BORROWED AESTHETICS OR STOLEN HERITAGE: A LEGAL INQUIRY INTO FASHION APPROPRIATION AND INTELLECTUAL PROPERTY RIGHTS

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ABSTRACT

The global fashion industry has long drawn inspiration from diverse cultures and aesthetics, but this practice often makes it challenging to distinguish between constructive appropriation and destructive infringement.[1] The traditional cultural expressions (TCEs) of various communities are usually not protected by traditional intellectual property (IP) frameworks such as copyright and trademark law. This research examines and reveals the doctrinal gaps that classify communal heritage as falling into the "public domain," which allows for free commercial exploitation, and offers a critical legal analysis of this phenomenon.

It discovers a basic discrepancy between the collective character of traditional knowledge and the individual authorship principles of Western intellectual property. While Alternative frameworks, such as Geographical Indications (GIs), provide partial protection for origin, they fail to protect underlying motifs. Case studies from leading brands show a changing environment wherein public pressure is forcing a move from one-way appropriation toward contested forms of collaboration. To ensure fair partnerships and safeguard cultural heritage, the manuscript concludes that a multi-tiered solution is necessary, combining ethical industry practices such as co-branding, sui generis national laws, and the pursuit of a legally binding international treaty.

Keywords: Cultural Appropriation, Intellectual Property, Traditional Cultural Expressions (TCEs), Fashion Law, Geographical Indications (GIs).

[1] *Curbing cultural appropriation in the fashion industry with intellectual property*, (Aug. 29, 2019), https://www.wipo.int/en/web/wipo-magazine/articles/curbing-cultural-appropriation-in-the-fashion-industry-with-intellectual-property-40880.

I. INSPIRATION OR APPROPRIATION: DRAWING THE LINE IN FASHION

The international fashion industry is a dynamic, cross-border interchange of ideas and aesthetics that is expressed through fabric. However, when inspiration becomes exploitation, this exchange becomes one-sided. When a dominant culture appropriates a marginalized community's traditional clothing, sacred symbols, and generational craftsmanship without consent, acknowledgment, or payment, a boundary is crossed. The act of commodifying heritage and reducing significant cultural expressions to fashionable trends while disregarding their original context and significance is the essence of cultural appropriation.[2] Cultural appreciation, in contrast, is a conversation that is based on respect, with true collaboration, equitable remuneration, and a profound understanding of the culture being celebrated.[3]

This conflict is exacerbated by the fashion industry's constant need for innovation and quick production cycles. A significant incentive is created by the never-ending pursuit of the next "inspiration" to exploit cultural expressions for their aesthetic value, frequently depriving them of their significance and causing substantial damage by trivializing sacred markers. This is a systemic legal failure rather than just an ethical violation. A commercial "gray zone" is created by the legal ambiguity surrounding appropriation, allowing the industry to function with minimal interference.[4] Without explicit legal safeguards, the debate is forced into the court of public opinion, which is a strong platform but rarely offers the justice or reparations that the law is supposed to provide.

II. THE INADEQUACY OF INTELLECTUAL PROPERTY LAW

The inability of intellectual property law to combat cultural appropriation is not just some minor defects but a fundamental and structural misalignment. Laws pertaining to copyright, trademarks, and design patents are based on Western philosophy, which is incompatible with traditional cultural expressions (TCEs).

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[2] *THINK BEFORE YOU APPROPRIATE,* (Jan. 4, 2016), https://www.sfu.ca/ipinch/sites/default/files/resources/teaching_resources/think_before_you_appropriate_jan_2016.pdf.

[3] *Cultural Appropriation in Fashion: A Guide to an Ethical and Sustainable Fashion System*, Dress Ecode (Jan. 30, 2025), https://dress-ecode.com/en/cultural-appropriation-in-fashion-a-guide-to-an-ethical-and-sustainable-fashion-system/.

[4] Ashley N Cloud, *Why Fashion Designs Aren't Protected by Intellectual Property in the U.S. — The Cloud Law Firm*, The Cloud Law Firm (July 31, 2023), https://www.thecloudlawfirm.com/your-fashion-attorney-blog/why-fashion-designs-arent-protected-by-intellectual-property-in-the-us.

A. Copyright Law: The Public Domain Trap

The majority of TCEs are classified as being in the "public domain" by copyright law, which permits appropriation. This happens because of copyright, which temporarily protects "original" works by distinct, individual authors. The fundamental requirements of authorship, originality, and limited duration are not fulfilled by TCEs since they are collectively produced, evolved generations, and are meant to be preserved forever.[5] They are considered "ownerless" and available for use by anybody since they do not have a specific author. In the United States, the "separability" doctrine further restricts protection by only protecting artistic elements that can be distinguished from their function, thereby denying copyright to the entire layout of a "useful article" such as a garment.

B. Trademark Law: The Commercialization Hurdle

For communities whose cultural symbols are identity markers rather than brands, trademark law, which protects source identifiers used "in commerce," creates a barrier to commercialization. Even when a community successfully registers a name, the protection is mainly defensive, and forcing its commercialization can be a violation of cultural values. The fundamental requirement of "novelty" for design patents makes them even less feasible for conventional designs, whose value is derived from their age rather than their novelty. Additionally, the patent process is highly expensive and slow, making it financially difficult for most artisan communities and being totally at odds with the rapidly evolving fashion industry.

Ultimately, the failure of these IP regimes is both philosophical and technical. The foundation of Western intellectual property law is a notion of property that encourages commercial exploitation by granting limited-term monopolies and rewards individual labor.[6] The viewpoint that underpins many indigenous cultures, where knowledge is held together, stewardship has significance over ownership, and preservation is given precedence over commercialization, is essentially in contradiction with this ideology. This collective, inherited creativity becomes legally invisible when it encounters the IP system. When there is no single "author" or "inventor," the work is ownerless and enters the public domain, where it is open for

[5] *Copyright Law : Its Implications on Protection of Traditional Handicrafts*, https://bnblegal.com/article/copyright-law-implication-protection-traditional-handicrafts-india/.
[6] Lorraine Pinsent, *Protecting Indigenous traditional knowledge through trademarks*, MLT Aikins (Apr. 1, 2025), https://www.mltaikins.com/insights/protecting-indigenous-traditional-knowledge-through-trademarks/.

appropriation. This shows that merely changing the laws that are already in place is not enough; the system cannot defend what its core principles reject.

III. REAL-WORLD DISPUTES AND LEGAL REALITIES

The theoretical shortcomings in intellectual property law stand out clearly when viewed through examples of real disputes. Significant litigations and public controversies involving major fashion brands and indigenous communities are revealing the inadequacies of the current system, how communities are forced to respond, and the first signs that corporations are changing their behaviour in response to growing legal and reputational risk.

A. Navajo Nation v. Urban Outfitters (US)[7]

In 2012, Urban Outfitters was sued by the Navajo Nation for using the "Navajo" name on offensive items such as the "Navajo Hipster Panty."[8] The Nation's legal approach circumvented copyright by utilizing its more than 80 registered trademarks and the Indian Arts and Crafts Act (IACA), which forbids deceptively advertising products as "Indian produced." After years of litigation, a settlement was reached in 2016, after Urban Outfitters agreed to work with the Nation on a new line of authentic jewellery. This partial success shows how, in the right circumstances, there can be an effective legal strategy pursued based on multiple approaches. This case, however, is unique in judicial history, as the Nation also has the necessary resources to pursue these claims and the IACA law that provided another basis for claims that would not be available to most other communities.

B. Louis Vuitton and Maasai Heritage

Over 1000 companies, including Louis Vuitton in its 2012 collection, have utilized the traditional red-and-blue checked shuka of the Maasai people without their consent or compensation. The Maasai believed their cultural brand was worth millions in annual licensing fees in the public domain because they lacked registered trademarks and special protection laws, unlike the Navajo Nation. [9]In response, the community established the Maasai

[7] *Navajo Nation v. Urban Outfitters (US),* 935 F. Supp. 2d 1147.
[8] *Navajo Nation, Corp. v. Urban Outfitters, Inc. – Case Brief Summary – Facts, Issue, Holding & Reasoning – Studicata*, https://www.studicata.com/case-briefs/case/navajo-nation-corp-v-urban-outfitters-inc.
[9] Caitlin Jeffrey, *The Loss of Profit: The Use of Maasai Culture for the Gain of Louis Vuitton & Valentino*, (May 9, 2022), https://digitalcommons.lindenwood.edu/theses/85/.

Intellectual Property Initiative (MIPI) to demand licensing agreements. In situations where formal law offered no remedy, the MIPI used ethical arguments and public pressure.

C. Dior and Mexican Embroidery

Dior and other luxury brands have been repeatedly accused of using embroidery artwork that is precisely identical to that of Mexican artisan communities. Dior switched to a "collaboration" model for its 2024 Cruise collection, collaborating with local artisans in response to public and governmental pressure.[10] The decision was contentious, as some artisans criticized the collaboration as a front for appropriation and claimed that their traditional clothing was altered and passed off as Dior's creation without their actual consent. The case displays the complicated distinctions between equitable partnership and unilateral appropriation.

D. The 'Scandinavian Scarf'

In 2025, Western influencers rebranded the traditional South Asian dupatta as a "Scandinavian scarf" as part of a viral social media trend, which is a clear example of decontextualization.[11] The garment's rich cultural heritage as a representation of modesty and tradition in nations like India and Pakistan was lost due to its renaming on platforms such as TikTok. The dispute brought to light a common trend in which cultural practices that have been derided by South Asians are praised after being embraced by Western elites. This instance serves as an example of a type of appropriation that is almost impossible to stop using the current IP law. There was no copyright or trademark infringement because the name "dupatta" was not used, and the fashion of wearing a garment is not protected by rights.

V. EXPLORING ALTERNATIVE AND SUI GENERIS REGIMES

A worldwide search for alternative and sui generis (of its own kind) legal frameworks has been ongoing for decades in response to the evident shortcomings of traditional intellectual property law. The objective of these initiatives is to establish frameworks that acknowledge the distinctive qualities of traditional cultural expressions (TCEs), especially their

[10] Camila Barbeito, *Fans Are Torn Over Dior's Mexico Show Honoring Frida Kahlo*, (May 22, 2023), https://wearemitu.com/wearemitu/culture/dior-mexico-show-frida-kahlo/.
[11] Economic Times, *Is the 'Scandinavian scarf' just the Indian 'dupatta' in disguise? The latest fashion appropriation after Bandhani and Pashmina*, The Economic Times (May 5, 2025), https://economictimes.indiatimes.com/magazines/panache/is-the-scandinavian-scarf-just-the-indian-dupatta-in-disguise-the-latest-fashion-appropriation-after-bandhani-and-pashmina/articleshow/120896135.cms?from=mdr.

intergenerational and collective character. The creation of an international legal framework for TCEs and the use of Geographical Indications (GIs) are the two main approaches.

A. Global Treaty for Traditional Cultural Expressions (TCEs)

The World Intellectual Property Organization (WIPO) is at the forefront of the most significant effort to develop a customized international system for safeguarding traditional heritage. TCEs, or "expressions of tradition," are defined by WIPO as the tangible and intangible manifestations of traditional culture, such as artwork, patterns, names, signs, and symbols that have been handed down through the ages.[12] The objective is to develop a sui generis, or specially designed, global legal mechanism that guards against infringement and abuse of these expressions. By acknowledging the collective ownership rather than individual authors, providing protection that could be perpetual rather than time-limited, and providing protection against unapproved commercial use or disparaging treatment that damages a community's reputation, such a treaty would address the fundamental shortcomings of copyright.

The primary forum for negotiating this instrument since 2000 has been WIPO's Intergovernmental Committee (IGC). Although the process has been stagnant, the WIPO Treaty on Intellectual Property, Genetic Resources, and Associated Traditional Knowledge was adopted in May 2024, marking a significant turning point. It establishes a strong precedent and gives momentum to ongoing negotiations on a parallel instrument devoted to TCEs because it is the first WIPO treaty to contain specific provisions for Indigenous Peoples.

B. Geographical Indications (GIs) for Handicrafts

The Geographical Indications (GIs) framework is an even more easily accessible, although not perfect, tool. Products with a specific geographical origin and a quality, reputation, or other attribute that is primarily related to that origin are designated with a geographical indication (GI).[13] The GI framework is becoming increasingly applied to textiles and handicrafts, despite being most frequently linked to agricultural products. Industry groups from a particular area can apply for a GI tag by outlining the distinctive features of the product and the production standards associated with that area. The name serves as an indication of authenticity and quality

[12] Constanza Marcus, *The Indigenous World 2025: World Intellectual Property Organization (WIPO)*, International Work Group for Indigenous Affairs (Apr. 25, 2025), https://iwgia.org/en/world-intellectual-property-organization-wipo/5722-iw-2025-wipo.html.
[13] *All about Geographical Indication Act, 1999*, https://thelegalschool.in/blog/geographical-indication-act.

and can only be used by authorized producers in that region after it has been registered. By enabling them to demand higher prices and distinguish their goods from replicas, this collective right can economically empower artisans.

Despite their usefulness, GIs have a major drawback when it comes to fashion appropriation: they only protect the name, not the style itself. If the designer does not use the protected name, a GI protects the name that is associated with the origin (such as "Kutch Embroidery") but does not stop them from copying the style, patterns, or techniques. The difficulty of registering and the weak enforcement of laws against infringement, especially in global marketplaces, are additional difficulties.

VI. NATIONAL FRAMEWORKS: A COMPARATIVE JURISDICTIONAL ANALYSIS

To safeguard TCEs, nations have implemented a variety of measures, ranging from reinterpreting current legislation to developing innovative, hybrid frameworks. A range of potential solutions for reforming the law is revealed through the comparison of these approaches.

A. The Indian Framework: A Patchwork of Potential

India, with its vast array of traditional artistic traditions, depends on a variety of legal instruments that provide substantial, albeit unrealized, protection potential.

- **Geographical Indications (GI) Act, 1999:** With over 600 GIs registered, many of which are for handicrafts like Madhubani and Warli paintings, this is India's most important piece of legislation for preserving locally produced crafts.[14] When Prada released a sandal that was almost the same as the GI-tagged Kolhapuri chappal, it demonstrated that, despite its success in differentiating the market, its protection is restricted to the name and origin rather than the visual style itself.

- **Copyright Act, 1957:** This law has provisions that are open to interpretation. Traditional motifs may be included in the broad definition of "artistic work" given in Section 2(c). The primary hurdle is Section 17, which grants copyright to a single "author," which is inconsistent with traditional art's collective nature.[15] However, if read to support

[14] *Geographical Indications of India*, https://ibef.org/discover-india/giofindia-2025.
[15] Hemakshi Prabhu, *Indian Folk Art and Traditional Works: Copyright vs. Cultural Misappropriation*, ATB

"community moral rights," Section 57, which gives authors perpetual "moral rights," offers radical potential by enabling a collective to protest disparaging uses of their heritage.

- **Framework for Tribal Rights:** Although not specifically IP tools, India's constitutional and legislative framework for tribal rights offers a solid philosophical foundation for safeguarding intangible cultural heritage. Stronger legal protection for TCEs can be argued for by citing provisions such as Article 29 (right of minorities to conserve their culture) and the Fifth and Sixth Schedules, which uphold the idea of community rights over heritage.

B. International Models: Towards Sui Generis Protection

Other Commonwealth countries have created simplified strategies, providing practical reform models.

- **Australia:** The dual-track system is used in Australia. To protect the aesthetic appeal of new products, including textiles with indigenous designs, it makes use of traditional Design Rights under the Designs Act 2003[16]. Significantly, this is complemented by significant, albeit non-binding, ethical standards like the "Protocols for using First Nations Cultural and Intellectual Property in the Arts," which establish a national benchmark for civil interaction.

- **New Zealand:** The Treaty of Waitangi, which ensures Māori control over their treasures (taonga), has constitutional significance, and New Zealand's approach is unique in that it formally integrates indigenous principles into the state's intellectual property apparatus.[17] A cultural impact assessment has been incorporated into the IP granting process through the establishment of Māori Advisory Committees under the Trade Marks Act and Patents Act. These committees are consulted whenever an application includes Māori text or imagery.

- **Canada:** The legal system in Canada received a lot of criticism for failing to safeguard Indigenous knowledge's collective character. Nonetheless, the Canadian debate has highlighted how crucial it is to acknowledge Indigenous customary laws as a separate and

Legal (July 7, 2025), https://atblegal.com/blog/intellectual-property-laww/folk-art-traditional-works-copyright-gi-tag-moral-rights/.

[16] *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions - Study #1*, (Sept. 22, 2005), https://www.wipo.int/edocs/pubdocs/en/tk/781/wipo_pub_781.pdf.

[17] Buchanan, *New Zealand: Maori Culture and Intellectual Property Law*, (Dec. 8, 2010), https://tile.loc.gov/storage-services/service/ll/llglrd/2018298829/2018298829.pdf.

valid legal framework that regulates the use of cultural expressions.

A critical pattern emerges from a comparative perspective. Systems that attempt to incorporate indigenous heritage into a strict Western intellectual property framework are not the most progressive. Rather, they are hybrid models that either formally incorporate indigenous legal principles and consultation into the state's decision-making process (New Zealand) or develop parallel ethical frameworks (Australia). Although India's GI-centric strategy is a useful economic instrument, it does not adequately address the more fundamental problems with cultural integrity that these alternative models are facing.

VII. POLICY RECOMMENDATIONS AND THE WAY FORWARD

Creating a path that supports artistic expression while safeguarding cultural heritage requires a multi-faceted approach that goes beyond the limitations of any one legal regime. The response is in a positive amalgamation of international human rights standards, fresh industry practices, and focused legal reforms at national and international levels.

A. National Level:

1. **Enact a Sui Generis Law for TCE Protection**: India must create a stand-alone law specifically aimed at safeguarding TCEs. This law should create a national digital registry of TCEs, establish explicit guidelines for access and benefit-sharing based on the Free, Prior, and Informed Consent (FPIC) principle, and offer both criminal and civil penalties for misappropriation, all of which are modelled after the WIPO draft provisions and the models of Australia and New Zealand.[18] This legislation must acknowledge collective ownership, designate the community as the owner of the rights, and give it the authority to stop the unapproved commercial use and disparaging treatment of its cultural heritage.

2. **Amend the Copyright Act, 1957 to Acknowledge Community Rights**: To get around the restriction of individual authorship, the Act should be amended to specifically acknowledge the idea of collective or community ownership of TCEs.[19]Additionally, a

[18] Robert B Burlingame, *Navajo Trademark Suit Against Urban Outfitters-Tribe Names Aren't Free*, https://www.pillsburylaw.com/en/news-and-insights/caution-tribal-names-not-a-free-for-all.html.
[19] Hemakshi Prabhu, *Indian Folk Art and Traditional Works: Copyright vs. Cultural Misappropriation*, ATB Legal (July 7, 2025), https://atblegal.com/blog/intellectual-property-laww/folk-art-traditional-works-copyright-gi-tag-moral-rights/.

clause establishing "community moral rights" under Section 57 needs to be inserted, enabling communities to file complaints against cultural heritage uses that harm their reputation or collective honour.

3. **Strengthen the Geographical Indications Act, 1999**: The Act's enforcement procedures need to be strengthened while keeping its provenance-focused emphasis. In international markets where the GI tag's effectiveness is limited, the government should fund consumer and artisan awareness campaigns and create a more efficient procedure for dealing with infringement.

B. International Level:

1. **Finalize a Binding WIPO Treaty on TCEs:** To finalize a legally binding international agreement on the protection of TCEs, member states must pledge to expedite negotiations at the WIPO IGC. Consensus can be reached, as demonstrated by the 2024 treaty on Genetic Resources' successful adoption. An international standard and a legal foundation for overseas enforcement against appropriation would be established by such a treaty.

2. **Leverage UNESCO Frameworks for Accountability:** To exert public and diplomatic pressure on governments and businesses that disregard cultural heritage, countries should make greater use of the reporting and oversight procedures provided by the 2003 and 2005 UNESCO Conventions. [20]These agreements offer the normative basis for arguing that cultural appropriation is not only a commercial law issue but also a matter of human rights and cultural preservation. law.

C. Industry Level

1. **Adopt Industry-Wide Codes of Conduct:** Organizations that represent the fashion industry should create and disseminate legally binding codes of conduct that are founded on the "Four C's": Credit (offering transparent attribution), Compensation (ensuring equitable benefit-sharing), Collaboration (forming equitable partnerships), and Consent (obtaining FPIC).

[20] *The UNESCO Convention*, sterreichische UNESCO-Kommission https://www.unesco.at/en/culture/diversity-of-cultural-expressions/the-unesco-convention.

2. **Establish Standardized Licensing Templates:** The industry must draft model licensing agreements in collaboration with legal professionals and native representatives. Through the definition of the scope of use, royalty structures, and quality control, these frameworks would offer a fair and legally sound foundation for collaborations, while minimizing power disparities and legal ambiguity.

VIII. CONCLUSION

Traditional intellectual property law is inherently unable to prevent appropriation of indigenous and local communities' traditional cultural expressions. These expressions are relegated to an unprotected "public domain" because its guiding principles, i.e., individual authorship, novelty, and limited-term protection, are essentially at odds with the collective, generational, and timeless nature of cultural heritage. Alternative frameworks, such as Geographical Indications, are useful for safeguarding economic interests and provenance, but they fall short in preserving the fundamental aesthetic motifs and styles that form the core of cultural identity.

The examination of significant case studies indicates a significant change in the landscape. Due to of the growing legal and reputational risks illustrated in cases such as Navajo Nation v. Urban Outfitters, the instances of unrestrained appropriation are coming to an end, not because of legislation that restricts it. As an outcome, the fashion industry is shifting toward a "collaboration" model. But this change creates new challenges because the struggle is presently about settling the conditions of these collaborations to make sure they are fair and not just a more advanced kind of exploitation, rather than preventing outright theft.

Ultimately, no one piece of legislation provides an exhaustive solution. A plurilateral strategy that incorporates multiple tiers of governance is the most practical approach. A legally binding international treaty on TCEs must be finalized to facilitate cross-border enforcement. Additionally, national sui generis laws that acknowledge collective rights must be enacted, and ethical business practices, such as transparent licensing and co-branding, must be widely implemented. The fashion industry can move from a system of appropriation to a framework of genuine, respectful, and equitable collaboration through this dynamic interaction between private contracts, market ethics, and public law.