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Cultural Appreciation or Cultural Appropriation. Protection of Traditional Garments and Textiles in the Fashion Industry under the Industrial Design Regime

1. Introduction

In 2015 Isabel Marant – a renowned French fashion designer – introduced her spring/summer collection. After the show, the indigenous Mixe community, originating from Santa Maria Tlahuitoltepec (Mexico), claimed that Marant copied their 600-year-old traditional design called *huipil* on one of the presented blouses. Media outrage began and the case started to live its own life. Eventually, the designer formally denied owning any copyright to the Santa Maria Tlahuitoltepec embroidered blouses. However, this statement was caused by another fashion company's – Antik Batik – claim regarding copyright protection of the design. Therefore, two entities completely unrelated to the Mixe community started a conflict over a design that originally was not their property.¹ The Judicial Court of Paris eventually ruled against Antik Batik and held that the design came from the Mixe community, and neither Antik Batik nor Isabel Marant could claim any property rights to it.² However, no compensation was awarded to the indigenous artists as they were not a party to the case.³

The story of Isabel Marant illustrates the most problematic issues arising from the indigenous design and fashion industry interface. Two entities entered a legal dispute over a traditional design originating from an indigenous community. The hardly satisfying ruling of the French court reveals incompatibility of traditional communities' interests and the western legal system, especially in the context of insufficient legal protection of indigenous creativity. This problem has been recognised by both scholars and legislators who attempt to address the issue through multiple legal tools. While UNESCO focuses on the safeguarding of the intangible cultural heritage,⁴ WIPO takes an approach aimed

¹ *Isabel Marant Under Fire over Copyright of Traditional Mexican Design*, The Fashion Law, 20 November 2015, <https://www.thefashionlaw.com/isabel-marant-under-fire-for-copyright-of-traditional-mexican-design/>; Anne Fullerton, *The Isabel Marant Plagiarism Case Takes a New Twist*, 2015, <https://style.nine.com.au/latest/isabel-marant-accused-of-plagiarism-blouse-mexico/fcaefa30-fc2b-4031-babd-86cb1d585660> (accessed 13 Sep. 2020).

² Tribunal de grande instance de Paris, 3e chambre 4e section, 3 December 2015, No. 15/03456

³ Vivian Hendriksz, *Isabel Marant Freed of Plagiarism Accusations*, 8 December 2015, <https://fashionunited.com/news/business/isabel-marant-freed-of-plagiarism-accusations/201512089354> (accessed 13 Sep. 2020).

⁴ This has been accomplished by adopting the Convention for the Safeguarding of the Intangible Cultural Heritage.

at protecting human intellectual creativity and innovation against unauthorized use within IP regimes.⁵ This paper concentrates on the latter and analyses the potential protection of traditional creativity under EU design law. Considering current trends, such as sustainability or eco-awareness, the author focuses on the interface between the fashion industry and traditional garments. A deeper analysis of this interconnection appears particularly noteworthy as the fashion industry is both a beneficiary of design protection and the industry where illegal copying is particularly common (or even desirable). Moreover, misappropriation of indigenous garments arises a serious problem of cultural appropriation.

2. Basic definitions

2.1. Traditional Cultural Expressions

Traditional Cultural Expressions are derived from the concept of *folklore*.⁶ Lawmakers both indicate that traditional cultural expressions are tangible or intangible manifestations of folklore and use the terms ‘traditional cultural expressions’ (TCE or TCEs) and ‘expressions of folklore’ interchangeably.⁷ At the international level, the most significant developments in the field of folklore protection have been made by Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (hereinafter referred to as the ‘IGC’), which was established by the General Assembly of WIPO in 2000.⁸

IGC abandoned using *folklore* in published documents as the term might imply some inferiority of traditional culture.⁹ Therefore, WIPO introduced the term *Traditional Cultural Expressions* to describe the object of protection, defined in the Draft Articles¹⁰ as follows:

Traditional Cultural Expressions are any forms in which traditional culture practices and knowledge are expressed, [appear or are manifested] [the result of intellectual activity, experiences, or insights] by indigenous [peoples], local communities and/or [other beneficiaries] in or from a traditional context, and may be dynamic and evolving and comprise verbal forms, musical forms, expressions by movement, tangible or intangible forms of expression, or combinations thereof.

⁵ See: WIPO/GRTKF/IC/40/8, para. 23.

⁶ *Folklore* is defined as ‘[t]he traditional beliefs, customs, and stories of a community, passed through the generations by word of mouth’; see: <https://www.lexico.com/definition/folklore>, Oxford University Press, 2019. The term *Folk-lore* has been used for the first time in William Thoms’ letter published in *The Athenaeum*, 862–863, No. 982 (22 August 1846) (following: Duncan Emrich, ‘*Folk-Lore*’: *William John Thoms*. 5 *California Folklore Quarterly* 355–374, 361, No. 4 (1946), <https://doi.org/10.2307/1495929>, <https://www.jstor.org/stable/1495929> (accessed 6 Jan. 2020).

⁷ WIPO/GRTKF/IC/40/8: *The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis*, Annex I, p. 3.

⁸ The primary objective of IGC is to conduct negotiations aiming at reaching agreement on an international legal instruments protecting traditional knowledge, traditional cultural expressions and genetic resources, <https://www.wipo.int/tk/en/igc/> (accessed 17 Jan. 2020).

⁹ WIPO, *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions* 15 (2015), <https://www.wipo.int/publications/en/details.jsp?id=248>; Agnes Lucas-Schloetter, *Folklore*, in Silke von Lewinski ed., *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore* 345 (Kluwer Law International, 2008).

¹⁰ Draft Articles concerning TCEs have been first commissioned in 2004 and for the most recent developments in the matter of TCEs protection. see: https://www.wipo.int/tk/en/igc/draft_provisions.html.

This is a broad definition encompassing many expressions of culture ranging from *tuvan* (Mongolian throat singing) to Inuit parkas. To be granted protection, a TCE must meet the eligibility criteria outlined in Article 3(1) of Draft Articles.

2.2. Traditional garments

TCEs cover a wide range of human activities and take various forms, whether tangible (e.g. designs) or intangible (e.g. melodies). Traditional garments are a type of TCE and share their characteristics (set forth below). However, because of the role traditional garments play in indigenous communities, these attributes acquire specific meanings. Basic characteristics of TCEs and their implication in the context of traditional garments can be summarised as follows:

TCEs ¹¹	In the context of traditional garments
(1) Are handed down from one generation to another, either orally or by imitation.	Patterns, embroideries or sewing methods are handed down from one generation to the next for centuries. Subsequent generations build upon their ancestors' knowledge and skills to preserve and develop them in the modern context.
(2) Reflect a community's cultural and social identity.	<ul style="list-style-type: none"> • Specific sacred patterns, colours embellishing robes and items carry spiritual meaning. • Can be reserved for specific social groups or indicate individual qualities of the bearer, e.g. social status.¹² • Communicate the fact of belonging to a community, ethnic group, or a particular family.
(3) Are made by 'authors unknown' and/or by communities and/or by individuals communally recognized as having the right, responsibility, or permission to do so.	Traditional garments do not originate from an individual artist; they are developed by a whole community throughout centuries. Even when traditional garments are made by individuals within the community, they may not be perceived as theirs (as an author's possession) but remain the property of the community. ¹³
(4) Consist of characteristic elements of a community's heritage.	They are created by and for a community and reinforce a sense of belonging to the community. They serve as an integration factor gathering members of the community around common tradition and culture.
(5) Are constantly evolving, developing and being recreated within the community.	Constitute a living heritage. Preservation of indigenous tradition does not mean constant repetition but rather learning, building on, and honouring ancestors' ways and achievements. That is where traditional garments' novelty and innovation lies.

¹¹ Characteristics of TCEs as indicated in: *Traditional Cultural Expressions/Expressions of Folklore: Legal and Policy Options*, WIPO Document, WIPO/GTRKF/IC/6/3, para. 50, p. 17.

¹² Ghana has a long tradition of weaving traditional *kente* cloth used to produce colourful robes reserved for royalty and worn for special occasions.

¹³ Wend B. Wendland, 'It's a Small World (After All)': *Some Reflections on Intellectual Property and Traditional Cultural Expressions* 168, in Christoph Beat Graber & Mira Burri-Nenova eds., *Intellectual Property and Traditional Cultural Expressions in a Digital Environment* (Cheltenham, UK: Edward Elgar Publishing, 2008), <https://www.elgaronline.com/view/9781847209214.00015.xml>; such individuals can be authorized by the community as custodians of its cultural heritage.

The indigenous community is a factor that binds all the above features together. TCEs and traditional garments are not isolated or alien to the community but rather spring from the community itself, encompassing the essence of its cultural heritage. This collective character¹⁴ influences all other aspects of TCEs. Intergenerational transmission makes cultural expressions ‘traditional’, which in this context equals neither to ‘old’, ‘antique’, or - in the IP jargon – ‘lacking novelty’, but rather to the way TCEs are developed, sustained and disseminated in one group.¹⁵ In this process, an expression of traditional creativity is marked by the community and vice versa. A TCE is perceived by the community as inherently theirs.¹⁶ The community’s mark makes a TCE specific to the group in the sense that it embodies the community’s values and culture, reflecting its identity. This gives the TCE a cultural content that refers to ‘the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities’.¹⁷

3. Traditional creativity and fashion

Contemporary fashion designers and fashion houses are willing to incorporate traditional designs into their clothing lines. It perfectly fits in with the trend for natural products from sustainable sources. Global and local manufacturers introduce environment-focused programmes and policies to increase the number of products from sustainable materials. This trend is accompanied by consumers’ growing eco-awareness and preference for local products. An increasing number of fashion designers and manufacturers introduce projects focused on local,¹⁸ handmade garments produced from materials developed with local – also indigenous – craftspeople.¹⁹ Nevertheless, the relationship between the fashion market and TCEs remains problematic. Despite the increasing popularity of sustainable economy and local, traditionally made products, the importance of traditional design and textiles has not been fully recognized by the Western fashion world.

3.1. Some remarks on cultural appropriation

The term which reflects the current state of affairs is cultural appropriation. Cultural appropriation is thoroughly described on Wikipedia²⁰ and defined in the Cambridge Dictionary.²¹ Nevertheless, the debate on the appropriate definition of this phenomenon,

¹⁴ This term was used by Lily Martinet to describe one of TCEs’ features, in Lily Martinet, *Traditional Cultural Expressions and International Intellectual Property Law*, 47 International Journal of Legal Information 6–12, 11, No. 1 (2019).

¹⁵ See WIPO, *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, n. 8 *supra*, 17.

¹⁶ See: Wend B. Wendland, n. 13 *supra*, 167; Lily Martinet, n. 14 *supra*, 11.

¹⁷ Article 4(2) of the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CCD), available at: <https://en.unesco.org/creativity/sites/creativity/files/passeport-convention2005-web2.pdf>.

¹⁸ In this section ‘local’ is used to describe both products manufactured close to the place where they are sold and those made by or in cooperation with small, traditional communities.

¹⁹ Most notable Polish examples of such manufacturers are KOKOworld (see: <https://www.kokoworld.pl/>) and MAPAYA (see: <https://www.mapaya.pl/>). However, many more operate in close cooperation with local tailor shops.

²⁰ See: https://en.wikipedia.org/wiki/Cultural_appropriation.

²¹ See: <https://dictionary.cambridge.org/dictionary/english/cultural-appropriation>.

its consequences (either positive or negative), or even its very existence is still ongoing.²² According to the dictionary definition, cultural appropriation is ‘the act of taking or using things from a culture that is not your own, especially without showing that you understand or respect this culture’.²³ In a similar vein, Bruce Ziff and Pratima Rao propose a definition focused on the mere act of appropriation: ‘the taking – from a culture that is not one’s own’.²⁴ A more nuanced approach is presented by Brigitte Vézina, who describes cultural appropriation as an act of unauthorised transformation of TCE by the members of the relatively dominant culture, made in isolation from the original context, meaning and purpose, which causes harm to the holders of traditional garments.²⁵ She further asserts that the proposed definition indicates three main characteristics: a distortion (change) of the original cultural context, a prevailing position of the appropriator, and the omission of the holder’s participation in the process.²⁶ Vézina’s proposition is consistent with the approach presented by Susan Scafidi, who distinguishes cultural inspiration and cultural appropriation.²⁷ Both definitions support the statement that it takes more than mere appropriation to conclude whether a given act is unlawful and inflicts harm on indigenous holders. Drawing inspiration from another culture – when done respectfully – is often desirable and beneficial.

3.2. The conflict

Meanwhile, traditional culture broadly serves as an ‘inspiration’ to clothes manufacturers and designers. Unfortunately, a decision to exploit traditional designs, patterns and textiles is hardly ever made with consideration for indigenous communities’ interests. It is after the product appears on the market or a catwalk when the question of potential appropriation arises. The fast-fashion segment is potentially the most convenient space for a conflict between indigenous societies’ interests and fashion. Indeed, numerous examples of such tensions can be found.

Traditional Mexican designs have become an inspiration to three actors of fast fashion scene. The Barcelona-based manufacturer Mango introduced garments embodying the unique indigenous embroidery called *tenango*, created by artisans from Hidalgo – a state in East Mexico. Mango priced its garments twice the price for which *tenango*-embroidered

²² Compare: Josephine Asmah, *Stepping Outside the Box: Traditional Knowledge, Folklore, Indigenous Textiles and Cultural Appropriation--Is There Room for Folklore Protection under Intellectual Property Law?* 134 (2010), <https://doi.org/10.20381/ruor-13235>; Eric M. Ruiz, *I’ve Learned This the Hard Way: There’s No Such Thing as Cultural Appropriation*, <https://observer.com/2017/01/ive-learned-this-the-hard-way-theres-no-such-thing-as-cultural-appropriation/>; George Chesterton, *Cultural Appropriation: Everything Is Culture and It’s All Appropriated*. GQ Magazine, <https://www.gq-magazine.co.uk/article/the-trouble-with-cultural-appropriation> (accessed 1 Sep. 2020).

²³ <https://dictionary.cambridge.org/dictionary/english/cultural-appropriation>.

²⁴ Bruce Ziff & Pratima V. Rao, *Introduction to Cultural Appropriation: A Framework for Analysis 1*, in Bruce Ziff & Pratima V. Rao eds., *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick, N.J.: Rutgers University Press, 1997), quoted in Josephine Asmah, n. 22 *supra*, 134.

²⁵ Brigitte Vézina, *Curbing Cultural Appropriation in the Fashion Industry* 6–7, Centre for International Governance Innovation, CIGI Papers, No. 213 (3 April 2019).

²⁶ *Ibid.*

²⁷ Susan Scafidi, *When Native American Appropriation Is Appropriate*, *Time*, 6 June 2014, <https://time.com/2840461/pharrell-native-american-headress/> (accessed 22 Jul. 2020).

clothing is sold by the artisans.²⁸ Spanish merchants also willingly sell clothes based on indigenous Mexican designs. Intropia copied Oaxacan designs of the traditional *huipil*;²⁹ Zara found inspiration in blouses created by artisans from Aguacatenango.³⁰ However, fast fashion manufacturers are not the only ones to appropriate traditional creations. In 2013 Nike, one of the most renowned activewear brands presented women's workout leggings with printed patterns resembling Samoan *malofie* (*pe'a*) tattoos. The manufacturer not only misappropriated a traditional design without the Samoans' consent but also used it without respecting the rules and culture of this community as *malofie* is reserved exclusively for men. Eventually, after extensive criticism, Nike decided to pull the product off the market.³¹

The *prêt-à-porter* and *haute couture* designs usually encompass a high level of originality; any similarities are rather a result of the fashion industry's 'spirit of the times'. Nevertheless, occasionally some form of 'too intense inspiration' among designers occurs, which – in the fashion industry, permeated with piracy, is not very shocking. Far more surprising is that some of the most famous *haute couture* houses present garments that are, to put it mildly, 'inspired' by indigenous art. Tory Burch openly admitted – after it was brought up to the broader attention by a local Romanian community – to have create a coat inspired by traditional Romanian clothing.³² Dior also could not resist the beauty of traditional Romanian fashion in the PreFall 2017 collection.



Figure 1. Traditional Romanian coat and piece of Tory Burch Resort 2018 collection (left). Christian Dior Pre-Fall 2017 collection and Beius Jacket (right). Photo Source: <https://www.branding.news/2018/05/29/romania-knocks-out-diors-copycat-clothes-with-authentic-coat/>

²⁸ *Clothing Firm Accused of Copying Embroidery*, Mexico News Daily, 16 October 2017, <https://mexiconews-daily.com/news/clothing-firm-accused-of-copying-embroidery/>.

²⁹ *Intropia, marca española plagia diseños de ropa de Oaxaca*, 21 February 2017, <https://regeneracion.mx/intropia-marca-espanola-plagia-disenos-de-ropa-de-oaxaca/>.

³⁰ *Practising an Ancient Craft in a Village Without Men*, The Economist, 25 August 2018, <https://www.economist.com/the-americas/2018/08/23/practising-an-ancient-craft-in-a-village-without-men> (accessed 17 Aug. 2020). An example of an Aguacatenango blouse can be seen on: <https://www.culturalfusion.se/130-011>.

³¹ Lily Martinet, n. 14 *supra*, 11.

³² Margo Bagley, *Designing Disclosure: Disclosure of Cultural and Genetic Resource Utilisation in Design Protection Regimes*, in Susy Frankel ed., *The Object and Purpose of Intellectual Property*, ATRIP Intellectual Property Series 110–153, 114 (Cheltenham, UK: Edward Elgar Publishing, 2019).

Cultural appropriation – in the case of fashion - poses a threat to TCEs in many ways. It is usually harmful to the indigenous culture itself, as it violates the tradition, social rules, or religious feelings. Using ancient, secret patterns and designs in isolation from the cultural context is disrespectful to indigenous communities and traditional artists. Acts of misappropriation undermine communities' sense of independence and their bond with the heritage of the ancestors. It can also lead to more measurable economic consequences.³³ Mass-made, unlawfully inspired garments can deprive indigenous artists and societies of their means of livelihood and destroy traditional crafts, which may be an important part of developing countries' economy.³⁴ Considering the number of misappropriation examples, one may wonder if there is a way to cross the border between illegal copying and respectful appreciation.

3.3. The cooperation

Cultural exchange is generally beneficial for the cultures or societies involved and is an inevitable consequence of globalization. It fosters understanding, openness to new ideas or concepts, and a higher level of creativity – all of which the world needs nowadays. Indeed, a similar beneficial cultural flow can occur in the fashion industry.

Any form of TCEs commercialization should consider the interests, customary and indigenous laws of traditional societies, for whom the production of traditional textiles is often the only source of income. Therefore, a set of principles is needed that would help manufacturers and the public to create a relation with the indigenous culture. One proposition has been presented by Susan Scafidi, who suggests the rule of three S's: significance, source, and similarity. Essentially, these principles come down to three questions: what is the meaning of a given garment for a relevant community? (significance); did the source community agreed to a specific use of their TCE? (source); what is a degree of similarity between an adaptation and the original textile - is it just an inspiration or an exact copy? (similarity).³⁵ Brigitte Vézina goes a bit further in recommending principles of beneficial cooperation. In her insightful study, she remarks that any form of traditional design application should be preceded by an understanding of its meaning, origin, and significance for the community. Further, replicating Scafidi's third 'S', she asserts that the degree of transformation of the basic design may help distinguish what amounts to permissible inspiration and what constitutes appropriation.³⁶ Both scholars emphasize

³³ An Australian court ordered approximately AUD 188,640 in damages in a case regarding infringement of traditional aboriginal designs: *Milpurrruru v. Indofurn* (the Carpets Case); *George M*, Rayunka, Marika & Others v. Indofurn Pty Ltd*, (1994) 54 FCR 240; Betsy J. Fowler, *Preventing Counterfeit Craft Designs*, in J. Michael Finger & Philip Schuler eds., *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* 117 (Washington, D.C.: World Bank and Oxford University Press, 2004).

³⁴ See also: Josephine Asmah, *Historical Threads: Intellectual Property Protection of Traditional Textile Designs: The Ghanaian Experience and African Perspectives*, 15(3) *International Journal of Cultural Property* 271–296, 277 (2008), <https://doi.org/10.1017/S0940739108080168>; Chee Ying Kuek, *Protection of Expressions of Folklore/Traditional Cultural Expressions: To What Extent Is Copyright Law the Solution*, 32 *Journal of Malaysian and Comparative Law* 31–70 (2005), p. 36.

³⁵ Susan Scafidi, n. 27 *supra*.

³⁶ Similarity or degree of transformation should be considered together with other principles, see: Brigitte Vézina, n. 25 *supra*, 11–12.

the need for indigenous artists' and communities' involvement in the process of commercialization. A few manufacturers have noticed a business opportunity in collaboration with traditional communities.

Tradition can be successfully used in modern garments. A prominent example is the Canada Goose Project Atigi collection launched in January 2019. A line of exclusive parkas was created in cooperation with Inuit seamstresses. Thus created garments combine traditional skills and design with modern materials.³⁷ Nevertheless, Project Atigi is not merely about beautiful clothing; the manufacturer engages in close collaboration with Inuit artists, who handcraft all presented parkas, and in the popularisation of Inuit culture. Moreover, profits from the sales go to the Inuit Tapiriit Kanatami, which is the national Inuit representative organization, and then directly to the Inuit communities.³⁸ A similar project was implemented by Oskar Metsavaht, the founder of the Brazilian sportswear label Osklen: garments presented in the 2016 ready-to-wear collection incorporated traditional tattoos or fabrics and through this, paid homage to Asháninka – indigenous inhabitants of Peru and the western part of Brazil. Osklen entered into an agreement with Asháninka people to pay a lump sum (US\$50,000)³⁹ for permission to adapt their traditional designs. Metsavaht also acts to promote knowledge about Asháninka culture and their struggle to protect the natural environment.⁴⁰

It is important when a strong voice of the fashion market shows that there is a possibility of intercultural cooperation, in particular when this voice belongs to someone who has been involved in traditional design copying. The artistic director for the French *haute couture* house of Christian Dior, Maria Grazia Chiuri (since 2016), proposed a new line of Dior's Cruise collection in 2019. The presented garments were created with African wax print fabrics which are made by Uniwax, based in Abidjan, Ivory Coast, which still uses traditional methods to manufacture its products.⁴¹ Furthermore, the collection presented in Marrakech in Morocco was created in collaboration with African artisans, including the craftswomen of Sumano – an association promoting tribal women's handicrafts.⁴²

Local entrepreneurs also can spread knowledge about traditional cultures and teach a respectful attitude towards indigenous artisans among western consumers. Tamay & Me is a collaboration of Hannah – an anthropologist from Bristol, UK – and Tamay, who is a member of the Red Dzao – a traditional society from North Vietnam. This community is famous for its incredibly detailed, beautiful embroidery used to embellish Dzao's

³⁷ Brigitte Vézina, 'Curbing Cultural Appropriation in the Fashion Industry with Intellectual Property', WIPO Magazine, August 2019, https://www.wipo.int/wipo_magazine/en/2019/04/article_0002.html (accessed 20 Sep. 2019).

³⁸ More about Project Atigi: <https://www.canadagoose.com/ca/en/project-atigi.html>.

³⁹ The money was used by Asháninka people to build a school and a store to sell their products.

⁴⁰ Krithika Varagur, *Is This The Right Way For Fashion To Do Cultural Appropriation?*, Huffington Post, Style & Beauty, 11 May 2015, updated 17 January 2017, https://www.huffpost.com/entry/fashion-cultural-appropriation_n_5632295ce4b00aa54a4ce639?gucounter=1 (accessed 15 Jul. 2020). The documentary is still available on Osklen's YouTube profile: <https://www.youtube.com/watch?v=hcIjhpUn2l0>.

⁴¹ Brigitte Vézina, n. 37 *supra*.

⁴² Lauren Alexis Fisher, *Dior Jets to Marrakech for Resort 2020*, Harper's Bazaar, 30 April 2019, <https://www.harpersbazaar.com/fashion/fashion-week/a27321038/dior-marrakech-resort-2020-show/> (accessed 23 Aug. 2020.)

everyday clothing. Tamay & Me design clothing celebrates the culture and skills of the Dzaio and the Black Taya people. The latter grow cotton and dye textiles with different indigo tones, Dzaio are responsible for unique embroidery. Proceeds from selling thus created garments are shared with families who now have a regular source of income.⁴³

To protect their traditional designs, indigenous communities have long called for developing a *sui generis* system of TCE protection. Since none have been presented yet, they must turn to existing solutions. The IPR protection regime seems particularly attractive. The potential subject-matter of protection (TCE) fits within the range of creations protected under this regime, with the legislative and organizational structure already existing. However, the same characteristics that make TCEs unique can make their legal protection problematic.

4. TCE as an object of design law protection

Scholarly literature and examples from various jurisdictions confirm that TCEs can be protected under copyright, design, trademark, or geographical indications regimes.⁴⁴ However, conceptual differences between Western legal systems and indigenous beliefs or customs make application of IPRs to TCEs 'trying to fit a round peg into a square hole'.⁴⁵ Without delving deeply into this incompatibility, three main attitudes towards folklore (TCEs) protectability should be distinguished: proponents, sceptics, and opponents. This distinction reflects the whole spectrum, from granting folklore intellectual property protection to recognizing IP as harmful to traditional cultural expressions. The author adopts the sceptics' perspective as the most balanced. This standpoint recognizes the importance of current IP regimes for TCEs protection. It also acknowledges that neither every object of indigenous heritage is eligible for protection, nor all expectations of traditional societies can be addressed within the IP system.

The author claims that modern IP systems can be applied to TCEs protection, especially to traditional garments and textiles. The European Union is an important fashion industry market.⁴⁶ Because of its size, the fashion industry is also of key importance for the EU economy; therefore, it is accorded strong protection, the crucial instrument being the European intellectual property system, especially Registered and Unregistered Community Designs (respectively, RCDs and UCDs). Although there are not many groups in Europe that fall within the definition of indigenous communities, cases of appropriation of traditional garments and designs are quite common. Therefore, the design regime may potentially be a valuable means of traditional textile protection in Europe. The following remarks are intended to assess its applicability.

⁴³ *What Does Traditional Culture Have to Contribute to the Fashion Revolution?*, Fashion Revolution, <https://www.fashionrevolution.org/what-does-traditional-culture-have-to-contribute-to-the-fashion-revolution/> (accessed 20 Jul. 2020).

⁴⁴ See: WIPO/GRTKF/IC/40/8; Josephine Asmah, n. 34 *supra*, 280; Wend B. Wendland, n. 13 *supra*, 156.

⁴⁵ Wend B. Wendland, n. 13 *supra*, 150.

⁴⁶ In 2017 European Union was the biggest apparel market in the world in terms of its value, which amounted to 374.5 billion USD (according to: <https://www.statista.com/statistics/279735/global-apparel-market-size-by-region/>).

4.1. Positive protection

The design protection regime offers twofold protection for traditional garments and textiles: positive and defensive. Positive protection under industrial design rights enables indigenous owners to acquire and assert legal protection. The granted positive rights allow traditional communities to prevent illicit uses of traditional garments by third parties. Moreover, rights holders can decide to benefit from the commercial exploitation of their TCEs. However, the application of these tools is only possible if the traditional design meets the requirements for protection.

Under CDR⁴⁷, a design is new if no identical design has been made available to the public (prior to the relevant date). Moreover, immaterial differences, if present, do not destroy the design's novelty feature. It must also be noted that this requirement is not applied to mean strict novelty. Prior designs do not compromise novelty if, in the normal course of business, they could not reasonably have become known to the circles specialized in the sector concerned, operating within the European Union – Article 7(1) and Article 11 (1) CDR. Meanwhile, TCEs derive from previous materials, e.g. traditional patterns and designs. Folklore and TCEs are a result of an 'impersonal process'⁴⁸ which is based upon imitation or, rather, inspiration and respect for the heritage left by the ancestors. This process occurs through intergenerational transmission, building upon old but living traditional melodies, stories, and designs; hence it is a perpetual evolution of the cultural heritage of the community.

The above poses two sets of problems. The first one boils down to the fact that in the case of many TCEs, especially those of spiritual or religious character, the scope of an artist's freedom is very limited as they are bound by the intrinsic law and customs of the community to replicate the previous design.⁴⁹ This especially affects the notion of novelty. The second problem arises when originality is considered as expression of the author's personality – the copyright law understanding of this term. TCEs emanate from a community. Even when they are created or performed by an individual, the artist expresses the spirit of the community and its cultural heritage, rather than their own. Hence, this perspective advocates that the requirement of originality – either understood as novelty or the author's individual creation – can rarely be met by TCEs.⁵⁰ However, as previously concluded, TCEs are living culture; they are still changing as the next generations build on their ancestors' heritage. Therefore, changes incorporated in TCEs by contemporary artists may just reach an adequate level of novelty as required by Article 5 CDR. Moreover, as the 'novelty' requirement relates to the circles specialized in the concerned sector, it cannot be excluded that even the creations of distant and small indigenous cultures will be able to obtain protection under the EU regime. It can be claimed that traditional garments embodying attractive designs will usually be recognizable among professional designers or traders (specialized circles⁵¹) who seek inspiration from different cultures and traditions.

⁴⁷ Council Regulation (EC) No. 6/2002 of 12 December 2001 on Community designs.

⁴⁸ See: Agnes Lucas-Schloetter, n. 9 *supra*, 384.

⁴⁹ Chee Ying Kuek, n. 34 *supra*, 7.

⁵⁰ Compare: Agnes Lucas-Schloetter, n. 9 *supra*, 384-385.

⁵¹ The definition of 'specialized circles' was the object of rulings of the Court of Justice of the European Union, for instance judgment of 13 February 2014, *H. Gautzsch Großhandel*, C-479/12, ECLI: EU:C:2014:75.

Some guidance relating to the above can be found in the decision of the Invalidity Division of the OHIM⁵² of 3 October 2012, concerning the Community design depicting ‘Čičmany pattern’.⁵³ Community design No. 001989088-0001 was registered with the date of filing of 9 February 2012 for the products indicated as ‘surface patterns’. The applicant, ALPINE PRO STORES s.r.o., a Slovakia-based entity, filed an application for a declaration of invalidity on the grounds that the design in question did not comply with the requirements of novelty, individual character, public policy, and accepted principles of morality. As evidence, the applicant provided photos of wooden houses situated in the village of Čičmany in the Slovak Republic bearing characteristic images called ‘Čičmany pattern’ – the prior design. Further, it was claimed that the design was not new, and that it did not meet the requirement of individual character as the pattern had been taken from the ornamentation of one hundred years old wooden buildings in Čičmany.⁵⁴ The Office conducted the novelty assessment through a side-by-side comparison of the registered design and the prior design. The patterns were compared globally, then graphic symbols repeating in both patterns were identified and compared individually. The Office concluded that some symbols were indeed identical while others were modifications or new symbols. The recognized differences were deemed not to be only immaterial; hence the prior design was not an obstacle to the novelty of the registered design.

The individual character was analysed regarding three basic concepts: the overall impression, the informed user, and the degree of freedom enjoyed by the designer. The standard of the informed user was described as follows⁵⁵:

1. s/he ‘knows that when designing a decorative pattern, the freedom of the designer is unlimited’;
2. s/he ‘is familiar with national symbols and recognized cultural heritage of Slovakia’, thus is ‘aware of specific patterns which are painted on the exterior walls of the houses in the village of Čičmany’;
3. s/he ‘knows that these patterns can vary from each other in details, but they always contain characteristic geometric symbols in a typical row arrangement’, thus s/he ‘does not pay attention to every single detail in the pattern but rather perceives the style of folk motives and their arrangement’.

Based on the adopted standard of informed user, the Office concluded that the registered design produced on the informed user the same overall impression as the prior design, hence it lacked individual character. Consequently, the registered design was declared invalid. Unfortunately, the Office decided not to examine the grounds of invalidity from Article 25(1)(b) CDR in conjunction with Article 9 CDR.

⁵² The Office for Harmonization in the Internal Market was replaced by the European Union Intellectual Property Office.

⁵³ Community Design No. 001989088-0001. The decision is available at: [https://www.oami.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/law_and_practice/decisions_invalid/ICD%20000008697%20decision%20\(EN\).pdf](https://www.oami.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/law_and_practice/decisions_invalid/ICD%20000008697%20decision%20(EN).pdf).

⁵⁴ Decision of the Invalidity Division of 3 October 2012 in the proceedings for a declaration of invalidity of a Registered Community Design, para. 5.

⁵⁵ *Ibid*, para. 15.



Figure 2. Left: RCD depicting 'Čičmany pattern' (source: the EUIPO's database), right: Village of Čičmany with characteristic wooden houses (by PMATAS – Own work, CC BY-SA 4.0, <https://commons.wikimedia.org/w/index.php?curid=36905813>)

The described decisions and the procedure carried out by the Office give an important insight into the way similar cases concerning traditional designs can be examined. However, the assessment can apply only to invalidity decisions, as novelty and individual character requirements are not examined at the stage of registration. Nevertheless, valuable conclusions can be drawn from the Office's remarks in the context of traditional garments and textiles' novelty. In the case of spiritual garments or textiles, which according to intrinsic customs and laws of an indigenous community must be faithfully reproduced to honour ancestors and tradition, the novelty requirement would not be met. Even modern reproductions of such TCEs would be identical or, at the most, would immaterially differ from the prior designs. Hence, the novelty would be lost. On the other hand, in the Čičmany decision, the Office recognized the existing differences between designs as not immaterial, though initially one could claim otherwise. This shows that within the novelty test, the Office compares details; therefore, even small changes introduced to the prior design may cross the novelty threshold. Such an approach advocates the view that reinterpretations and adaptations of traditional designs, created by contemporary indigenous artists, can pass the novelty test, even if introduced modifications are not extensive.

The requirement of individual character seems more problematic. It may be assumed that the standard of informed user created by the Office in the Čičmany decision would apply to similar cases regarding traditional garments. Traditional textiles usually bear characteristic indigenous patterns, colours, or a combination thereof. For instance, Ghanaian *kente* is known for its vibrant colours and distinctive patterns, Dza'o's clothing is decorated with detailed embroidery, similar colourful designs can be found on the Romanian clothing crafted by people from Bihor. Therefore, in such cases, it would be reasonable to expect the informed user to know that when designing a decorative pattern, the freedom of the designer is unlimited (the first attribute of the informed user, outlined in the Čičmany decision). Moreover, s/he would recognize that traditional patterns always contain characteristic shapes or arrangements. Thus, s/he would not pay attention to every single detail in the indigenous design but rather perceive the style of traditional motifs (the third characteristic).

However, the last attribute of the informed user (indicated above as a second characteristic) may raise some doubts. In the Čičmany decision, the Office observed

that the informed user was familiar with national symbols and recognized the cultural heritage of Slovakia emphasizing that Slovakia was a member of the EU and the protection was sought for its territory. Although a similar approach would be justified in the case of such traditional garments as Romanian clothing,⁵⁶ it may be questionable when more ‘exotic’ traditional designs are concerned. Would it be reasonable to require the informed user to be familiar with indigenous designs created in a distinct part of the world? There is not enough comparative material regarding the EUIPO approach to answer this question in the case of traditional garments decisively. However, a relatively high standard of the informed user in design law – this notional person is situated between the model of the average consumer and the sector expert – would suggest that an informed user can be expected to be familiar with traditional garments and textiles in many situations. Such an approach is justified, at least in the case of indigenous garments and designs that are internationally recognised, e.g. Samoan tattoos, Maasai clothing or Inuit parkas.

4.2. Defensive protection

Defensive protection of traditional garments and textiles reverses the perspective described in the previous section. This approach concentrates on the question how to prevent third parties from registering an industrial design containing indigenous designs and motifs? In the EU design regime, this aim can be attained in two ways: at the registration stage or in the invalidity procedure.

During the initial examination, the EUIPO determines whether the design in question corresponds to the definition set out in the CDR and whether it is contrary to public policy or accepted principles of morality.⁵⁷ Traditional patterns are often used on garments without respecting the rules and culture of the source community.⁵⁸ Especially when a spiritual pattern is concerned, such use can offend indigenous people’s religious feelings and their sense of cultural independence. Unfortunately, since rejection decisions of the Office are not published, it is not possible to examine how many designs are rejected based on Article 9 CDR. Moreover, lack of invalidity decisions regarding accepted principles of morality does not enable determining whether it would also apply to indigenous garments and textiles.⁵⁹ However, in the Guidelines for Examination of Registered Community Designs religion is recognized as an important factor for determining whether principles of morality are infringed.⁶⁰ Therefore, it can be anticipated that when a design for which the protection is sought offensively incorporates traditional patterns, thus offending indigenous societies’ religious feelings, registration should be rejected.

⁵⁶ Romania is also a EU Member State.

⁵⁷ European Union Intellectual Property Office (EUIPO), *Guidelines for Examination of Registered Community Designs*; European Union Intellectual Property Office (EUIPO); *Examination of Applications for Registered Community Designs* 25, 1 February 2020, <https://guidelines.euipo.europa.eu/binary/1803372/2008000000>.

⁵⁸ See the Nike example described in section 3.2.

⁵⁹ Research conducted with the EUIPO eSearch Case Law search engine, <https://euipo.europa.eu/eSearchCLW/#advanced/community-designs>.

⁶⁰ EUIPO, n. 57 *supra*, 28.

A Community design may be declared invalid in situations listed in Article 25(1) CDR, among others, if it does not fulfil the requirements of Articles 4 to 9 CDR. Therefore, invalidity can be declared when a design is not novel or does not have an individual character. Although other grounds of invalidity may apply to traditional garments, the two indicated above are most relevant. It has been asserted that when a modern design incorporates exact traditional patterns or similar patterns, registration may be refused based on prior art, hence lack of novelty.⁶¹ However, it will only be true when the design copies the prior indigenous motifs. As the Čičmany decision suggests, the novelty threshold is rather low, and even small modifications may be claimed not to be immaterial. Nevertheless, the same decision proves that even if a design's novelty is not destroyed by prior traditional patterns, an assessment of its individual character may lead to the conclusion that the overall impression made by a modern design on the informed user is the same as made by an indigenous design. The relative character of the 'novelty' requirement also works in favour of indigenous designers. They may be able to prove that the relevant TCE is a prior design as it has become known to the circles specialized in the fashion sector operating within the EU. The examples presented in section 3 clearly confirm that to European creators are often familiar traditional designs. Hence, it should be concluded that indigenous communities can benefit from defensive protection through the invalidity procedure.

5. Conclusion

The presented analysis covers only selected legal problems regarding the protection of TCEs. Many more fundamental incompatibilities await resolution. Nevertheless, the author believes that the article strongly supports the claim that the European industrial design regime (and potentially the regime of other IPRs) cannot be *a priori* excluded as a possible tool of TCE protection. Nevertheless, it does not mean that illicit use of traditional heritage will end. Indeed, work conducted by international organisations (e.g. WIPO and UNESCO) got us much closer towards a mutual understanding and recognition of the need for indigenous culture protection. However, there are still many problems to resolve on both the 'Western' and traditional communities' side. This is amply illustrated by the problems surrounding the adoption of the Design Law Treaty, which is being negotiated under the auspices of the IGC. The proposal of the African Group to introduce the requirement to disclose the origin of traditional cultural expressions, traditional knowledge, or biological or genetic resources used in creating a design, led to the suspension of further work on the Treaty.⁶² Although some conceptual changes can

⁶¹ Compare: Maree Sainsbury, *Indigenous Cultural Expression and Registered Designs*, in Matthew Rimmer ed., *Indigenous Intellectual Property* 233–249, 246 (United Kingdom: Edward Elgar Publishing, 2015), <https://doi.org/10.4337/9781781955901.00019>; WIPO, *Protect and Promote Your Culture, A Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities* 52 (WIPO, 2017).

⁶² For more information on this topic see: Margo A. Bagley, *Ask Me No Questions: The Struggle for Disclosure of Cultural and Genetic Resource Utilization in Design Law*, 20 *Vanderbilt Journal of Entertainment and Technology Law* 975 (2020), <https://scholarship.law.vanderbilt.edu/jetlaw/vol20/iss4/1> (accessed on 16 Aug. 2021).

be introduced into the Western legal systems, indigenous people must determine whether they are ready for necessary adjustments as well. One thing remains clear; further cooperation will require the involvement not only of IP regimes but of diverse (not only) legal systems on the international scale.

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Abstract

Cultural Appreciation or Cultural Appropriation. Protection of Traditional Garments and Textiles in the Fashion Industry under the Industrial Design Regime

This article aims to analyse the potential applicability of the European Union industrial design regime to the protection of TCEs, with special focus on traditional garments. The author begins with the definition of traditional cultural expressions based on scholarly literature and legal acts or drafts thereof. Further, the author observes a connection between traditional creativity and the fashion industry, marked by the phenomenon of cultural appropriation. Examples of unlawful exploitation of traditional communities' heritage presented by the author (partly counterbalanced by examples of successful cooperation) demonstrate the need to reach for legal instruments of protection. The author claims that such a legal instrument can be found in EU industrial design legislation. Although neither every object of indigenous heritage would be eligible for protection, nor all expectations of traditional societies can be addressed within the Western intellectual property system, the EU regime can be an attractive solution for contemporary indigenous artists.

Keywords: *industrial designs, designs, traditional cultural expressions (TCEs), indigenous people, traditional garments, traditional textiles, folklore, fashion, fashion industry*

Bibliografia / References

- Asmah, Josephine, *Historical Threads: Intellectual Property Protection of Traditional Textile Designs: The Ghanaian Experience and African Perspectives*, 15(3) *International Journal of Cultural Property* 271–962 (2008), <https://doi.org/10.1017/S0940739108080168>
- Asmah, Josephine, *Stepping Outside the Box: Traditional Knowledge, Folklore, Indigenous Textiles and Cultural Appropriation-Is There Room for Folklore Protection under Intellectual Property Law?* (2010), <https://doi.org/10.20381/ruor-13235>
- Bagley, Margo A., 'Ask Me No Questions': *The Struggle for Disclosure of Cultural and Genetic Resource Utilization in Design Law*, 20 *Vanderbilt Journal of Entertainment and Technology Law* 975 (2020), <https://scholarship.law.vanderbilt.edu/jetlaw/vol20/iss4/1>
- Bagley, Margo A., *Designing Disclosure: Disclosure of Cultural and Genetic Resource Utilisation in Design Protection Regimes* 110–153, in Susy Frankel ed., *The Object and Purpose of Intellectual Property*, ATRIP Intellectual Property Series (Cheltenham, UK: Edward Elgar Publishing, 2019)

- Chesterton, George, *Cultural Appropriation: Everything Is Culture and It's All Appropriated*, GQ Magazine, 1 September 2020, <https://www.gq-magazine.co.uk/article/the-trouble-with-cultural-appropriation>
- Clothing Firm Accused of Copying Embroidery*, Mexico News Daily, 16 October 2017, <https://mexico-newsdaily.com/news/clothing-firm-accused-of-copying-embroidery/>
- Emrich, Duncan. 'Folk-Lore': *William John Thoms*, 5(4) California Folklore Quarterly 355–374 (1946), <https://doi.org/10.2307/1495929>
- Finger, J. Michael, Schuler, Philip eds., *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (Washington, D.C.: World Bank and Oxford University Press, 2004), https://archive.org/details/poorpeo_XXX_2004_00_1758
- Fisher, Lauren Alexis, *Dior Jets to Marrakech for Resort 2020*, Harper's BAZAAR, 30 April 2019, <https://www.harpersbazaar.com/fashion/fashion-week/a27321038/dior-marrakech-resort-2020-show/>
- Hendriksz, Vivian, *Isabel Marant Freed of Plagiarism Accusations*, 8 December 2015. <https://fashionunited.com/news/business/isabel-marant-freed-of-plagiarism-accusations/201512089354>
- Intropia, marca española plagia diseños de ropa de Oaxaca, 21 February 2017. <https://regeneracion.mx/intropia-marca-espanola-plagia-disenos-de-ropa-de-oaxaca/>
- Isabel Marant Under Fire over Copyright of Traditional Mexican Design*, The Fashion Law, 20 November 2015, <https://www.thefashionlaw.com/isabel-marant-under-fire-for-copyright-of-traditional-mexican-design/>
- Kuek, Chee Ying, *Protection of Expressions of Folklore/Traditional Cultural Expressions*, 32 Journal of Malaysian and Comparative Law (2005), <https://ejournal.um.edu.my/index.php/JMCL/article/view/16268>
- Lewinski, Silke von, ed. *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore* (2nd ed., Austin: Wolters Kluwer Law & Business, 2008)
- Martinet, Lily, *Traditional Cultural Expressions and International Intellectual Property Law*, 47(1) International Journal of Legal Information 6-12 (2019), <https://doi.org/10.1017/jli.2019.8>
- Practising an Ancient Craft in a Village without Men*, The Economist, 25 August 2018, <https://www.economist.com/the-americas/2018/08/23/practising-an-ancient-craft-in-a-village-without-men>
- Sainsbury, Maree, *Indigenous Cultural Expression and Registered Designs* 233–249, in Matthew Rimmer ed., *Indigenous Intellectual Property* (United Kingdom: Edward Elgar Publishing, 2015), <https://doi.org/10.4337/9781781955901.00019>
- Scafid, Susan, *When Native American Appropriation Is Appropriate*, Time, 6 June 2014, <https://time.com/2840461/pharrell-native-american-headaddress/>
- Varagur, Krithika, *Is This The Right Way For Fashion To Do Cultural Appropriation?*, Huffington Post, Style & Beauty, 11 May 2015, https://www.huffpost.com/entry/fashion-cultural-appropriation_n_5632295ce4b00aa54a4ce639?gucounter=1
- Vézina, Brigitte, *Curbing Cultural Appropriation in the Fashion Industry*, Centre for International Governance Innovation, CIGI Papers, No. 213 (3 April 2019), <https://www.cigionline.org/publications/curbing-cultural-appropriation-fashion-industry>
- Vézina, Brigitte, *Curbing Cultural Appropriation in the Fashion Industry with Intellectual Property* (August 2019), https://www.wipo.int/wipo_magazine/en/2019/04/article_0002.html
- WIPO, *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions* (2015), <https://www.wipo.int/publications/en/details.jsp?id=248>
- WIPO, *Protect and Promote Your Culture, A Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities* (2017), <https://www.wipo.int/publications/en/details.jsp?id=4195>
- Wendland, Wend B., 'It's a Small World (After All)': *Some Reflections on Intellectual Property and Traditional Cultural Expressions*, in Christoph Beat Graber & Mira Burri-Nenova eds., *Intellectual Property and Traditional Cultural Expressions in a Digital Environment* (Cheltenham, UK: Edward Elgar Publishing, 2008), <https://www.elgaronline.com/view/9781847209214.00015.xml>
- What Does Traditional Culture Have to Contribute to the Fashion Revolution?*, Fashion Revolution. Accessed 20 July 2020. <https://www.fashionrevolution.org/what-does-traditional-culture-have-to-contribute-to-the-fashion-revolution/>