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Protection and Prevention: The Shortcomings of U.S. Copyright Law in Combatting Cultural Appropriation in the Fashion Industry

Luke E. Steffe
Indiana University Maurer School of Law, lesteffe@iu.edu

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PROTECTION AND PREVENTION: THE SHORTCOMINGS OF U.S. COPYRIGHT LAW IN COMBATTING CULTURAL APPROPRIATION IN THE FASHION INDUSTRY

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Luke E. Steffe

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PROTECTION AND PREVENTION: THE SHORTCOMINGS OF U.S. COPYRIGHT LAW IN COMBATTING CULTURAL APPROPRIATION IN THE FASHION INDUSTRY

Luke E. Steffe*

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INTRODUCTION

American fashion represents an eclectic patchwork of diverse experiences and ideas;[1] however, drawing upon Indigenous communities' cultural identities and sacred traditions can easily cross the line between inspiration and appropriation. In reality, designs derived from culturally significant symbols, which have been stolen from Indigenous communities and stripped of their meaning, flood the American market. From runway shows[2] to sports teams' mascots[3] to undergarment designs,[4] these manifestations of cultural appropriation occur legally under the existing U.S. copyright regime, and adaptations to the current, Westernized system of intellectual property (IP) rights must integrate Indigenous perceptions of communal ownership with respect to their intellectual property.[5] Copyright protection empowers native communities with both a sword and a shield, allowing for the protection and enforcement of their sacred art forms.[6] By expanding current notions of authorship, copyright protection can extend to traditional designs and protect them from constant appropriation, and quite

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[1] MET Costume Exhibit 2021 inspired reflection on the rich history of American fashion. *See* Steff Yotka, *Insider "In America: A Lexicon of Fashion" with Andrew Bolton*, VOGUE (Sept. 13, 2021), https://www.vogue.com/article/in-america-a-lexicon-of-fashion-costume-institute-exhibition [https://perma.cc/LT9P-RLYF].

[2] 2017 Victoria's Secret Fashion Show criticized for dressing models with "Indigenous inspired headdress and accessories." *See* Natalie Sechyson, *Victoria's Secret Appropriates Indigenous Culture, Yet Again, in Fashion Show*, HUFFPOST (Nov. 22, 2017, 12:25 PM), https://www.huffpost.com/archive/ca/entry/victorias-secret-cultural-appropriation_a_23285423 [https://perma.cc/2AD8-XCS6].

[3] Washington Football team undergoes name change, without apology or acknowledgment despite decades of criticism. *See* Press Release, Washington Commanders, *Washington Announces Franchise Will Be Called 'Washington Football Team' Pending Adoption of New Name* (Jul. 23, 2020, 12:56 PM), https://www.washingtonfootball.com/news/redskins-announce-franchise-will-be-called-washington-football-team-pending-adop [https://perma.cc/D5XQ-EPUH].

[4] Urban Outfitters criticized after rolling out underwear with Navajo branding. *See* Christina Ng, *Urban Outfitters Under Fire for 'Navajo' Collection*, ABC NEWS (Oct. 12, 2011, 1:40 PM), https://abcnews.go.com/US/urban-outfitters-fire-navajo-collection/story?id=14721931 [https://perma.cc/6ERN-D92S].

[5] Peter Shand, *Scenes from the Colonial Catwalk: Cultural Appropriation, Intellectual Property Rights, and Fashion*, 3 CULTURAL ANALYSIS 47, 61 (2002).

[6] Megan M. Carpenter, *Intellectual Property Law and Indigenous Peoples: Adapting Copyright Law to the Needs of a Global Community*, 7 YALE HUM. RTS. & DEV. L.J. 51, 51 (2004).

frankly, stealing by fashion labels. Moreover, granting a valid copyright to Indigenous designs in fashion must be accompanied by the explicit recognition of moral rights to provide comprehensive protection. In the United States, a suit for copyright infringement relies on the existence of a valid copyright; thus, the current law denying these protections to Native American and Alaskan Native communities leaves them without legal remedy when faced with the appropriation of their intellectual property.[7] This Note proceeds in three Parts. Part One discusses Indigenous designs in fashion as a classification of Traditional Cultural Expressions (TCEs). Part Two analyzes the legal framework of U.S. copyright law as it stands and offers insight into the discrepancies between Western and Indigenous notions of intellectual property rights. Finally, Part Three suggests two legislative adaptations to account for these discrepancies and provide for the protection of Indigenous fashion designs, and all classes of TCEs, drawing upon international solutions to this issue.[8]

I. INDIGENOUS DESIGNS IN FASHION AS TRADITIONAL CULTURAL EXPRESSIONS

Traditional Cultural Expressions (TCEs) categorically refer to a community's tangible and intangible expressions of culture.[9] While many working definitions exist, this Note will adopt the definition used by the World Intellectual Property Organization's Intergovernmental Committee (WIPO IGC).[10] According to the WIPO IGC's website, TCEs "form part of the identity and heritage of a traditional or Indigenous community."[11] These expressions include music, dance, art, designs, signs and symbols,

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[7] Elizabeth L. Rosenblatt, *Copyright's One-Way Racial Appropriation Ratchet*, 53 U.C. DAVIS L. REV. 591, 635 (2019).

[8] Important considerations of constitutionality and Tribal sovereignty arise with modifications to legislation. While this Note remains conscious of these added considerations, it will not discuss them in depth. *See generally* Alexander Bussey, *Traditional Cultural Expressions and the U.S. Constitution*, 10 BUFF. INTELL. PROP. L.J. 1 (2014) (discussing constitutional implications of protecting TCEs in the United States).

[9] Brigitte Vézina, *Curbing Cultural Appropriation in the Fashion Industry*, CIGI PAPERS, Apr. 2019, at 1, 4.

[10] Multinational organizations such as WIPO IGC provide the appropriate forum to agree upon what fits under the umbrella of TCEs for the purposes of an international treaty. These discussions remain open, and a multilateral treaty will allow for the enforcement of protecting TCEs across the world. *See, e.g.*, *Intergovernmental Committee (IGC)*, WORLD INTELL. PROP. ORG., https://www.wipo.int/tk/en/igc/ [https://perma.cc/B6QS-BXNQ].

[11] *Traditional Cultural Expressions*, WORLD INTELL. PROP. ORG., http://www.wipo.int/tk/en/folklore/ [https://perma.cc/QL8X-ENWJ].

ceremonies, handicrafts, and narratives and generally pass between generations.[12] TCEs take many shapes across the globe and typically share three characteristics.[13] First, these art forms present cultural content, embodying symbolic meaning and cultural values.[14] Second, TCEs have a collective essence, both developed by and belonging to the community.[15] Finally, TCEs pass intergenerationally, tightly binding the expression with the community itself.[16] These characteristics demonstrate the profound meaning behind TCEs and support the need for strong intellectual property protections.[17] Nevertheless, despite the value placed on these expressions, IP regimes across the globe largely exclude TCEs from protection.[18]

Fitting well within all definitions of TCEs, fashion design and Tribe-specific ceremonial vestments play an essential role in establishing a cultural identity.[19] Indigenous garment and jewelry design[20] personify Indigenous traditions by incorporating culturally significant motifs into fashion design through forms of artistry, including beadwork, weaving, and tufting.[21] Furthermore, some Tribe-specific patterns and graphics go beyond cultural significance and are held sacred, only to be worn by designated community members—thereby heightening the harm felt when mainstream fashion houses appropriate these TCEs.[22] The use, better characterized as misuse, of Indigenous designs in mainstream fashion severs the clothing from its cultural significance and vulgarizes the most tightly held symbols of Indigenous culture.[23] In the era of colonization, Western culture viewed Indigenous design as "uncivilized," but as time progressed, Indigenous

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[12] Richard Awopetu, *In Defense of Culture: Protecting Traditional Cultural Expressions in Intellectual Property*, 69 EMORY L.J. 745, 749 (2020).
[13] Lily Martinet, *Traditional Cultural Expressions and International Intellectual Property Law*, 47 INT'L J. LEGAL INFO. 6, 9 (2019).
[14] *Id.*
[15] *Id.* at 11.
[16] *Id.*
[17] The Navajo nation views its Trademarks as some of their most valuable assets. *See* Vézina, *supra* note 9, at 4.
[18] Vézina, *supra* note 9, at 4.
[19] Elizabeth M. Lenjo, *Inspiration Versus Exploitation: Traditional Cultural Expressions at the Hem of the Fashion Industry*, 21 MARQ. INTELL. PROP. L. REV. 139, 139 (2017).
[20] *Id.* at 144.
[21] Aman K. Gebru, The Piracy Paradox *and Indigenous Fashion*, 39 CARDOZO ARTS & ENT. L.J. 607, 614 (2021).
[22] Gebru, *supra* note 21, at 619.
[23] *Id.* at 618.

designs quickly became yet another mainstream trend.[24] Now, both high-fashion and fast-fashion companies appropriate, distribute, and profit from these TCEs worldwide.[25]

Cultural appropriation[26] is defined by professors Ziff and Rao as "the taking—from a culture that is not one's own—of intellectual property, cultural expressions or artifacts, history and ways of knowledge."[27] Actions of appropriation take a TCE from a minority culture and repurpose it in a different context without authorization, acknowledgment, or compensation to the rightful holders.[28] Without attribution, a TCE becomes separated from its traditional meaning, thereby diluting or distorting the cultural significance of the design.[29] For instance, when fashion labels and big-box stores incorporate Ingenious headdresses into their products, these outsiders completely disregard and strip the headdress of its spiritual meaning.[30] Moreover, an extreme power imbalance often exists between the appropriator and the appropriated.[31] These power discrepancies derive from economic, social, and political power and often render Native communities unable to fight against the use of their TCEs due to a drastic disparity of resources.[32]

The harms experienced by the appropriation of traditional designs "strikes at the heart of communal self-constitution and ritual expression."[33]

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[24] Lenjo, *supra* note 19, at 144.
[25] *Id.*
[26] *See generally* Gebru, *supra* note 21, at 11 (discussing cultural appropriation and its impacts in depth).
[27] Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 310 (2002) (quoting Bruce Ziff & Pratima V. Rao, Introduction to Cultural Appropriation: A Framework for Analysis, *in* BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION 1, 1 (Bruce Ziff & Pratima V. Rao eds., 1997)).
[28] Vézina, *supra* note 9, at 6.
[29] *Id.*
[30] *See, e.g.*, Sarah Karmali, *Feathers Ruffled at H&M*, VOGUE U.K. (Aug. 12, 2013), https://www.vogue.co.uk/article/h-and-m-native-american-hipster-headdress-pulls-accessory-after-complaints [https://perma.cc/695Z-39YS].
[31] Vézina, *supra* note 9, at 7.
[32] *Navajo Nation v. Urban Outfitters, Inc.*, provides an example of the legal realities of fighting appropriation. Urban Outfitters sold a line called "Navajo hipster panties." The Navajo nation pursued legal action and eventually received an undisclosed settlement from Urban. 191 F. Supp. 3d 1238 (D.N.M. 2016); *see also* Ng, *supra* note 4.
[33] Stephanie Spangler, *When Indigenous Communities Go Digital: Protecting Traditional Cultural Expressions Through Integration of IP and Customary Law*, 27 CARDOZO ARTS & ENT. L.J. 709, 711 (2010) (quoting SUSAN SCAFIDI, WHO OWNS CULTURE? APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW 105 (2005)).

Moreover, appropriation generally occurs with no compensation to the harmed communities.[34] Because standing to bring suit from infringement requires a valid copyright, the Copyright Act renders Indigenous communities powerless when seeking legal recourse for the financial harms caused by the appropriation of their own culture.[35] TCEs do not fall within the Western framework of property rights; thus, these designs and art forms freely exist in the public domain.[36] The use of TCEs from the public domain does not require recognition or compensation, and the American fashion industry widely uses these Indigenous designs, symbols, and prints.[37]

II. INADEQUACIES OF U.S. COPYRIGHT LAW

Article I, Section 8 of the U.S. Constitution grants Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[38] In practice, copyright and other IP protections achieve this by offering a limited economic monopoly to authors and inventors, thus, incentivizing creation through financial reward while temporally restricting the monopoly's duration.[39] After these protections expire, works enter the public domain and are freely available for public consumption, allowing greater access to knowledge and art.[40] These protections have expanded both in duration and scope in response to the advance of science and technology.[41] The Copyright Act of 1976[42] reflects

[34] Vézina, *supra* note 9, at 7.
[35] *See* Copyright Act, 17 U.S.C. § 106 (2018) (granting copyright owners exclusive rights upon which appropriation infringes).
[36] Awopetu, *supra* note 12, at 754.
[37] Martinet, *supra* note 13, at 11.
[38] U.S. Const. art. I, § 8, cl. 8.
[39] Awopetu, *supra* note 12, at 770.
[40] Given the intergenerational nature of TCEs, this limited term, even expanded by hundreds of years, inadequately offers lasting and meaningful protection *See* J. Janewa OseiTutu, *A* Sui Generis *Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law*, 15 MARQ. INTELL. PROP. L. REV. 147, 192–93 (2011).
[41] *See generally* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified in scattered sections of 17 U.S.C.) (amending the Copyright Act of 1976 to extend the duration of copyright protections for most works to life of the author plus seventy years); *cf.* Semiconductor Chip Protection Act of 1984, Pub. L. No. 98-620, § 301, 98 Stat. 3335, 3347 (codified as Ch. 9 of 17 U.S.C.) (protecting the design of semiconductor chips).
[42] This legislation completely overhauled its predecessor, the Copyright Act of 1909. *Compare* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as 17 U.S.C.)

these changes through statutory enhancements and continues to respond to new understandings of the role of copyright law in an evolving society.[43] This historical expansion of the copyright regime in response to a changing IP landscape sets precedent to include expanded notions of authorship and ownership through similar statutory enhancements, which Part Three will argue.

Despite the availability of protection for fashion designs, this comes at the exclusion of Indigenous designs in fashion because the intergenerational nature and communal ownership of TCEs do not harmonize with the fundamental tenants of copyright law—authorship, originality, fixation, term, and the public domain.[44] These frustrations have led scholars to refer to Copyright as an "unpalatable form of protection of [I]ndigenous heritage rights."[45] In the United States, "Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . ."[46] Thus, these protections automatically come into existence[47] as long as a work meets the three requirements of a valid copyright—originality, authorship, and fixation.[48] Without meeting these criteria, a work exists in the public domain, where it can be freely copied, claimed, and exploited.

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with Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (repealing Copyright Act of 1870).

[43] The Copyright Act of 1976 has undergone over fifty "statutory enhancements" in response to the rapid evolution of technology. *See* Shira Perlmutter, Preface to U.S. Copyright OFF., Circular 92: Copyright Law of the United States and Related Laws Contained in Title 17 of the U.S. Code, at vii–xv (2021) (listing these enhancements chronologically through May of 2021).

[44] Awopetu, *supra* note 12, at 770.

[45] Shand, *supra* note 5, at 61.

[46] 17 U.S.C. § 102 (2018).

[47] Registration of a copyright is not required by the act, and any work that is copyrightable enjoys copyright protections with or without official registration with the Copyright Office. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified in scattered sections of 17 U.S.C.) (abolishing the requirement of registration); *see also* 17 U.S.C. § 201(a) (2018) ("Copyright in a work protected under this title vests initially in the author or authors of the work.").

[48] While other TCEs, such as storytelling and traditional dance, may struggle to meet the fixation requirement, Indigenous design and fashion easily satisfy this criterion; thus, fixation will not be discussed further in this Note.

A. Originality

The Copyright Act offers protection only to original works.[49] Originality is required by the Constitution, as explained by the U.S. Supreme Court in the seminal case *Feist Publications, Inc. v. Rural Telephone Service Co*.[50] Although a low threshold, "a modicum of creativity" is required for a work to be considered original.[51] Further case law shows that, as it stands, copyright protections extend only to original works created by an author falling within one of the three classes of authorship: an individual author, joint authors, or an employee creating a work made for hire.[52] Works that enjoy copyright protection stem from the original thought, skill, or labor of an identifiable author, and a work derived from a pre-existing work must show a substantial variation to the extent that the variations themselves merit protection under the Act.[53]

The very essence of TCEs prevents them from reaching of this threshold, as they customarily pass down from generation to generation.[54] The precise reproduction across generations is essential to maintaining the integrity and cultural significance of TCEs.[55] These designs and prints carry centuries' worth of heritage and only vary trivially from their previous form.[56] To achieve this revered level of cultural significance, preservation, not innovation, is the goal of Indigenous art; thus, the current text of the Copyright Act does not consider TCEs original.[57] Additionally, modifications that occur across generations are minimal and do not meet the substantial variation test for originality in works based on pre-existing works.[58] In the rare case that Indigenous designs undergo more than a trivial amount of modification, they receive only a limited, "thin copyright"

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[49] 17 U.S.C. § 102 (2018).
[50] 499 U.S. 340, 346–47 (1991).
[51] *Id.* at 362.
[52] Shand, *supra* note 5, at 66; *see also* 17 U.S.C. § 201 (2018) (granting initial copyright protections to an author, group of joint authors, or employer of an author, in the case of a work made for hire).
[53] Carpenter, *supra* note 6, at 68.
[54] Vézina, *supra* note 9, at 5.
[55] Molly Torsen, *Intellectual Property and Traditional Cultural Expressions: A Synopsis of Current Issues*, 3 INTERCULTURAL HUM. RTS. L. REV. 199, 203 (2008).
[56] Sahara F. Farzaneh, Note, *Cultural Appropriation of Traditional Garment Designs in the Post-*Star Athletica *Era*, 37 CARDOZO ARTS & ENT. L.J. 415, 428 (2019).
[57] *Id.*
[58] Awopetu, *supra* note 12, at 771.

protection.[59] Currently, the only available workaround to satisfy the originality requirement, requires Native American or Alaskan Native Tribes to grant permission to an author, likely a member of the Tribe, to individually make and claim protection for an original design or garment based on the TCE they desire to protect.[60] These protections belonging to an individual member of the community, rather than the Tribe as a whole, directly conflict with the communal nature of these cultural expressions, and equity calls for the protection of Indigenous designs without this dissatisfactory workaround approach.[61] Moreover, requiring the original work to vary from the TCE itself compromises the cultural integrity of the design. In reality, this workaround approach creates a race between Indigenous communities and fashion designers to create an "original" variation of the TCE and register it first.

B. Authorship

The Copyright Act identifies three types of authorship: sole authorship, joint authorship, and works made for hire.[62] A sole author is an individual who either produces or superintends the production and serves as the "mastermind of the work."[63] Joint authorship occurs when two or more authors' contributions combine to form an inseparable or interdependent work with the intention and agreement to create a joint work.[64] The Copyright Act's conception of authorship follows a rationale derived from romantic individualism, which considers writings to be the product of one man's unique thoughts transcribed for the rest of the world to read.[65] This individualistic approach contrasts with earlier thinking where authors such as

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[59] Farzaneh, *supra* note 56, at 428; *see also* Ets-Hokin v. Skyy Spirits, Inc., 323 F.3d 763, 766 (9th Cir. 2003) ("When we apply the limiting doctrines, subtracting the unoriginal elements, Ets-Hokin is left with only a 'thin' copyright, which protects against only virtually identical copying.").
[60] Awopetu, *supra* note 12, at 771.
[61] These rights either remain with the individual or vest in the Indigenous community, as a corporate entity, if the work satisfies the criteria of a Work Made for Hire. Both scenarios conflict with Native conceptions of communal ownership, and individual or corporate ownership of TCEs does not account for the generational and cultural significance of these designs. *See* 17 U.S.C. § 101 (2018) (defining a "Work Made for Hire"); *see also* Carpenter, *supra* note 6, at 69.
[62] 17 U.S.C. §§ 101, 201 (2018). Indigenous communities do not recognize an employment relationship with the members of their group, and thus, work made for hire is not a relevant category of authorship for the purposes of this Note.
[63] 17 U.S.C. § 101 (2018).
[64] *Id.*
[65] Carpenter, *supra* note 6, at 58–59.

Plato and Aristotle considered themselves curators more than creators, reflecting on inspiration and ideas from the society in which they lived.[66] The romantic roots of modern copyright law conflict with Indigenous notions of authorship, which align more closely with that of Plato and Aristotle.[67]

Looking at the very heart of the construction of the U.S. copyright regime provides insight into why TCEs are incompatible with the protections currently offered. To this point, Lou-Ann Neel and Dianna Biin, artists and members of First Nations, a community indigenous to Canada, point out that their language lacks a single word for an artist.[68] They note: "Instead, we have words and phrases that describe individuals or groups of individuals as being knowledgeable or skilled in a particular area of creative works . . . ."[69] These classifications as groups of creators rather than individual artists demonstrates the disconnect between current law and Indigenous conceptions of authorship and supports the need for developing a broader understanding of who, and what, constitutes an author as defined by the Copyright Act.

In addition to the challenges around conflicting conceptions of authorship, practical and substantive legal issues exist that result in Indigenous designs failing to meet the authorship requirement. The passing of these TCEs between generations makes it challenging, if not impossible, to identify an author.[70] In *Burrow-Giles Lithographic Co. v. Sarony*, the Supreme Court defined an author as "he to whom anything owes its origin; originator; maker."[71] The law considers works without an identifiable author, or group of authors, as unauthored and thus unworthy of copyright protection.[72] Often, multiple members of a community, across multiple generations, collaborate to create Indigenous textile designs.[73] Thus, these sacred garments cannot enjoy copyright protection and will exist freely in the public domain until a "valid" author claims them as their own—often an outsider who appropriates and strips these designs of their sacred meanings.[74]

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[66] *Id.* at 59.
[67] *Id.*
[68] Shand, *supra* note 5, at 64.
[69] *Id.*
[70] Vézina, *supra* note 9, at 5.
[71] 111 U.S. 53 (1884).
[72] Rosenblatt, *supra* note 7, at 613.
[73] *Id.*
[74] Paolo D. Farah & Riccardo Tremolada, *Conflict Between Intellectual Property Rights and Human Rights: A Case Study on Intangible Cultural Heritage*, 94 OR. L. REV. 125, 148 (2015).

Because the Act confers real-property rights that divide equally amongst joint authors, the current legal framework makes it extremely difficult to grant and devise meaningful property rights to a fluid group of people.[75] Thus, any potential solutions must re-envision the concepts of authorship and joint authorship and offer a way to reconcile this collective interest and ownership of the works.[76]

C. *The Public Domain*

Entrance into the Berne Convention for the Protection of Literary and Artistic Works, a multi-lateral treaty, and compliance with its terms fundamentally shaped U.S. copyright law as it exists today.[77] Concepts of originality, fixation, term, and authorship push TCEs outside the umbrella of protection established by the Berne Convention and into the public domain.[78] As a result of their cultural significance, Indigenous designs in fashion often serve as references and cultural markers for outside groups to use as a lens into these traditional cultures.[79] Because TCEs belong to no identifiable author and thus exist in the public domain, they are free to be exploited and manipulated under the terms of the Copyright Act.[80] This exploitation leads not only to appropriation but to obtainment of copyright protections by outside groups over near-replicas of these garments since originality only requires a trivial amount of modification from the Indigenous garment designs. To receive full intellectual property rights for these stolen cultural expressions, outsiders simply need to register the copyright first because the first "author" of an original work enjoys copyright protection.[81] Thus, identifying an outsider as an author satisfies the requirements of a valid copyright and will result in the full enjoyment of protections under the Act. For example, Feral Childe, a clothing label for women, currently holds a copyright for "Teepees" used to protect its signature pattern, an abstract depiction of these TCEs.[82] Facilitated by their existence in the public domain,

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[75] Torsen, *supra* note 55, at 207 ("[E]ntire tribes and clans consider themselves, as a whole, stewards and caretakers of their culture").
[76] Farzaneh, *supra* note 56, at 426.
[77] Awopetu, *supra* note 12, at 770.
[78] Torsen, *supra* note 55, at 202.
[79] Vézina, *supra* note 9, at 9.
[80] *Id.*
[81] *Id.* at 5.
[82] *Id.*

Teepees are just one example of an Indigenous expression of culture becoming mainstream.[83]

As with authorship, a conceptual disconnect exists between Western and Indigenous conceptions of the public domain. Scholar James Leach notes that intellectual property operates under Western ideas of property rights compared to the many traditional cultures operating under their own system of communal rights.[84] Indigenous communities view their designs and TCEs as "building blocks of their heritage which to them 'is a bundle of relationships rather than a bundle of economic rights.'"[85] While TCEs exist freely among their respective communities, this does not indicate the intention to be available in the broader public domain.[86] In fact, the public domain is not a concept recognized by some Indigenous communities.[87] The sad irony of the current copyright framework is that the very concept that subjects Indigenous designs in fashion to free exploitation and modification is not recognized by the communities this appropriation harms. TCEs, when existing in the public domain, may never receive IP protections and thus cannot be subject to enforcement. Therefore, to effectively offer protection to these culturally significant designs, a solution must incorporate customary law into the real-property framework of existing IP protections.[88]

III. ADAPTING THE COPYRIGHT ACT TO PROTECT INDIGENOUS DESIGNS IN FASHION

Fashion reflects a dialog between society and culture, drawing inspiration from the world in which it exists.[89] Culture inherently influences the creative process, and TCEs must have additional protections to ensure this inspiration does not devolve into appropriation.[90] Native fashion contributes to this creative conversation by using design to embody a community's cultural and social identity,[91] and the availability of copyright

[83] Vézina, *supra* note 9, at 9.
[84] Farah & Tremolada, *supra* note 74, at 149.
[85] Farzaneh, *supra* note 56, at 426 (internal citation omitted).
[86] Farah & Tremolada, *supra* note 74, at 149.
[87] OseiTutu, *supra* note 40, at 191.
[88] *Id.*
[89] Rosenblatt, *supra* note 7, at 652.
[90] Vézina, *supra* note 9, at 1–2.
[91] Spangler, *supra* note 33, at 713.

protections offers both protection from cultural appropriation and agency to license and exploit TCEs as their rightful owners see fit.[92]

A. Overarching Considerations for Solutions

These garments, accessories, and prints, all of which represent, and belong to, a community, fall within the scope of customary law.[93] The expansion of copyright protections must consciously work to incorporate traditional notions of communal property rights without stifling the creative process inherent in completely isolating access to TCEs.[94] More importantly, legal solutions must be mindful of Tribal sovereignty any time federal policy applies to Indigenous communities.[95] Integrating customary law into current legislation, both through interpretation and amendment, will respect these considerations and allow TCEs to enjoy the full extent of the protections and legal remedies offered by the Copyright Act.[96] The primary goal of these solutions must aim to grant Indigenous communities the complete autonomy to protect and exploit their TCEs as they see fit.[97] A solution ought not attempt to force copyright protections on all designs but instead provide the option for both proactive (registering valid copyrights) and reactive (prosecuting infringement) legal protection. Different handlings of TCEs in copyright regimes around the world offer valuable insight into the mechanisms of implementing these much-needed protections. This final Part will explore how international copyright schemes protect TCEs and suggest ways to incorporate these legal concepts into U.S. copyright law. Specifically, these solutions aim to broaden Western concepts of authorship to recognize communal authorship and offer post-registration protection by strengthening moral rights in the United States.

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[92] *Id.* at 715.
[93] *Id.* at 713.
[94] *See* Vézina, *supra* note 9, at 7–8; *see also* Martinet, *supra* note 13, at 12 (describing the impacts of the end of Japan's isolationist IP Policy on the European impersonalism movement).
[95] Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 868 (2016).
[96] Spangler, *supra* note 33, at 770.
[97] *Id.* at 715.

B. *Broadening Current Legislation to Incorporate Customary Law*

After several failed attempts to protect fashion design through legislation, the Supreme Court solidified the scope of copyright protection available for fashion design in *Star Athletica, L.L.C. v. Varsity Brands, Inc.*[98] Before this shift in jurisprudence, the fashion industry did not enjoy the full extent of copyright protections because aesthetic elements of clothing were considered inseverable from the useful object to which they attach.[99] The Court dispensed of this notion in favor of an expansive reading of the Copyright Act, establishing a two-prong severability test under which a design merits copyright protection if (1) it can be separately perceived as a two or three-dimensional work separate from the useful article and (2) that design, on its own, qualifies for copyright protection.[100] Under this expanded understanding of severability, the Copyright Act now unquestionably protects against the unauthorized reproduction of garments, textiles, and patterns or prints.[101]

While this case did not directly relate to Indigenous designs in fashion, it exemplifies the feasibility and positive impact of expanding the interpretation of the Copyright Act; moreover, by undeniably granting protection to fashion design categorically, *Star Athletica* increases protections available to Indigenous fashion design. In 2015, the great-granddaughter of an Inuit shaman discovered that high-end fashion house Kokon To Zai (KTZ) had appropriated a caribou skin parka in the form of a sweater.[102] The parka, crafted in the early 1900s, served both culturally significant and utilitarian purposes, with two artistic motifs protecting the breasts and three motifs covering the stomach.[103] Before *Star Athletica*, this parka's utilitarian aspect would have barred it from copyright protection.[104] However, by expanding the concepts of what constitutes a valid copyright, *Star Athletica* now provides the framework to hold KTZ liable for

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[98] *See* 137 S. Ct. 1002, 1012 (2017); *see also* Farzaneh, *supra* note 56, at 420.
[99] *See* Farzaneh, *supra* note 56, at 420.
[100] Star Athletica, 137 S. Ct. at 1010–12 ("In sum, a feature of the design of a useful article is eligible for copyright if, when identified and imagined apart from the useful article, it would qualify as a pictorial, graphic, or sculptural work either on its own or when fixed in some other tangible medium.").
[101] *See* Farah & Tremolada, *supra* note 74, at 147.
[102] Farzaneh, *supra* note 56, at 416.
[103] *Id.*
[104] *Id.* at 421.

infringement upon a showing that the motifs could be separated from the parka's utilitarian functions and protected on their own.[105] Despite the parka itself representing a copyrightable object, the Copyright Act remains restrictive when considered in light of customary law and traditional notions of communal authorship. Thus, it presents hurdles to the protection of analogous Indigenous designs. *Star Athletica* exemplifies the benefits of utilizing broad legislative interpretation as a tool to provide for greater protections and lays the groundwork for preventing cultural appropriation by incorporating customary laws within the existing legislative framework by recognizing notions of communal authorship and strengthening moral rights.

i. A Broadened Category of Authorship

Both the economic monopoly and legal protections offered to a work of art under the Copyright Act hinge on the work satisfying the parameters of a valid copyright. Thus, to begin the fight against cultural appropriation, the criteria of a copyrightable work must accommodate the communal and generational nature of TCEs. The collective authorship exhibited by TCEs does not satisfy the Act's definition of authorship and presents a fundamental hurdle to their protection.[106] The recognition of communal authorship will overcome this hurdle and simultaneously satisfy the Act's originality and authorship required by §102. Under a regime recognizing communal authorship, an Indigenous community can claim ownership of pre-existing works, and the work of successor generations can then be classified and protected as a lawful derivative work.[107]

Judge-made law can effectuate these changes, as demonstrated by the Federal Courts of Australia. In a line of cases regarding the protection of Aboriginal art, the courts recognized the need for an expanded notion of authorship to afford sacred Aboriginal art copyright protections.[108] In the 1994 case, *Milpurrurru v. Indofurn Ltd.*, a carpet manufacturer appropriated designs of eight Aboriginal artists, producing the paintings nearly identically on its carpets.[109] Despite the copyright statute only providing for actual

[105] *Id.* at 436–37.
[106] Spangler, *supra* note 33, at 729.
[107] *See* Copyright Act of 1976, 17 U.S.C. § 101 (2018) ("A 'derivative work' is a work based upon one or more preexisting works . . . [in] any . . . form in which a work may be recast, transformed, or adapted"); *see also id.* § 106 (granting the owner of a copyright the exclusive right to prepare derivative works).
[108] Carpenter, *supra* note 6, at 62.
[109] *Id.* at 61.

damages based on economic depreciation, the court recognized that customary law allowed for strict enforcement against infringement and offered a range of damages for the clan.[110] The court grappled with the existing statutory framework's inability to rectify harms felt by Aboriginal communities as a whole rather than an individual or corporate entity.[111] Restrained by the statute's text, the court turned to an infrequently used provision allowing for damages in cases of egregious infringement.[112] For the first time, the court expressly considered customary law in conjunction with the existing legal framework during their assessment of damages.[113]

Only a few years later, in 1998, the Australian courts took another step towards recognizing the communal ownership interests of Aboriginal communities. In *Bulun Bulun v. R & T Textiles Pty Ltd.*, a famous Aboriginal artist brought suit for infringement when an Australian fashion company reproduced his work, depicting a sacred location, on textiles.[114] Bulun Bulun argued that his clan entrusted him with the sacred duty of producing these works, thereby making the art the clan's property and not his own.[115] While the court did not expressly expand authorship to the community, the opinion recognized that the "paintings w[ere] a physical manifestation of the fiduciary relationship between the artist and his community."[116] The court ultimately dismissed the clan's representative from the suit but first recognized that if Bulun Bulun had breached his fiduciary duty by inappropriately exploiting these sacred works, the clan could seek legal remedy.[117] Notably, the court forecasted a scenario where a fiduciary duty, established by customary law, would be recognized and enforced by Western law. Despite not acknowledging the clan as a communal author, the court expressly acknowledged its defensible interest in its intellectual property.[118] This hypothesized bridge between customary and Western law lays the foundation for incorporating communal authorship into the existing U.S. copyright regime.[119]

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[110] *Id.* at 66.
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] Spangler, *supra* note 33, at 719.
[115] MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 44 (2003).
[116] *Id.* at 45.
[117] Carpenter, *supra* note 6, at 67.
[118] Brown, *supra* note 115, at 65.
[119] Spangler, *supra* note 33, at 719.

This notion of Indigenous communities having a defensible interest in their TCEs has been recognized in the United States but only through *sui generis* legislation. The Native American Graves Protection and Repatriation Act (NAGPRA) facilitates the return of culturally significant "items" found at Indigenous burial sites and formally recognizes tribal sovereignty over burial sites both on federal and Indigenous land.[120] The Act designates a class of objects as "cultural patrimony," which are:

> [O]bject[s] having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.[121]

The 10th Circuit, in *United States v. Corrow*, used this provision to provide relief after the trafficking of Indigenous ceremonial adornments by an artifact salesperson.[122] The *Corrow* court found objects of cultural patrimony embodied such cultural significance as to be owned collectively by the members of the Tribe.[123]

While *sui generis* protections address specific legal shortcomings, they merely *accommodate* customary law.[124] Modifying the Copyright Act to incorporate, rather than separately address, these legal concepts fully recognize the value of TCEs as copyrightable material. Fusing concepts such as cultural patrimony into the fundamental tenants of copyright law would allow for an expanded understanding of authorship, as TCEs often represent this same level of cultural significance such that the community the TCE represents effectively "authored" it.[125] This new category of authorship must

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[120] *See* Francis P. McManamon, *The Native American Graves Protection and Repatriation Act (NAGPRA)*, U.S. NAT'L PARK SERV. (2000), https://www.nps.gov/archeology/tools/laws/nagpra.htm [https://perma.cc/M87N-LDMP].
[121] Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 (2018).
[122] 119 F.3d 796, 799 (10th Cir. 1997).
[123] *Id.* at 800–03.
[124] *See* Spangler, *supra* note 33, at 729.
[125] Farzaneh, *supra* note 56, at 427.

operate in a limited scope, only extending to a work with such cultural significance that it exists indivisible from its holder.[126] Following the 10th Circuit's lead in *Corrow* and taking note from Australian jurisprudence, judge-made law can begin the process of recognizing communal authorship in the United States.

The current inability to identify an author because of the differences in customary notions of authorship leaves incredibly sacred Indigenous designs and garments entirely unprotected. By expanding the definition of authorship, the Copyright Act can accommodate TCEs within the existing framework, and possessing a valid copyright allows for full enjoyment of the benefits granted by the Act, such as an economic monopoly and standing to bring suit for infringement.[127] Indigenous communities will also have the autonomy to make decisions about licensing and exploiting their designs, options foreclosed to works existing in the public domain.[128] However, merely recognizing Indigenous designs as copyrightable only partially protects them from exploitation by mainstream fashion. To offer a well-rounded bundle of protections, the United States must explicitly recognize and enforce moral rights.[129]

ii. Explicit Recognition and Enforcement of Moral Rights

In addition to considering TCEs as copyrightable material, the recognition of moral rights aids in preventing cultural appropriation in fashion. Moral rights are the inalienable rights of a creator with respect to their creation and most commonly take two forms—the rights of integrity and attribution.[130] These rights give authors the autonomy to control their work beyond creation and are crucial to ensuring Indigenous communities maintain exclusive control over how the mainstream exploits their tribal-specific designs.[131] The Berne Convention requires its member states to provide for these moral rights, and article 6*bis* states:

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[126] *See* Farah & Tremolada, *supra* note 74, at 170.
[127] Copyright Act of 1976, 17 U.S.C. § 501(b) (2019) ("[T]he legal or beneficial owner of an exclusive right under a copyright is entitled to . . . institute an action for any infringement of that particular right committed while he or she is the owner of it.").
[128] Spangler, *supra* note 33, at 715.
[129] Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 2 (1985).
[130] Spangler, *supra* note 33, at 717.
[131] *Id.*

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.[132]

Despite this, the United States opted not to include moral rights when Congress passed the Berne Convention Implementation Act of 1988.[133] Historically, the United States has approached moral rights with great hesitancy, and Congress concluded that moral rights already existed *de facto* through other existing legal avenues such as defamation, unfair competition, and state art preservation laws.[134] A 2019 report published by the U.S. Register of Copyrights describes the current regime as providing a "moral rights patchwork."[135] These limited protections in U.S. law do not meet the standard of protection prescribed by Berne, and the necessary expansion of these rights will allow for greater protection of TCEs against cultural appropriation.[136]

The right of authorship also referred to as the right of attribution, acts positively and negatively, allowing the author to both claim and disclaim their work.[137] The right of integrity prevents distortion, mutilation, or modification of a work in a manner prejudicial to the author's honor or reputation.[138] The recognition of these rights plays an essential role in preventing cultural appropriation because it allows Indigenous communities to retain control over the public use of their works, thereby stopping the stripping of the cultural significance from their sacredly held designs and

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[132] Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*, Sept. 9, 1886, 1161 U.N.T.S. 3 (revised at Paris July 24, 1971).
[133] Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.
[134] *See generally Authors, Attribution, and Integrity: Examining Moral Rights in the United States*, U.S. COPYRIGHT OFF. (Apr. 2019), https://www.copyright.gov/policy/moralrights/full-report.pdf [https://perma.cc/C3XK-ER6T].
[135] *Id.*
[136] Spangler, *supra* note 33, at 718.
[137] *Authors, Attribution, and Integrity: Examining Moral Rights in the United States*, *supra* note 134, at 6 n.9.
[138] Farah & Tremolada, *supra* note 74, at 163.

garments.[139] The international community has well surpassed the United States in terms of implementing protections for moral rights, and these successes support the need for, and show the feasibility of, recognizing these rights under the current copyright regime.

New Zealand has a robust scheme of protections available for Indigenous intellectual property that offers substantial moral rights through landmark legislation arising from treaty negotiations with Māori, the Indigenous people of New Zealand.[140] The Haka Ka Mate Attribution Act and Māori Advisory Committee exemplify how New Zealand copyright law lays the groundwork for implementing more effective moral rights in the United States. The Intellectual Property Office of New Zealand (IPONZ) offers proactive protection by eliminating the registration of trademarks offensive to Māori culture.[141] This committee holds a "deep understanding . . . of Māori worldview, culture, and protocols" and advises IPONZ when deciding whether a suspect mark offends Māori culture, thus precluding its trademark registration.[142] On the legislative front, the Haka Ka Mate Attribution Act was passed in 2014[143] and codified the moral right of attribution.[144] The Māori faced appropriation of their sacred performance of the Haka Ka Mate; this Act aims to prevent misuse by requiring clear and prominent attribution for any performance of the Ka Mate.[145] While the Act has its limitations, notably not extending beyond New Zealand and the inability of courts to order injunctions to prevent a continuing breach,[146] it offers a categorical example of the legislation needed in the United States to, at the very minimum, ensure Indigenous designs and other TCEs receive attribution.

The Copyright Act, as it stands, inadequately provides moral rights to creators, especially Indigenous artists. Equity calls for the codification of

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[139] Spangler, *supra* note 33, at 710–11.
[140] Isabella Tekaumarua Wilson, *The Misappropriation of the Haka: Are the Current Legal Protections Around Matauranga Maori in Aotearoa New Zealand Sufficient?*, 51 VICT. UNIV. WELLINGTON L. REV. 523, 523, 545 (2020).
[141] *Id.* at 542.
[142] *Māori Advisory Committees,* NEW ZEALAND INTELL. PROP. OFF., https://www.iponz.govt.nz/about-ip/maori-ip/maori-advisory-committees/ [https://perma.cc/E8ZP-E252].
[143] Haka Ka Mate Attribution Act, s 3 (N.Z.).
[144] Wilson, *supra* note 140, at 545.
[145] *Id.* at 530, 545.
[146] *Id.* at 546–47.

moral rights in the current intellectual property regime. The successes and weaknesses of international schemes will provide lawmakers with the insight necessary to draft legislation to grant and protect moral rights.

CONCLUSION

Indigenous designs in fashion exemplify only one of the many classes of TCEs, and the profound cultural significance of these sacred garments supports the need for robust intellectual property protections. Indigenous conceptions of communal ownership are incompatible with the Western origins of U.S. copyright law in its current form. By expanding the Copyright Act to recognize communal authorship, Indigenous communities enjoy the right to protect and exploit their designs at their sole discretion. Beyond receiving a valid copyright, the protection of Indigenous fashion requires recognizing and enforcing moral rights in the United States. The combination of copyright and moral rights protections provides Indigenous communities with adequate tools to fight against the appropriation, vulgarization, and monetization of their sacred designs.

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