

8-16-2018

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### Recommended Citation

Baker, KaDeidra (2018) "Indigenous Appropriation and Protections Provided by Intellectual Property Law," *North Carolina Central University Science & Intellectual Property Law Review*: Vol. 11 : Iss. 1 , Article 4.

Available at: <https://archives.law.nccu.edu/siplr/vol11/iss1/4>

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# INDIGENOUS APPROPRIATION AND PROTECTIONS PROVIDED BY INTELLECTUAL PROPERTY LAW

KADEIDRA BAKER

## I. INTRODUCTION

Cultural appropriation is defined as the “unacknowledged or inappropriate adoption of the customs, practices, and ideas of one people or society by members of another and typically more dominant people or society.”<sup>1</sup> In recent years, the term has become a buzzword of sorts in response to culturally-inspired Halloween costumes, hairstyles, and clothing, among other things.

In 2013, American pop singer, Selena Gomez was the subject of public backlash after she took the stage at the MTV Music Awards wearing traditional Indian clothing and a bindi.<sup>2</sup> One critic of Gomez’s garb noted, “[a] bindi is not a costume.”<sup>3</sup> Another critic stated, “[l]eave bindis for Indian women.”<sup>4</sup> Many other American entertainers have also been cited for donning the traditional apparel of other cultures including: Miley Cyrus<sup>5</sup>, Gwen

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\*J.D. candidate, North Carolina Central University School of Law, 2019; B.A., Wake Forest University, Sociology, 2016. To my family and closest friends, thank you all for your continued support and constant encouragement. This note is dedicated to you all.

1. *Cultural appropriation*, English Oxford Living Dictionary, [https://en.oxforddictionaries.com/definition/cultural\\_appropriation](https://en.oxforddictionaries.com/definition/cultural_appropriation).

2. Sarina Lotlikar, *Whose Bindi is it ANYWAY?: When Selena Gomez Sports a Bindi at Her Concert, Is That Cultural Appropriation? When Indians Use Ching’s Secret in Their Kitchens, Is That Cultural Mis-Appropriation? Sarina Lotlikar Wonders*, DNA. (Aug. 17, 2014), <https://www.highbeam.com/doc/1P3-3404773651.html>.

3. *Id.*

4. *Id.*

5. Pop singer, Miley Cyrus became the subject of public backlash after critics accused her of appropriating hip-hop culture by twerking, rapping, dread locking her hair, and wearing gold grills in her mouth. See Khal, *A Timeline of Miley Cyrus Appropriating Hip-Hop Culture*, Complex (May 4, 2017), <http://www.complex.com/music/2017/05/miley-cyrus-appropriating-hip-hop-culture>; Chelsea Stone, *Miley Cyrus Accused of Cultural Appropriation for Hip-Hop Comments*, Teen Vogue (May 5, 2017), <https://www.teenvogue.com/story/miley-cyrus-hip-hop-comments>.

Stefani<sup>6</sup>, and Katy Perry<sup>7</sup>. In response to these instances, Rajan Zed, President of the Universal Society of Hinduism stated, “[o]ur cultural symbols have a well-defined meaning and purpose. They have sanctity and spirituality. They were not created just for Hollywood or corporate use to add dramatic effect.”<sup>8</sup>

Several critics of the term “cultural appropriation” argue that in multicultural countries such as the United States, cultural emulation is merely admiration.<sup>9</sup> Some opponents of the term suggest that because cultures coexist in such proximity, the exchange of cultural practices is to be expected. One

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6. American singer, Gwen Stefani was accused of appropriating Japanese street culture after releasing a song titled, “Harajuku Girls.” The music video featured four backup dancers of Asian descent, whom Stefani later referred to as the “Harajuku Girls.” After the song’s release, the women became members of Stefani’s entourage for promotional purposes and were reportedly contractually obligated to speak only Japanese in public. Stefani also went on to launch a fragrance line, a clothing line, a cartoon series, and a camera of the same name, using Japanese designs. See xMaud1990, *Gwen Stefani - Harajuku Girls*, YouTube (July 25, 2011), <https://www.youtube.com/watch?v=qecNL1266ms>; Erica Russell, *Kuu Kuu Harajuku: On Growing Up With Gwen Stefani, Japan Street Fashion + Cultural Appropriation*, PopCrush (Sep. 30, 2016), <http://popcrush.com/gwen-stefani-kuu-kuu-harajuku-japanese-fashion-appropriation/>; Eliana Dockterman, *Before We Embrace Gwen Stefani’s Comeback, She Owes Us An Apology*, Time (Oct. 20, 2014), <http://www.time.com/3524847/gwen-stefani-racist-harajuku-girls/>.

7. Pop singer, Katy Perry has been criticized for appropriating both black culture and Japanese culture on separate occasions. In 2014, Perry was accused of perpetuating racist tropes in the music video for her song, “This Is How We Do.” In the video, Perry is seen with a braid in her hair, eating watermelon, and making a sideways peace sign with her hands. Later in the video, Perry is seen donning comrows with gelled edges. Arguably, all of these expressions are easily traced to black culture and black stereotypes. Perry was also accused of appropriating Japanese culture in 2013 after she took the stage at the American Music Awards to perform her song, “Unconditionally.” During the performance, Perry wore a low-cut kimono and powdery makeup in the style of Japanese geishas. See KatyPerryVEVO, *Katy Perry - This Is How We Do (Official)*, YouTube (July 31, 2014), <https://www.youtube.com/watch?v=7RMQksXpQSk>; Juan Pablo, *Katy Perry - Unconditionally (Live at AMA’s 2013)*, YouTube (Nov. 24, 2013), <https://www.youtube.com/watch?v=iXqcjgX-I9E>; see also Derrick Clifton, *5 Reasons Why Katy Perry Is Pop Music’s Worst Cultural Appropriator*, Mic (Aug. 1, 2014), <https://mic.com/articles/95444/5-reasons-katy-perry-is-pop-music-s-worst-cultural-appropriator#.84rHvUPJI>; Yesha Callahan, *Katy ‘the Queen of Cultural Appropriation’ Perry Is at It Again*, The Grapevine (July 31, 2014), <https://thegrapevine.the-root.com/katy-the-queen-of-cultural-appropriation-perry-is-at-1790885633>; Jeff Yang, *Katy Perry’s AMAs Performance Stirs Debate*, The Wall Street Journal (Nov. 25, 2013), <https://blogs.wsj.com/speak-easy/2013/11/25/memories-of-a-geisha-katy-perrys-amas-performance-stirs-debate/>.

8. Lotlikar, *supra* note 2.

9. See Idrees Kahloon, *The Near Myth of Cultural Appropriation*, The Harvard Crimson (Sep. 22, 2015), <http://www.thecrimson.com/column/words-words-words/article/2015/9/22/column-myth-cultural-appropriation/> (“Take music: the most active arena for these largely meaningless criticisms by the appropriators of cultural appropriation. White rapper Iggy Azalea is criticized for ‘affecting a culturally black accent and vernacular and flaunting physical features, like a large rump.’ Isn’t loving and respecting the diversity of bodies something that this crowd generally supports?”); John McWorther, *You Can’t ‘Steal’ a Culture: In Defense of Cultural Appropriation*, The Daily Beast (July 15, 2014), <https://www.thedailybeast.com/you-cant-steal-a-culture-in-defense-of-cultural-appropriation> (responding to an accusation that white gay men appropriate the culture of black women.) (“[W]hite gay men imitate black women out of admiration, much of it out of a sense of black women as fellow sufferers of oppression.”); see also Bari Weiss, *Three Cheers for Cultural Appropriation*, N.Y. Times (Aug. 30, 2017), <https://www.nytimes.com/2017/08/30/opinion/cultural-appropriation.html?smid=tw-ny-topinion&smtyp=cur>.

critic notes that “[m]aybe cultural appropriation is just a side effect of sharing. I see things you see through my filter; sometimes my filter enhances it, sometimes it contorts it.”<sup>10</sup> Despite these conflicting viewpoints, cultural appropriation has impacted indigenous<sup>11</sup> communities across the globe throughout history.<sup>12</sup>

In 1967, the United Nations established the World Intellectual Property Organization (WIPO).<sup>13</sup> The UN charged the Committee with creating a global intellectual property system that would assist all countries in analyzing its intellectual property possibilities for economic, social, and cultural development.<sup>14</sup> In 2001, in response to concerns raised by indigenous groups about the protection of indigenous art, clothing, and knowledge<sup>15</sup>, the WIPO began

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10. Lotlikar, *supra* note 2.

11. The United Nations defines indigenous people as “the descendants—according to a common definition—of those who inhabited a country or a geographical region at the time when people of different cultures or ethnic origins arrived. The new arrivals later became dominant through conquest, occupation, settlement or other means . . . . These and most other indigenous peoples have retained distinct characteristics which are clearly different from those of other segments of the national populations.” United Nations Permanent Forum on Indigenous Issues, *Indigenous People, Indigenous Voices Factsheet* (2009), [http://www.un.org/esa/socdev/unpfii/documents/5session\\_factsheet1.pdf](http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf).

12. See E. Wanda George, *Intangible cultural heritage, ownership, copyrights, and tourism*, 4 INT’L J. OF CULTURE, TOURISM, AND HOSPITALITY RES. 376, 378–80 (2010) (“Ongoing research focuses on the disputes and debates about intellectual property rights and ownership of cultural resources in aboriginal or indigenous communities, whose secret and sacred traditions have been appropriated and exploited by outsiders over centuries. Many of the disputes center on the appropriation by large biotechnology firms of local indigenous knowledge of medicinal plants and herbs and the natives’ knowledge of traditional healing methods from the natural world . . . . Other sources of conflict also emerge when outsiders appropriate native cultural resources – music, design styles, folktales and stories, religious practices and so on.”).

13. *Inside WIPO. What is WIPO?*, WIPO, <http://www.wipo.int/about-wipo/en/>.

14. Constantine Anechitoe, *Intellectual Creation in the Light of the Convention Establishing the World Intellectual Property Organization –the WIPO Organization*, 4 CONTEMP. READINGS IN L. AND SOC. JUST. 866, 867 (2012).

15. Indigenous knowledge is defined as “tangible and intangible cultural materials and artifacts, secret and sacred information and know-how, cultural expressions, and the biogenetic resources justly owned and possessed by Indigenous Peoples.” See Danielle Conway, *Indigenizing Intellectual Property Law: Customary Law, Legal Pluralism, and the Protection of Indigenous Peoples’ Rights, Identity, and Resources*, 15 TEX. WESLEYAN L. REV. 207, 209 (2009).

working on negotiations to protect cultural symbols<sup>16</sup> as intellectual property.<sup>17</sup>

In June 2016, after many years of failed negotiations, representatives and indigenous rights advocates met with the Committee to request a global ban on the unwarranted replication of indigenous cultural expressions.<sup>18</sup> Simply put, these advocates met with the Committee to request that cultural appropriation be made illegal, across all nations.

The United States was among the countries represented at the Committee's meeting.<sup>19</sup> Cultural appropriation of indigenous clothing is a historic and ongoing issue in the United States<sup>20</sup> The following Note will examine the regulations currently employed by the United States to protect the cultural clothing of Native Americans through intellectual property law. In addition, this Note will also discuss the feasibility of the WIPO's proposed regulations to prohibit cultural appropriation through intellectual property law. Part II will examine the intellectual property provisions already in place in the United States to protect clothing. Part III will address the specific concerns of Native Americans in protecting their cultural apparel. Finally, Section IV will examine the practicality of any proposed regulations from the UN to ban cultural appropriation.

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16. The term "cultural symbols" is used here to describe an indigenous group's traditional knowledge, cultural expressions, and genetic resources. WIPO defines these terms as follows: Traditional knowledge is "knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity." Cultural expressions are "forms in which traditional culture is expressed." These expressions may include music, dance, art, designs, names, performances, and narratives, among other things. Genetic resources are "any material of plant, animal, microbial or other origin containing functional units of heredity" that has actual or potential value. See Carla Herreria, *Indigenous Advocates Call on UN to Make Cultural Appropriation Illegal*, Huffington Post (June 22, 2017), [https://www.huffingtonpost.com/entry/un-cultural-appropriation-illegal\\_us\\_594073d3e4b0d3185485ba9a](https://www.huffingtonpost.com/entry/un-cultural-appropriation-illegal_us_594073d3e4b0d3185485ba9a); *Traditional Knowledge*, WIPO, <http://www.wipo.int/tk/en/tk/>; *Traditional Cultural Expressions*, WIPO, <http://www.wipo.int/tk/en/folklore/> [hereinafter *Expressions*]; *Genetic Resources*, WIPO, <http://www.wipo.int/tk/en/genetic/>.

17. See Herreria, *supra* note 16; see also Katherine Timpf, *A UN Committee is Considering Making Cultural Appropriation Illegal Worldwide*, National Review (June 14, 2017), <http://www.nationalreview.com/article/448657/un-committee-considering-making-culturalappropriation-illegal-worldwide>.

18. *Id.*; See *Expressions*, *supra* note 16 (Cultural expressions are "forms in which traditional culture is expressed." These expressions may include music, dance, art, designs, names, performances, and narratives).

19. WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (2017), [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_34/wipo\\_grtkf\\_ic\\_34\\_14.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_34/wipo_grtkf_ic_34_14.pdf).

20. See Jacki Lyden, *Seminole Patchwork: Admiration And Appropriation*, NPR (Feb. 18, 2017), <https://www.npr.org/sections/codeswitch/2017/02/18/510241789/seminole-patchwork-admiration-and-appropriation> (Seminole seamstresses criticized designer, Donna Karan, after Karan used Seminole patchwork designs in a skirt and called the designs "her own creative concept"); Hillary George-Parkin, *Victoria's Secret apologizes for Native American-inspired look*, NBC News (Nov. 12, 2012), <https://www.nbcnews.com/news/other/victorias-secret-apologizes-native-american-inspired-look-v15113674> (Victoria's Secret was criticized after dressing a model in a feathered headdress and a buckskin bikini in recognition of Thanksgiving).

## II. INTELLECTUAL PROPERTY PROVISIONS

Before examining the protections of indigenous clothing, it is important to note the provisions already in place in the United States regarding the general protection of clothing as intellectual property.<sup>21</sup> This section will first examine the protection of clothing under general copyright, trademark, and patent laws in the United States. The second subsection will analyze the efforts made by legislators to make specific laws banning the replication of clothing designs.

The final subsection will examine a specific provision in place for the protection of Native Americans. Taken together, these already-existing protections, or lack thereof, suggest the need for a further development in protecting clothing designs, especially as they relate to the protection of indigenous designs.

### A. General Provisions

There are no specific provisions within the laws of the United States that bar the replication of clothing.<sup>22</sup> As a result, some designers and retailers alike seek protection of their fashion products through copyright and trademark provisions; and less often, patent law provisions.<sup>23</sup> However, for the reasons explained below, American designers are met with a great challenge when seeking to protect their products using federal intellectual property laws.<sup>24</sup>

#### *i. Copyright*

Pursuant to the U.S. Copyright Act of 1976, copyrights generally protect “an original design of a useful article which makes the article attractive or distinctive in appearance to the purchasing or using public.”<sup>25</sup> According to the statute, a design is considered original when it is the product of the designer’s creativity and it can be distinguished from other works.<sup>26</sup> Despite these laws, it remains difficult for clothing to be protected by copyright provisions.<sup>27</sup>

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21. See discussion *infra* Part II.A.

22. Cassandra Elrod, *The Domino Effect: How Inadequate Intellectual Property Rights in the Fashion Industry Affect Global Sustainability*, 24 IND. J. OF GLOBAL LEGAL STUDIES 575, 580 (2017).

23. *Id.* at 580–84.

24. See discussion *infra* Parts II.A.i, II.A.ii, II.A.iii.

25. 17 U.S.C.S. § 1301 (2018).

26. *Id.*

27. Brandon Scruggs, *Should Fashion Design be Copyrightable?*, 6 NW. J. TECH. & INTELL. PROP. 122, 123 (2007).

Copyrights only protect “original works of authorship fixed to any tangible medium of expression.”<sup>28</sup> Designs protected under copyright law include pictures, graphics, and sculptures.<sup>29</sup> Clothing, however, is not regarded as an art form for the purposes of copyright protection.<sup>30</sup> Thus, many designers are at a disadvantage when seeking to copyright their designs.

Furthermore, works regarded as mere “useful articles” cannot be protected under copyright law.<sup>31</sup> For that reason, a graphic on a shirt could be protected as an original, copyrighted work.<sup>32</sup> However, the shirt, itself, would only be regarded as a “useful article” because shirts have a functional purpose.<sup>33</sup> Therefore, the graphic on the shirt could be copyrighted, but the design of the shirt could not.<sup>34</sup> Because of this, many designers seek other means of protecting their designs to prevent receiving only partial protection of their work.

## *ii. Trademarks*

Alternatively, some creators seek protection through trademark law. According to the Lanham Act, marks are protected when they are distinguishable from other marks.<sup>35</sup> In addition, marks must not be deceptive or compromising to a United States insignia.<sup>36</sup>

Much like the provisions set forth in copyright law, the protection of clothing by means of trademark use is also limited. Trademark provisions do not allow designers to protect whole garments.<sup>37</sup> In fact, trademarks typically only protect logos and labels used by the designer.<sup>38</sup> This has caused many designers to overwhelmingly display their marks or logos throughout their designs to prevent replication.<sup>39</sup> Several critics argue that this infringes upon

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28. 17 U.S.C.S. § 102 (2018).

29. *Id.*

30. 17 U.S.C.S. § 101 (2018).

31. *Id.*

32. Elrod, *supra* note 22, at 584.

33. *Id.*

34. *Id.*

35. 15 U.S.C.S. § 1052 (2018).

36. *Id.*

37. Tyler McCall, *Copyright, Trademark, Patent: Your Go-To Primer for Fashion Intellectual Property Law*, Fashionista (Dec. 16, 2016), <https://fashionista.com/2016/12/fashion-law-patent-copyright-trademark>.

38. *Id.*

39. Elrod, *supra* note 22, at 583 (discussing Coach’s use of the “COACH” logo and Yves St. Laurent’s use of “YSL” letters repeatedly and prominently on products to protect designs from duplication).

creativity in the fashion industry.<sup>40</sup> In addition, some buyers refrain from purchasing items in which the designers logo is used prominently and frequently throughout the garment.<sup>41</sup>

Despite the hardships designers face when trademarking their creations, several designers have been able to protect their designs as trade dress.<sup>42</sup> Trade dress “includes the total look of a product including its packaging, and even includes the design and shape of the product itself.”<sup>43</sup> For a design to qualify for protection as trade dress it must have acquired a “secondary meaning.”<sup>44</sup> Perhaps the most recognizable example of trade dress is the red sole of shoes by designer Christian Louboutin.<sup>45</sup> Consumers are able to easily identify Louboutin’s designs by the red soles on the shoes rather than by the design of the shoes, alone.<sup>46</sup> Unfortunately, many designs are unable to obtain a “secondary meaning “in the public eye; therefore, many designers are unable to protect their products as trade dress.<sup>47</sup>

### *iii. Patents*

An even lesser used alternative to using copyrights or trademarks to protect designs is patent law. Few American designers rely on patent protections for their work.<sup>48</sup> A patent protects a “new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement.”<sup>49</sup> In terms of patents, creators may apply for a design patent or a utility patent.<sup>50</sup>

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40. *Id.*; see also Amy L. Landers, *The Anti-Economy of Fashion: An Openwork Approach to Intellectual Property Protection*, 24 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 427, 465 (“The traditional Ralph Lauren polo shirts that bear the pony logo obtain a theoretically infinite term of protection despite the fact that the design of the shirt dates back decades . . . Essentially, trademark protection enables Ralph Lauren to prevent copyists from appropriating both the logo and the shirt design. This circumstance leads to unjustifiably large welfare implications and offers no incentive for new, creative output of new, expressive shirt designs.”).

41. See Elrod, *supra* note 22, at 583; see also Ashley Lutz, *Millennials are rejecting a strategy Coach, Abercrombie & Fitch, and Michael Kors have relied on for years*, *Business Insider* (Dec. 19, 2015, 3:27 PM), <http://www.businessinsider.com/millennials-turn-away-from-logos-2015-12> (describing a study showing that millennial women increasingly prefer clothing without logos.) (“Kat[e] Spade’s handbags topped the list of favorites, putting it ahead of Michael Kors, Coach, and Tory Burch. Unlike Coach and Michael Kors, which have been known for their loud logos in the past, Kate Spade’s bags feature just a tiny stamp with the brand name.”).

42. See Elrod, *supra* note 22, at 583.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 580.

49. 35 U.S.C.S. § 101 (2018).

50. Elrod, *supra* note 22, at 581.



Design patents protect “new, original, and ornamental designs.”<sup>51</sup> For a clothing item to be patented with a design patent, the design must be a new invention or an improvement to an already-existing design.<sup>52</sup> Designers are often unable to meet this qualification due to the cyclical nature of the fashion industry.<sup>53</sup> Many “new” clothing designs are not significantly dissimilar from past designs; therefore, they do not qualify as a new design in terms of patent protection.<sup>54</sup> Utility patents, on the other hand, are even harder to obtain for items of clothing.<sup>55</sup> Utility patents “protect the functional aspects of a product.”<sup>56</sup> Therefore, only useful designs such as a zipper or functional improvements to already existing clothing items are eligible for utility patents.<sup>57</sup> In addition, the process of obtaining a patent is time consuming.<sup>58</sup> This makes patent protection nonsensical in the fast paced, ever-changing fashion industry.<sup>59</sup> Accordingly, many designs are not eligible for patent protection, thus fashion designers seek patent protection for their creations even less frequently than they seek copyright or trademark protection.

### B. The “Fashion Bill”

As evidenced above, federal intellectual property laws do not entirely protect many clothing items. Many designers and legislators alike have sought to fill this grey area in intellectual property laws with “fashion bills.” In 2009, for example, Congress introduced H.R. 2196, also known as the Design Piracy Prohibition Act (DPPA).<sup>60</sup>

This proposed act would have extended copyright protection to clothing, handbags, and eyeglasses.<sup>61</sup> Under the DPPA, designs would not be consid-

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51. 35 U.S.C.S. § 171 (2018).

52. Elrod, *supra* note 22, at 581.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*; Elrod, *supra* note 22, at 581; *see also* MPEP § 1502.01 (2018).

57. Elrod, *supra* note 22, at 581.

58. *Id.* at 580–81; *See* U.S. PAT. & TRADEMARK OFF., PERFORMANCE AND ACCOUNTABILITY REP.: FISCAL YEAR 2017 48 (2017), <https://www.uspto.gov/sites/default/files/documents/USPTOFY17PAR.pdf> (On average, the time from when a patent application is filed, until it receives an initial determination of patentability by the patent examiner is 16.3 months. The time from filing an application until a patent is issued or the application is abandoned, is 24.2 months).

59. Elrod, *supra* note 22, at 580.

60. Design Piracy Prohibition Act, H.R. 2196, 111th Cong. § 1 (2009); *see also* H.R. 5055, 109th Cong. (2006). In 2006, H.R. 5055 was introduced to amend Chapter 13 of the U.S. Copyright Act to include protections for fashion designs. The bill was considered in a hearing held by the House Committee on the Judiciary, Subcommittee on Courts, the Internet, and Intellectual Property. *A Bill to Provide Protection for Fashion Design: Hearing before Subcomm. on Courts, the Internet, and Intellectual Property*, 109th Cong. (2006).

61. *Id.* § 2.

ered a replication if it can be proven that the design is an original, independent creation, that is not substantially similar to a previous design and does not merely reflect a trend.<sup>62</sup>

Critics of the DPPA argued that fashion's limited protections under the present intellectual property laws maintain the industry's business cycle by encouraging a consisting flow of new creations.<sup>63</sup> According to critics, the free flow of designs into the market, exhausts trends at a rapid rate, thus creating the constant demand for new designs.<sup>64</sup> In addition, critics argued that limiting intellectual property protections in the fashion industry allows cheaper alternatives to certain trends, thus ensuring affordability across various demographics.<sup>65</sup> Proponents of the bill asserted that protecting fashion designs with intellectual property provisions enhances marketability of designs and allows designers to obtain a profit from their creative products.<sup>66</sup> As a result of this ongoing debate, neither the DPPA nor any bill proposed thereafter, has passed both houses of Congress.<sup>67</sup>

### C. A Special Provision for Native American Art

In addition to the provisions listed above, some Native American cultural property is also protected by the Indian Arts and Crafts Act (Act). The Act created the Indian Arts and Crafts Board (Board) within the United States Department of the Interior.<sup>68</sup> The Board is responsible for promoting the "economic welfare of the Indian tribes and Indian individuals through the development of Indian arts and crafts and the expansion of the market for the products of Indian art."<sup>69</sup> Furthermore, this Act bars retailers from selling arts and crafts in a manner that "falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organizations."<sup>70</sup> The Board defines an "Indian product" as "any art or craft product made by an Indian."<sup>71</sup>

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62. *Id.*

63. Judith S. Roth & David Jacoby, *Fashion, Copyright, and the Proposed Design Piracy Prohibition Act*, IP LITIGATOR, Nov.–Dec. 2009, at 6.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 4; see also Innovative Design Protection and Piracy Prevention Act, S. 3728, 111th Cong. (2010) (seeking to refine the U.S. Copyright Act's definition of "useful articles" to include articles of apparel); Innovative Design Protection Act of 2012, S. 3523, 112th Cong. (2012) (proposing that designers give purported replicators written notice of the infringement 21 days before commencing an action against them); *Copyright Legislation for Fashion Designs (Proposed)*, The Fashion Law (Oct. 7, 2016), <http://www.thefashionlaw.com/learn/proposed-copyright-legislation-for-fashion-designs>.

68. 25 U.S.C.S. § 305 (2018).

69. 25 U.S.C.S. § 305(a) (2018).

70. Indian Arts and Crafts Board, U.S. Department of the Interior, *Know the Law: Indian Arts and Crafts*, <http://www.wipo.int/edocs/lexdocs/laws/en/us/us207en.pdf>.

71. *Id.*

Much of the case law surrounding the Act focuses primarily on the protection of items such as jewelry, pottery, dreamcatchers, tomahawks, and other Native American creations of the like.<sup>72</sup> In 2004, Native American Arts, Incorporated, an “Indian arts and crafts organization” for the purpose of the Act, sued Emma’s Sterling Silver Jewelry, alleging that the retailer sold jewelry which they falsely proclaimed was made by Native Americans.<sup>73</sup> On December 21, 2002, Native American Arts, Incorporated (“NAA”) sent an agent to one of Emma’s Sterling Silver Jewelry’s (“Emma’s”) Illinois locations to purchase a necklace.<sup>74</sup> During the purchase, the sales clerk at the store told the agent that the necklace was an “authentic Indian-produced product.”<sup>75</sup> Days later, NAA sent an agent back to the same Emma’s location.<sup>76</sup> On this visit, the agent purchased two pendants and a bracelet modeled in the style of traditional Native American designs.<sup>77</sup> At the time of purchase, a store clerk again said that the items were “authentic Indian made products.”<sup>78</sup> Days later, NAA, sent an agent to a different Emma’s location to purchase merchandise.<sup>79</sup> The agent purchased another “Indian necklace” and earrings.<sup>80</sup> During the purchase, the sales clerk told the agent that the jewelry as well as other items in the store were “authentic Indian-produced products.”<sup>81</sup> Despite the clerk’s claims on all three occasions, NAA asserted that none of the items sold at Emma’s, including those the agents purchased, were made by Native Americans.<sup>82</sup>

The claim was eventually dismissed, as the court ruled that NAA did not provide an adequate basis for why they believed the items were not made by Native Americans.<sup>83</sup> The court, however, noted that NAA would be allowed time to amend their initial complaint to include a basis for their suspicions.<sup>84</sup> At the present time, there is no accessible information regarding whether NAA refiled the claim, settled with Emma’s outside of court, or stopped pursuing the case, altogether.

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72. *Native Am. Arts, Inc. v. Peter Stone Co., U.S.A., Inc.*, No. 08C3908, 2015 WL 3561439 (N.D. Ill. June 9, 2015); *Native Am. Arts, Inc. v. J.C. Penney Co., Inc.*, 5 F. Supp. 2d 599, 600 (N.D. Ill. 1998); *Native Am. Arts, Inc. v. Chico Arts, Inc.*, 8 F. Supp. 2d 1066, 1067 (N.D. Ill. 1998).

73. *Native Am. Arts, Inc. v. Aquino*, No. 04C2540, 2004 WL 2434260, at 1 (N.D. Ill. Oct. 29, 2014).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 2–3.

84. *Id.* at 3.

Regardless of this ruling, it is clear that the courts consider jewelry as a product that is afforded the protections of the Act.<sup>85</sup> Despite the Act's inclusion of fashion accessories in its protective reach, neither the Board, nor the Act expressly state whether traditional, Native American clothing qualifies as an "Indian product" under the Act. Therefore, the Act does not explicitly ban fashion retailers from producing clothing modeled after Native American garments—whether the retailer advertises the garment the product of Native American labor or not. For these reasons, it is ambiguous as to whether the Act can be used to entirely prevent designers from replicating traditional Native American designs in the mainstream, fashion industry.

### III. INTELLECTUAL PROPERTY CONCERNS OF INDIGENOUS POPULATIONS

As a result of the limited protections afforded to the preservation of Native American clothing, a number of mainstream retailers have replicated Native American designs without crediting their Native American creators.<sup>86</sup> This section will first provide a general overview of the history of Native American appropriation. This section will then narrow the scope of this appropriation to focus on the present-day appropriation of Native American clothing. Overall, this section is important in understanding the longevity of the nation's use of Native American cultural property, as well as the need for reform in order to protect the use of cultural fashions.

The appropriation of Native American culture has been a widespread phenomenon since the inception of the United States.<sup>87</sup> Several scholars<sup>88</sup> of Native American studies assert that for centuries, non-Native Americans have used Native American culture as their own means of self-fulfillment.<sup>89</sup> Prize-winning author and noteworthy historian, Philip Deloria argues that from the point of European arrival in the Americas, Europeans sought to create a new "American" identity by accepting or refusing "images of Indianness."<sup>90</sup> This group of "new Americans" regarded Native Americans a symbol of freedom—as the former Europeans had just gained their own means of freedom

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85. See Indian Arts and Crafts Board *supra* note 70, at 3 (including jewelry as an example of a product that is protected under the Act).

86. See *infra* text accompanying notes 102–05; see also *supra* note 20 (regarding designer Donna Karan's statements that a skirt made in the style of traditional Seminole patchwork was her own creative design).

87. See PHILIP DELORIA, *PLAYING Indian* 20 (1998) (arguing that American colonists developed a revolutionary identity by adopting Native American ideologies).

88. *Id.*; see also Shari Huhndorf, *GOING NATIVE: INDIANS IN THE AMERICAN CULTURAL IMAGINATION* 6 (2001) (asserting that by viewing Native Americans as "savages," European colonists were able to craft their own contradicting ideas of "civility").

89. Angela Riley and Kristen Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 862 (2016).

90. *Id.*

after establishing their independence from Europe.<sup>91</sup> However, the new Americans made certain to simultaneously distance themselves from Native Americans by regarding the Natives as savages.<sup>92</sup> This dangerous characterization of Native Americans led to legislation that discriminated against Natives by denying them access to their own previously occupied lands, as well as the access to many of their basic human rights.<sup>93</sup>

Historians argue even today that non-Natives continue to relish in Native American images of freedom with “little regard for contemporary Native people.”<sup>94</sup> These scholars assert that while companies profit from genetically modified “Indian wild rice,” Native Americans cannot protect their own Native varieties of rice from cross-contamination.<sup>95</sup> While the entertainment industry profits from oversexualizing Native women<sup>96</sup>, present-day Native American women encounter instances of domestic violence and sexual assault at alarming rate.<sup>97</sup>

While sports teams, both professional and recreational, profit from using Native American symbols as mascots<sup>98</sup>, many Native Americans—from high

91. *Id.* at 862–63.

92. *Id.* at 863.

93. *Id.*; See Indian Removal Act, 4 Stat. 411 (1830) (granting the President the authority to remove Native Americans from their lands and force them onto lands beyond the Mississippi River at the President’s discretion); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 521–28 (1832) (citing 19th century Georgia acts that annulled all laws of the Cherokee Nation, provided that the governor could organize a guard to enforce laws of force within the Nation, and prohibited the Nation from assembling as a council and serving as a witness in any case to which a white person was a party).

94. Riley & Carpenter, *supra* note 89, at 863.

95. *Id.*; see also *Don’t Meddle with Manoomin Say Ojibwe*, Indian Country Today Media Network (Jul. 15, 2002), <http://indiancountrytodaymedianetwork.com/2002/07/15/dont-meddle-manoomin-say-objibwe-87891> (detailing Native American opposition to Norcal Wild Rice Company obtaining patents on genetically engineered wild rice.) (“Scientist[s] estimate that genetically engineered wild rice released into the natural beds could contaminate right to the core or heart of the wild rice genome within five years.”).

96. See M. ELISE MARUBBIO, *KILLING THE INDIAN MAIDEN: IMAGES OF NATIVE AMERICAN WOMEN IN FILM* 4-8 (2009) (examining the cinematic portrayal of Native American women as both a celluloid princess and a sexualized maiden); *Native American Women Are More Than Princesses and Squaws*, Bitch Media (Sept. 19, 2017), <https://www.bitchmedia.org/article/whats-problem-thinking-indian-women-princesses-or-squaws> (arguing that Disney’s depiction of Pocahontas as lighter skinned with a “petite but shapely body” was sexually suggestive, and particularly troubling, given the real Pocahontas was only a child when she met John Smith).

97. Riley & Carpenter, *supra* note 89, at 863; see also Andre Rosay, *Violence Against American Indian and Alaska Native Women and Men*, NAT’L INST. OF JUST., no. 277, Sept. 2016, at 1 (“More than 4 in 5 American Indian and Alaska Native women [84.3 percent] have experienced violence in their lifetime. This includes 56.1 percent who have experienced sexual violence, 55.5 percent who have experienced physical violence by an intimate partner., 48.8 percent who have experienced stalking, and 66.4 percent who have experienced psychological aggression by an intimate partner.”). American Indian and Alaska Native women are also significantly more likely to have experienced violence by an interracial perpetrator and significantly less likely to have experienced violence by an intraracial perpetrator.

98. Teams named Warriors, Braves, Indians, Redskins, Apaches, Mohawks, and Chiefs have been criticized for using Native American symbols as mascots and in their team names. See CAROL SPINDEL, *DANCING AT HALFTIME: SPORTS AND THE CONTROVERSY OVER AMERICAN INDIAN MASCOTS* 13-14 (2000).

school students to athletes—have publicly spoken on the harms caused by the use of Native American mascots.<sup>99</sup>

This sentiment has also rung true in the fashion industry.<sup>100</sup> While designers like Victoria's Secret adorn their models in feathered, Native American-inspired headdresses, some Native American religious leaders cannot obtain eagle feathers for their own traditional ceremonies.<sup>101</sup> As previously mentioned, protecting fashion designs with intellectual property provisions can be difficult. This difficulty can be exacerbated when the claims are brought by Native Americans against mainstream fashion retailers. Perhaps the most judicially compelling of these instances is Urban Outfitters' turn of the century use of Native American cultural relics in its mainstream fashion designs.

In 2001, Urban Outfitters launched a Native American-inspired product line.<sup>102</sup> This line featured undergarments, jewelry, pants, jackets, dresses, shirts, and a flask.<sup>103</sup> All of the items on the line were adorned with geometric patterns in the style of traditional Native American designs.<sup>104</sup> In addition, Urban Outfitters marketed the line using the terms "Navajo" and "Navaho," interchangeably.<sup>105</sup> The Navajo Nation<sup>106</sup> neither consented nor contributed to the line. Several members of the Navajo Nation were displeased with the

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99. Riley & Carpenter, *supra* note 89, at 863; *see also* Jeff Potrykus, *Bronson Koenig embraces being role model for American Indians*, Milwaukee Journal Sentinel (Feb. 2, 2015), <http://archive.jsonline.com/sports/badgers/bronson-koenig-embraces-being-role-model-for-american-indians-b99437027z1-290605481.html> (detailing an interview with Native American, collegiate athlete, Bronson Koenig) ("The worst, in Koenig's mind, is Redskins. 'That term comes from when we were skinned and our flesh was red,' he said. 'I don't see how that is honoring us in anyway. Is our skin red? Would it be OK for the Kansas City Negroes or the Blackskins? That's not OK at all.'"); MICHAEL FRIEDMAN, *THE HARMFUL PSYCHOLOGICAL EFFECTS OF THE WASHINGTON FOOTBALL MASCOT* 9–13 (2013), <http://www.changethemascot.org/wp-content/uploads/2013/10/DrFriedmanReport.pdf> (referencing psychological studies on students finding that Native American mascots affect Native American self-esteem, community confidence, and sense of achievement, while also perpetuating negative attitudes toward Native Americans among non-Native groups).

100. *See* Riley & Carpenter, *supra* note 89, at 862.

101. *Id.* at 862–63; *see also* 50 CFR 22.22 (2018) (authorizing only members of federally recognized Native tribes to apply for permits to use eagle feathers in religious ceremonies); Rob Hotakainen, *Some Native Americans defy U.S. law on eagle feathers*, Washington Post (Feb. 22, 2013), [https://www.washingtonpost.com/politics/some-native-americans-defy-us-law-on-eagle-feathers/2013/02/21/057349ce-7ad4-11e2-9a75-dab0201670da\\_story.html?utm\\_term=.3c3199e1d430](https://www.washingtonpost.com/politics/some-native-americans-defy-us-law-on-eagle-feathers/2013/02/21/057349ce-7ad4-11e2-9a75-dab0201670da_story.html?utm_term=.3c3199e1d430) (describing the concerns of non-federally recognized Native American groups that are not allowed to use eagle feathers in religious ceremonies).

102. Ariz Flagstaff, *Navajo Nation Seeks Millions from Urban Outfitters for Using Tribe's Name*, Chicago Tribune (Feb. 3, 2016), <http://www.chicagotribune.com/business/ct-navajo-nation-urban-outfitters-lawsuit-20160203-story.html>; *Navajo Nation v. Urban Outfitters*, 935 F.Supp.2d 1147, 1154 (D.N.M., 2013).

103. Ariz Flagstaff, *supra* note 102.

104. *Id.*

105. *Id.*

106. The Navajo Nation is a Native American territory extending into Utah, Arizona, and New Mexico. In 1923, a tribal government within the Navajo Nation was established. Since then, Navajo government has evolved into one of the largest, and most sophisticated forms of Native American government. *See History*, Navajo Nation Government, <http://www.navajo-nsn.gov/history.htm>.

retailer's use of the tribe's name without any consultation from the tribe in the design of the line. A spokesman for the Navajo Nation explained:

For some of our Navajo and Native artisans, that's what sells their products. Attaching the name Navajo to their item generates income . . . To the larger world, we are Navajo and we take pride in being Navajo . . . We don't want our name to be associated with anything that is not Navajo.<sup>107</sup>

In 2011, the Navajo Nation filed a lawsuit against the retailer in federal court for trademark infringement, trademark dilution, unfair competition, false advertising, the violation of commercial practice laws, and the violation of the Indian Arts and Crafts Act.<sup>108</sup> In their complaint, the Navajo Nation stated that they had 86 registered trademarks using the term "NAVAJO."<sup>109</sup> Plaintiffs further alleged that members of the Navajo Nation have been recognized with the term "Navajo" for centuries, and members of the Navajo Nation have consistently used the "NAVAJO" trademark for clothing, jewelry, blankets, foods, crafts, and services, among other things.<sup>110</sup>

Furthermore, according to the Navajo Nation, Urban Outfitters' Navajo line was in direct competition with the Nation's NAVAJO<sup>111</sup> branded clothing.<sup>112</sup> According to the Complaint, this competition confused consumers and made them believe that they were purchasing authentic products made by the Navajo when, in fact, they were not.<sup>113</sup> The Navajo Nation also claimed that the clothing sold by Urban Outfitters was of lesser quality than NAVAJO branded designs, thus harming the reputation of the NAVAJO brand.<sup>114</sup> In addition, the Nation asserted that Urban Outfitter's use of the Navajo name to sell undergarments and flasks was "derogatory, scandalous, and contrary to the Navajo Nation's principles."<sup>115</sup> Furthermore, the Nation contended that Urban Outfitters' interchangeable use of "Navajo" and "Navaho" was also derogatory and also conflicted with the laws of the Navajo Nation.<sup>116</sup>

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107. Riley & Carpenter, *supra* note 89, at 903.

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

109. *Id.* at 1153.

110. *Id.*

111. *See id.* According to the Navajo Nation, they have been known by the name "Navajo" since 1849 and have continuously used the NAVAJO trademark in commerce. The Nation has sold clothing, accessories, blankets, jewelry, and decorations, among other things, under the NAVAJO name and trademark. Additionally, the Nation asserts that they have 86 trademarks with the United States Patent and Trademark Office using the NAVAJO component.

112. *Id.* at 1153.

113. *Id.* at 1155.

114. *Id.*

115. *Id.* at 1154. Product names included, among others, "Deter Navajo Tee," "Ecote Navajo Surplus Jacket," "Lucca Couture Navajo Pullover Sweater," "Navajo Bracelet," "Navajo Feather Earring," "Navajo Hipster Panty," "Navajo Print Fabric Wrapped Flask," "OBEY Navajo Glove," "Pendleton Navajo Weekender Bag," "Vintage Woolrich Navajo Jacket," and "Wide Navajo Scarf."

116. *Id.* at 1155.

Urban Outfitters argued that the Navajo line was not made in bad faith.<sup>117</sup> According to the retailer, they did not use the term “Navajo” to suggest that the items were made by members of the Navajo Nation, as “Navajo” is merely a word used to describe “Indian-styled” designs.<sup>118</sup> Urban Outfitters further contended that “Navajo” was not a well-known source of goods, therefore there was no way that the Navajo Nation’s brand could be harmed by Urban Outfitters’ line.<sup>119</sup>

During the case’s 2013 sitting, the Court sided primarily with the Navajo Nation.<sup>120</sup> The Court did not, however, agree that the Navajo Nation’s brand was diluted by Urban Outfitters’ sale of “Navajo” flasks and undergarments.<sup>121</sup> Despite this ruling, the case continued in litigation. Before the claim could finally be resolved in court, the Navajo Nation and Urban Outfitters reached a settlement in the matter, and the Navajo Nation dismissed the lawsuit.<sup>122</sup> Pursuant to the terms of the settlement, the Navajo Nation and Urban Outfitters established a supply and license agreement in which the retailer would sell authentic merchandise, made by members of the Navajo Nation.<sup>123</sup>

This court proceeding is one of the first well-known federal intellectual property claims filed by a Native American sovereign state against a fashion retailer for the replication of clothing. While the case was eventually settled outside of court, it is important to note that the Navajo Nation’s claims were bolstered by the tribe’s trademarks.<sup>124</sup> These registered trademarks could have been beneficial in protecting the Navajo Nation’s designs from being replicated by Urban Outfitters. As noted above, however, trademark protections come with their own set of limitations.<sup>125</sup> Therefore, the use of trademarks may not be applicable for other Native American tribes seeking to protect their designs from appropriation in the fashion industry.

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117. *Id.* at 1161.

118. *Id.*

119. *Id.* at 1168.

120. *Id.* at 1178.

121. *Id.*

122. *Navajo Nation v. Urban Outfitters*, No. 12-195, 2014 WL 11511718 (D.N.M., Sept. 19, 2014).

123. Noel Lyn Smith, *Navajo Nation, Urban Outfitters Settle Design Suit*, USA Today (Nov. 17, 2016), [https://www.usatoday.com/story/money/nation-now/2016/11/18/navajo-nation-urban-outfitters-settle/94061622/?TB\\_iframe=true&width=921.6&height=921.6](https://www.usatoday.com/story/money/nation-now/2016/11/18/navajo-nation-urban-outfitters-settle/94061622/?TB_iframe=true&width=921.6&height=921.6).

124. *Urban Outfitters Wins One, Loses Two in Latest Navajo Rulings*, The Fashion Law (Sept. 23, 2016), <http://www.thefashionlaw.com/home/urban-outfitters-wins-one-loses-two-in-latest-navajo-rulings> (explaining how two of Urban Outfitters’ defenses were struck down due to Navajo trademarks) (“In less positive news for Urban Outfitters . . . Judge Black shot down two key trademark defenses that the hipster-friendly retailer had asserted . . . [B]lack held that Urban Outfitters had failed to furnish any admissible evidence to support its arguments that the Navajo Nation had abandoned its trademarks and/or that the marks had become generic, and thus, not protectable.”).

125. *See supra* Section II.A.ii.



#### IV. FEASIBILITY OF UNITED NATIONS' INTELLECTUAL PROPERTY REGULATIONS

As shown in the Navajo Nation suit, Native Americans face many difficulties when attempting to resolve claims of cultural appropriation in American courts. Because of this, the United Nations World Intellectual Property Organization should take several things into consideration when drafting their impending provisions, especially as they relate to indigenous clothing.

##### A. Global Understandings of Fashion Protection

The UN's WIPO should take into consideration that intellectual property laws relating to clothing vary from each country within their committee. In the United States, clothing—whether inspired by Native American culture or not—is not wholly protected by copyright, trademark, or patent provisions.<sup>126</sup> In addition, the United States has yet to successfully pass a legislative statute that would protect fashion designs.<sup>127</sup>

In Europe, however, fashion designs are widely protected as intellectual property. In the European Union, fashion designs are protected by copyrights, unregistered community design rights, and cumulative protection.<sup>128</sup> These provisions move far beyond the United States current provisions regarding fashion protection.

In France, a country that houses the fashion capital of the world, works of “pure arts” such as paintings and music are often associated with “applied arts” like fashion designs.<sup>129</sup> Because of this association, French law offers legal protection to clothing design.<sup>130</sup> In addition, France employs a lower standard of distinguishability in terms of patterns and other clothing designs.<sup>131</sup> This lower standard makes it easier for designers to protect their pieces, even when their designs share some similarities with other designs.

These differences should be considered as they expose a global disconnect in the protection of clothing designs. In addition, these differences allow for dialogue that could ignite change in the global protection of indigenous clothing, as countries may learn from one another.

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126. Michelle Woods & Miyunk Monroig, *Fashion Design and Copyright in the US and EU*, World Intellectual Property Organization (Nov. 17, 2015), [http://www.wipo.int/edocs/mdocs/mdocs/en/wipo\\_ipr\\_ge\\_15/wipo\\_ipr\\_ge\\_15\\_t2.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ipr_ge_15/wipo_ipr_ge_15_t2.pdf).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

## B. Conflicts Between Tribal Laws and Western Intellectual Property Law Provisions

In addition, throughout the history of the United States, there has been a long standing disconnect between the cultural values of Native American nations and the laws of the United States federal government.<sup>132</sup> For example, the Sioux Nation<sup>133</sup> is the poorest Native American nation in the United States.<sup>134</sup> Over the course of the last century, the Sioux Nation has asserted that the federal government breached the Fort Laramie Treaty of 1868<sup>135</sup> by forcefully taking possession of land occupied by the tribe.<sup>136</sup> The tribe brought a claim against the United States to regain what they consider to be sacred land.<sup>137</sup> After a long fought court battle, the United States was eventually ordered to pay the Sioux Nation \$122.5 million.<sup>138</sup> Despite the Sioux Nation's struggling financial standing, the tribe refused the money.<sup>139</sup> The tribe, instead, argued that the compensation for the claim was incomparable to the cultural value of the land that the federal government expropriated.<sup>140</sup>

For these reasons, the WIPO should also consider the meaning of certain culturally significant designs when determining appropriate remedies and penalties for violating the proposed intellectual property provisions. As noted in the presented case law, in certain circumstances, monetary relief may not be sufficient to justify a sacred injury.

In addition, it is also worth noting that there is no singular, "Native American perspective." Therefore, what one Native group values, may be of no value to another group. Similarly, Native groups do not remain the same throughout time. Therefore, what may be of value to one Native group at one

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132. See Catherine Magallanes, *Native American Values and Laws of Exclusion*, in ENVIRONMENTAL LAW AND CONTRASTING IDEAS OF NATURE: A CONSTRUCTIVIST APPROACH 200, 201–07 (Keith Hirokawa ed., 2014) (arguing that the Western societies, like the United States, constructed laws and policy in accordance with an understanding that humankind dominates the natural world, while many indigenous populations consider humans as part of nature and acknowledge humanity's interdependence with nature).

133. "The Sioux are a confederacy of several tribes that speak three different dialects, the Lakota, Dakota and Nakota. The Lakota, also called the Teton Sioux, are comprised of seven tribal bands and are the largest and most western of the three groups, occupying lands in both North and South Dakota. The Dakota, or Santee Sioux, live mostly in Minnesota and Nebraska, while the smallest of the three, the Nakota, primarily reside in South Dakota, North Dakota and Montana." See *Lakota, Dakota, Nakota – The Great Sioux Nation*, Legends of America, <https://www.legendsofamerica.com/na-sioux/>.

134. Kirsten Carlson, *Priceless Property*, 29 GA. ST. U.L. REV. 685, 687 (2013).

135. The Fort Laramie Treaty of 1868 provided that the Great Sioux Reservation, including the Black Hills, would be "set apart for the absolute and undisturbed use and occupation" of the Sioux Nation. See *U.S. v. Sioux Nation of Indians*, 448 U.S. 371, 374 (1980); Treaty with the Sioux Indians, Agreement for Peace, Apr. 29, 1868, 15 Stat. 635, 636.

136. Carlson, *supra* note 134, at 688.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

point in time, may be of no value in future years. For these reasons, it is also of great importance that the WIPO also take into consideration that indigenous groups are not monolithic or stagnant in their growth. Therefore, there is no set strategy that transcend the test of time and work favorably for all groups involved. For that reason, it is also worthwhile to consider using other legal theories in addition to intellectual property when protecting the cultural designs of indigenous people.

### C. Utilizing Other Legal Theories to Preserve Cultural Clothing and Fashion

A number of experts argue that cultural property, including clothing, is better protected using other legal theories.<sup>141</sup> Some experts argue that the ownership rights of indigenous clothing and designs could be resolved using other civil claims.<sup>142</sup>

Arguably one of the most applicable alternatives to protecting indigenous clothing is using contract law.<sup>143</sup> Using contract law, indigenous people have the ability to enter into express contracts with mainstream designers regarding the use of their cultural designs.<sup>144</sup> Engaging in these express contractual agreements allow indigenous people to place conditions on the use of their designs by retailers, as well as retain a monetary profit from the use of their designs.<sup>145</sup>

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141. See Robert K. Paterson, *Looking Beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples*, CARDOZO J. 11 INT'L & COMP. L. 633, 635 (2003) (arguing that concerns of indigenous appropriation can be accommodated without recognizing new intellectual property rights by either reinterpreting current legal regimes or amending common law principles); Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 54–55 (1997) (asserting that cultural property is unlike the type of work anticipated by intellectual property laws and may require different types of protection); David B. Jordan, *Square Pegs and Round Holes: Domestic Intellectual Property Law and Native American Economic and Cultural Policy: Can it Fit?*, 25 AM. INDIAN L. REV. 93, 94 (2000–01) (arguing that intellectual property “lacks respect for the moral and economic rights of indigenous artists, limits protection for authors as a market growth incentive, and values copyright as a welfare tax on the public instead of a private right of the author, and therefore limits the utility of intellectual property protection for Native American tribes.”).

142. See Paterson, *supra* note 141, at 652–668; see also Daniel Austin Green, *Indigenous Intellect: Problems of Calling Knowledge Property and Assigning It Rights*, 15 TEX. WESLEYAN L. REV. 335, 355–56 (2009) (suggesting the use of common law, unfair competition laws, and customary law to protect indigenous design); Shyamkrishna Balganes, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543, 1560–62 (2010) (examining the use of misappropriation to protect property not covered under copyright and patent laws).

143. Paterson, *supra* note 145, at 662–5; see generally Raymond Nimmer, *Breaking Barriers: The Relation Between Contract and Intellectual Property Law*, 13 BERKELEY TECH. L.J. 827 (1998); Lorelei Ritchie, *Reconciling Contract Doctrine with Intellectual Property Law: An Interdisciplinary Solution*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 105 (2008).

144. Paterson, *supra* note 141, at 663.

145. *Id.*

Express contracts would allow tribes like the Navajo to prohibit retailers from selling flasks and undergarments using the Navajo name. Express contracts, however, come with limitations, as designers would have to consult with the indigenous communities prior to marketing the designs.<sup>146</sup> Unfortunately, as mentioned in the case law featured in previous sections, many designers do not consult with indigenous communities prior to using or replicating their designs. Despite this shortcoming, express contracts may still be used by retailers as a preventative measure to avoid future legal claims. In addition, designers and indigenous communities can also use express contracts as a remedy to prior replication claims, as with the Navajo Nation and Urban Outfitters settlement.

Another alternative contract theory would be a quasi-contract.<sup>147</sup> In the absence of an express contract, indigenous people may argue that a quasi-contract exists between the retailer and the indigenous community.<sup>148</sup> When an indigenous community discloses information regarding designs or design techniques, the disclosure of this cultural knowledge is a service that warrants a payment—especially if the service benefits its recipient with a profit.<sup>149</sup> Therefore, when a designer or mainstream retailer is unjustly enriched by the cultural knowledge of indigenous people, they breach a quasi-contract, making them liable for restoring the party from which the design, or knowledge, originates. As with express contracts, quasi-contracts also come with limitations. Quasi-contracts require specific circumstances. For example, the retailer would have to engage in unfair conduct<sup>150</sup> when replicating the indigenous design.<sup>151</sup> In addition, there would also have to be facts that suggest that the indigenous community made a disclosure to the designer.<sup>152</sup> Because judges do not uniformly apply the theory of quasi-contracts, what constitutes a valid disclosure that warrants a quasi-contract could differ from court to court.<sup>153</sup>

Despite these limitations, the UN should take contract theories into consideration when drafting regulations that protects indigenous designs. While

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146. *Id.*

147. A quasi-contract is a determination by a court about the obligation of one party to another. In terms of a quasi-contract, no actual contract exists, however, the agreement is similar to a contract. Quasi contracts are based on the conduct of the parties involved, their relationship, and that one party may become unjustly enriched without court intervention. See *What is QUASI CONTRACT?*, The Law Dictionary, <https://thelawdictionary.org/quasi-contract/>.

148. *Paterson, supra* note 141, at 664.

149. *Id.*

150. *Id.* Unfair conduct include a “breach of confidence or other reprehensible means of obtaining valuable information without compensation.” Deeming conduct to be unfair is heavily fact dependent and may not be easy to prove.

151. *Id.*

152. *Id.*

153. *Id.*

contract laws come with their own set of limitations in the protection of cultural designs, contract theory could be used in addition to intellectual property principles to increase the protection of indigenous designs from unfair replication in the fashion industry.

## V. CONCLUSION

In closing, the appropriation of Native American clothing has been an ongoing issue in the United States. Current United States intellectual property provisions fall short in protecting fashions—whether they are the product of Native American labor or not. In addition, legislators have been unable to successfully pass legislation that would protect fashion designs from unwarranted replication. In that same vein, it remains uncertain whether the Indian Arts and Crafts Act prohibits the replication of Native American clothing. Because of these lapses in the law, mainstream retailers have been able to profit from the designs of Native Americans without regard for actual Native Americans. For these reasons, there is an obvious need for reform in terms of protecting the cultural property of Native Americans and indigenous communities, worldwide.

In determining how to protect this property, the WIPO should also take into consideration that the countries within its membership enforce their own intellectual property laws differently, especially as they relate to fashion. These differences, however, could bring about new ideas and create an environment for growth in terms of protecting indigenous clothing designs. In addition, the WIPO should also remember that indigenous groups are neither primitive nor monolithic; and that intellectual property is not the only means for protecting indigenous clothing. In fact, using other fields of law in addition to intellectual property may better serve indigenous communities under certain circumstances. Regardless of the methods that will be employed to protect indigenous communities from unwarranted cultural appropriation, the claims made by members of the Committee and indigenous rights advocates are certainly substantiated for the reasons listed above. Therefore, reform efforts should be well researched and enforced with equity amongst all nations.