



World cultures and fashion: Questions of 'cultural appropriation' and intellectual property

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Content

1. The phenomenon of cultural appropriation in fashion

- Fashion industry creating cultural cocktails & working as a cultural appropriator
- The concept of cultural appropriation
 - Issues

2. What's law got to do with it?

- Who owns culture - basics of IPR
- Can copyright control cultural appropriation?
 - Copyright to folklore, traditional knowledge (TK) & traditional cultural expressions (TCE)
 - Background
 - Issues
 - Other IPRs
 - Legal possibilities?

3. Concluding remarks

Background reading

Reading:

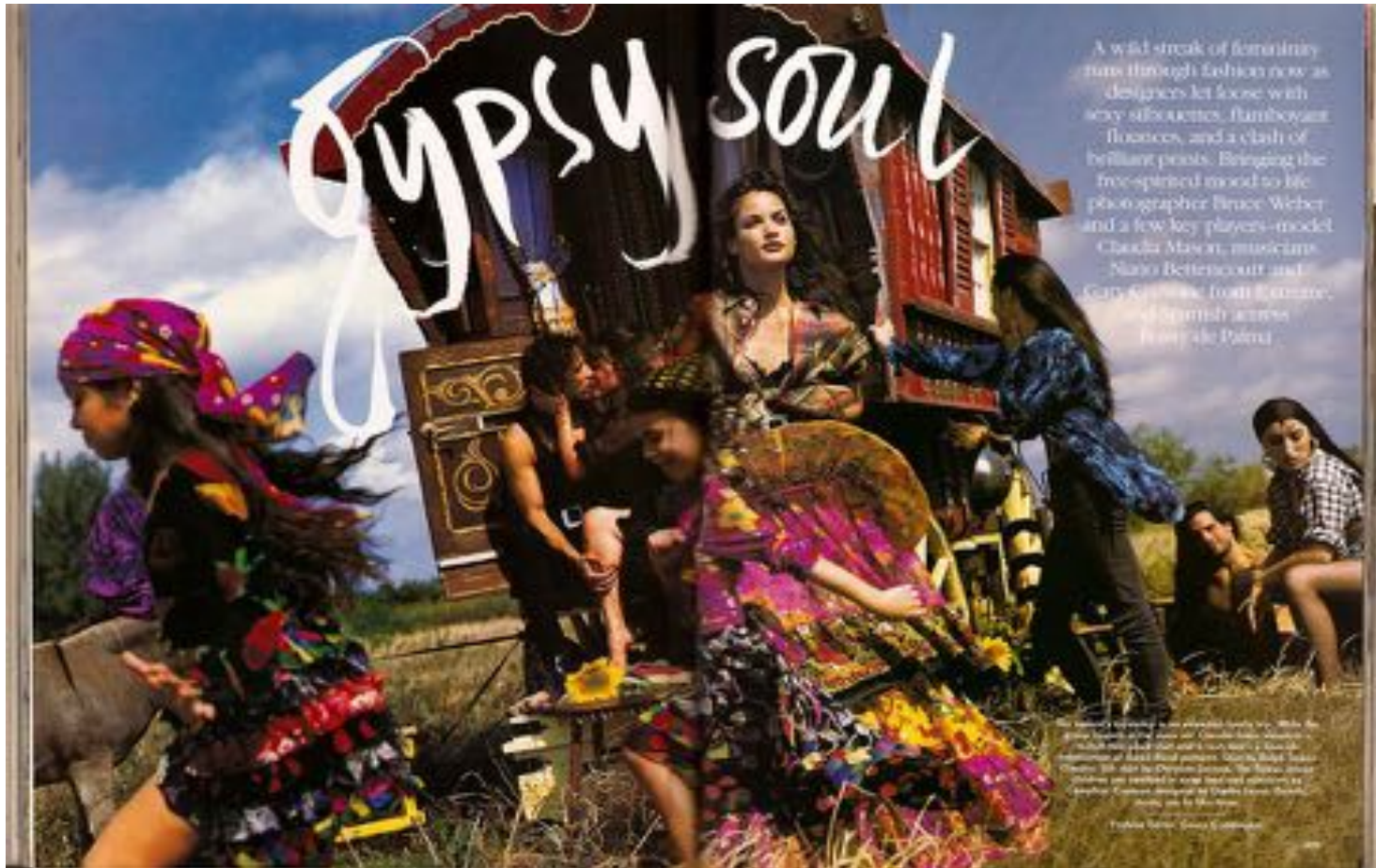
Åhren, M. 2010. The Saami Traditional Dress & Beauty Pageants: Indigenous Peoples' Right of Authorship and Self-Determination over their Cultures. Universitet i Tromsø, Juridisk fakultet 2010. Pages 1 - 6; 135 - 148; 215 - 220 and 281 - 282.

Available on-line: <https://munin.uit.no/handle/10037/9698>



1. THE PHENOMENON OF CULTURAL APPROPRIATION IN FASHION

Fashion designers & various cultures



"Gypsy Soul" editorial photoshoot for US Vogue by Bruce Weber, 1992

Fashion designers & various cultures



Photos: Guerlain / Shalimar; The Beatles in India 1968 / GL-photo IN; Elizabeth Hurley in Versace 1995 / Getty Images

Fashion designers & various cultures

- No one creates in a void
- Modern fashion industry has always been seeking inspiration from exotic cultures, subcultures and various indigenous groups and made references to those
 - Trickle theories
- At a certain time, certain culture is chosen to be “in” (and the next season, it’s out)
 - Orientalism is a good example

Fashion designers & various cultures



Musée Yves Saint Laurent Paris:
Yves Saint Laurent: Dreams of the Orient (02.10.2018 to 27.01.2019) Photo credit Heidi Härkönen.

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Fashion designers & various cultures



Musée Yves Saint Laurent Paris:
Yves Saint Laurent: Dreams of the Orient (02.10.2018 to 27.01.2019) Photo credit Heidi Härkönen.

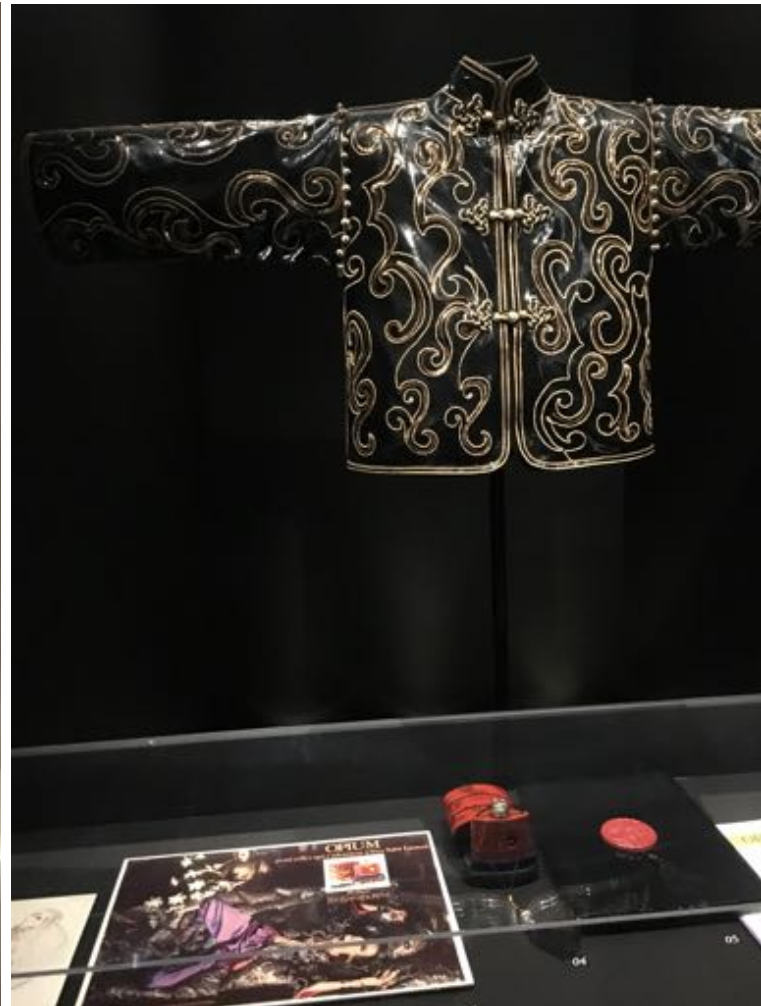
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Fashion designers & various cultures



Musée Yves Saint Laurent Paris:
Yves Saint Laurent: Dreams of the Orient (02.10.2018 to 27.01.2019) Photo credit Heidi Härkönen.

Fashion designers & various cultures



Musée Yves Saint Laurent Paris:
Yves Saint Laurent: Dreams of the Orient (02.10.2018 to 27.01.2019) Photo credit Heidi Härkönen.

Sometimes it's the other way around...



Installation view, *Vlisco: African Fashion on a Global Stage* at the Philadelphia Museum of Art (photo by Tim Tiebout, courtesy the Philadelphia Museum of Art)

[“How Dutch Wax Fabrics Became a Mainstay of African Fashion”](#)

What is cultural appropriation?

- All references in the field of fashion are not completely trouble-free
- *Cultural appropriation* (“CA”) widely disputed concept
- A phenomenon where a dominant culture adopts elements from a **marginalized** and/or **oppressed** culture **without the consent** of the source culture, **disconnecting** the elements from their original meaning and without properly **crediting** and/or **compensating** the source culture
- *“Cultural appropriation often occurs when a source community’s words, names, designs, motifs, symbols, artworks, art styles, songs, musical genres, stories, or dances are used in a different cultural group’s creative works or consumer products without the permission of the source community” (Sharoni, 2017)*

What is cultural appropriation?

- Discussions of CA are almost always connected with the power-imbalance in the society
- Post-colonial debate
 - Forced assimilation of marginalized groups
 - Indigenous peoples
 - + post-colonial *legal* debate
- Back in the days, questions of the fashion world's cultural appropriation and morality in cultural reference-making did not cause much of a debate – however, in the 21st century, cultural appropriation in fashion designing is a major risk for a fashion house's reputation
- “A major culture appropriating a tiny minority” is not always the case when it comes to CA
 - The source culture can be rather significant, but the way of appropriation is somehow harmful for the source culture or representing it in a negative light
 - E.g. orientalism and hypersexualising of Asian women

Fashion as a cultural appropriator



Photos: Victoria's Secret fashion show / Getty Images; Sexy Little Geisha / Victoria's Secret

Fashion as a cultural appropriator

- In addition to *fashion*, appropriation can be seen in other fields of the garment industry as well (e.g. costumes)



Photos: Pilailupuoti

What's the problem?

- Making references to other cultures is not being criticised *per se*. The critique towards cultural appropriation is caused by the lack of respect towards the source culture.
- *“The movement of cultural products from subculture to public domain provokes both majority-minority struggles and fraternal conflict. Outsiders attracted by particular art forms are seldom content to limit themselves to **recognition and appreciation** of the source community or even to limited consumption at the invitation of the community. Instead, **members of the public copy and transform cultural products to suit their own tastes, express their own creative individuality, or simply make a profit**. This ‘taking—from a culture that is not one’s own—of intellectual property, cultural expressions or artifacts, history, and ways of knowledge’ is often termed “cultural appropriation.”* (Scafidi, 2005)

What's the problem?

- Cultural elements are often detached from their context and their relevance to the source culture is being ignored
 - Elements being altered in a way that they would better suit the taste of the public
 - Lack of understanding of the source culture
 - Customary law
 - Commercialising of sacred elements or elements that otherwise have a significant sentimental value to the source culture
 - Often appears vulgar and/or insulting in the eyes of the source culture
 - Furthermore, **the source culture rarely gets their share of the profits** that are made while making their cultural heritage mainstream by international fashion chains
 - Traditional handicraft

What's the problem?

- Fashion houses seldom make the effort to find out the source culture's opinion on borrowing their elements, or, when the opinion is notorious, it is being ignored
 - E.g. Gákti

What's the problem?



Real or fake?
Left: Pilailupuoti costume
Right: Enontekiö-Kautokeino genuine gákti dress

The representative of Finland Carola Miller in Miss World –contest, 2015

Photos: Saamelaiskulttuurikeskus Sajos / YLE; Miss World Organization

(c) Heidi Härkönen 2019

What's the problem?



Photos: Miss Helsinki -organisaatio, 2017

(c) Heidi Härkönen 2019

Fashion as a cultural appropriator

- Cultural appropriation is problematic especially when the source culture is in an oppressed or discriminated position
 - Institutionalized discrimination, poverty and subordinate position compared to the majority culture
 - Chanel-boomerang (photo below) (EUR 2,000) and Australian aboriginals
 - Reinforcing harmful stereotypes
 - Victoria's Secret -examples
 - Cultural imperialism
 - History of colonialism and forced assimilation



→ To conclude: in addition to issues related to ownership of intangible assets like TCEs, cultural appropriation deals with a bunch of moral and ethical problems

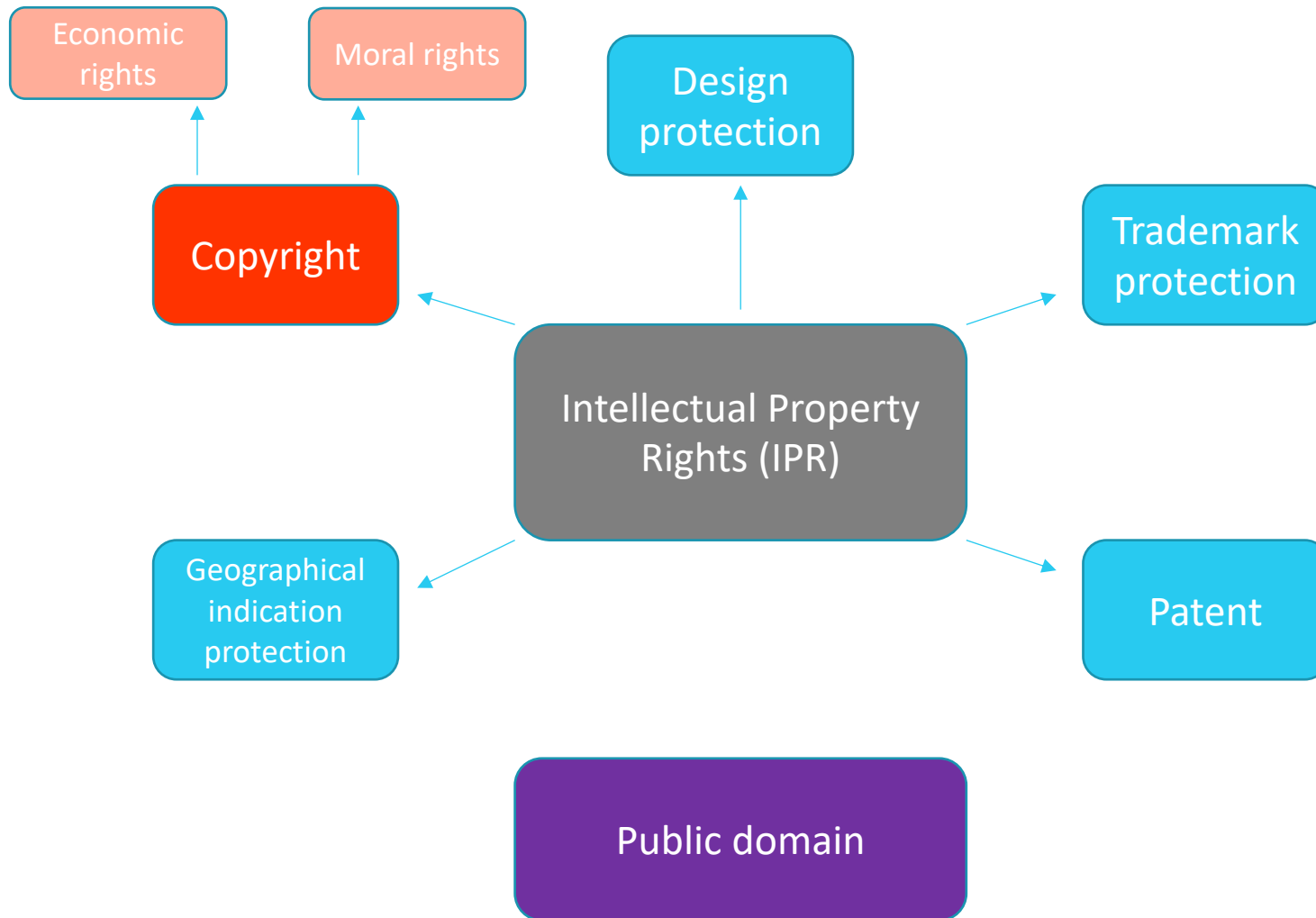


2. WHAT'S LAW GOT TO DO WITH IT?

Legal framework

- Dress heritage = intangible asset
 - Intellectual property rights
 - Copyright law
 - Trademark law
 - Design law
 - Patent law
 - Also: geographical indication protection
- all linked to ownership of traditional cultural expressions

Legal framework



Legal framework

- Constitution and fundamental rights
- Indigenous rights / United Nations Declaration on the Rights of Indigenous Peoples, Article 31
 1. *Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*
 2. *In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.*

Who owns culture?

- Cultural self-determination rights and preservation of cultural heritage vs. Freedom of expression
 - Copyright to products of folklore
 - The copyright system has difficulties when applied to products of folklore
 - Civil law countries' copyright protection is based on a romantic idea of a “creative genius” – not communal creativity
 - In addition, copyright of fashion designs has its own difficulties (depending on the jurisdiction)
 - Applied art
- Protection of traditional dresses with the current copyright system is difficult

Who owns culture?

- What is more...
 - The current global IPR system has spread through colonialism and fails to recognize other types of creativity than “Western” traditional forms of creativity
 - Especially collective creativity of indigenous peoples is being ignored
 - Indigenous property rights – are there any?
 - Lands of indigenous peoples being traditionally seen as *terra nullius* areas
 - Similarly, their creativity has been seen to be a part of *public domain*
 - Previously (in the 20th century) folklore was considered to be automatically a part of public domain, free for everyone to use and outside of the reach of copyright protection (and basically any IP protection)
 - Recently the attitudes towards folklore’s IP protection have started to change and the injustice has been recognized

Copyright and folklore

- Various problems when applying copyright to dress heritage
 - 1. Author**
 - When it comes to traditional cultural expressions, it is difficult to identify a single author or authors
 - Products of collective creativity
 - Who would be the rightholder?
 - 2. The lack of fixed form**
 - Traditional dresses have evolved during a long period of time, and still continue evolving
 - What is the “original work” that is subject to protection – and how many are there exactly?

Copyright and folklore

3. The copyright threshold and originality requirement

- Garments being products of applied art → difficult to get copyright protection even if an author could be identified
 - Elements that can be separated vs. the garment itself
 - It is possible for a feature of a garment to get copyright protection, even if the garment as a whole would not qualify as a protected item

4. Term of protection

Copyright and folklore – is there *any* chance?

- Protection of classics – a Nordic speciality
 - Copyright's term of protection is often too short when it comes to TCEs
 - Copyright Act 53 §:
 - *” (1) If, after the death of the author, a literary or artistic work is **publicly treated in a manner which violates cultural interests, the authority to be designated by decree shall have the right to prohibit such an action, notwithstanding that the copyright therein is no longer in force, or that copyright has never existed.***
 - *(2) If the person whom the prohibition concerns is dissatisfied with the prohibition, he may submit the matter to a court of justice for decision.*
 - The section is used once in a blue moon and does not automatically protect anything
 - Equivalent sections in the copyright acts of other Nordic countries
- Can protection classics be applied to folklore and dress heritage?
 - Surely difficult and unorthodox but not impossible
 - E.g. Haarmann and Karhu & Nuorgam have mentioned this possibility

Copyright and folklore – is there *any* chance?

- The 53 § protects *cultural interests*
 - A vague expression – *how* does one determine “cultural interests” in a manner that is precise enough?
 - *Who* determines what is a cultural interest that is worth protecting?
 - Ministry of Education?
 - From which culture’s perspective are cultural interests viewed?
Majority or minority culture’s?
 - What is seen offensive towards cultural interests, varies depending on e.g. time and culture
 - According to legal literature, in order for something to violate cultural interests, it should be widely disapproved of
 - Of course, then a minority culture’s cultural interests are being violated, the disapproval is not as extensive as what it would be if the majority culture’s cultural interests were violated – the group of people that potentially would be offended is smaller

Copyright and folklore – is there *any* chance?

- Appropriation of a minority culture can endanger the preservation of that culture even when the appropriation seems harmless in the eyes of an outsider
 - For example, tourism in Lapland has widely appropriated and misused the Sami culture. This has caused young Sami people in Rovaniemi area to wear their traditional Sami outfits less often, because they do not want to be identified as a tourist attractions (Åhren, 2010)
 - When it comes to evaluation of the violation, there is always a subjective element involved
- Taking into account the previously stated, it would be logical to value the culture's perspective that is allegedly violated when 53 § is applied
 - Any other kind of interpretation would negate the function of the section
 - Also: the society is responsible for protecting the diversity of cultures

Copyright and folklore – is there *any* chance?

- What kind of cultural appropriation in fashion violates cultural interests?
 - Drawing a line is not simple
 - For example, using the dress heritage of a marginalized culture to in order to make fun of it, reinforcing stereotypes, violating sacred elements of a culture somehow...
- Protection of classics vs. freedom of expression – is there a conflict of interests?
 - Should cultural appropriation be tolerated because of the aforementioned right in the first place?
 - On the other hand: freedom of expression and freedom of speech are not absolute, unlimited rights – they are narrowed down by rights of others
 - For example, Penal code (e.g. defamation, dissemination of information violating personal privacy, incitement to racial hatred, blasphemy (!), public incitement to an offence, harassing communications...)
 - Right + responsibility!

Other IPRs and folklore

1. Trademark

- Helps to distinguish and protect for example genuine indigenous handicrafts by indicating the source of origin
 - E.g. *TOI IHO Māori made*
 - The benefit depends a lot on the marketing strategy

2. Geographical Indication Protection

- Protection of genuine products in a similar way than trademark
 - Unlike TM, GI may be used by *all* producers who make their products in the place designated by a geographical indication and whose products share typical qualities - there isn't a single "rightholder" with an exclusive right
- However, does not prevent fake products that are marketed and sold under some other name

3. Design protection

- Novelty requirement and maximum protection of 25 years makes it rather useless for traditional cultural expressions

4. Patents

IPRs and folklore

- Enforcement of IPRs
 - Not automatic
 - Responsibility of the rightholder

Navajo Nation vs Urban Outfitters

URBAN OUTFITTERS

Women's Men's Apartment Community Sale



Title Unknown Techno Navajo Quilt
Oversized Crop Tee
\$29.00

Overall Rating



[Read Reviews \(11\)](#) [Write a review](#)

COLORS:



SIZE:

Select Size

QUANTITY:



[Size Chart](#)

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Photo: Urban Outfitters

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Are there any other options than the pre-existing IPRs?

1. Customary law –based **soft law** measures
 - E.g. *Kuvaohjeistus saamelaisuuden ja saamelaiskulttuurin esittämisen periaatteet* (House of Lapland & Saamelaiskäräjät, 2016)
 - Instructions to presenting the Sami culture and the Sami people
 - Ineffective towards third parties – cannot be enforced
 - Easy to ignore for parties that do not agree with the content

2. **Code of conduct** -kind of arrangements
 - Internal regulation where a company commits to act in a certain way
 - Ineffective towards third parties – cannot be enforced

Are there any other options than the pre-existing IPRs?

3. **Prohibition of registering** IP rights that refer to cultural groups that need special protection, when the applicant is a third party
 - In the spirit of UNDRIP
 - E.g. *Māori Trade Marks Advisory Committee* and *Māori Patents Advisory Committee* -committees in New Zealand

4. **Sui generis** protection
 - For example: USA: Indian Arts and Crafts Act
 - A law that protects Native American–made designs and goods from being ripped off and appropriated by prohibiting the “misrepresentation in marketing of Indian arts and crafts products within the United States.”



3. TO CONCLUDE

To Conclude

- CA is not only a copyright / IP issue – also ethical issues to be concerned about
- *“We should be not asking ‘Who owns native culture?’ but ‘How can we promote respectful treatment of native cultures and indigenous forms of self-expression within mass-cultures?’” (Brown, 2003)*
- Respecting and protecting minority cultures’ intellectual property (such as dress heritage) helps in preservation of these cultures and keeping them alive in the future
 - Especially indigenous peoples are in a constant threat of extinction

To Conclude

- Do fashion houses have responsibilities in this sense?
 - If not, why care about cultural appropriation?
 - Cultural appropriation and disrespect towards cultures is a massive risk to a company's reputation
 - Dolce & Gabbana example
- Whether the copyright system should be applied to dress heritage and other cultural expressions (or whether they should be protected in some other way) depends on what *values* do we want to protect
 - Do we cherish endangered cultures, or public domain?
- The current *terra nullius* situation – setting TCEs outside of the scope of IP – is a strong statement both in the world of IP and the world of fashion

To Conclude

- Both the legislator and the fashion world can rethink their attitudes towards TCEs
- It is foreseeable that CA will diminish in the future of fashion
 - Strong disapproval
 - Risk of scandals
 - Social media

To Conclude



Company says they did not mean to disrespect the Aboriginal community

Gucci Is Being Called Out For Cultural Appropriation

The brand sent models down the runway wearing turbans

BY TAYLOR BRYANT · FEBRUARY 23, 2018



A Dolce & Gabbana show was canceled after racist online messages leaked

It's not the first time the brand has received blowback for offensive comments.

By Rebecca Jennings | @RebeccaJennings | Nov 21, 2018, 2:40pm EST

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5 Times Victoria's Secret Was Accused of Cultural Appropriation

FASHION

7 SLIDES

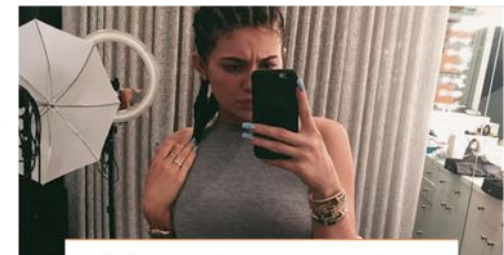
From Chinese dragons to Native headdresses.

News

Vogue's Rihanna cover photographer accused of cultural appropriation

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5 Times Kylie Jenner Was Called Out For Cultural Appropriation

Where is the line between respecting and disrespecting a culture?

To Conclude

- Fashion
 - Due to the previously mentioned risks, nowadays the fashion world is almost required to find out the source culture's opinion on borrowing its elements on catwalks
- Law
 - Acknowledging the colonial heritage & cultural imperialism of the current global IP system
 - Rethinking of the IP system from a perspective that acknowledges the aforementioned "baggage"
- A total prohibition of cultural references is not being demanded
- A solution? **Borrow respectfully.**



Thank you!

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Additional reading for those who are interested

- *Asmah, Josephine: Stepping Outside the Box: Traditional Knowledge, Folklore, Indigenous Textiles and Cultural Appropriation – is there Room for Folklore Protection under Intellectual Property Law?* University of Ottawa, Faculty of Law, 2010
- *Brown, Michael F.: Who Owns Native Culture?* Harvard University Press, Cambridge, Massachusetts, 2003
- *Dutfield, Graham: Protecting Traditional Knowledge and Folklore.* International Center for Trade and Sustainable Development (ICTSD) International Environment House. Switzerland 2003
- *Karhu, Juha & Nuorgam, Piia: Saamelaiskäsitöön (duodjin) oikeudellinen suoja osana saamelaiskulttuuria* from the book "Kysymyksiä saamelaisten oikeusasemasta" (p. 172—184) (toimittanut Kai Kokko). Lapin yliopiston oikeustieteiden tiedekunta, 2010
- *Rimmer, Matthew (edit.): Indigenous Intellectual Property. A Handbook of Contemporary Research.* Edward Elgar Publishing, United Kingdom 2015
- *Scafidi, Susan: Who Owns Culture?* Rutgers University Press, 2005