (WIPO, 2013) <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_transition_9.pdf> accessed 21 February 2022.

¹² ‘Traditional Cultural Expressions’, (WIPO) <<https://www.wipo.int/tk/en/folklore/>> accessed 13 December 2021.

Cultural appropriation can be defined as ‘the taking of intellectual property, cultural artifacts, expressions, history, and ways of knowledge’,¹³ usually from a minority or indigenous groups, without their consent, input, credit, or compensation.¹⁴ Legal and cultural scholars and academicians have observed cultural appropriation to be something that happens when an appropriator of a certain culture ‘takes’ certain cultural products that may be tangible or intangible from a different source culture,¹⁵ without attribution, consent, or compensation.¹⁶ Impermissible appropriation could attract legal consequences and sanctions for the taker or appropriator. Cultural appropriation is essentially ‘permissible inspiration’ - which is observed to be a constant headliner for major fashion houses in the past few years.

In the case of *Star Athletica, LLC v. Varsity Brands, Inc.*¹⁷ the United States Supreme Court ruled that fashion designs can be protected under copyright if they are distinct and "capable of existing independently" of the useful product in which they are incorporated. While the overall implications of the ruling are still being assessed, the fact that the Supreme Court permitted some sort of design protection will open the way for indigenous designs to be protected as well, if they meet the other standards of acquiring IPR protection.

3. CULTURAL APPROPRIATION IN FASHION AND APPAREL

The fashion industry, in the 21st century, is facing a huge crisis of cultural appropriation. From social media outrage, and street protests to lawsuits, the industry is set to change its ways and undergo an extensive transformation in an attempt for designers and brands to be more mindful and sensitive when borrowing inspiration and elements from cultures. Cultural appropriation in the fashion industry always denotes blatant and pervasive copying, and IPR laws inevitably find a place for intervention, protection, and prevention in this modish dilemma.

In an attempt to decipher the complexities surrounding cultural appropriation, one is often led to the glaring question- Can designers and brands ever borrow from cultures responsibly? This is followed by the mind-boggling question- How does one distinguish between inspiration and

¹³ Mathias Siems, ‘The law and ethics of ‘cultural appropriation’, (2019)15, INT J LAW CONTEXT. 408, 408.

¹⁴ Natasha Reed, ‘Cultural and Intellectual Property Appropriation: Disputes over culturally-inspired fashions’, (*Trademark and copyright law blog*, 08 February 2019) <<https://www.trademarkandcopyrightlawblog.com/2019/02/cultural-and-intellectual-property-appropriation-disputes-over-culturally-inspired-fashions/>> accessed 13 December 2021.

¹⁵ Sari Sharoni, ‘The Mark of Culture: The Efficiency and Propriety of Using Trademark Law to deter Cultural Appropriation’, (2016) IP Award-winning paper, Stanford Law School, 4 <<https://www-cdn.law.stanford.edu/wp-content/uploads/2016/09/The-Mark-of-a-Culture-The-Efficiency-and-Propriety-of-Using-Trademark-Law-to-Deter-Cultural-Appropriation.pdf>> accessed 13 November 2021.

¹⁶ Brigitte Vézina, ‘Curbing cultural appropriation in the fashion industry with intellectual property’ (*WIPO*, August 2019) <https://www.wipo.int/wipo_magazine/en/2019/04/article_0002.html> accessed 27 November 2021.

¹⁷ *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017).

appropriation when the line between the two is a hazy blur? A study into past cases and instances makes one realize that the problem lies when the appropriation impacts the appropriated group as mere thievery would.¹⁸ This realization helps break down and simplify the dilemma and leads one to further enquire into what ultimately distinguishes inspiration from thievery. And the answer to this is as simple as due credit, acknowledgement, responsibility, permission, and compensation. The practice of brands using significant cultural traditions and expressions especially those of minority and indigenous groups, all in the name of creating an aesthetic is where the problem stems from. Borrowers must show responsibility, be mindful of the cultural significance their borrowings carry, and realize that culture is not an aesthetic. Essentially, being respectful is all it takes for brands to avoid being called out or cancelled by fashion vigilantes.

American retailer ‘Urban Outfitters’ made headlines for a lawsuit that was brought against it by the Navajo Nation in 2012 after the company illegally used the tribe’s name for a collection adorning jewellery and clothing, for which the tribe holds the trademarks.¹⁹ In *Navajo Nation v. Urban Outfitters, Inc.*²⁰, the retailer company was accused of violating the Indian Arts and Crafts Act of 1990, by using the Navajo federal registered trademark for their products in such a manner that it falsely suggested or illusioned their association with the American Indians. After an extensive legal battle, the parties finally settled their dispute in 2016 by entering into a supply and license agreement which enabled their collaboration for Native American jewellery and proved to be a lucrative avenue for both parties.²¹ The company also faced backlash when it began to sell the culturally appropriated version of the ‘keffiyeh’ as an ‘anti-war woven scarf’. The ‘keffiyeh’, in its black and white checked abstract, is best known as the symbol of resistance of the Palestinians against the Israeli occupation.²²

Scholars and critics perceived Dior’s “Sauvage” fragrance ad campaign as deeply offensive, racist, and a clear-cut case of cultural appropriation where the company was looking for a way of profiting by depicting a harmful stereotype about native people.²³ This ad displayed Native American imagery and received backlash from several indigenous networks and groups over “romanticizing

¹⁸ James O. Young, *Cultural Appropriation and the Arts* (2008) 63-105

¹⁹ Nicky Woolf, ‘Urban Outfitters settles with Navajo Nation after illegally using tribe’s name’, (*The Guardian*, 19 November 2016) <<https://www.theguardian.com/us-news/2016/nov/18/urban-outfitters-navajo-nation-settlement>> accessed 23 November 2021.

²⁰ *Navajo Nation v. Urban Outfitters, Inc.*, CIV 12-0195 BB/LAM.

²¹ Mathias, (n 13).

²² Manjima Bhattacharjya, ‘Appropriated by fashion brands as a ‘desert scarf’, the keffiyeh remains powerful symbol of Palestinian resistance, solidarity’, (*First post*, 17 May 2021) <<https://www.firstpost.com/living/appropriated-by-fashion-brands-as-a-desert-scarf-the-keffiyeh-remains-powerful-symbol-of-palestinian-resistance-solidarity-9621331.html>> accessed 08 December 2021.

²³ Chavie Lieber, ‘Dior pulls ‘Sauvage’ Campaign after facing Appropriation backlash’, (*Business of Fashion*, 31 August 2019) <<https://www.businessoffashion.com/articles/news-analysis/dior-pulls-sauvage-campaign-from-instagram-after-facing-appropriation-backlash>> accessed 09 December 2021.

Native Americans as relics from the past” and inherently “fueling racism”.²⁴ Gucci faced backlash for selling the “Indy turban” head wrap at Nordstrom for almost \$800 each. The turban, a religious article of faith viewed as sacred by millions of Sikhs around the world, was ripped off by the luxury brand which amounted to cultural appropriation since those wearing them as designer accessories won’t particularly appreciate or acknowledge ‘their deep religious significance’.²⁵

According to a Washington DC-based nonprofit advocacy group ‘Light Years IP’, which specializes in ‘intellectual property value capture’, the ‘Maasai’ brand may be worth more than \$10 million per year.²⁶ The use of the warrior tribe’s iconography and imagery has been seen in many instances of several leading brands like Land Rover for their Maasai advertisement and range of accessories,²⁷ Calvin Klein and Ralph Lauren for their Maasai fabrics, Louis Vuitton for their Maasai line which includes the Basotho Blanket,²⁸ etc. Despite this immense brand value, 80% of the two million Maasai people in East Africa live in below-the-poverty-line conditions and gain negligible benefits from the use of their cultural expression.²⁹ Owing to this lack of credit or compensation, the Maasai Intellectual Property Initiative (MIPI) has been set up to protect the tribe’s interests and cultural integrity.³⁰

The MIPI’s homepage greets the viewers with a fitting proverb, “Esuj erashe ng’ejuk emusana”, which translates to “If an idea is good, it will be copied and followed”³¹. It is critical to create a distinction between inspiration and illegal appropriation in an age where originality is uncommon and nothing is done for the first time, especially in the fashion and creative areas. The present

²⁴ Maanvi Singh, ‘Dior perfume ad featuring Johnny Depp criticized over Native American tropes’, (*The Guardian*, 31 August 2019) <<https://www.theguardian.com/fashion/2019/aug/30/diors-fragrance-ad-draws-criticism-for-featuring-native-american-tropes>> accessed 09 December 2021.

²⁵ Ludwig Hurtado, ‘Gucci’s ‘Indy Turban’ criticized for cultural appropriation’, (*NBC News*, 15 May 2019) <<https://www.nbcnews.com/news/asian-america/gucci-s-indy-turban-criticized-cultural-appropriation-n1005971>> accessed 11 December 2021.

²⁶ Olga Khazan, ‘The Maasai People take back their brand’, (*The Atlantic*, September 2013) <<https://www.theatlantic.com/magazine/archive/2013/09/big-in-kenya/309425/>> accessed 13 December 2021.

²⁷ Tania Phipps- Rufus, ‘Companies accused of exploiting cultural identity of Kenya’s Maasai’, (*The Guardian*, 08 August 2013) <<https://www.theguardian.com/sustainable-business/ethical-exploit-cultural-brands-masai>> accessed 13 December 2021.

²⁸ ‘Borrow do not steal: Louis Vuitton strikes again this time leaving behind the Maasai Shuka for the Basotho blanket’, (*This is Africa*, 19 July 2017) <<https://thisisafrika.me/lifestyle/borrow-not-steal-louis-vuitton-strikes-time-leaving-behind-masai-shuka-basotho-blanket/>> accessed 13 December 2021.

²⁹ Ephrat Livni, ‘The Maasai want their brand back,’ (*Quartz*, 28 January 2017) <<https://qz.com/896520/the-masai-want-their-brand-back/>> accessed 13 December 2021.

³⁰ Latha Jishnu, ‘The Maasai are protecting their intellectual property rights, what of others like India’s Warlis?’, (*Down to Earth*, 15 March 2018) <<https://www.downtoearth.org.in/blog/economy/protecting-a-tribe-s-brand-59857>> accessed 13 December 2021.

³¹ ‘Maasai proverbs’, (*SUPEETMAASAICULTURE*, 22 August 2017) <<https://supeetblog.wordpress.com/2017/08/22/maasai-proverbs/>> accessed 13 December 2021.

times have proved to be challenging for the perpetrators of cultural appropriation to go unnoticed and unquestioned. The advancement in technology has equipped the present generation with much more power and adequate platforms to call out perpetrating brands and voice their concerns. ‘Diet Prada’ is a popular fashion watchdog group that is best known for using social media as a platform for exposing copycats and campaigning for integrity and accountability in the fashion industry.³²

It is pertinent to realize that the problem arises when designers capitalize on another culture’s design practices without giving back in the form of credit and compensation. Emphasis must be laid on finding source material and reflecting on their design processes.

4. PIRACY PARADOX IN INDIGENOUS FASHION

In the fashion industry, copying is quite rampant where a huge variety of creative goods are produced without strong IP protection in contrast to the ever-vibrant innovation and investment. However, what has been observed to be accepted as a norm in the fashion industry is that firms take stiff measures to protect the brand’s value and trademarks but seem quite quiescent about the appropriation of designs. It has been observed over the years that unauthorized copying or appropriation of indigenous designs and expressions has created mistrust-induced friction between source communities and mainstream designers. Unlike other industries, the fashion industry remains quite passive about protecting its designs despite the immense scope for appropriation and copying. What’s unusual about this is that the widespread copying does not seem to deter innovation and in reality, seems to promote it. This rather unusual equation is referred to as the fashion industry’s ‘Piracy Paradox’.

Owing to their ability to mimic designs from high-end brands and names and make them available in the local mass market, fast fashion and low-priced brands such as H&M and Zara have significantly flourished in the industry. Photographs and sketches of newly released designs that appear on runways are sent to Chinese factories where facsimiles of these top-quality high-end products are made at a fraction of the original cost. However, recent studies³³ have shown that weak intellectual property rules have in reality been integral to success in the fashion industry, rather than posing as a hindrance.

In the case of indigenous fashion, the Paradox only seems to work as long as the community is open to commercialization. When it comes to sacred or restricted indigenous fashion, tolerance of unauthorized copying, which is at the heart of the Piracy Paradox, does not appear to exist.

³² Amy Farley, ‘How the Diet Prada cofounders became the fashion industry’s most influential watch dogs’, (*Fast Company*, 22 May 2019) <<https://www.fastcompany.com/90345174/most-creative-people-2019-diet-prada-tony-liu-lindsey-schuyler>> accessed 29 November 2021.

³³ Kal Raustiala, Christopher Jon Sprigman, ‘The Piracy Paradox: Innovation and Intellectual Property in Fashion Design’ (2006) *Virginia Law Review*, Vol. 92, p.1687, UCLA School of Law Research Paper.

Indigenous fashion closed to commercialization owes its restrictions to the sacred nature, customary rules, and practices of the cultural expressions, symbols, and designs. In this restricted sphere, the unauthorized and rather offensive usage of indigenous fashion by outsiders paves the way for public outrage, blacklisting, and boycotting, at least on the part of the source community.

It is comparatively easier to apply the Piracy Paradox in the context of indigenous fashion that is open to commercialization. However, the element of success can only be a relatable prospect for big names and fast fashion brands, even in the context of indigenous fashion that is open to commercialization, if mainstream fashion brands allow the indigenous communities to be more than a mere source of inspiration with benefits in both the artistic as well as economic sense.

5. HOW CAN BRANDS AVOID CULTURAL APPROPRIATION

Amidst the discussions surrounding cultural appropriation, companies, brands, and designers need to understand the process of drawing inspiration without being accused of cultural appropriation. Brands need to keep in mind that studying the success stories and failures of other brands can help them avoid making the same mistakes. One important aspect a brand should keep in mind to avoid controversies is to partner or collaborate with ‘Advocacy Groups’. For instance, following the backlash they received after their ‘Sauvage’ ad campaign, Dior partnered with a non-profit organization named Americans for Indian Opportunity (AIO), which essentially catalyzes Native American initiatives, to create a respectful, more sensitive, and less offensive ad campaign featuring Native American imagery. Dior’s initiative in the right direction, i.e., to create a safe and appreciative space while using cultural expressions of Native Americans by collaborating with an organization designed to create allies for and to advocate the rights and interests of indigenous people, is something to be noted and hopefully followed by brands.³⁴ Reaching out to advocacy groups helps educate brands about the history and significance of different cultures and their imagery.

Following this, it could also prove to be helpful if brands utilize focus groups, in addition to advocacy groups, especially at the time of launching campaigns. Focus groups are essentially market research method that involves a small interview group of demographically similar people who provide feedback and contribute to the research and development of a product, service, or marketing campaign.³⁵ In a 2017 report, it was revealed that the United States alone spends \$809

³⁴ Janice Gassam Asare, ‘How to prevent your company from cultural appropriation’, (*Forbes*, 11 September 2019) <<https://www.forbes.com/sites/janicegassam/2019/09/11/how-to-prevent-your-company-from-cultural-appropriation/?sh=6fddf9583728>> accessed 27 November 2021.

³⁵ ‘What is a focus group?’, (*B2B INTERNATIONAL*) <<https://www.b2binternational.com/research/methods/faq/what-is-a-focus-group/>> accessed 19 November 2021.

million out of a global total of \$2.2 billion on focus groups.³⁶ To avoid offensive and ineffective ad campaigns, brands can use focus groups to garner feedback from their target audience. In addition to this, what could be done on an internal level would be to employ a diverse marketing team. When the advertising and marketing teams are homogenous, there lies a high possibility that the team would be ignorant about the significance and value of cultural norms and history.³⁷ Having a diverse marketing team can help ensure inclusivity and sensitivity when creating products and advertisement campaigns.

Another important aspect brands should consider in avoiding cultural appropriation would be to engage, promote and share the benefits of the inspiration they've drawn with the culture they're adopting from.³⁸ Emphasis is laid on studying, understanding, and engaging with the adopted cultural expression and ensuring that the adoption leads to the promotion of their culture and people and sharing of benefits with them. For instance, the New York's Metropolitan Museum of Art hosted its 2015 Costume Institute Exhibition with the theme, "China: Through the Looking Glass".³⁹ This exhibition proved to be a perfect example of how to use a culture's history, tradition, aesthetics, and expressions without it amounting to illegal appropriation. What was apprehended to be "a minefield for accidental racism" and "a goldmine for the cultural-appropriation police" actually proved to be a monumental moment in the history of fashion as 'appropriation did the right way'.⁴⁰ The organizers of the Gala collaborated with their counterparts and experts from China to ensure every aspect of the event was tasteful, sensitive and did not in any manner disrespect Chinese tradition and history. Apart from this, several celebrities who attended the event were dressed in Chinese designs by several established as well as up-and-coming Chinese designers, thereby promoting and enhancing their tribute to Chinese culture.

Besides actively implementing the aforementioned aspects, brands need to follow the following four principles that comprise non-appropriating behaviour, as laid out by WIPO⁴¹-

1. Understanding and respecting the holders of TCEs.

³⁶ Joseph Stromberg, 'Focus groups shape what we buy. But how much do they really say about us?', (*VOX*, 22 January 2019) <<https://www.vox.com/the-goods/2019/1/22/18187443/focus-groups-brand-market-research>> accessed 19 November 2021.

³⁷ Janice (n 34).

³⁸ 'How to avoid cultural appropriation & promote cultural awareness instead', (*COMMISCEO GLOBAL*) <<https://www.commisceo-global.com/blog/how-to-avoid-cultural-appropriation-promote-cultural-awareness-instead>> accessed 09 December 2021.

³⁹ 'China: Through the looking glass', (*THE MET*) <<https://www.metmuseum.org/exhibitions/listings/2015/china-through-the-looking-glass>> accessed 10 December 2021.

⁴⁰ Jenny Avins, Quartz, 'The Dos and Don'ts of Cultural Appropriation', (*The Atlantic*, 20 October 2015) <<https://www.theatlantic.com/entertainment/archive/2015/10/the-dos-and-donts-of-cultural-appropriation/411292/>> accessed 12 December 2021.

⁴¹ Brigitte (n 16).

2. Acknowledging and giving due recognition to the holders of TCEs.
3. Respectful transformation and reinterpretation of TCEs.
4. Engaging with the holders of TCEs through requests for authorization and collaborative partnerships.

The fashion industry has witnessed countless instances of collaborative partnerships with holders of TCEs, which resulted in big brands successfully avoiding allegations of cultural appropriation. The Christian Dior Cruise Collection 2020⁴² which took place in Marrakech acknowledged and honoured the creativity and talent of African creators of wax print fabrics. These fabrics are made by Uniwax, a company located in Abidjan, Ivory Coast, which is one of the few fabric makers still employing traditional methods. This Collection was a statement indicating the growing awareness and understanding in the fashion industry of the significance of respecting the varied cultures of the world while simultaneously highlighting how the complexities of cultural appropriation can cause change to happen gradually. In the words of Dior's Designer Maria Grazia Chiuri, the collection "proposed a dialogue between the Dior wardrobe and African fashion" and that the Collection was her way of extending support and appreciation for African fashion and the tradition of wax fabric which is constantly under threat from cheap, digitally created copies.

The aforementioned measures and principles help keep fashion brands in check and allow them to meet the expectations of both indigenous groups as well as the public.

6. CONCLUSION AND SUGGESTIONS

While TCEs seem to be the most textbook medium for the protection of cultural expressions, in reality, it is quite impossible to lay down specific boundaries and definitions for them since they're highly subject to public opinion, and other factors like history and sentiments, all of which are highly variable. To add to the complication, cultural appropriation isn't generally recognized by law, and it exists in a grey area where permissible inspiration meets illegal appropriation. In most cases, drawing inspiration from certain cultures and their elements is rarely seen as illegal appropriation as long as there exists consent, credit, and compensation. What has been observed over the years is that indigenous groups are beginning to challenge appropriators and stake claims to their traditional expressions and intellectual property. For instance, New Zealand recently

⁴² Raphael Dautigny, 'Dior 2020 Cruise Collection celebrates Africa' (*LVMH*, 2 May 2019) <<https://www.lvmh.com/news-documents/news/dior-2020-cruise-collection-celebrates-africa/>> accessed 29 November 2021.

ensured that its patent and trademark laws comprise specific provisions for the protection of the Māori.⁴³

An alternative for minority and indigenous groups could be to set up voluntary codes to govern the use of their cultural expressions and intellectual property. This could prove to be an effective measure and might be as powerful as securing IP protection since it is likely that companies may not risk negative publicity since the consumer base is beginning to place emphasis and greater value on the company's ethical practices, and corporate social responsibility. Any sort of negative publicity especially on the lines of cultural appropriation could prove to be catastrophic for the company's image and brand value, as has been the trend in recent times. It is of grave importance that in-depth research on visual languages, the target audience's culture, and the history of the expressions be conducted when using the aesthetics of any culture.⁴⁴

Considering the vast irregularities in the conceptual and legal notions around cultural appropriation, it is of dire importance that a uniform and viable legal framework for the protection of cultural expressions be implemented. Emphasis should be laid on preventing cross-border misappropriation of significant cultural expressions and ensuring that minorities and indigenous communities are in a position to proactively leverage their intangible wealth.⁴⁵ It is therefore concluded that recognizing enforceable rights, developing professional ethical guidelines, and ensuring that every brand is responsible for creating and achieving corporate social responsibility standards, can help foster a harmonious and collaborative relationship between indigenous communities and mainstream fashion brands and designers.

⁴³ 'Māori IP', (*New Zealand Intellectual Property Office*) <<https://www.iponz.govt.nz/about-ip/maori-ip/>> accessed 30 November 2021.

⁴⁴ Molly Long, 'Cultural appropriation: Can designers ever responsibly "borrow" from other cultures?', (*DESIGN WEEK*, 13 March 2020) <<https://www.designweek.co.uk/issues/9-15-march-2020/cultural-appropriation-in-design/>> accessed 07 December 2021.

⁴⁵ Shamnad Basheer, 'Disney can use 'Hakuna Matata'', (*Hindustan Times*, 31 December 2018) <<https://www.hindustantimes.com/analysis/hakuna-matata-trademark-controversy-disney-is-well-within-its-rights-to-do-so/story-TptOiNKVFfyvrb14mtH6tN.html>> accessed 18 November 2021.