



USAGE OF TRADITIONAL CULTURAL EXPRESSIONS (TCEs) BY FASHION INDUSTRIES

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ABSTRACT

Traditional Cultural Expressions or TCEs refer to the work of indigenous people and traditional communities that are vital to the culture and its social identities. TCEs are passed from generation to generation. These expressions are either tangible, intangible or in other mixed forms.

From over decades these expressions have been let loose without a proper form of protection or rather the required form of protection. The communities responsible for these expressions have been unable to appropriately protect their heritage due to the unavailability of a proper system of protection. Even though there have been various attempts at resolving this issue by multiple national and international committees, there still exists a gap.

This paper focuses on the tangible form of TCEs which is used by the fashion industries. The paper tries to analyse the present situation that the indigenous people and communities have to face to protect their heritage and tries to provide a solution thereto.

1. INTRODUCTION

1.1 Overview

1.1.1 What are Traditional Cultural Expressions(TCEs)?

There have been attempts to define TCEs by various national, regional and international committees but there is no internationally accepted definition of the term. TCEs generally mean various creative expressions of an indigenous community in tangible, intangible and mixed forms. These expressions include music, musical instruments, art, dance, performances, ceremonies, signs, symbols, handicraft, designs, names, textiles etc¹. They were often created for spiritual and religious purposes, which with time became an integral part of the community. The following things can be noted about the TCEs :

- They are previously existing material dated long ago that were developed by unknown authors.
- These expressions have been altered infinitely from time to time.
- They are a community's heritage and social identity because they involve a community's characteristic elements.
- The authors of such expressions are unknown and unlocatable.

1.1.2 What is the link to the Fashion Industry?

Some may ridicule the fashion industry as a mere "fuzz", but the monetary results validate it to be a multi-trillion "fuzz". Clothing, when promoted by the fashion industry, is often said to be the visible means

¹ THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS: UPDATED DRAFT GAP ANALYSIS', , Intergovernmental Committee on Intellectual Property and Genetic Resources,

Traditional Knowledge and Folklore Thirty Seventh Session (WIPO 2018)
<<https://www.wipo.int/publications/en/details.jsp?id=248>> accessed 22 August 2020.



of self-expression, that people are investing more and more in, in the present times. Oftentimes these industries turn towards the various handicraft and textile expressions of indigenous communities while trying to fulfil their constant desire to innovate².

Sometimes the recognition of usage of such expression is given to the community while sometimes it is not. The communities suffer a disadvantage in both cases when they get no benefit out of such usage.

Some communities would like to get benefited from the use of their TCE while some communities want to keep their TCE only to themselves. E.g Navajo tribe was fine with Urban Outfitters to use their TCE for an advantage while the Native American Tribe was not fine with the Victoria Secret's model wearing the headdress for the annual show, even when the benefit or recognition was being offered.

1.2 Review of Literature

1) **Marquette Intellectual Property Review, Volume 21, Issue 2, Article 4 - Inspiration versus exploitation: Traditional Cultural Expressions at the Hem of the Fashion Industry by Elizabeth M. Lego³** - The author supports that the existing IP regime is adequate to protect TCEs. Even though he talks about various drawbacks and gaps, he does not clarify the way out. He does not

support a sui generis system of protection and rather says that such a system will kill innovation.

2) **MDPI journal, Fashion between Inspiration and Appropriation by Barbara Pozzo, published on 12th February 2020⁴** - She talks about how the community's respect is attached to its heritage and ways in which a community tries to protect its heritage. She explains what the communities expect and why there is a need to worry about such TCEs. She has talked about the protection that has been developed over time. She has given an amazing difference between appropriation and appreciation. She calls inspiration as creative re-interpretation. The author has taken her stand in every situation with the most relevant examples. She has given some possible examples of how the gaps in the existing IP regime may be bridged. She talks about some tools that might help both the parties i.e the one who owns the TCE and another who wants to get benefit out of its usage.

She does not conclude the article with a rigid opinion.

3) **CIGI Papers no. 213, Curbing cultural appropriation in the fashion Industry by Brigitte Vezina, published in April 2019⁵** - The two cases - Navajo vs urban outfitter and Marant vs the Mixe community of Oxana have been discussed by

² Barbara Pozzo, 'Fashion Between Inspiration And Appropriation' (2020) 9 Laws <https://www.researchgate.net/publication/339278531_Fashion_between_Inspiration_and_Appropriation> accessed 19 August 2020.

³ Inspiration Versus Exploitation: Traditional Cultural Expressions At The Hem Of The Fashion Industry' (2020) 21 Marquette Intellectual property Law <<https://scholarship.law.marquette.edu/iplr/vol21/iss2/4/>> accessed 21 August 2020

⁴ Fashion Between Inspiration And Appropriation' [2020] MDPI <<https://www.mdpi.com/2075-471X/9/1/5>> accessed 20 August 2020

⁵ Curbing Cultural Appropriation In The Fashion Industry' [2019] CIGI <<https://www.cigionline.org/publications/curbing-cultural-appropriation-fashion-industry>> accessed 21 August 2020



the author. The author talks about cultural appropriation and about how existing IP regimes may help raise the culture's profile.

- 4) **Emory Law Journal, Volume 69, Issue 745, In the defense of culture: Protecting traditional cultural expressions in intellectual property by Richard Awopetu⁶** - The article was more US-centric. It talks about why protection is necessary in the first place. It clarifies the need for defensive rights and positive rights and explains the significance of the same. The article supports. The article explains the efficiency of UNIDRIP to protect the indigenous community.
- 5) **JSTOR, E-book - Indigenous Peoples' Innovation: Intellectual Property Pathways to Development, Chapter- 7. The Branding of Traditional Cultural Expressions: To Whose Benefit? by Daphne Zografos Johnsson⁷** - The author examines how the existing IP tools can assist an Indigenous community in protecting its TCE as well as benefit from the same. He emphasizes the importance of an education campaign in a particular community along with the registration of a TCE as a trademark. I do not agree with the author's view on mandating the use of defensive marks commercially. It would be wrong as some communities do not want commercial use of their TCE or a part thereof, they just want to

protect it's being used because it holds cultural significance.

- 6) **WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: Thirty-Seventh Session' Geneva, prepared by the secretariat of IGC, Thirty-seventh Session, Geneva, August 27 to 31, 2018⁸** - The gap analysis has established a few gaps but has not addressed them all. The analysis still has not come up with any definite solution.
- 7) **Amerique Phillips and Alexis Baker, 'Cultural Appropriation Or Appreciation? , Published on 30th October 2017** - The author has used minimum examples and has talked about industry aspect more than the legal aspect, but the blog was useful to understand the fashion industry view of the issue of appropriation versus appreciation

1.3 Scope and Objective

The scope of the paper is - what TCEs are and their importance. The paper discusses the various solutions available to the communities to differentiate their TCE on fashion products. The paper aims at explaining and providing a solution thereof by advocating for the existing system.

1.4 Hypothesis

⁶In defense of culture: protecting traditional cultural expressions in intellectual property' (2020) 69 emory law

journal<<https://law.emory.edu/elj/content/volume-69/issue-4/comments/defense-culture-protecting-expressions-intellectual-property.html>> accessed 21 August 2020

⁷ Indigenous Peoples' Innovation: Intellectual Property Pathways To Development (1st edn, Anu E Press 2012)

<<https://www.jstor.org/stable/j.ctt24hfgx.13?seq=1#>

metadata_info_tab_contents> accessed 21 August 2020

⁸Amerique Phillips and Alexis Baker, 'Cultural Appropriation Or Appreciation? | @Theu' (Attheu.utah.edu, 2017)

<<https://attheu.utah.edu/facultystaff/cultural-appropriation-or-appreciation/#:~:text=Cultural%20appropriation%20can%20be%20defined,to%20gain%20knowledge%20and%20understanding.>> accessed 22 August 2020.



The current IP regime provides sufficient protection to the indigenous communities to distinguish their TCE on fashion commodities. There are various tools in the existing regime that can be altered and used for the benefit of both parties.

1.5 Research Methodology

Considering the objective of the paper the qualitative research method is the most suitable.

2. WHAT IS CULTURAL APPROPRIATION OR MISAPPROPRIATION

2.1 Offensive appropriation vs appropriate appreciation.

Indigenous communities over time have embellished their work with cultural expressions. Most of this work was created out of traditional needs. Over time this work became a part of their cultural heritage i.e they started to relate this work to the respect of their community. But with the development of western culture, the imposition of the same started to take place. As a result of this, anything traditional started to be called as “uncivilised”. But in the current times, western fashion has started to adopt these traditional expressions in their culture via fashion and started to call it “civilised”.

Cultural appropriation refers to the act of taking intellectual property such as the cultural expressions etc without permission from the respective community. It is selective picking of a culture’s aspects while disregarding the original significance of it. It

becomes offensive when an aspect becomes a mere fashion trend without any appreciation for its cultural significance.⁹ Understanding the culture is a necessity before usage of its expression. Had Urban Outfitters Incorporated tried to gain knowledge and understanding of the Navajo Tribe’s cultural beliefs, they wouldn’t have used the traditional Navajo print fabric on an alcohol flask because in Navajo culture alcohol consumption is considered as a taboo. It was insensitive and considered as disrespect of a community.

Appreciation is to honour and respect another culture by gaining the required knowledge before using its heritage.¹⁰ For example, when Gianfranco Ferré, the famous Italian designer, on his trip to India in 1973, studied the local craftsmanship and got inspired by the designs of Indian Shawls of Kashmir, he reproduced the designs on organza fabrics with the help of Indian artisans which was both respectful and beneficial to the Indian community.¹¹

When a cultural expression is appropriated without attributing it to the community it is considered as appropriation or misappropriation of the TCE. Cultural appropriation has not been defined firmly in any law¹², it has only been added to the oxford dictionary in the year 2017¹³. For example, when Isabel Marant used the embroidery element similar to those applied on a Mixe’s traditional blouse known as ‘huipil’. Instead of accrediting the community with the design, she labelled it to have a “bohemian appeal”. This was offensive to the community because huipil

⁹ Supra note 8

¹⁰ Supra note 8

¹¹ Supra note 4

¹² Supra note 3

¹³ Supra note 5



was a symbol of its identity and the pattern was a part of its cultural heritage. It declared an invitation to the designer to visit the Mixe artisan women who had been creating the Huipil for generations, with the purpose to appreciate the significance of the blouse for their history.¹⁴

Therefore, it is offensive appropriation when a community is either disrespected or not attributed to but it is appropriate appreciation when a TCE user gives value to the heritage of the community as a whole and acknowledges the use of TCE.

2.2 **Why is there a need to protect such TCEs?**

Primarily, TCEs are an embodiment of a culture's way of expressions and skills. They are fundamental to a community.¹⁵ It deserves a form of custodianship as it has an inseparable relationship with the community. According to CEIS "there is a recognition of the living fabric of the community and social relationships that go beyond the monetary value".¹⁶ Protection of TCE is about the ownership and gatekeeping by way of a code of behaviour on how TCE is to be used. For E.g the use of the Native American Headdress used by H&M, which later had to be pulled down because the community said: "they are a sign of respect and leadership" and were offended by its use as a regular accessory.¹⁷

Act of appropriation is humiliating and discriminatory due to stereotyping in an insensitive way where the history of brutality

to the indigenous people due to their traditionalism is ignored.¹⁸ This kind of appropriation is generally done to the minority communities. This is disrespect of the community which originally holds right over such TCE¹⁹. Members of a dominant culture take TCE from a minority culture and repurpose it without the authorization of the community or any compensation.

²⁰There are two aspects in which TCEs require protection. The following two examples explain each aspect:

1. Isabel Marant's use of the Mixe Huipil - The designer Marant used Mixe's traditional blouse without assigning it with cultural importance and rather tagged it with a "bohemian appeal". The original huipil prepared by the Mixe artisan women costs around 300 Mexican pesos (US\$13.63) while Marant retailed it for US\$365. It is an issue, as Marant is benefited by the design way more than the Mixe artisans do.

Secondly, she neither took any permission from the community nor did she acknowledge the traditional blouse as the origin of her design. This is the most crucial issue as the principal way to use a TCE respectfully is to ask for the authorization. Anyone who wishes to use a TCE should perform due diligence to identify the source community. Failing to obtain such permission should restrain a person from usage.²¹

¹⁴ Supra note 5

¹⁵ Supra note 3

¹⁶ Supra note 4

¹⁷ H&M Pulls Native-Inspired Headdress After Customer Complaints' (*TODAY.com*, 2013) <<https://www.today.com/style/h-m-pulls-native->

[inspired-headdress-after-customer-complaints-6C10900100](https://www.today.com/style/h-m-pulls-native-inspired-headdress-after-customer-complaints-6C10900100)> accessed 22 August 2020.

¹⁸ Supra note 5

¹⁹ Supra note 3

²⁰ Supra note 5

²¹ Supra note 3



This example shows the aspect of protection when a community : **3.1.1**

- Is fine with the usage of their TCE by an outsider
- Is proud to promote their cultural heritage.
- Wants to preserve, at the same time benefit out of such usage and promotion.

2. Lisa Blue's Hindu goddess printed swimsuit - In 2011, designer's swimsuit with a print of the Hindu goddess Lakshmi on it became a reason for protests in India amongst Hindus. The statesman Rajan Zed called it disturbing to see goddess Lakshmi on a swimsuit because she was highly respected in Hinduism. She is worshipped in temples or home shrines. The designer was at fault to use it on a swimsuit out of sheer greed and with no regard to the community.²²

Another e.g of the same situation is when Chanel used a Koran verse on a dress, which was irrelevantly dubbed as "the satanic breasts". To this, Hasan Basri, head of Indonesia's ulema, called the usage of the expression an insult to the religion.²³

These examples show the aspect of protection when a community:

- Is not fine with the usage of certain parts of their heritage in any way.
- Are not seeking for any benefit.
- Only want to protect their TCE.

3. RESEARCH QUESTIONS

3.1 Can a community employ existing IP regimes to distinguish their TCE on fashion commodities?

What are the available existing IP regimes?

It has been well accepted that TCEs are a creation of the human mind and eligible for protection under IP. There are various lacunas when it comes to adequate protection of TCEs via the existing regime but if certain alterations are considered in these regimes, it can protect TCE on fashion commodities. The conventional IP regimes are trademark, copyright, patents, industrial design, geographical indications. Further, each regime is discussed concerning TCE.

Trademark refers to an exclusive right to use a distinctive symbol, sign, name or a combination thereof. Right-holder can be an individual, company or a group of people. The case of Navajo Tribe vs Urban Outfitters Incorporated shows the potential of the existing IP regime to protect TCE via trademarks. The Navajo Nation in the US, commonly known as an "Indian Reservation" whose status is that of a "Dependant Nation"²⁴. Navajo nation refers not only to the land but also to the community. Urban Outfitters came up with a line of products and labelled them with the use of "Navajo". The products included "staring at stars skull native headdress" T-shirt, a Navajo hipster panty and a Navajo print fabric wrapped flask. The name "Navajo" was used in a derogatory manner "Navaho". The Navajo nation had a trademark over Navajo in various classes of goods that included clothing, footwear, online retail sales,

²² Supra note 4

²³ Idib.

²⁴ 'The Navajo Nation Treaty Of 1868 Lives On At The American Indian Museum' (Smithsonian Magazine, 2020)

<<https://www.smithsonianmag.com/smithsonian-institution/old-paper-navajo-nation-treaty-1868-lives-american-indian-museum-180968235/#:~:text=The%20acceptance%20by%20hose%20federal,removed%20from%20their%20ancestral%20territory.>> accessed 25 August 2020.



household products and textiles. The tribe claimed infringement of this trademark by Urban Outfitters. The lawsuit tried to get monetary compensation and injunctive relief to permanently disable Urban Outfitters and its subsidiaries from manufacturing, marketing and selling goods with “Navajo” name or its variations. Urban Outfitter argued that “Navajo” was a generic term for a style or design, the usage of which should be made legally permissible. It sought for a declaratory judgement that no infringement happened and that the tribe’s trademark should be cancelled²⁵. In September 2016 both the parties reached an undisclosed settlement. Navajo Nation’s president Russel Bagaya appreciated Urban Outfitters for acknowledging the validity of Navajo Tribe’s trademark. The settlement included parties entering into a supply and license agreement. The tribe stated that anyone who wishes to use the Navajo name or designs commercially should seek prior permission. The trademark turned out to be the most valuable asset that the community held, which secured it with adequate protection and benefit.²⁶

Trademarks that belong to a group of people are called collective marks or certification marks. Indigenous producers and craftsmen can register as an association register a collective mark and authorise its members to use it accordingly. This will help them gain and retain recognition and loyalty from consumers. E.g. Toi iho™ is a registered certification trademark in New Zealand used

to promote and sell original Māori arts and crafts. It aims to certify that the arts and crafts are made by Māori people and to provide a mark of quality. It was developed and implemented in response to calls from Māori to assist them to retain ownership and control of their aonga (treasures) and maintain the integrity of their art culture²⁷. Another e.g would be how the certification regime in Australia has allowed the National Indigenous Arts Advocacy Association to register two certification marks i.e ‘the label of authenticity’ and ‘the collaboration mark’. If a non-indigenous entity adopts the registered TCE without the permission of the indigenous community, it can take action against the user. In addition to this, representatives of the respective community can challenge the unauthorized use of the TCE in court.²⁸

Industrial design laws can be another tool for the protection of TCE that can be employed by the communities for the protection of the aesthetic features of an article. Proprietary right under design law is given to registered owners of the visual form of an article. Industrial designs apply to a range of articles including handicrafts, textiles, household and industrial items. A registered design equips the registered owner with exclusive rights over the design that can help in preventing others from using his or her design without their permission.²⁹

A design does not necessarily need to have any artistic merit. Registration of a design

²⁵Navajo Nation v Urban Outfitters, Inc CIV 12-0195 BB/LAM 2016

²⁶ Supra note 5

²⁷ Supra note 7.

²⁸Supra note 6

²⁹ Terri Janke, 'MINDING CULTURE CASE STUDIES ON INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS' (*Wipo.int*, 2003) <https://www.wipo.int/edocs/pubdocs/en/tk/781/wipo_pub_781.pdf> accessed 7 September 2020.



gives the registered owner protection for the visual appearance of the product, and not its basic design (shape, colour etc but as a whole). This becomes especially useful when a community is unable to get a separate registration for just the basic design due to similarity with another community³⁰. It offers protection for designs as long as they are a pattern or ornamentation, shape and configuration of an article manufactured for commercial purposes. When a community is looking at differentiating its design on fashion commodities it automatically becomes a commercial usage.

Geographical indications refer to signs used on goods that belong to a special geographical origin. These goods have certain qualities, characteristics and reputation that are attributable to the place of origin³¹. GI is the closest to TCEs because just how GI is attributable to a particular place of origin, TCEs are attributable to a particular community. In both cases, the source of the product is what makes it distinguishable. E.g. the Kullu shawls are protected by a registered GI. In the same way, a community can get a GI for its attributable product³². The scope of particular GIs for non-agricultural products can be widened to include other tangible TCE in it, as is under discussion in the European Union. This alteration would be very helpful to protect TCEs via GI, as TCEs are affected by its surrounding and the place they were developed in. Chapter III of the Geneva Act of the Lisbon Agreement provides for the protection of GI. This Chapter if efficiently

applied to TCEs can result in the same level of protection as for GI³³. There are various examples where GI is used to protect TCEs like. Other examples around the world where indigenous names, symbols etc have used the GI regime to protect their TCE as registered GIs are JABLONEC jewellery, MADEIRA embroidery from Portugal, OLINATA handicrafts from Mexico etc³⁴.

TCEs are hand and glove with TK and somehow form part of it in a way in which they become inseparable. The considerations and thoughts that formed the foundation of WIPO IGC acknowledge that the TK, folklore and GR are tightly knotted together. Neither one can be addressed effectively in absence of the other³⁵. Just like TCEs, TK has no internationally accepted definition as well. The fusion of positive and defensive rights available to the communities in the case of TK can also be implemented to ensure effective protection of TCEs. Defensive protection for TK is a set of strategies to ensure that third parties are restricted from obtaining illegitimate or unfounded IP rights over TK. These were several measures including the amendment of WIPO-administered patent systems. Some countries and communities have also developed TK databases that may be used as evidence of prior art to defeat in case of claims to such TK. Positive protection includes two aspects i.e. (i) preventing unauthorized use and (ii)

³⁰ Supra note 3

³¹ Supra note 3.

³² Supra note 7.

³³ Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications and Regulations Under the Geneva Act of the Lisbon Agreement of May 20, 2015

³⁴ Supra note 7.

³⁵ Ministry of ayush, 'Protection of Traditional Cultural Expressions in India' (*SCOPING PAPER No 3, February 2019, 2019*) <<http://www.ris.org.in/fitm/sites/default/files/Scoopin%20Paper%20No%203.pdf>> accessed 4 September 2020



active exploitation of TK by the originating community itself³⁶.

3.1.2 Why should a sui generis system be avoided?

A sui generis system for the protection of TCEs is not as appealing and winsome as it sounds. A distinct system has the capability of going against the basic principles of the IP regime. Inspiration and derivative works in case of TCEs are dubious. It would give the rights to communities to claim frivolously i.e for the non-serious purpose. When closely examined one would observe that various expressions are similar³⁷ (shapes, colours, alphabets etc) because of their aboriginal nature. E.g. the similarity between the geometrical structure of Ikat prints, Ganado prints and Chinle prints³⁸. Therefore, if the similarity aspect of such expressions is considered, any work related to TCE would become an unfair practice. This will eventually lead to the end of innovation in this sector. This challenges the idea-expression dichotomy which is the key ingredient of the IPR protection. The dichotomy works towards the promotion of innovation. If these communities are provided with such rights they would lock those ideas and leave no room for innovation. The best example would be the bizarre legislation designed by Kenya for protection of their TCEs. The system lacks clarification about a specific and centralized body that will sort out the clearance issues. In addition to this, it lays down exaggerated punishments like fine up to Kshs 2,000,000 (\$20,000) and

imprisonment up to 10 years or both. Sec-7 of the act is peculiar as it kills the possibility of trading entirely. The sections lay down that any person who has any course of trade; sells exchanges offers etc; imports or exports etc is committing an offence and would be liable to punishment (up to five years and fine up to 500 shillings³⁹). Such an extreme punitive system would not be beneficial to society and obstruct social innovation for the community itself.

Thus, the existing IP system is better than a sui generis system. Even though there exist lacunas in the existing regime, if applied carefully and utilized efficiently, a community can effectively protect its TCEs on fashion commodities.

3.2 What can be the right way to use such TCEs, which is profitable to the fashion industry using the TCE and beneficial to the community whose TCE is being used?

There are various ways in which both parties can collaborate and benefit. But before we discuss them, there is a need to understand why such collaboration is required in the first place.

3.2.1 Why is there a need for such collaboration?

Collaboration is like a cross-pollination of the market structure of fashion brands and multi-cultures of the non-segregated society. Therefore the need for such collaboration is twofold. Firstly we'll discuss the need for collaboration at the community's end. Indigenous communities lack knowledge of modernized methods of working due to living

³⁶ Traditional Knowledge' (*Wipo.int*) <<https://www.wipo.int/tk/en/tk/>> accessed 7 September 2020.

³⁷ Supra note 3

³⁸ Types Of Tribal Prints - TAYE' (*TAYE*, 2017) <<https://tayelolu.com/types-of-tribal-prints/>> accessed 6 September 2020.

³⁹ The Protection of Traditional Knowledge and Cultural Expressions Act 2016. Kenya Gazette Supplement No. 154, 7 September 2016.



mostly in secluded geographical areas. This affects not only their culture but also the community as a whole. For example, in a recent study on silk fabric in Thailand the following observations were made:

- The production equipment was inefficient due to old-fashioned techniques.
- Weavers lack knowledge of systematic management leading to an uncertain scale of production.
- Sale prices were not standardized
- Marketing was almost nix due to lack of education.
- The product design was not up to date with the market demands.
- There was no quality control process⁴⁰.

This shows that even though the community does not deliberately ask for help, it is struggling. This leads to a decline in the significance of their heritage for the world.

Through collaboration, a community opens the gateway to their preserved heritage for innovation. E.g. Japan has designed a new plan to protect the technique of their indigenous community that holds knowledge on the traditional techniques to utilize banana fibres to produce yarns, fabrics and papers. Japan is looking forward to collaborating with foreign countries to get the supply of bananas because the country lacks banana plantation⁴¹.

Auá with the Maxakali collection set another example where together the parties promote the understanding of cultural diversity and permit the participation of the indigenous people in the fashion system. This has led to the promotion of the tribe's culture and social advancement from profit earned⁴².

Now, let us see the reasons for fashion industries to enter into such collaboration. The primary reason being the requirement of constant innovation. Inducing TCEs into modern fashion not only provides novelty but also authenticity. Fashion industries that have included cultural expressions into their brand or have created a brand out of such a blend have let to a profitable and inspirational genre. E.g. House of Anita Dongre (HOAD) is a homegrown success for India's fashion industry. Anita Dongre was the only designer to understand the need for diffusion wear in India. She infused cultural Indian designs into modern clothing with the help of various local artisans. HOAD now has five brands under its banner: AND, Global Desi, her bespoke namesake bridal line, the jewellery brand Anita Dongre Pinkcity, Grassroot⁴³.

Thus, when a community agrees to collaborate it not only opens the gates to promote the culture but also gain various

⁴⁰ Prempre Anuchit, Songkoon Chantachon and Sisikka Wannajun, 'The Integration Of Traditional Knowledge In The Design And Development Of Mudmee, Praewa And Yok Tong Silk Products For Enhancing Community Economy.' (2014) 13 Indian Journal of Traditional Knowledge <<http://nopr.niscair.res.in/bitstream/123456789/27917/1/IJTK%2013%282%29%20305-312.pdf>> accessed 5 September 2020.

⁴¹ Supra note 4

⁴² 'Fashion Law - When Fashion Meets Fundamental Rights :: Fashion And The Rights Of Indigenous And

Local Communities' (*Fashionmeetsrights.com*, 2017) <<http://www.fashionmeetsrights.com/page/home/77#:~:text=For%20product%20issue%20with%20traditional,from%20those%20of%20another%20trader.>> accessed 5 September 2020.

⁴³ 'The Rise Of India'S Biggest Fashion House' (*Vogue Business*, 2020) <<https://www.voguebusiness.com/companies/the-rise-of-indias-biggest-fashion-house-anita-dongre-traditional-wear-sustainability>> accessed 5 September 2020.



monetary benefits which are crucial for social innovation. Through these benefits, it can gain better control over its TCEs and development thereof. At the same time, fashion brands gain various monetary benefits and goodwill.

3.2.2 What can be the best set up to make both ends meet?

When a community is certain about using its TCEs commercially, there are various ways in which a beneficial system of exchange can be set up.

The first beneficial tool could be Access and benefit-sharing (ABS) which refers to the system in which the people or country providing the genetic resource and the country using it, share the benefit that results from the use. The ABS is based on (i) prior informed consent (PIC) which is granted by a provider to the user and (ii) negotiations between both parties to develop mutually agreed terms (MAT). MAT ensures fair and equitable sharing of genetic resources and associated benefits⁴⁴. Similarly, PIC should be required by the user of TCE and if the community agrees to collaborate, MAT should be created. The benefits shared can either be monetary (such as sharing royalties when the TCE is put to commercial use) or non-monetary (such as the development of research skills and knowledge). A similar system can be used to share benefits between the community owning TCE and a party that wants to use the TCE. Navajo case is the best example of such a contract where the tribe became the supplier and marketing and sales

were handled by Urban Outfitters Incorporated.

Branding is another tool that the TCE holders can use to take advantage of their skills and heritage. Branding would provide authentication, protection and commercial exploitation from their TCE⁴⁵. E.g. Maxakali tribe from northeast of the Brazilian State of Minas Gerais, has vast knowledge on biodiversity which is reproduced in their drawings, hymns, legends and accessories made of beads. Auá (Designer) is based in the same area. The fashion brand and the indigenous community signed a contract to design together with the Maxakali Collection. The clothes in this collection are inspired by their TCE. The indigenous community receives a percentage from the sale of each piece of the collection. Besides, the Maxakali often meet the designers of Auá at their fashion brand atelier⁴⁶.

A few indigenous designers have used branding to their advantage while showcasing their culture at the same time. E.g. Ataumbi Metals by Keri Ataumbi from tribe Kiowa Based in Santa Fe. She fuses the old with the new. She combines traditional indigenous elements, like quillwork or featherwork, with traditional and contemporary goldsmithing techniques and 3-D printing⁴⁷.

Some communities want to collaborate to raise their cultural profile and innovate along. Fashion industries should approach such

⁴⁴ (Cbd.int, 2020) <<https://www.cbd.int/abs/infokit/revise/web/all-files-en.pdf>> accessed 5 September 2020.

⁴⁵ Supra note 7.

⁴⁶ Supra note 42

⁴⁷ Christian Allaire, 'How 6 Indigenous Designers Are Using Fashion To Reclaim Their Culture' (*Vogue*, 2019) <<https://www.vogue.com/article/indigenous-fashion-designers-cultural-appropriation-activism>> accessed 5 September 2020.



communities and enter into beneficial contractual agreements⁴⁸.

E.g. The Brazilian luxury brand Osklen has a collection named Asháninka. The collection comprises garments inspired by the Asháninka culture. Oskar Metsavaht (founder and creative director of Osklen) has created a black dress with a printed image of an Asháninka person, coats and skirts based on the chusma traditional dress, a white dress with printed feathers and dresses and skirts with Asháninka's black geometric patterns. The use of this TCE, image and name was authorised by the indigenous community. The Asháninka signed a contract where they received an amount of 46.500 Euros. This money was used for the construction of a new school in their village and to buy a piece of land in order to install their store in the city Cruzeiro do Sul, close to their village and other such developments⁴⁹.

In the current time, almost every fashion brand has its corporate social responsibility developing rapidly. It has become a social trend. Such fashion brands can include local artisan designs and encourage traditional artisans to develop their techniques. This can be another form of a beneficial system between two parties.⁵⁰

CONCLUSION AND RECOMMENDATIONS

TCEs are not just an intellectual heritage to the community owning it but also an emerging right in the colossal space of the IPR regime. A sui generis system for the protection of these expressions in fashion in these industries would only be an added unnecessary struggle. Every country should

try to come up with the best possible way to protect its TCEs via alterations to the existing regime. TCEs can be best protected with a half and half system of the defensive and positive rights. In the past, efficient use of the existing regime i.e trademark, collective mark, GI mark etc has proven to be enough for the protection and distinction of these expressions. These expressions are an integral part of the community's heritage, therefore adequate protection is very necessary. The right protection would not only help the communities in social innovation but also in raising social-political level of the community by employing benefits arising out of commercial usage of TCEs. There still are some communities who want to fortify and preserve their TCE from the world. The existing IP regime provides for such circumstances as well by providing the right to register defensive marks. Defensive marks are registered by the owners but are not intended to be used commercially. Even though there are various lacunas in the existing regime, attempts have been made to fix those gaps. The existing regime is still enough to protect and distinguish TCE from fashion products. Communities with such TCEs should be educated on how their tangible and intangible expressions might be protected. National and regional government should invest in gaining knowledge of various TCEs present in the country and educate the respective community about its importance. TCEs of such communities are jewels to the country's crown. Only when the communities have adequate tools to protect their heritage they can start forming various beneficial contracts. Such contracts will lead to the overall development of the community.

⁴⁸Supra note 5

⁴⁹ Supra note 42

⁵⁰Supra note 4



A sui generis system would lead to the death of innovation by creating unrealistic offences. Such a system would be overprotection of these expressions.

TCEs undoubtedly require adequate protection but it also needs to develop with time to survive the changing world. If the communities remain antiquated, it would lead to vanquishing of their heritage. Commercializing does not suggest that the natural and ancestral flow has to be questioned or interrupted, it just adds the need to modernize.

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