

Inspiration Versus Exploitation: Traditional Cultural Expressions at the Hem of the Fashion Industry

Elizabeth M. Lenjo

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Repository Citation

Elizabeth M. Lenjo, *Inspiration Versus Exploitation: Traditional Cultural Expressions at the Hem of the Fashion Industry*, 21 Marq. Intellectual Property L. Rev. 139 (2017).

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INSPIRATION VERSUS EXPLOITATION: TRADITIONAL CULTURAL EXPRESSIONS AT THE HEM OF THE FASHION INDUSTRY

ELIZABETH M. LENJO*

ABSTRACT

The fashion industry is a multitrillion dollar global industry. In 2016, consumers in the United States of America alone, spent almost \$380 billion on apparel and footwear.¹ Some may deride the fashion industry as lacking substance and mere “fluff,” but the numbers validate that it is important and extremely valuable “fluff.” After all, clothing and footwear are human necessities and are the main output from this sector that spans from high-end luxury brands to low-end necessities.

Clothing and fashion help define a culture and reflect individual identity. Throughout most of human history, regional variations in style and clothing served as cultural markers. Some might slowly influence other cultures, thus spreading from one culture to another. However, in an age of globalization, one cultural cue from one group can spark creativity to a fashion line and show up on a Paris runway.

The Maasai “*Shuka*,”² the Louis Vuitton 2012 Spring Collection,³ and

* The author is a practicing lawyer in Kenya specializing in intellectual property and entertainment law. This paper was greatly inspired by the vibrant fashion industry in Kenya and around the world. The author thanks her husband Al, son Harry and sister Tecla, without whose support this Master of Laws (WIPO-Turin) program would not be possible; her parents for making sure she survived the Italian winter; the University of Turin and WIPO team for their guidance and without forgetting her paper advisor Marc Randazza who has been instrumental in making this research journey a pleasant and fulfilling one.

1. STAFF OF JOINT ECON. COMM., 114TH CONG., THE ECONOMIC IMPACT OF THE FASHION INDUSTRY (Sept. 2016), https://www.jec.senate.gov/public/_cache/files/2757cd22-0d16-4599-9586-8b2aef63cd2c/fashion—september-2016.pdf [<https://perma.cc/CM82-5ULV>].

2. “Shuka” is Kiswahili for a cloth wrapped around the body. The Maasai believe that the combination of colors and the patterns represent their identity as a community.

3. Tim Blanks, *Spring 2012 Men's Wear Louis Vuitton*, VOGUE (June 22, 2011), <http://www.vogue.com/fashion-shows/spring-2012-menswear/louis-vuitton#coverage> [<https://perma.cc/V2V9-XDAM>].

Beyoncé’s Indian Desi⁴ inspired music video brought the issue of traditional cultural expressions to the surface of social media. In reaction to this, several proponents of traditional knowledge and cultural expressions shared their opinions on social media about the need for compensation and recognition of such intellectual property rights for communities whose culture is exploited for commercial gain. This is arguably a valid reaction judging from the value of the fashion industry on a global economy scale.

However, the fashion industry must address the role of culture in the fashion business—and we must determine where we draw the line between “inspiration” and “exploitation,” and most importantly, when compensation is due. Traditional knowledge and cultural expressions are attempting to come into their own as intellectual property rights. Thus, we must focus the presently blurred line for the fashion industry to avoid frivolous claims that will undoubtedly affect this economically lucrative industry.

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4. Helena Horton, *Beyoncé Criticized For ‘Cultural Appropriation’ In New Music Video with Coldplay and Sonam Kapoor*, THE TELEGRAPH UK (Jan. 29, 2016), <http://www.telegraph.co.uk/music/news/beyonc-criticised-for-cultural-appropriation-in-new-music-video/> [<https://perma.cc/2AVL-VZ4Y>].

I. INTRODUCTION

A. Existing Intellectual Property Regimes

To contextualize the subject matter, it is important to briefly capture the basic background information about intellectual property. Intellectual Property (IP) refers to the intangible products of the mind which include inventions, literary and artistic works, designs, performances, names, symbols and signs as well as plant varieties.⁵

The established IP regimes are patents, copyright, industrial designs, trademarks and trade secret protection. One of the theories of IP⁶ is based on the need to incentivize creators and inventors so that they invest more in innovations which in turn make life easier for humankind. Without incentives for inventors, there would be no innovative products as we know them today. These incentives include the opportunity for an inventor to recover their initial costs accrued to create or invent.

Copyright⁷ is a protection granted to an author to control copies of his works for the author's lifetime plus fifty to seventy years depending on the jurisdiction. Some of the works protectable by copyright include songs books, paintings, photographs, sculptures and even choreography. This protection also extends to derivatives of such mentioned works. Copyright also grants the author paternity rights and right to integrity of the works which are jointly referred to as moral rights.

Industrial design⁸ is protection granted to the artistic and design aspect of a product, which determines the product's appearance. In some laws, it is protection granted to the combination of colors, shapes and lines in a product. This protection extends to products, including but not limited to food, garments, household appliances, jewelry, toys among others.

A trademark⁹ is an exclusive right to use a distinctive sign, symbol, name or a combination of any of these to an individual, company or group of people in regard to production of goods or services. For groups, people, or communities, such marks are referred to as collective marks and certification marks. Distinctiveness of a name, symbol or sign is important in relation to a good or service. Where such is descriptive of the good or service, an owner's claim to the trademark right is likely to fail.

5. Frederick Abbott, Thomas Cottier, & Francis Gurry, *International Intellectual Property in AN INTEGRATED WORLD ECON.* 8 (3d ed. 2015).

6. David Fagundes & Jonathan Masur, *Costly Intellectual Property*, 65 VAND. L. REV. 677, 721–22, 727 (2012).

7. Abbot, et al., *supra* note 5, at 10.

8. *Id.* at 11.

9. *Id.* at 9.

Geographical indications¹⁰ (GIs) are protections granted to signs used on goods that have a specific geographical origin which possess qualities, reputation or characteristics that are attributable to the place of origin. GIs generally include the good's place of origin. Under GIs, there is also a special form of protection known as Appellations of Origin. They consist of a geographical name or a traditional designation used on products that have a specific quality or character due to a geographical environment, such as *Elets* lace from the Russian Federation and *Gračanicko Keranje* lace and crocheted dolls from Gračanicko.

Patents¹¹ are the highest form of protection that grants an exclusive right to an invention which is a product or process that provides a new way of doing something or a new technical solution to a problem. For an invention to be patentable, it must be novel, have inventive step and industrial application. In other jurisdictions, it must be new, useful and non-obvious.

Trade secret¹² protection is granted to information or technological know-how that provides a competitive edge to a business entity. Such information is basically kept secret or is unavailable to the public. Where a trade secret is violated, it results in an unfair competition claim. A trade secret ceases to be one, if it is protected by patent because a patent is granted in exchange for public disclosure.

These existing forms of intellectual property will help contextualize the question of protecting traditional cultural expressions and whether there is need for a *sui generis*¹³ approach.

B. What are Traditional Cultural Expressions? What is the link with the Fashion Industry?

There is no precise definition of Traditional Cultural Expressions which previously was implied to be synonymous to Traditional Knowledge (TK).¹⁴

10. *Id.* at 12.

11. *Id.* at 8.

12. *Id.* at 13.

13. Latin for its own kind, and used to describe a form of legal protection that exists outside typical legal protection—that is, something that is unique or different. See WORLD INTELLECTUAL PROP. ORG. [WIPO], *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Elements of a Sui Generis System for the Protection of Traditional Knowledge*, ¶¶4–5, WIPO/GRTKF/IC/3/8 (Dec. 9–17, 2002), http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_8.pdf [<https://perma.cc/M5ZU-48F3>].

14. See *Traditional Knowledge*, WIPO, www.wipo.int/tk/en/tk/ [<https://perma.cc/6YCV-5FUG>] (last visited Feb. 24, 2017). Traditional Knowledge (TK) is differentiated from Traditional Cultural Expressions. TK is defined by WIPO as a living body of knowledge that is developed, sustained and passed on from generation to generation which includes know-how, skills, innovations and practices. For example, a tie and dye method for decorating fabrics or a crocheting technique to

Since then, there have been a few attempts to define Traditional Cultural Expressions (TCEs) by international instruments. On the national level, most countries have absconded from a definition. With little universal agreement on what these rights are, and how they can be enforced, ambiguity may be by design—so that these rights can evolve without unintended consequences.¹⁵

One of the earliest international instruments, the UNESCO-WIPO Model Rules,¹⁶ uses the terms “traditional cultural expressions” and “folklore” in a synonymous context. In similar fashion to a majority of legal instruments, as opposed to defining the term, the Model Rules provides a list of traditional cultural expressions. In section two of these Model Rules, the drafters attempt to define folklore as “productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community.”¹⁷ This definition is quite solid compared to definitions attempted by later instruments, but at the same time, in this current context, it leaves one hankering for a further definition of the word “traditional” or “tradition.”

The Cambridge Dictionary defines “traditional” as “following or belonging to the customs or ways of behaving that have continued in a group of people or society for a longtime without changing.”¹⁸ A further look into the noun “tradition” defines it as “following or belonging to the customs or ways of behaving that have continues in a group of people or society for a long time without changing.”¹⁹ This article will examine these definitions vis-à-vis the issue of globalization and the dynamic nature of culture, customs and tradition, whichever synonym preferred.

The World Intellectual Property Organization states “[t]raditional cultural expressions may include music, dance, art, designs, names, signs and symbols,

make jewelry qualify as traditional knowledge. *Id.*

15. The conversation on asserting traditional cultural rights has been under discussion as early as 1967 with the introduction of Article 15(4) of the Berne Convention and later in 1972 with the drafting of the Tunis Model Law on Copyright. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last amended Sept. 28, 1979, 25 U.S.T. 1341 [hereinafter Berne Convention]; UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORG. [UNESCO] & WORLD INTELLECTUAL PROP. ORG. [WIPO], *Tunis Model Law on Copyright Law for Developing Countries* (1976).

16. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORG. [UNESCO] & WORLD INTELLECTUAL PROP. ORG. [WIPO], *Model Provisions for National Laws on the Protection of Expression of Folklore Against Illicit Exploitation and Other Prejudicial Actions* (1985), <http://www.wipo.int/export/sites/www/tk/en/folklore/1982-folklore-model-provisions.pdf> [<https://perma.cc/G5V5-MPFW>].

17. *Id.* at 17.

18. See *Meaning of “traditional” in the English Dictionary*, CAMBRIDGE DICTIONARY, <http://dictionary.cambridge.org/dictionary/english/traditional> [<https://perma.cc/3K2V-ZAA9>].

19. *Id.*

performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions.”²⁰ The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions under article 4 (3) defines “cultural expressions” as “those expressions result[ing] from the creativity of individuals, groups and societies and that have cultural content.”²¹

Since ancient times, garment and jewelry makers have adorned their works with cultural expression.²² Some, if not most, of these elements of traditional cultures were not so eminent in the way people dressed. For example, when one looks at the evolution of western fashion within the last fifty years, fashion has a “modern” approach,²³ which has been carried on and transferred to the various colonies acquired by western European countries.

With the imposition of Western culture on the colonies, for a period, anything “traditional” was viewed as “uncivilized.” Fast forward to the twenty-first century, traditional cultural expressions are now in vogue – almost a token of virtue among the so-called “civilized.” The colonized once mimicked the colonizers, and now, the former colonizers imitate, honor, or “dress up” as the colonized—depending upon the perspective.²⁴

These traditional expressions have come to play an ornamental role and have become a marketing imperative for many fashion brands, whether locally in their respective countries or internationally. As such, we have seen flair from various indigenous and pre-industrial cultures making a comeback on the catwalk, in fashion magazines, and have trickled down to day-to-day apparel.²⁵

20. *Traditional Cultural Expressions*, WIPO, <http://www.wipo.int/tk/en/folklore/> [https://perma.cc/R9UC-WG4R]. See also WORLD INTELLECTUAL PROP. ORG. [WIPO], *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions* (2015), http://www.wipo.int/edocs/pubdocs/en/tk/933/wipo_pub_933.pdf [https://perma.cc/SD4Z-6ADY].

21. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORG. [UNESCO], *Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005*, art. 4(3), adopted Oct. 20, 2005, entered into force Mar. 18, 2007, <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf> [https://perma.cc/77KE-JQ8Y].

22. See e.g., Harold Koda, *The Chiton, Peplos & Himation in Modern Dress*, THE METROPOLITAN MUSEUM OF ART (Oct. 2003), http://www.metmuseum.org/toah/hd/god3/hd_god3.htm [https://perma.cc/V43H-N78N].

23. See *Over Seventy Years of Fashion History – How Fashions Have Changed Since the 1920’s*, THE PEOPLE HISTORY, <http://www.thepeoplehistory.com/fashions.html> [https://perma.cc/W5HE-QJFP] (last visited Feb. 24, 2017).

24. See *Encyclopedia of Clothing and Fashion – Colonialism and Imperialism*, ANGELASANCARTIER.NET (Apr. 2, 2010), <http://angelasancartier.net/colonialism-and-imperialism> [https://perma.cc/4VB9-3S38]. During the colonization period in Africa, the Europeans through missionaries introduced modern clothing because they found their way of dressing backward and uncivilized as it was characterized by a hint of nudity. Slowly, indigenous people were assimilated into the new form of dressing introduced. *Id.*

25. See e.g., Steff Yotka, *A 10-Point Guide to Dolce & Gabbana’s Sicilian Inspirations*,

With this growing recognition of the marketing power of traditional knowledge and a consciousness of traditional cultural expression being recognized as community rights, we must examine how to deal with the two together. Traditional Knowledge (TK) and genetic resources are the subject of much study. For example, the benefit sharing approach under the Convention on Biodiversity²⁶ requires that the consent of the owners of a genetic resource be sought and the associated TK be accessed and utilized to preserve the resources.²⁷ However, this could be considered a quasi-patent right in the TK realm. Additionally, attention should also be paid to the cultural natural resources held by traditional communities.

A recent case in the United States is probably the most reported and studied example of the enforcement of these types of rights. *Navajo Nation v. Urban Outfitters Incorporated*²⁸ shows the potential for protection when traditional knowledge and cultural expression rights are meshed with existing intellectual property regimes. In the United States, the Navajo nation is commonly called an “Indian reservation.” However, the official status is that of a “Dependent Nation,”²⁹ which enjoys a large degree of sovereignty, but remains dependent upon the United States. The Navajo Nation does not refer only to land, but to the Navajo people. The Navajo Nation case involved the use of the name “Navajo” in a derogatory manner “Navaho” and the use of the “Navajo Print Fabric Wrapped Flask” by the defendants. This was considered particularly insensitive because Navajo culture taboos the consumption of alcoholic beverages. The Navajo Nation has a registered trademark for the name “Navajo” in the relevant classes concerning apparel and additionally, they continue to use their prints to date for their apparel. This case was eventually settled out of court,³⁰ although the contribution of the “Navajo” registered trademark would have solidified the Navajo Nation’s case. This shows the potential for a community to successfully secure its rights using existing IP

VOGUE, (Feb. 27, 2016), <http://www.vogue.com/article/dolce-and-gabbana-sicilian-references> [<https://perma.cc/2SZM-23CF>].

26. United Nations Convention on Biological Diversity, *opened for signature* June 5, 1992, entered into force Dec. 29, 1993), 1760 U.N.T.S. 30619.

27. Tesh Dagne, *Protecting Traditional Knowledge in International Intellectual Property Law: Imperatives for Protection & Choice of Modalities*, 14 J. MARSHALL REV. INTELL. PROP. L. 25, 40 (2014).

28. *Navajo Nation v. Urban Outfitters*, 935 F. Supp. 2d 1147, 1155 (D.N.M. 2013).

29. *See Treaty Between United States of America and Navajo Tribe of Indians*, June 1, 1868, 15 Stat. 667.

30. Press Release. Office of the President and Vice President of Navajo Nation, The Navajo Nation and Urban Outfitters, Inc. Announce a Settlement Agreement (Nov. 17, 2015), http://www.navajo-nsn.gov/News%20Releases/OPVP/2016/nov/The%20Navajo%20Nation%20and%20Urban%20Outfitters_Inc_Announce%20a%20Settlement%20Agreement.pdf [<https://perma.cc/P7EZ-42DW>].

regimes in traditional cultural expressions.

C. Protection of Traditional Cultural Expressions (TCE)

Traditional cultural expressions are integral to cultural and social identities of indigenous communities. They embody ways of expression, know-how skills, and transmit core values and beliefs.³¹ For example, the Maasai say that the combination of colors in their jewelry and clothes communicate the status of a member of a community.³² However, is this enough justification to seek intellectual property protection or some semblance of it through a *sui generis* system?

To effectively create a regime to protect traditional cultural expressions, we must find a way to effectively define them, and must come up with a workable mode of implementation of the desired protections. If legislation creates more ambiguity and superfluous protections, more harm than good will come from it—both for freedom of expression³³ and for protection of TCEs.

As the conversation begins about justifying traditional cultural expressions, we must distinguish what is original and what is assimilated by a community. Legislators must consider assimilation when answering the “what” and “how” of the protection question. Pre-colonial and early post-colonial barter trade is a good example of a factor that promoted assimilation of other cultural expressions by their trading counterparts.

This poses a challenge to what communities can claim where cultural expressions are concerned. How would a community justify certain types of traditional cultural expression? As we have the conversation about a traditional knowledge and cultural expressions registry,³⁴ it is necessary that these considerations are factored. The Zulu of South Africa have attempted to document³⁵ their cultural expressions on various online sources, which forms a

31. WIPO, *Traditional Cultural Expressions*, *supra* note 20.

32. Maasai Warriors wear red to signify bravery from the danger they face from protecting their homesteads from wildlife. See *Maasai Women*, MAASAI IP INITIATIVE (Nov. 4, 2016), <http://maasaiip.org/2016/11/04/maasai-women/#more-13> [<https://perma.cc/VN5C-DVAE>]; see also *Certain Shapes and Colours Connote a Certain Meaning*, ZULU BEADWORK CULTURE, <http://zulubeadculture.weebly.com/symbols-and-meanings.html> [<https://perma.cc/SUM5-5X6Q>] (last visited Feb. 25, 2017).

33. Marc J. Randazza, *Freedom of Expression and Morality-Based Impediments to the Enforcement of Intellectual Property Rights*, 16 *NEV. L.J.* 107, 139 (2015).

34. Thomas J. Krumenacher, *Protection for Indigenous Peoples & their Traditional Knowledge: Would a Registry System Reduce the Misappropriation of Traditional Knowledge?* 8 *MARQ. INTELL. PROP. L. REV.* 143 (2004).

35. *Zulu Royal Warrant System*, ZULU IP MGMT., <http://zuluip.org/zulu-royal-warrant-system> [<https://perma.cc/6L5T-X92N>] (last visited Feb. 24, 2017); see *Certain Shapes and Colours Connote a Certain Meaning*, *supra* note 32.

good base for a starting point to identify ownership of cultural expressions. However, even their “traditions” are far more complicated than an unbroken line of tradition.

For example, Maasai beads were once made from locally available materials like clay, bones, brass, wood and copper. After European contact, the Maasai adapted and introduced glass beads and later plastic beads. The same Europeans colonized other parts of Africa and introduced the same beads to other communities, for example, to the Zulu whose women are equally as talented in beadwork as the Maasai women in Kenya. The reality here, is that the beads used today are not an original product of either of these communities, but have been assimilated by these communities to advance their traditions since time immemorial of beadwork for their various occasions and ceremonies. Therefore, it would be impossible to claim a right over the raw material and calls for one to decipher what elements and expression in the beadworks are characteristic of either community.

Traditional knowledge deserves some form of custodianship, since traditional knowledge has contributed to modern science to cure diseases and ailments,³⁶ preserve food,³⁷ and other advancements of science and the useful arts. Traditional knowledge is not a standalone concept or right, but is contextual. It has an inseparable relationship with the natural surroundings and cultural factors around its host community, which is commonly referred to as “genetic resources.” This assists in justifying a community’s enjoyment of the benefits from use of its traditional knowledge and genetic resources together.³⁸

On the other hand, this theory of protection is less persuasive when it comes to traditional cultural expressions. Expressions vary with various phases of life and are easily discarded and forgotten. Thus, it is futile to seek to protect TCEs that are no longer in use. “Equity aids the vigilant and not the indolent.”³⁹ Therefore, legal protection of a TCE should inure with proactive and continuous use. A community should assert ownership rights to sufficiently deter misrepresentation by a competitor or any other entity passing off its goods

36. See S.K Jain, *Dynamism of Traditional Knowledge*, 4(2) INDIAN J. OF TRADITIONAL KNOWLEDGE 115 (2005) (discussing the use of the plant parthenium hysterophorous L. to clear nasal block in Sikkim, India).

37. Laying fish in salt until it ferments making a concentrated fish pickle sauce called “garum” in ancient Rome. See Venkata Krishnan, STUDY OF TRADITIONAL METHODS OF FOOD PRESERVATION, ITS SCIENTIFIC UNDERSTANDING AND TECHNOLOGICAL INTERVENTION, INDIAN INST. OF TECH. MANDI (2014), <http://www.iitmandi.ac.in/istp/projects/2014/reports/Group%2007%20Food%20Preservation.pdf> [<https://perma.cc/6RBZ-UWD8>].

38. WIPO, *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, *supra* note 20, at 24.

39. A DICTIONARY OF LAW (Jonathan Law & Elizabeth A Martin eds. 7th ed., 2014).

marked by its existing, and in use, TCEs.⁴⁰ These goals can be advanced by a community's use of existing copyright and trademark systems as opposed to a *sui generis* and new intellectual property right.

One of the world's most popular shoe designers Manolo Blahnik⁴¹ has been quoted saying that "shoes are not fashion . . . they are art that happens to be fashion." On the same note, "fashion and art are each other's sister craft."⁴² Thus, existing intellectual property laws protecting copyright, trademarks, and geographical indications should strengthen cultural expression rights, and protect them sufficiently.

To put this rationale more into context, consider the famous red sole case involving Christian Louboutin.⁴³ In that case, the court established that the plaintiff's red sole shoe had limited secondary meaning, but its secondary meaning was strong enough that the red sole served as a trademark to distinguish his brand of shoes. This permitted Louboutin to limit others use of a red sole on their shoes. Similarly, a community can effectively employ existing trademark law to distinguish their TCEs on fashion commodities. The mere identification of TCEs can, and should be, subject to a trademark, collective mark, or certification mark. Trademarks' perpetual protection would fit this kind of intellectual property right, and the public would have certainty over the origin of goods it purchases. There may be room to explore reasonable amendments on how to explore protection of what are seemingly "popular" expressions to a community, specific or not, and how to protect them as identifying marks from a specific culture.

II. INSPIRATION VERSUS EXPLOITATION

A. *Inspiration, Public Domain and Derivative Works*

While I advocate for Traditional Cultural Expression to be recognized as a quasi-intellectual property right, doing so presents some difficulties. On one hand, some argue that they are *sui generis*, and any rights of this sort will be outside the boundaries of established intellectual property rights.⁴⁴ On the other hand, others agree that existing intellectual property laws and treaties

40. Navajo Nation v. Urban Outfitters, 935 F. Supp. 2d 1147, 1155 (D.N.M. 2013).

41. Jae-Ha Kim, *Well- Heeled Stars Love their Manolos*, CHI. SUN TIMES, Aug. 30, 2000, at 57.

42. Kimberly Harchuck, *Fashion Design Protection: The Eternal Plight of the "Soft Sculpture,"* 4 AKRON INTELL. PROP. J. 73, 80 (2010).

43. Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding Inc., 696 F.3d 206, 220 (2d Cir. 2012).

44. See Enyinna S. Nwauche, *The Swakopmund Protocol and the Communal Ownership and the Control of Expressions of Folklore in Africa*, 17 J. OF WORLD INTELL. PROP. 191 (2014).

accommodate these rights, while granting almost immediate economic benefits when accurately executed.⁴⁵

Currently, intellectual property laws recognize strategic rights to enhance effective and lucrative participation in the international marketplace.⁴⁶ As such, it is important for traditional cultural expression practices to provide latitude for a robust public domain, while reflecting the reality in this unique context. This will enable the establishment of safeguards to use traditional cultural expressions outside the perspective of traditional setting.

The initial conversation concerning public domain is suggested to be one referencing “publicly available” in the context of western countries.⁴⁷ In other arenas, public domain can be viewed as properties whose rights have been exhausted or property made available for the public to use freely and openly as resources.⁴⁸ The WIPO’s Intergovernmental Committee on Genetic Resources, on the other hand, has the view that “public domain is elastic, versatile, and relative concept, and it is not susceptible to a uniform legal meaning.”⁴⁹

Once a documentary is recorded and broadcasted regarding a culture, their lifestyle and any other interesting phenomenon, as perceived by the director, becomes public knowledge and is publicly available. Such situations can be mitigated considering existing traditional knowledge and expressions. It may be hard to try and control knowledge and what people do with it in the public spectrum, however, exploiting existing IP regimes may make it possible. It would further be unreasonable and against the fundamental principle of law when laws apply retrospectively. If a community had already cast-off or forgotten about a cultural expression or knowledge and is no longer in use, an adventurous and innovative individual or entity should not be castigated for finding gold in the trash.

Due to globalization and simple progress, many communities have abandoned certain TCEs. Some have done so to westernize, and others have

45. Erin Mackay, *Indigenous Traditional Knowledge, Copyright and Art – Shortcoming in Protection and an Alternative Approach*, 32 U.N.S.W. L.J. 1 (2009).

46. Shubha Ghosh, *Globalization, Patents, and Traditional Knowledge*, 17 COLUM. J. ASIAN L. 73, 83 (2003).

47. Claudio Chiarolla, Legal Officer, Department for Traditional Knowledge and Global Challenges, World Intellectual Property Organization, *Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: Recent Developments in WIPO* (Nov. 30, 2016).

48. David Hansen, *Protection of Traditional Knowledge: Trade Barriers & the Public Domain*, 58 J. COPYRIGHT SOC’Y U.S. 757, 780 (2011).

49. WORLD INTELLECTUAL PROP. ORG. [WIPO], INTERGOVERNMENTAL COMMITTEE ON GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE, *Note on the meanings of the term “Public Domain” in the Intellectual Property System with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/ Expressions of Folklore*, WIPO/GRTKF/IC/17/INF/8 (Nov. 24, 2010), http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_17/wipo_grtkf_ic_17_inf_8.pdf [<https://perma.cc/K8TR-DPUC>].

simply done so out of the natural flow of things. Regardless of their origin, what has been discarded should belong to the public domain.

As such, the reiteration remains that mitigation opportunities mentioned would include the use of existing intellectual property laws and treaties. In addition, the flexibility accommodated by the Geneva Act⁵⁰ under article 9, provides countries ratifying this Act to have flexibility to choose the way they provide for protection of geographical indications. However, for the purposes of this article, the highlight of this Act is article 4,⁵¹ which provides for the mandatory existence of a national register of the geographical indications and appellations of origin. Thus, the source of such a product becomes public knowledge and easily accessible. To illustrate how the use of geographical indications and appellations of origin to secure rights in TCEs is feasible, the registration of the beautiful *Elets* lace from Elets, Russia Federations or *Gračanicko Keranje* lace from Gračanicko, Bosnia and Herzegovina serve as good examples.

On one hand, the geographical indications in the Geneva Act, for example, do not address issues of inspiration or borrowing, and neither does trademark, and to some extent, copyright. On the other hand, a *sui generis* approach would be punitive and claim compensation over mere inspiration. For that reason, the existing laws are more clear and create certainty, which is not the case with a *sui generis* system for TCEs and traditional knowledge.

The issue of inspiration and derivative works regarding TCEs is a murky one. It poses the potential for frivolous claims, especially because there are many similarities when considering indigenous tribes and their cultures. Through a close lens, some of these expressions are quite similar as they are a combination of the same shapes and some alphabets. Putting the similarities in context, defining derivative works in relation to TCEs would be an unfair exercise that would interfere with innovation. This would defeat the purpose and spirit of the existence of intellectual property protection.

Some contentious terms might be better left undefined or generally defined,⁵² but then again, what are the legal ramifications when these terms are not defined? In the international dome, there has been no attempt to define derivative works. However, there is an attempted definition in the Traditional

50. Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, art. 9, adopted May 20, 2015, http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=370115 [<https://perma.cc/R78F-UCZU>]. The new amendments have made the registration of GIs much easier than before under the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, amended Sept. 28, 1978.

51. *Id.* at art. 4.

52. G. Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT'L L. 233, 240 (2001).

Knowledge Act of Kenya.⁵³ The definition under Part I states a derivative work is “any intellectual creation or innovation based upon or derived from traditional knowledge or cultural expressions.”⁵⁴ Such a definition is highly likely to confuse because “derived” is included to define a derivative work. The unambiguous definitions of “derived” includes to “infer” or to “deduce” or “to obtain from a [specific] source.”⁵⁵ These different definitions can be a source of legal semantics.

It is noteworthy, that in the Berne Convention,⁵⁶ the term “derived” is not defined, but uses the phrase “and other alterations” to capture the context of derivative works. The inference of derivative works in the context of TCEs becomes a legal conundrum on where to draw the line between drawing inspiration and borrowing from these cultures.

B. Defining Appropriation- A New Legal Offence?

The absence of a definition for the word “appropriation,” or its opposite, “misappropriation” in all international, regional, and national instruments is well recognized. In the UNESCO Model Provisions,⁵⁷ there is reference to illicit exploitation in the context of developed and maintained folklore, which assists in paving a clear rationale of what can be claimed by a community. This emphasizes that what was or is discarded, or no longer maintained by a community, should not be subjected to protection and any claims thereafter.

The Swakopmund Protocol⁵⁸ also fails to define the term “misappropriation,” which is an offence under section 19 of the regional instrument and connotes the need for appropriate consultations with the relevant community. In this same section, derivative works are prohibited without “Prior Informed Consent.”⁵⁹ However, this leaves confusion on creation of independent work under copyright. The provision also fails to address the crucial point on potential conflict where one community’s traditional cultural expression is perceived to be vulgar or taboo in another

53. The Protection of Traditional Knowledge and Cultural Expressions Act, No. 33 (2016), KENYA GAZETTE SUPPLEMENT NO. 154 §§1–5.

54. *Id.*

55. See *Derive*, DICTIONARY.COM, <http://www.dictionary.com/browse/derive> (last visited Sept. 8, 2017).

56. Berne Convention, *supra* note 15, at art. 2(3). It has been ratified by 172 member states.

57. UNESCO & WIPO, *Model Provisions for National Laws on the Protection of Expression of Folklore Against Illicit Exploitation and Other Prejudicial Actions*, *supra* note 16, § 1.

58. AFRICAN REG’L INTELLECTUAL PROP. ORG. (ARIPO), SWAKOPMUND PROTOCOL ON THE PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF FOLKLORE, § 19 (2010). The Africa Regional Intellectual Property Office (ARIPO) put together this *sui generis* standard setting protocol to be adopted by its member states. See also Nwauche, *supra* note 44.

59. *Id.*

community.

To understand cultural appropriation, Professor Susan Scafidi states that “[b]efore outsiders can appropriate a cultural product, they must first recognize its existence, source community and value,”⁶⁰ which is a valid and supported conclusion in respect to maintained and valued cultural expressions. In 2016, there was a raging internet debate regarding the IT Bag by designer Balenciaga that somewhat resembles the Thai plastic rainbow bag regularly used for market errands. The Intellectual Property Office of Thailand released an honest statement assuring that there was no resemblance,⁶¹ which in turn, helped secure the business interests of the design house and prevent a frivolous suit. This was quite a noble and unexpected stance from a developing nation because the predictable knee-jerk reaction would be to litigate and create a public relations fiasco for the fashion brand. Developing nations should “borrow a leaf” in this context to exercise restraint when creating regimes that might benefit them, but which could stifle innovation and commerce if they encourage vexatious litigations regarding TCEs. By applying existing copyright rules, the Intellectual Property Office of Thailand confirmed that existing intellectual property regimes are sufficient in relation to TCEs and the fashion industry.

Therefore, perhaps it is time to be rid of these terms “appropriation” and “misappropriation,” as they do not have a place in the TCE context and the copyright context. Its continuous use and reference creates confusion both in the legal scope as well as in the context of trading in “culturally inspired” products and designs.

III. CLEARANCE OF TRADITIONAL CULTURAL EXPRESSION RIGHTS FOR FASHION BUSINESSES

A. Envisioned Clearance Practices. Examples of legal Provisions in Kenya and South Africa

There is no denying that rights are involved when there is use of existing cultural expressions, whether for gain or just for education purposes. As the discussion continues, the issue of rights clearance is one that cannot be ignored.

60. SUSAN SCAFIDI, WHO OWNS CULTURE? APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW 91 (2005).

61. See *IT Bag: Thai Officials Deny Balenciaga Copied Common Thai Plastic Bag*, BANGKOK COCONUTS BLOG (Mar. 8, 2016), <http://bangkok.coconuts.co/2016/03/08/it-bag-thai-officials-deny-balenciaga-copied-common-thai-plastic-bag> [https://perma.cc/Q8X3-LSE4]; Scarlet Conlon, *Balenciaga Market Bags Approved*, VOGUE UK (Mar. 11, 2016), <http://www.vogue.co.uk/article/balenciaga-not-copying-thai-market-bags> [https://perma.cc/WC2Q-2GZ6]; Balenciaga Did Not “Copy” Traditional Thai Shopping Bagins For F/W16, THE FASHION LAW BLOG (Mar. 10, 2016), <http://www.thefashionlaw.com/home/shk1luxb7w8en33x62s0j1th5ns3nos> [https://perma.cc/9H8Q-Z3YK].

As we acknowledge that TCEs in most instances are communal rights, how have various legislations envisioned the clearances mechanisms? The UNESCO Model⁶² and the Swakopmund Protocol⁶³ recommend the establishment of a competent authority as the point of authorization for use of TCEs for commercial gain.

The newly crafted legislation in Kenya⁶⁴ is a classic far-reaching and overly exaggerated example of how not to protect traditional knowledge and cultural expressions. Apart from the lack of a specified and centralized body to deal with the clearance issues, the Act also fails to recognize the importance of a registry for the various communities to make a declaration of their cultural expressions and knowledge; this leaves a lot hanging in the air. Further, the Act restricts use of words, signs, names, and symbols that are cultural expressions and its derivatives as well, resonating with Section 19 of the Swakopmund Protocol. This specific provision is a ticking time bomb considering the similarities in cultural expressions by the various communities in the Republic of Kenya.

To make matters more complicated and unreasonable, the offences laid down under Section 37⁶⁵ opens a new can of worms. For example, the offence of distortion of cultural expressions, aside from this offence being vague, attracts a Kshs. 1,000,000 (\$10,000) fine, as well as a five-year prison term.⁶⁶ Other offences include the failure to acknowledge a community that attracts the same penalties as the distortion while the offence of misleading, confusing, or false indication of a cultural expression attracts a Kshs. 2,000,000 (\$20,000) fine, a ten-year prison term, or both.⁶⁷

62. UNESCO & WIPO, *Model Provisions for National Laws on the Protection of Expression of Folklore Against Illicit Exploitation and Other Prejudicial Actions*, *supra* note 16, at 10.

63. ARIPO, SWAKOPMUND PROTOCOL ON THE PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF FOLKLORE, *supra* note 58, § 3.

64. The Protection of Traditional Knowledge and Cultural Expressions Act, No. 33 (2016), KENYA GAZETTE SUPPLEMENT NO. 154.

65. *Id.* § 37.

66. *Id.* § 37(2).

67. *Id.* § 37(5).

The offence under Section 37(1) calls for a special mention, as this is just an attempt to restrict trade in its entirety:

(1) A person who—

- (a) has in possession or control in the course of trade;
- (b) manufactures, produces or makes in the course of trade;
- (c) sells, barters or exchanges, offers or exposes for sale, disposes, distributes, hires out;
- (d) exposes or exhibits for the purposes of trade;
- (e) imports into, transit through, trans ships within or exports from Kenya, except for private, domestic, industrial and commercial use of the importer or exporter, as the case may be; or
- (f) in any manner develops any goods or service using unauthorized traditional knowledge or cultural expressions in the course of trade,

commits an offence and is liable on conviction to imprisonment for a term not exceeding five years, or to a fine of not exceeding five hundred thousand shillings in respect of each article or item involved or to imprisonment for a term not exceeding ten years or to a fine not exceeding one million shillings.⁶⁸

The quality of the Kenyan legislation leaves its constituents as well as the international community questioning the level of research and understanding of these contentious set of rights. The enactment of the Traditional Knowledge and Cultural Expressions Act confirms the lack of understanding of the magnitude of finding a reasonable enforcement regime both at the national and international arena without interfering with innovation and trade at all levels.

On the other hand, South Africa makes a more sober attempt at establishing a *sui generis* system with the Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill.⁶⁹ The South Africa Bill attempts to make a deliberate effort to comply with the UNESCO Model Provisions⁷⁰ by refraining from including a provision to prohibit creation of derivative works. It attempts to introduce this misplaced notion by providing for protection of TCEs in its strictest form under Section 11,⁷¹ as it should be.

68. *Id.* § 37(1).

69. Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill, GN 199 of GG 39910, § 3 (Apr. 8. 2016).

70. UNESCO & WIPO, *Model Provisions for National Laws on the Protection of Expression of Folklore Against Illicit Exploitation and Other Prejudicial Actions*, *supra* note 16, § 3.

71. Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill § 11.

The bill also provides for registration of indigenous knowledge and expressions whose registration will be made available for public inspection.⁷² This provision cures two problems: (1) the issue of identifying the respective community, and (2) a public record of declarations by the different communities in South Africa. Further, the provision establishing the National Indigenous Knowledge Systems Office (NIKSO) with an elaborate list of functions and powers,⁷³ makes it more appealing to contemplate a *sui generis* system.

In addition, compared to Kenya, the offences laid down by the South Africa bill are more precise, practical, and the penalties are more reasonable.

28. (1) Any person who uses indigenous knowledge in a manner which is inconsistent with the license issued for that indigenous knowledge, shall be guilty of an offence and liable to any sanction determined by the Dispute Resolution Committee.

(2) Any person who uses indigenous knowledge without authorization, shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding three years or to a fine of R30 000 or both.

(3) Any person who falsely professes to be a certified indigenous knowledge practitioner shall be guilty of an offence and liable on conviction to imprisonment not exceeding three years or to a fine of R30 000 or both. 35

(4) Any person who hinders or interferes with the management of an official in the performance of their official duties in terms of this Act shall be guilty of an offence and liable on conviction to imprisonment not exceeding three years or to a fine of R30 000 or both.⁷⁴

Here, South Africa takes a more tolerable approach compared to Kenya. As seen above, the maximum fine an offending party may be charged does not exceed \$3,000. This fine is more reasonable than the fines set by the Kenyan legislation.

B. Business and Legal Implications for Small to Medium Enterprises and for Fashion Empires

Generally, the nature of community rights of TCEs implies that an entrepreneur must consult directly with the community. However, with

72. *Id.* § 3.

73. *Id.* § 4–5.

74. *Id.* § 28.

examples like South Africa and Egypt,⁷⁵ dealing with one entity for rights clearance protocol is a much simpler route, as opposed to the decentralized approach proposed by the Kenyan legislation,⁷⁶ where the clearance process could take years.

There are challenges ahead for these TCE community rights. These challenges will likely resemble the cries by members of collective management organizations, who are constantly complaining that their well-earned revenues do not trickle down to the deserving rights holders.

The South African bill attempt invites the opportunity of collaboration between fashion houses and entrepreneurs, even in instances where the fashion products may not be licensing traditional cultural expressions. It does so by leaving the issue of derivative works unaddressed. For example, it would encourage a designer to hire a group of women from the Zulu community to help with beadwork in a fashion line, thus creating jobs. The bill facilitates openness and invites such opportunities compared to the Kenyan attempt. Working with any Kenyan related TCEs would be a tip-toe situation with more imminent business risks than benefits.

The registry system⁷⁷ approach, as envisioned in the South Africa bill, is a much more practical system that should be mandatory to cure the blurred lines regarding inspiration versus exploitation.

IV. CONCLUSION

A purely custodian approach to assert rights in traditional cultural expressions would be an indolent strategy to tackle these “emerging” rights; active or visible use must be part of the equation to achieve maximum benefits. The push for a *sui generis* system will hinder innovation and interfere with international commercial activities that could positively impact the endowed communities. The potential for frivolous traditional cultural expressions lawsuits in the fashion industry is now ripe. If the approach to TCEs is not carefully approached using familiar and sufficient existing intellectual property law mechanisms, the fashion industry may tank or existing collaborations among design houses and fashion empires are likely to die if the blurred line between inspiration and exploitation exists. Cultural expressions are the raw fibers that influence fashion trends and boost self-expression and identity for people around the world.

75. Law No. 82 of 2002 (Pertaining to the Protection of Intellectual Property Rights, Copyrights and Neighboring Rights), June 3, 2002, art. 142 (Egypt).

76. The Protection of Traditional Knowledge and Cultural Expressions Act, No. 33 (2016), KENYA GAZETTE SUPPLEMENT NO. 154 § 25(1).

77. Krumenacher, *supra* note 34, at 144.

It is of great importance that administration of traditional cultural expressions and traditional knowledge is tackled in a fair and practical fashion. The international and national communities need to refrain from creating a potential monstrosity based on a *sui generis* system.

This article makes the following recommendations to ensure that we refrain from allegations of cultural appropriation or misappropriation:

(1) The international, regional and national bodies employ the services of anthropologists to conduct research, surveys, and to investigate what aspects of traditional cultural expressions remain relevant and an asset to a community. This will help avoid the retrospective application of any upcoming laws on subject matter that is already public domain property.

(2) Considering the first recommendation, this would help establish an accurate and comprehensive registry systems for traditional cultural expressions and outline factors to be considered for establishing a registry. These registries should reflect in the WIPO resources as well.

(3) The laws could be amended to promote active use of TCEs as opposed to the custodian approach. This can easily be achieved by use of existing intellectual property laws and exhausting the provisions. Specifically, registered trademarks ensure that the integrity of the community's name is upheld, and ensures that the use of their name connotes origin. This is possibly one of the strong factors that were considered in the Navajo Nation case that was settled out of court. Although the details of the Navajo Nation settlement⁷⁸ remain undisclosed, the settlement resulted in the Navajo Nation securing employment for its people in collaboration with Urban Outfitters through a supply and license agreement. From an intellectual property law perspective, this favorable resolution was influenced by the registered trademark as well as by the Navajo Nation's active use of their traditional cultural expressions, even though the use occurred mostly at the local level.

(4) The international community, spearheaded by the World Intellectual Property Organization, can explore the possibility of policy considerations for Member States in balancing TRIPS provisions on

78. Much has been written about the settlement regarding the Navajo Nation and Urban Outfitters case. Some of the well-researched sources include: see David Schwartz, *Navajo Nation settles trademark suit against Urban Outfitters*, THE BUS. INSIDER (Nov. 18, 2016), <http://www.businessinsider.com/r-navajo-nation-settles-trademark-suit-against-urban-outfitters-2016-11?IR=T> [<https://perma.cc/V7RN-W5NY>]; Noel L. Smith, *Navajo Nation, Urban Outfitters reach settlement*, DAILY TIMES (Nov. 17, 2016), <http://www.daily-times.com/story/news/local/navajo-nation/2016/11/17/navajo-nation-urban-outfitters-reach-settlement/94029162/> [<https://perma.cc/F8SP-NPZW>].

intellectual property and anti-trust practices⁷⁹ to accommodate protection of traditional cultural expressions in the existing IP regimes, avoid overprotection, and offer flexibility to communities that may not be financially endowed to register their TCEs.

In conclusion, it would defeat the purpose of intellectual property protection by overprotecting traditional cultural expressions and traditional knowledge in general. A *sui generis* approach will kill innovation and affect among others the fashion industry. As seen, the danger of creating unrealistic offences by national legislations is high and must be mitigated.

79. Marco Ricolfi, *Is There an Antitrust Antidote Against IP Overprotection Within TRIPS?*, 10 MARQ. INTELL. PROP. L. REV. 305, 321 (2006).