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## THE PIRACY PARADOX AND INDIGENOUS FASHION♦

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### ABSTRACT

*The conventional justification of intellectual property laws is that recognizing exclusive rights is indispensable for encouraging creativity. The Piracy Paradox challenged this assumption by providing strong evidence of the fashion industry's robust creativity in the face of widespread copying of designs, thereby suggesting that some types of creativity may not need exclusive rights. This Article examines the applicability of the piracy paradox in the context of non-Western cultures. It categorizes indigenous fashion as those open to commercialization and those closed to it. With some important caveats, this Article suggests the piracy paradox may apply to indigenous fashion that is open to commercialization. However, tolerance of unauthorized copying, which is at the core of the piracy paradox thesis, does not seem to exist in the case of sacred or restricted indigenous fashion. Instead of resulting in more creativity, unauthorized copying of indigenous fashion has created the hot-button issue of cultural appropriation and a relationship of mistrust between source communities and mainstream designers. This Article concludes by suggesting that recognizing enforceable cultural rights, creating professional ethical principles, and implementing corporate social responsibility standards can serve as mechanisms of creating a harmonious relationship between indigenous communities and mainstream fashion designers.*

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### INTRODUCTION

The orthodox justification for recognizing exclusive intellectual property (IP) rights is that expression and inventions require resources to create but are easy to copy. In the absence of such rights, creators and inventors would be unable to recoup their investments leading to a reduced interest to create or invent. *The Piracy Paradox* thesis developed in 2006 highlighted a critical exception to this conventional thought. It revealed that widespread copying of designs takes place in the fashion industry, and rather than discouraging creativity, it may be a key driver of it.<sup>1</sup> The thesis outlined the positional and cyclical nature of fashion design, giving rise to an “induced obsolesce” of designs, which enables robust creativity in the presence of rampant copying.

This Article examines whether the piracy paradox applies in the context of non-Western cultures. The answer to this question depends on empirical evidence. However, an attempt is made to provide a general answer to the question. Given the diversity of interests and expectations that non-Western societies may hold, the Article provides two broad categories of source communities. The term “indigenous peoples” broadly refers to communities who reside in their native lands with settler communities. In contrast, the term “local communities” refers to those who live in countries where colonizing powers have left but who nonetheless do not form part of the mainstream culture. For the sake of readability, the term “indigenous communities” will be used to refer to both groups, with the recognition that they both hold considerable diversity within

<sup>1</sup> Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1688 (2006).

them. Thus, “indigenous fashion” refers to the fashion expressions of both groups unless a specific reference to one group is warranted.

The Article then outlines two categories of indigenous fashion—those open to commercialization and those that are closed to it. It is easier to imagine the piracy paradox working in indigenous fashion that is open to commercialization. Given the impacts of globalization and the broad reach of capitalism, many communities increasingly resemble Western societies and, as such, may have similar values and behaviors. In that respect, the piracy paradox thesis may apply to indigenous communities in more or less the same manner as it does to mainstream fashion. However, the Article provides real examples of when the use of indigenous fashion open to commercialization still created controversies for violating the standards of source communities or the public’s sense of fairness.

On the other hand, the piracy paradox does not seem to work well in the context of indigenous fashion closed to commercialization. The rejection of commercialization can come from the sacred nature of the cultural symbols or restrictions imposed on such symbols arising from customary rules and practices. In this context, outsiders’ use of indigenous fashion tends to result in unauthorized and offensive uses that spark public outrage, at least on the part of the source community. Mainstream fashion designers should be cautious when interacting with indigenous fashion not to use sacred or restricted cultural symbols. Despite the public outcry in the face of offending uses, some mainstream fashion designers insist their use should be considered an inevitable part of creativity and not an attempt to steal indigenous fashion symbols. In a sense, the piracy paradox is already taking place in indigenous fashion, albeit with a different outcome. Unauthorized copying of indigenous fashion is common; however, it has also given rise to the hot-button issue of cultural appropriation.

After outlining these two categories of indigenous fashion, the Article highlights the low-IP ecosystem that currently applies to indigenous fashion. Using examples from the United States and other countries, the Article outlines rights that indigenous communities may have over their fashion, both within and outside of IP laws. These protections include copyright and trademark laws or *sui generis* systems designed to extend legal protection to some forms of cultural expressions. In the United States, this includes the 1990 Indian Arts and Crafts Act, which has mixed results. The Article then proceeds to outline the effects of allowing unfettered access to indigenous fashion. While mainstream fashion designers could benefit from the diverse pool of cultural expressions, allowing these practices to continue will result in the inequitable scenario of indigenous communities remaining merely the source of inspiration without

benefits in the artistic and economic sense. In this regard, the piracy paradox does not seem to have the same effects in the context of sacred or restricted indigenous fashion as it does in mainstream fashion.

The Article concludes with some suggestions for managing the relationship between indigenous communities and mainstream fashion designers. Legal intervention that recognizes enforceable cultural rights is recommended. Similar suggestions have already been made by several scholars.<sup>2</sup> Despite the laudable concerns around the effect of such rights in limiting the freedom of discourse and the risks of commercializing indigenous cultures, proposals for recognizing limited cultural rights should be seriously considered. Additionally, creating ethical standards in the mainstream fashion industry and corporate social responsibility are suggested as tools to foster a more harmonious relationship between indigenous communities and mainstream fashion designers.

The rest of the Article proceeds as follows: Part I provides the two categories of indigenous fashion—those open to commercialization and those closed to it. It also provides examples and explanations of the cultural appropriations debate. Part II explains the low-IP ecosystem for indigenous fashion and analyzes the piracy paradox thesis's applicability to indigenous fashion. Part III outlines potential legal and quasi-legal interventions which can create a harmonious relationship between source communities and fashion designers. The Conclusion summarizes the main points.

## I. INDIGENOUS FASHION AND CULTURAL APPROPRIATION

This Article seeks to examine the piracy paradox and what it tells us about intellectual property laws in the context of non-western communities. Since the diversity of non-Western communities makes any form of holistic analysis impossible, this Article focuses on two groups of non-Western communities—indigenous peoples and local communities. These terms are preferred because they have been formally adopted in the context of international intellectual property law discussions, and particularly in discussions around the protection of traditional knowledge and traditional cultural expressions.<sup>3</sup>

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<sup>2</sup> See, e.g., Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022 (2009) (advocating the use of a "stewardship" rather than an "exclusive ownership" approach over cultural property as a practical strategy to protecting indigenous community intangible property and cultural property).

<sup>3</sup> WORLD INTELL. PROP. ORG. [WIPO], WIPO INTERGOVERNMENTAL COMM. ON INTELL. PROP. & GENETIC RES., TRADITIONAL KNOWLEDGE AND FOLKLORE BACKGROUND BRIEF NO. 2, at 1 (2016) [hereinafter TRADITIONAL KNOWLEDGE BRIEF].

The term “indigenous peoples” refers to native or aboriginal communities who reside in countries with settler communities. Examples include native or aboriginal communities in the United States, Canada, Australia, New Zealand, and South Africa. Whereas the term “local communities” refers to communities native to former European colonies, such as communities in the Global South<sup>4</sup> or in various parts of the world.<sup>5</sup>

While it is essential to distinguish between indigenous peoples and local communities, the similarities between these two groups allow for some general legal observations. For readability purposes, the author will use the term “indigenous communities” throughout this Article to refer to indigenous peoples and local communities. The term “indigenous fashion” will also refer to the various cultural expressions in which indigenous peoples engage. Whenever specific references are needed, the particular terminologies of “indigenous peoples” and “local communities” will be used.

The piracy paradox’s key feature is that mainstream fashion design has a status-conferring function aside from serving a strictly practical function—to cover our bodies. In fact, some of the most celebrated fashion designs may not be entirely effective in covering one’s body parts but still provide a substantial value as status-conferring products.<sup>6</sup> Besides, the positional nature of designs creates a cyclical flow of new expressions that allows consumers to stay “in style.”<sup>7</sup> An application of the piracy paradox to the context of indigenous fashion requires examining the presence of status-conferring and positional features that are key to mainstream fashion.

As mentioned earlier, the term “indigenous fashion” refers to a diverse set of communities with potentially divergent perspectives regarding the values depicted in and expectations from their fashion. This diversity significantly limits the assumption around the preferences of members of indigenous communities. Thus, the generalizations made here will not necessarily capture the varied ways indigenous communities

<sup>4</sup> The term “Global South” and “Global North” are terms frequently used in the international development literature to refer to countries south and north of the equator and which roughly fall along the developing–developed country distinction. See, e.g., Jeffrey J. Minneti, *Environmental Governance and the Global South*, 43 WM. & MARY ENV’T. L. & POL’Y REV. 83 (2018).

<sup>5</sup> Although most of the literature on local communities focuses on local communities in the Global South, countries in the Global North do have their own versions of local communities. See generally Rainer Grote, *On the Fringes of Europe: Europe’s Largely Forgotten Indigenous Peoples*, 31 AM. INDIAN L. REV. 425 (2007).

<sup>6</sup> See, e.g., Amanda Krause, *The Fashion Trends that Were All the Rage the Year You Were Born*, INSIDER (Sept. 16, 2020), <https://www.insider.com/popular-fashion-trends-history-us-2019-2> (last visited June 6, 2021) (noting that some of the most popular fashion designs, especially those in recent years, involve bold cut-outs, crop tops, and “no-pants” trends).

<sup>7</sup> Raustiala & Sprigman, *supra* note 1, at 1692.

prefer to interact with their fashion and those external to their community. Therefore, this Article analyzes the standard view among indigenous communities as communicated through various platforms. With that broad disclaimer, it is possible to categorize some preferences or tendencies relevant to the piracy paradox thesis.

Some indigenous fashion may be open for commercialization or use by entities outside of the indigenous community, while customary rules may restrict the use of other fashion designs. These limitations may exist either because the expression is sacred to the community, or because it is intended for internal use only, or for some other reason. While a detailed analysis of the various interests of indigenous communities is outside the purview of this Article, the potential relevance of the piracy paradox to the non-Western fashion context should be explored via two parallel routes based on the broad categories of commercial and non-commercial use.

#### A. *Indigenous Fashion Open to Commercialization*

One can imagine that some indigenous fashion is open for commercialization. Members of indigenous communities or designers may want such cultural representations to interact with the broader audience outside of their communities.<sup>8</sup> In this respect, indigenous fashion may have more in common with mainstream fashion. Indigenous designers may want to create new styles and trends with the same vigor as the leading mainstream fashion firms.<sup>9</sup> In this limited manner, the application of the piracy paradox to indigenous fashion is relatively easy to imagine.

Before providing examples of indigenous fashion that is open to commercialization, it may be helpful to highlight some of the main differences between indigenous fashion and mainstream fashion. Indigenous communities were and continue to be influenced by the dominating impact of a settler community or modern mainstream culture. As a result, a formalized indigenous fashion may be in its early stages of development, while mainstream fashion has benefited from centuries of

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<sup>8</sup> See generally KWAME ANTHONY APPIAH, COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS (2006) (highlighting that not all members of a culturally identifiable group agree on the future of the group, and that some leaders may want to encourage cosmopolitanism). Some level of integration seems to be accepted by at least some communities around the world. See, e.g., JOHN W. FRIESEN & VIRGINIA LYONS FRIESEN, ABORIGINAL EDUCATION IN CANADA: A PLEA FOR INTEGRATION, at ix (2002).

<sup>9</sup> One Canadian university even offers a virtual “incubation program that supports Indigenous entrepreneurs” in “building and scaling a business in the fashion industry.” *The Indigenous Fashion Support (IFS) Program Is Now Accepting Applications!*, RYERSON UNIV. (Jan. 18, 2021), <https://www.ryerson.ca/fashion-zone/news-events/2021/01/ifs-2021/> [https://perma.cc/42Q3-97SC].

considerable investment by an elite customer base.<sup>10</sup> In addition to its economic significance, the fashion industry also receives unparalleled access to popular media and sets societal expectations and standards.

In contrast, the oppression that indigenous people have suffered (and continue to suffer) means that most of their traditional institutions, including fashion and art, were not allowed to flourish. It is rare to see considerable attention given to indigenous fashion, even in countries with significant indigenous communities. Although the most substantial claims have primarily focused on gaining ownership of traditional lands, several decades have passed since the early calls for ownership of indigenous communities' intellectual property.<sup>11</sup> In recent years, the concerns of indigenous communities around the use of their fashion symbols have received significant attention, as can be seen in the growing debate around "cultural appropriation."<sup>12</sup> Recent rise in social justice movements and the resulting increased receptiveness of the general public means that both indigenous communities and an increasing portion of outsiders will join forces to continue shedding light on the practice of cultural appropriation.

However, there are notable similarities between modern and indigenous fashion. At the heart of any fashion is artistic expression, and the expressive outlet of the arts is one of those modes of creativity that transcend cultural boundaries.<sup>13</sup> Indigenous communities worldwide have an impressive pool of artistic expression, and some of these expressions have found their way into mainstream fashion.<sup>14</sup> Artistic expression, and particularly fashion, is frequently used to re-connect community members to their indigenous roots and heritage.<sup>15</sup> While unauthorized use of indigenous cultural expressions is common and will be discussed below, it is worth noting that some indigenous designers have succeeded in

<sup>10</sup> The fashion industry is estimated to be worth \$2.5 trillion globally. A 2017 estimate shows that Americans spent \$380 billion on fashion products. See *The Economic Impact of the Fashion Industry*, U.S. CONGRESS, JOINT ECON. COMM. 1 (Feb. 2019), <https://www.jec.senate.gov/public/index.cfm/democrats/2019/2/the-economic-impact-of-the-fashion-industry> [https://perma.cc/M8XR-8N9Y].

<sup>11</sup> TRADITIONAL KNOWLEDGE BRIEF, *supra* note 3, at 1.

<sup>12</sup> See discussion *infra* Section I.C on Cultural Appropriation.

<sup>13</sup> See generally Karen Tranberg Hansen, *The World in Dress: Anthropological Perspectives on Clothing, Fashion, and Culture*, 33 ANN. REV. ANTHROPOLOGY 369, 369 (2004).

<sup>14</sup> Miguel Angel Gardetti & Shams Rahman, *Sustainable Luxury Fashion: A Vehicle for Salvaging and Revaluating Indigenous Culture*, in ETHNIC FASHION 1, 1 (Miguel Angel Gardetti & Subramanian Senthilkannan Muthu eds., 2016).

<sup>15</sup> Jennifer Craik & Kathleen Horton, *A Spotlight on: Sustainable Australian Indigenous Fashion*, in GLOBAL PERSPECTIVES ON SUSTAINABLE FASHION 191–93 (Alison Gwilt, Alice Payne & Evelise Anicet Ruthschilling eds., 2019); see Jasmine Kabatay, 'It Excites People': First Nations Artists Give Beadwork a Modern Twist, CAN. BROAD. CORP. (Apr. 4, 2021), <https://www.cbc.ca/news/canada/london/indigenous-beadwork-artists-modern-traditional-1.5965524> [https://perma.cc/HB8R-4J5X] (examples of indigenous fashion forming part of mainstream fashion).

promoting their cultures in creative ways.<sup>16</sup> Major fashion publications have started to highlight indigenous designers that reclaim their heritage by creating traditionally inspired fashion.<sup>17</sup> The global movement to promote greater equity in production and global trade has also created spaces for native designers to control the branding and sale of authentic indigenous cultural products.<sup>18</sup>

Many Native American fashion designs involve cultural symbols, motifs, traditional designs, beadwork, weaving, and tufting.<sup>19</sup> While, traditionally, indigenous fashion was intended for members belonging to indigenous communities, recent trends show that Native designers are offering their products to the general public.<sup>20</sup> Native fashion has increasingly received exposure in various fashion shows, major magazines, and other outlets.<sup>21</sup>

One of the main differences between local communities and indigenous peoples in the context of fashion is that the former reside in countries colonizing forces have left. Since gaining independence, local communities have had increased freedom to express their fashion preferences. The elites of these communities, including political leaders, celebrities, and people who hold high social status, are free and are often encouraged to wear cultural clothing.<sup>22</sup> At least in theory, this allowance should foster some national pride, thereby leading to the empowerment of local designers.

Taking the African continent as an example, in recent times, local designers have benefited from the growing attention given to local fashion both by their fellow citizens and outsiders.<sup>23</sup> For example, in West

<sup>16</sup> See Kabatay, *supra* note 15.

<sup>17</sup> See, e.g., Christian Allaire, *How 6 Indigenous Designers Are Using Fashion to Reclaim Their Culture*, VOGUE (May 30, 2018), <https://www.vogue.com/article/indigenous-fashion-designers-cultural-appropriation-activism> [<https://perma.cc/WN7T-NEZV>].

<sup>18</sup> See, e.g., *Aboriginal Artists*, AUTHENTIC INDIGENOUS, <http://www.authenticindigenous.com/artists/> [<https://perma.cc/L8GL-H4VR>] (last visited Apr. 9, 2021) (a project created to showcase indigenous fashion by members of various Native and Aboriginal communities in Canada).

<sup>19</sup> Jessica RheAnn Metcalfe, *Native Designers of High Fashion: Expressing Identity, Creativity, and Tradition in Contemporary Customary Clothing Design* 136 (2010) (Ph.D. dissertation, University of Arizona) (ProQuest).

<sup>20</sup> Tara Paniogue, *Meet Bethany Yellowtail, a Native American Fashion Designer Who's Inspiring a Whole Generation of Women*, L.A. TIMES (June 9, 2017), <https://www.latimes.com/fashion/la-ig-bethany-yellowtail-los-angeles-designer-20170609-htlmstory.html> [<https://perma.cc/6NNM-C5Z5>].

<sup>21</sup> Chavie Lieber, *The Reclaiming of Native American Fashion*, RACKED (Jan. 21, 2016), <https://www.racked.com/2016/1/21/10763702/native-american-fashion> [<https://perma.cc/GK53-RDVP>].

<sup>22</sup> Kwame Anthony Appiah, *The Case for Contamination*, N.Y. TIMES MAG. (Jan. 1, 2006), <http://www.nytimes.com/2006/01/01/magazine/01cosmopolitan.html> [<https://perma.cc/X6Z9-3WP8>].

<sup>23</sup> See generally Leora Farber, *Africanising Hybridity? Toward an Afropolitan Aesthetic in Contemporary South African Fashion Design*, 24 CRITICAL ARTS: SOUTH-NORTH CULTURAL & MEDIA STUD. 128 (2010) (highlighting the increasing commercialization of local fashion by South African designers thereby generating economic benefits to the local community).



Africa, modernized versions of traditional dresses, such as Ghanaian *adinkra* and *kente* fashion and designs belonging to various ethnic groups in Nigeria, have generated increasing demand and higher prices.<sup>24</sup> A similar trend can be seen in East Africa. The dramatic increase in the price of traditional Ethiopian dresses over the last two decades is one instance among many.<sup>25</sup> Some of these local designs are outside the average citizen's price range in many African countries and have achieved luxury status resembling mainstream fashion.<sup>26</sup> Although the market for such elite and expensive local designs is a small portion of the overall market for local fashion, it is rapidly expanding, and the status-conferring and positional features of mainstream fashion are becoming more apparent in this context.<sup>27</sup>

Visual arts can provide a unique insight into cultural trends, as shown in some successful movies and music videos that feature costumes inspired by African fashion. For instance, the 2018 blockbuster, *Black Panther*,<sup>28</sup> showcases creative fashion designs drawn from different African countries.<sup>29</sup> The film was lauded for its masterful representation of African culture and clothing,<sup>30</sup> and it generated a record-breaking \$1.3 billion at the box office.<sup>31</sup> Another recent hit movie, *Coming 2 America*,<sup>32</sup> also highlights the enchanting variety of fashion from various African countries. Similarly, some of the most famous music videos on the African continent draw on contemporary local fashion.<sup>33</sup> Such productions

<sup>24</sup> Appiah, *supra* note 22.

<sup>25</sup> The author has an Ethiopian background, and as a result, personal knowledge of the trends in Ethiopia. See also Yonatan Belay, *Imitation Cultural Clothes Hit Markets, Raise Concerns*, ADDIS FORTUNE, <https://addisfortune.net/addisfortunefeature/imitation-cultural-clothes-hit-markets-raise-concerns/> [<https://perma.cc/CLR7-WC6H>] (last visited Apr. 13, 2021).

<sup>26</sup> James Jeffrey, *Ethiopia's Clothes Firms Aim to Fashion Global Sales*, BBC News (Mar. 20, 2014), <https://www.bbc.com/news/business-26627406> [<https://perma.cc/YRR4-MKJX>].

<sup>27</sup> Appiah, *supra* note 22 (highlighting how expensive Ghanaian cultural designs have become and the effect of such increasing popularity among locals); BOATEMA BOATENG, *THE COPYRIGHT THING DOESN'T WORK HERE: ADINKRA AND KENTE CLOTH AND INTELLECTUAL PROPERTY IN GHANA* 26 (2011) (noting the status-conferring nature of *adinkra* and *kente* cloth).

<sup>28</sup> *BLACK PANTHER* (Marvel Studios 2018).

<sup>29</sup> See Melena Ryzik, *The Afrofuturistic Designs of 'Black Panther'*, N.Y. Times (Feb. 23, 2018), <https://www.nytimes.com/2018/02/23/movies/black-panther-afrofuturism-costumes-ruth-carter.html> [<https://perma.cc/W89E-F6BL>].

<sup>30</sup> *Id.*

<sup>31</sup> Rachel E. Greenspan, *Here Are the Highest-Grossing Marvel Movies*, TIME, <https://time.com/5523398/highest-grossing-marvel-movies/> [<https://perma.cc/N93C-GLWU>] (last updated July 21, 2019, 1:58 PM).

<sup>32</sup> *COMING 2 AMERICA* (Paramount Pictures 2021).

<sup>33</sup> Nigerian music is one of the most popular on the continent, and it is a good example of the point the Article makes here. Nigeria is home to several ethnic groups, some of which include Hausa, Yoruba, and Igbo (Ibo). For a representative sample of music videos with cultural fashion, see, e.g., Official Flavour, *Flavour – Ada Ada (Official Video)*, YOUTUBE (June 30, 2013), <https://www.youtube.com/watch?v=2IUfM8yTtUc> (last visited Apr. 9, 2021) (reflecting modern Igbo fashion); N-tyze Entertainment, *OSINACHI (Remix) – Humblesmith ft. Davido (Official Video)*, YOUTUBE (Jan. 31, 2016), <https://www.youtube.com/watch?v=SSw8EmVX-gM> (last visited Apr. 9, 2021).

are part of a mutually beneficial relationship between the source communities and the producers or directors that feature locally inspired fashion in their work.<sup>34</sup> These depictions of local fashion and the reception of members of local communities reveal the status-conferring nature of high-end clothing and accessories.

The style and design of one's cultural attire, along with the quality of the fabric, are often regarded as a signal of wealth and elite status.<sup>35</sup> A particular instance of the status-conferring nature of expensive local designs can be observed in traditional Ethiopian dresses. In 2007, singer and actress Beyoncé Knowles started her world tour in Ethiopia.<sup>36</sup> During some of her widely publicized appearances, including a visit to the Patriarch of the Ethiopian Orthodox Church, she wore a distinctive type of traditional Ethiopian dress.<sup>37</sup> These appearances were covered by major media outlets in the country and the region. The event was followed by a dramatic increase in demand for, and corresponding increase in price, of the dress.<sup>38</sup> This causal relationship is especially evident because the type of dress Ms. Knowles wore is referred to as "The Beyoncé" dress to this day. Interestingly, Oprah Winfrey wore the same style of dress during her visit to Ethiopia in 2004,<sup>39</sup> and for a couple of years, the dress was then called "The Oprah" dress. Similarly, with the growing popularity of "The Oprah" dress came a significant increase in prices, thereby providing a status-conferring function. The elite class in Ethiopia would wear traditional dresses with that particular design, in part, to communicate their elite status.

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(highlighting Igbo culture); Adekunle Gold, *Adekunle Gold – My Life [Official Video]*, YOUTUBE (Dec. 1, 2016), <https://www.youtube.com/watch?v=emyciiFTHCE> (last visited Apr. 9, 2021) (styled after indigenous Yoruba fashion); DMW HQ, *Aye – Davido (Official Music Video)*, YOUTUBE (Feb. 7, 2014), [https://www.youtube.com/watch?v=uZ-\\_HIoEBE8](https://www.youtube.com/watch?v=uZ-_HIoEBE8) (last visited Apr. 9, 2021) (loosely reflecting Yoruba fashion).

<sup>34</sup> See, e.g., Olamide Olarewaju, *Meet Donald Onugha, the Eclectic Stylist Behind Singer's Bold Looks*, PULSE NIGERIA (July 20, 2017), <https://www.pulse.ng/lifestyle/fashion/adekunle-gold-meet-donald-onugha-the-eclectic-stylist-behind-singers-bold-looks/cxll68s> [<https://perma.cc/K569-XJ49>].

<sup>35</sup> Jeffrey, *supra* note 26.

<sup>36</sup> Lawrence van Gelder, *Beyoncé in Ethiopia*, N.Y. TIMES (Oct. 22, 2007), [https://www.nytimes.com/2007/10/22/arts/22arts-BEYONCINETHI\\_BRF.html](https://www.nytimes.com/2007/10/22/arts/22arts-BEYONCINETHI_BRF.html) [<https://perma.cc/HFB3-2KC5>]. The event was part of Ethiopia's celebration to welcome the new millennium. Ethiopia follows the Coptic calendar, and it welcomed the new millennium in 2007 in the Gregorian calendar. See ETHIOPIAN CALENDAR, <https://www.ethiopiancalendar.net/> [<https://perma.cc/83M9-W52X>] (last visited Apr. 3, 2021).

<sup>37</sup> Edom Freedom, *Ethiopian Beauty*, PINTEREST, <https://www.pinterest.com.au/pin/418694096577898811/> [<https://perma.cc/GJE2-2D7V>] (last visited June 6, 2021).

<sup>38</sup> Fasika Tadesse, *In Style with Traditional Clothes*, ADDIS FORTUNE (Apr. 14, 2017), <https://addisfortune.net/articles/in-style-with-traditional-clothes/> [<https://perma.cc/6F7R-NVDU>].

<sup>39</sup> *Inside the Fistula Hospital*, OPRAH (Dec. 1, 2005), [https://www.oprah.com/spirit/inside-the-fistula-hospital\\_1](https://www.oprah.com/spirit/inside-the-fistula-hospital_1) [<https://perma.cc/NA77-GX8E>] (click the arrows to advance to picture 3 of 8).

A similar status-conferring function of traditional dresses is seen in other parts of Africa. One example is the success of Ebuka Obi-Uchendu, a Nigerian lawyer and media personality who has been repeatedly credited for setting trends in the country and among the diaspora in various corners of the world.<sup>40</sup> He sets trends influenced by luxury brands and creates fashion designs that sell out quickly.<sup>41</sup> As a result of the increasing interest in locally inspired cultural fashion, various African countries now have a burgeoning fashion industry.<sup>42</sup>

These examples demonstrate that the status-conferring function of fashion design is not limited to mainstream fashion but is shared by other communities around the world. Of course, the reach of such a phenomenon differs from one community to another. It may in part depend on the community's acceptance of global trends and whether the community is welcoming of a capitalist worldview. While local designers draw on their communities' traditions, they must also adopt modern and unique styles to ensure that their creations are distinctive from other, perhaps more commonplace, designs. These trends of merging the local and the global may invite both local designers and outsiders to commercialize local fashion. There seems to be a small but growing population of consumers in the source countries and a considerable diaspora population willing to purchase high-end fashion that straddles the local and global.<sup>43</sup>

### B. *Indigenous Fashion Closed to Commercialization*

Some types of indigenous fashion may be closed to commercialization, either entirely or in a limited manner against commercialization by or for outsiders. While there may be several factors as to why an indigenous community may shy away from commercialization, the major reasons include the sacred nature of the expression and the restrictions embedded in customary laws about when, where, and by whom the expression is to be communicated. The risks of commodifying indigenous

<sup>40</sup> 30+ *Latest Agbada Styles from Ebuka's Wardrobe that You Need to See (Updated)*, CLARAITO'S BLOG, <https://www.claraitosblog.com/2019/07/20-latest-agbada-styles-from-ebukas.html> [https://perma.cc/3AQX-D7V5] (last visited Apr. 9, 2021); see also Kunle Ologunro, *6 Times Ebuka Served Us Premium Agbada Goodness*, ZIKOKO (Jan. 18, 2020), <https://www.zikoko.com/life/oldies/6-times-ebuka-served-us-premium-agbada-goodness/> [https://perma.cc/GE5U-KMP9].

<sup>41</sup> Yvonne Onyinye, *The Reale Designer Behind Ebuka's Agbada to #BAAD2017: Ugochukwu Monye*, THE GUARDIAN (NIGERIA) (Nov. 20, 2017), <https://m.guardian.ng/life/spotlight/the-reale-designer-ugochukwu-monye/> [https://perma.cc/7HG3-P8KR].

<sup>42</sup> *Special Report: The Business of African Fashion & Design*, FIN. TIMES (July 1, 2019), <https://www.ft.com/reports/business-african-fashion-design> [https://perma.cc/E8FB-LAGV].

<sup>43</sup> Nigeria is the source of the biggest population of African immigrants in the United States with close to 350,000 Nigerian immigrants currently residing in the country. See John Gramlich, *Fast Facts About Nigeria and Its Immigrants as U.S. Travel Ban Expands*, PEW RSCH. CTR. (Feb. 3, 2021), <https://www.pewresearch.org/fact-tank/2020/02/03/fast-facts-about-nigeria-and-its-immigrants-as-u-s-travel-ban-expands/> [https://perma.cc/D4M7-CLFE].

cultures are strongly felt in the concerns of advocates for local communities.<sup>44</sup>

At first glance, the rules around indigenous fashion closed to commercialization may sound alien to outsiders. However, the Western world has its version of fashion that is not open to commercialization, of which military and religious attires are good examples. Forever 21 realized this when it started selling t-shirts that closely resembled recruits' training attire of the U.S. Army.<sup>45</sup> The company faced intense criticism for disrespecting the military.<sup>46</sup> Offensive uses of religious attires have also provoked outrage among believers. American singer-songwriter Madonna particularly stands out for her provocative attire involving various symbols of the Catholic Church.<sup>47</sup>

As highlighted earlier, indigenous peoples' diversity counsels against generalizing their interests and expectations. Thus, this section will only attempt to categorize some of the general interests that stand out in the context of fashion and interactions with outsiders. There may be various reasons why members of an indigenous group would prefer to avoid commercializing their cultural expressions. The sacred nature of a symbol is one of the most important reasons for prohibiting commercialization.<sup>48</sup> The various sacred traditions of indigenous people are steeped in cultural expression, including dancing ceremonies, artifacts, and

<sup>44</sup> See, e.g., Rebecca Tsosie, *ReClaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 300, 310 (2002). Tsosie examines cultural appropriation of North American Native cultures to formulate an idea of a "right to culture" and speculate on how laws can be developed to protect such a right, exploring legal and theoretical arguments both for and against the establishment of a recognized "right to culture." The major arguments against the establishment of a recognized "right to culture" that are set forth in the article are protecting the commitment to freedom of discourse, the danger of cultural reification, and the risk of homogenization created by commodification of Native cultures. The article posits that although these are worthy concerns, the argument in favor of the establishment of a right to culture can survive the challenges and should be considered.

<sup>45</sup> Elise Solé, *Why Forever 21 May Be in Trouble with the U.S. Army*, YAHOO! FIN. (May 1, 2017), <http://finance.yahoo.com/news/forever-21-may-trouble-u-s-army-193619960.html> [https://perma.cc/S75A-A3DQ]; see also *U.S. Military Wages Trademark Lawsuit Against Similarly Named Liquor Store*, FASHION L. (Aug. 10, 2017), <https://www.thefashionlaw.com/us-military-wages-trademark-lawsuit-against-similarly-named-liquor-store/> [https://perma.cc/YQU4-8DZ8].

<sup>46</sup> Solé, *supra* note 45.

<sup>47</sup> Donna Freitas, *Madonna's Cross Raises Thorny Questions*, NPR (Aug. 16, 2006), <https://www.npr.org/templates/story/story.php?storyId=5658956> [https://perma.cc/2ADU-W7BA]; Cheryl Wischhover, *Madonna Has Been Prepping for this Met Gala Theme for over 30 Years*, RACKED, (May 7, 2018), <https://www.racked.com/2018/5/7/17327776/madonna-met-gala-catholic> [https://perma.cc/8FJZ-7GK4]; *Madonna Is "Highly Offensive to Christianity", Says New Zealand Bishop*, THE GUARDIAN (Mar. 4, 2016), <http://www.theguardian.com/music/2016/mar/04/madonna-highly-offensive-christianity-new-zealand-bishop-catholic-rebel-heart> [https://perma.cc/2B7U-4HWM].

<sup>48</sup> See generally WINONA LADUKE, *RECOVERING THE SACRED: THE POWER OF NAMING AND CLAIMING* (2005); see also James O. Young, *Profound Offense and Cultural Appropriation*, 63 J. AESTHETICS & ART CRITICISM 135 (2005).

unique clothing.<sup>49</sup> The use of these expressions by outsiders and in a context that does not respect their sacred nature offends the conscience of community members. As a result, indigenous peoples have been working to block the “vulgarization” of their culture.<sup>50</sup>

The second reason indigenous communities may object to commercialization could be a justifiable mistrust of outsiders in general. The long, arduous, and continuous fight to exercise fundamental rights explains why the communities are hesitant to share their most intimate forms of self- and communal expression.<sup>51</sup> The trauma of colonization and the destruction of the traditional socio-economic structure resulted in internalized oppression that persists into the present day.<sup>52</sup> While the decolonization and reconciliation process is taking place, indigenous communities worldwide may prefer to restrict access to their culture and expression from the outside world.<sup>53</sup>

Like indigenous peoples, local communities also tend to have restrictions on commercializing some of their cultural expressions for similar reasons. The restrictions could relate to sacred or revered cultural elements that should never be commercialized as per customary laws.<sup>54</sup> Certain expressions may also be governed under customary rules restricting who can communicate the expression and in what manner.<sup>55</sup> For instance, customary laws may instruct that only elders or chiefs of the community can wear specific clothing for particular ceremonies.<sup>56</sup>

Because of the diversity of interests and the complexities of customary law, attempts to create conversations between different cultures must be managed on a case-by-case basis. It is a gross over-simplification to assume that members of source communities will accept any form of use

<sup>49</sup> PETER JORDAN, *MATERIAL CULTURE AND SACRED LANDSCAPE: THE ANTHROPOLOGY OF THE SIBERIAN KHANTY* 146 (2003).

<sup>50</sup> See, e.g., David Howes, *Combating Cultural Appropriation in the American Southwest: Lessons from the Hopi Experience Concerning the Uses of Law*, 10 CAN. J.L. & SOC'Y 129, 131, 148 (1995).

<sup>51</sup> See Michael C. Harding & Quinn D. Bott, *Earning Trust Among Native American Populations*, 94 ACAD. MED., Apr. 2019, at 460.

<sup>52</sup> See generally EDUARDO DURAN & BONNIE DURAN, *NATIVE AMERICAN POSTCOLONIAL PSYCHOLOGY* (1995).

<sup>53</sup> Aman Gebru, *Patents, Disclosure, and Biopiracy*, 96 DENV. U. L. REV. 535, 551 (2019).

<sup>54</sup> Daniel J. Gervais, *Spiritual but Not Intellectual? The Protection of Sacred Intangible Traditional Knowledge*, 11 CARDOZO J. INT'L & COMPAR. L. 467, 477 (2003). An example of a customary restriction could be that anyone using a cultural expression receive prior consent from the community. See, e.g., Meghana RaoRane, *Aiming Straight: The Use of Indigenous Customary Law to Protect Traditional Cultural Expressions*, 15 PAC. RIM L. & POL'Y J. 827, 827 (2006) (highlighting a restriction among the Ganalbingu people of Australia, who only allow for sacred paintings to be made by community members with ties to the traditional land of those people).

<sup>55</sup> Nicolas Brahy, *The Contribution of Databases and Customary Law to the Protection of Traditional Knowledge*, 58 INT'L SOC. SCI. J. 259 (2006).

<sup>56</sup> Isabella Gomez Sarmiento, *Kente Cloth: From Royals to Graduation Ceremonies ... To Congress?*, NPR (June 11, 2020), <https://www.npr.org/sections/goatsandsoda/2020/06/11/875054683/kente-cloth-from-royals-to-graduation-ceremonies-to-congress> [https://perma.cc/Y2R7-TE4X].

of their cultural expression. The recent uproar over the Ghanaian *kente* patterns in Louis Vuitton's Autumn/Winter 2021 collection is a good example of the complexity of this issue.<sup>57</sup> The work was a collaboration between Louis Vuitton and Virgil Abloh—a Ghanaian luxury designer. The *kente* designs are meant for royal attire and are only worn during extraordinary occasions.<sup>58</sup> This design has traveled across borders and is frequently worn as graduation stoles by students of African descent in the diaspora.<sup>59</sup> It has found its way into the halls of the U.S. Congress, where some members of Congress wore *kente* cloth stoles while kneeling in solidarity with the Black Lives Matter movement following the tragic death of George Floyd.<sup>60</sup>

Given the special significance the *kente* cloth design holds in Ghanaian culture, some Ghanaians were offended by the use of such revered designs in Louis Vuitton's collection.<sup>61</sup> The *kente* designs play such an essential role in Ghanaian tradition that the domestic copyright law protects the design.<sup>62</sup> Designers interested in using the country's celebrated traditional fabric are required to get a license from the Ghanaian National Folklore Board.<sup>63</sup> In contrast, some critics had the opposite view regarding this restrictive protection, as they applauded and encouraged the bold and creative use of the *kente* design.<sup>64</sup> For designers outside of the local communities, these sensitive conversations should inspire caution when they work with local fashion, even if that fashion symbol is somewhat open for commercialization.

Given this tendency of some indigenous communities to block or protest commercialization of their fashion, it is hard to imagine the applicability of the piracy paradox thesis to non-Western communities in this context. Some of the main reasons why the piracy paradox thesis may

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<sup>57</sup> *Here's Why Virgil Abloh Using Kente Fabrics for His Louis Vuitton AW21 Collection Caused an Uproar*, MAUVELLI (Jan. 22, 2021), <https://mauvelli.com/post/heres-why-virgil-abloh-using-kente-fabrics-for-his-louis-vuitton-aw21-collection-caused-an-uproar/> [https://perma.cc/S57P-WNYG].

<sup>58</sup> Nicolas Nhalungu, *Op-Ed: Contextualizing the Question of "Cultural Appropriation" in Virgil Abloh's Louis Vuitton Mens [sic] FW '21 Collection*, INDUSTRIE AFR. (Jan. 28, 2021), <https://industrieafrica.com/blogs/imprint/op-ed-louis-vuitton-mens-fw-21-designer-virgil-abloh-cultural-appropriation-ghana-kente> [https://perma.cc/F5L3-NK32].

<sup>59</sup> Lily O'Brien, *Why Do You Dress Me in Borrowed Robes? The Role of Kente Cloth at Skidmore College 11* (2014) (Art History Honors Project, Skidmore College), <https://core.ac.uk/download/pdf/235415667.pdf> (last visited June 6, 2021).

<sup>60</sup> Sarmiento, *supra* note 56.

<sup>61</sup> *Here's Why Virgil Abloh Using Kente Fabrics for His Louis Vuitton AW21 Collection Caused an Uproar*, *supra* note 57.

<sup>62</sup> Copyright Act, 2005, Act 690 of 2005 §§ 1, 2(f) (Ghana), *reprinted in* 33 COMMONWEALTH L. BULL. 707 (2007).

<sup>63</sup> *Id.* § 44.

<sup>64</sup> *Here's Why Virgil Abloh Using Kente Fabrics for His Louis Vuitton AW21 Collection Caused an Uproar*, *supra* note 57.

not work in the context of indigenous fashion closed to commercialization include the preference of community leaders to uphold restrictive customary rules, the restraint of outsiders who want to respect customary rules, and the decision of companies preferring to avoid a public relations problems.

### C. *Cultural Appropriation*

Analysis of the piracy paradox thesis in the context of indigenous fashion must consider the concept of cultural appropriation. Cultural appropriation has been in the public's conscience for quite some time. Despite the ubiquity of the term, there is no authoritative definition of the concept. However, some valuable suggestions do exist. One author proposed a relatively neutral definition of cultural appropriation as the act of "taking an existing cultural form from one social group and replaying it in another with different meanings or practices."<sup>65</sup> Another author defined it as "the taking, by a member of a dominant culture, of a cultural element from a minority culture, without consent, attribution or compensation."<sup>66</sup> The latter definition highlights the power imbalances between a dominant and minority culture, thereby making the label "cultural appropriation" so potent. And it is that historical context that renders these types of borrowing as cultural appropriations.<sup>67</sup>

It is rare to see a marginalized group "appropriate" the culture of a dominant group. One such example is Dapper Dan's copying of various luxury brands in the 1980s when those brands declined to dress the leading African American figures at the time.<sup>68</sup> Dapper Dan's blatant use of famous fashion logos meant that his business faced repeated legal challenges.<sup>69</sup> And only recently did he begin having positive relationships with the fashion houses.<sup>70</sup>

<sup>65</sup> Sally Engle Merry, *Law, Culture, and Cultural Appropriation*, 10 YALE J.L. & HUMAN. 575, 585 (1998).

<sup>66</sup> BRIGITTE VÉZINA, CTR. FOR INT'L GOVERNANCE INNOVATION, CURBING CULTURAL APPROPRIATION IN THE FASHION INDUSTRY 1 (CIGI Papers No. 213, Apr. 2019).

<sup>67</sup> Anisha Khopkar, *Is It Ever OK to Wear a Bindi or Headdress?*, ABC EVERYDAY (Nov. 26, 2018, 2:06 PM), <https://www.abc.net.au/everyday/cultural-appropriation-and-fashion/10501010> [<https://perma.cc/354Z-9RYX>].

<sup>68</sup> Faith Cummings, *Gucci, Dapper Dan, and How the Fashion Industry Fails Black People*, TEEN VOGUE (June 1, 2017), <https://www.teenvogue.com/story/gucci-dapper-dan-cultural-appropriation> [<https://perma.cc/UM22-37NY>].

<sup>69</sup> Myles E. Johnson, *Dapper Dan Was Once Sued out of Business, But Now Gucci Is Knocking Him Off*, VICE (June 7, 2017, 1:01 PM) <https://www.vice.com/en/article/8x9xn4/gucci-ruined-culture-by-suing-dapper-dan-now-theyre-ruining-it-by-ripping-him-off> [<https://perma.cc/ER48-VUNW>].

<sup>70</sup> Matthew Schneier, *Thanks, Internet Outrage! Now Dapper Dan and Gucci Are Buds*, N.Y. TIMES (Sept. 10, 2017), <https://www.nytimes.com/2017/09/10/fashion/dapper-dan-gucci-partnership.html> [<https://perma.cc/S88M-ZBZ8>].

In contrast, examples of cultural appropriations where dominant cultures copy cultural elements from minority cultures are numerous.<sup>71</sup> Incidents of cultural appropriation have affected both indigenous peoples and local communities. The reactions have mostly been similar among these communities, allowing for a combined analysis at a general level. Instead of comparing the extent to which indigenous people and local communities have experienced cultural appropriation, it may be more beneficial to categorize the various types of cultural appropriation to which such communities may be exposed.<sup>72</sup>

Cultural appropriation could arise because of an intentional lack of attribution or a mischaracterization of indigenous fashion symbols. One such example involves the French designer Isabel Marant's use of a design closely resembling a traditional costume of Mexico's Mixe people. Marant did not attribute her work to the Mixe people; instead, she labeled her dress as having a "bohemian appeal."<sup>73</sup> A similar incident occurred when Urban Outfitters sold a dress from the Ethiopian and Eritrean traditions but labeled it as a "vintage 90s dress" with no reference to the countries of origin.<sup>74</sup> Furthermore, several fashion houses have been accused of using a cultural symbol from an underrepresented group but failing to use models from that group. In 2017, Karlie Kloss posed for Vogue's "diversity" issue wearing a dress resembling the Japanese geisha tradition.<sup>75</sup> The complaints were against the decision not to use a Japanese model at a time when the magazine was publicizing that it cared about diverse representations.<sup>76</sup> Gucci's 2018 product line used various cultural symbols from around the world, but wearing these symbols were mostly Caucasian models.<sup>77</sup>

A more controversial type of cultural appropriation is when the outsider's use is offensive or generally inappropriate to the source community. Gucci's 2018 show, in addition to being criticized for its lack of diversity, displayed the mostly Caucasian models wearing turbans—

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<sup>71</sup> In fact, there have been so many instances of cultural appropriations that experts have developed websites dedicated to highlighting them. See, e.g., NATIVE APPROPRIATIONS, <https://nativeappropriations.com> [<https://perma.cc/77XA-JAUM>] (last visited Apr. 4, 2021).

<sup>72</sup> JAMES O. YOUNG, CULTURAL APPROPRIATION AND THE ARTS 5–7 (2008).

<sup>73</sup> VÉZINA, *supra* note 66, at 2–3.

<sup>74</sup> Al Jazeera English, *The Stream – When Traditions Become Trends*, YOUTUBE (Apr. 2, 2013), <https://www.youtube.com/watch?v=Ksc6KnDMtNU> (last visited Apr. 21, 2021).

<sup>75</sup> *Vogue*, *Karlie Kloss Blasted for Geisha Photo Spread*, CBC (Feb. 15, 2017), <https://www.cbc.ca/news/entertainment/vogue-diversity-issue-woes-1.3984210> [<https://perma.cc/R6J6-YBED>].

<sup>76</sup> *Id.*

<sup>77</sup> Tahmina Begum, *Gucci Criticised for Cultural Appropriation on a Global Scale*, HUFFPOST (Feb. 22, 2018), [https://www.huffingtonpost.co.uk/entry/gucci-autumn-winter-2018-show\\_uk\\_5a8e996be4b0161d4318dfdc](https://www.huffingtonpost.co.uk/entry/gucci-autumn-winter-2018-show_uk_5a8e996be4b0161d4318dfdc) [<https://perma.cc/G6YC-SP82>].



religious head coverings forming a core part of Sikhism.<sup>78</sup> Followers of Sikhism were outraged to see such a religiously important symbol used by non-Sikhs outside of its local context. Gucci's fashion show also included head scarfs worn by Muslim women without addressing these symbols' religious context.<sup>79</sup> Additionally, the absence of credit to the source cultures adds insult to injury for members of the aggrieved communities. For instance, Victoria's Secret was accused of cultural appropriation on several occasions. In 2010, its runway show, *Wild Things*, showed models wearing indigenous paints, head coverings, and patterns of religious significance.<sup>80</sup>

There are also numerous instances of cultural appropriation outside of the context of fashion.<sup>81</sup> Several celebrities have been on the receiving end of public backlash for appropriating indigenous cultural symbols.<sup>82</sup> The use of Native American-inspired names and imagery in sports teams is particularly controversial. The former Washington Redskins football team faced years of public backlash and litigation before changing their name to the Washington Football Team.<sup>83</sup> The Cleveland Indians baseball team phased out the team's mascot, Chief Wahoo, and announced its decision to change its name.<sup>84</sup> The Atlanta Braves, on the other hand, have resisted the pressure to change their name, but there has been a renewed push to persuade them to do so.<sup>85</sup>

The core debate surrounding cultural appropriation stems from the line between inspiration, which is acceptable and may even be encouraged, and appropriation, which must be avoided and potentially penalized. Is an outsider's use of indigenous expression a flattering imitation that should be applauded, or is it an example of neo-colonial relations where outsiders take from indigenous communities without consent or attribution? The debate rages on because of the confusion around the

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *11 Times Designers Were Called Out for Cultural Appropriation*, THE LAST FASHION BIBLE (Nov. 2, 2019), <https://thelastfashionbible.com/2019/11/02/designers-cultural-appropriation/> [<https://perma.cc/75MQ-MJ24>].

<sup>81</sup> YOUNG, *supra* note 72, at 131.

<sup>82</sup> See, e.g., Brian Welk, *15 Celebrities Who Have Been Accused of 'Cultural Appropriation,' from Katy Perry to Zac Efron (Photos)*, THE WRAP (July 9, 2018), <https://www.thewrap.com/celebrities-who-have-been-accused-of-cultural-appropriation-photos/> [<https://perma.cc/3WAE-KRDZ>].

<sup>83</sup> Les Carpenter, *Washington's NFL Team to Retire Redskins Name, Following Sponsor Pressure and Calls for Change*, WASH. POST (July 13, 2020), <https://www.washingtonpost.com/sports/2020/07/13/redskins-change-name-announcement/> [<https://perma.cc/2CYE-STZL>].

<sup>84</sup> David Waldstein & Michael S. Schmidt, *Cleveland's Baseball Team Will Drop Its Indians Team Name*, N.Y. TIMES (Dec. 14, 2020), <https://www.nytimes.com/2020/12/13/sports/baseball/cleveland-indians-baseball-name-change.html> [<https://perma.cc/Z7VX-4QM2>].

<sup>85</sup> Matt Bonesteel, *The Braves Have Resisted a Name Change, but Hank Aaron's Death Renews Calls for 'The Hammers,'* WASH. POST (Jan. 22, 2021), <https://www.washingtonpost.com/sports/2021/01/22/braves-name-change-hammers/> [<https://perma.cc/U7KZ-EL6G>].

scope of cultural appropriation and the varied reactions people have to the alleged appropriation.<sup>86</sup> What adds to the confusion is that the same creative expression can be considered cultural appropriation by some and acceptable inter-cultural exchange of art by others.<sup>87</sup>

The resistance to cultural appropriation has found a good outlet among Internet users who can quickly “call out” someone’s “improper” use of an indigenous expression.<sup>88</sup> The public relations fallout is, at times, sufficient to encourage the outsider to either drop the use of indigenous expressions or collaborate with indigenous designers.<sup>89</sup> Some designers, fashion houses, and observers have defended these actions as celebrations of the source culture or pure artistic intrigue, with some even refusing to change course.<sup>90</sup> While some designers may intentionally avoid giving attribution, others could be genuinely confused about indigenous communities’ expectations and ethical standards.<sup>91</sup> It is not strange to read about designers being frustrated over the public outrage their use provokes.<sup>92</sup> In this respect, measures designed to bring more clarity to when and how designers can use indigenous fashion are desperately needed.<sup>93</sup>

While the debate is ongoing, some are already working to establish community standards and guidelines. For example, Jane Anderson, a professor at New York University, has created a system of labeling indigenous expression that informs users of any conditions attached to such expression.<sup>94</sup> The system is based on the Creative Commons model and is

<sup>86</sup> Al Jazeera English, *supra* note 74.

<sup>87</sup> Samar Esapzai, *Dear Forever 21 and Urban Outfitters [sic], Please Stop Plagiarising our Sindhi Cultural Heritage*, EXPRESS TRIB. (PAK.) (Aug. 16, 2016), <http://tribune.com.pk/article/38942/dear-forever-21-and-urban-outfitters-please-stop-plagiarising-our-sindhi-cultural-heritage> (last visited Apr. 7, 2021).

<sup>88</sup> Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 868, 893, 896–98, 905 (2016).

<sup>89</sup> See, e.g., Colleen Barry, *From Gucci to Prada, Fashion Fails Evoke Racist Imagery*, ASSOCIATED PRESS (Feb. 7, 2019), <https://apnews.com/article/fashion-design-milan-ap-top-news-fashion-international-news-f0c3f426627a414a8440f93414b028fc> (last visited June 6, 2021) (reporting that Gucci apologized for selling a design resembling blackface and stated the experience is “a powerful learning moment for the Gucci team and beyond”).

<sup>90</sup> See, e.g., Stephanie Soh, *Does Fashion Have a Cultural Appropriation Problem?*, BBC NEWS (Nov. 22, 2018), <https://www.bbc.com/news/newsbeat-46297329> [<https://perma.cc/M37K-TBUW>] (listing the various high-profile cases of fashion designers and firms being accused of cultural appropriation).

<sup>91</sup> Tonya Blazio-Licorish & Obi Anyanwu, *How Cultural Appropriation Became a Hot-Button Issue for Fashion*, WWD (Nov. 3, 2020), <https://wwd.com/fashion-news/fashion-features/how-cultural-appropriation-became-a-hot-button-issue-for-fashion-1234579968/> [<https://perma.cc/9ZBV-7J9AJ>].

<sup>92</sup> See, e.g., Al Jazeera English, *supra* note 74, at 7:22–8:55 (a designer of African origin arguing she should be allowed to use cultural symbols from her country of origin).

<sup>93</sup> See discussion *infra* Section III.B on Professional Ethics and Corporate Social Responsibility.

<sup>94</sup> Jennie Rose Halperin, *Is It Possible to Decolonize the Commons? An Interview with Jane Anderson of Local Contexts*, CREATIVE COMMONS (Jan. 30, 2019), <https://creativecommons.org/2019/01/30/jane-anderson/> [<https://perma.cc/55QL-6S4N>].

designed to work with the digital medium, which is prevalent in contemporary fashion designs. Some professions have already developed ethical guidelines for their work with indigenous communities.<sup>95</sup> As outlined below,<sup>96</sup> the fashion industry would benefit from similar standards.

## II. PIRACY PARADOX AND INDIGENOUS FASHION

Before examining whether the piracy paradox is applicable in the context of indigenous fashion, an outline of the IP laws that may be relevant to indigenous fashion would be helpful. The IP law field was developed without the involvement of indigenous communities. It finds its origin in European case law and statutory laws, and it has not changed to accommodate indigenous peoples' worldviews. The below section discusses the minimal IP protection available for indigenous fashion and its similarity to the low-IP equilibrium of mainstream fashion.

### A. *Intellectual Property Rights in Indigenous Fashion*

A major focus of the literature on indigenous cultures has been that formal IP laws are not a good fit to govern indigenous communities' creativity.<sup>97</sup> Several reasons have been suggested to explain why formal intellectual property rights do not work well to protect the knowledge and creativity of non-Western communities.<sup>98</sup> The core factors for this mismatch include the individualistic perspective of copyright law, which contradicts with the communal nature of indigenous worldviews;<sup>99</sup> the focus on economic remedies, while source communities may be interested in moral rights;<sup>100</sup> the focus of IP laws on fixation of knowledge and expressions while source communities emphasize oral cultures;<sup>101</sup> and the fact that use of formal laws requires resources and expertise that local communities do not tend to have.<sup>102</sup>

<sup>95</sup> See, e.g., Mark J. Lynott, *Ethical Principles and Archaeological Practice: Development of an Ethics Policy*, 62 AM. ANTIQUITY 589 (1997); see also Terence S. Turner, *Anthropology and the Politics of Indigenous Peoples' Struggles*, 5 CAMBRIDGE J. ANTHROPOLOGY, Jan. 1979, at 1.

<sup>96</sup> See *infra* Part III on Fostering a Harmonious Future.

<sup>97</sup> See William Fisher, *Why Is Traditional Knowledge Different from All Other Intellectual Property?*, 58 WASHBURN L.J. 365 (2019).

<sup>98</sup> CHIDI OGUAMANAM, *INTERNATIONAL LAW AND INDIGENOUS KNOWLEDGE: INTELLECTUAL PROPERTY, PLANT BIODIVERSITY, AND TRADITIONAL MEDICINE* 28 (2006).

<sup>99</sup> *Id.*

<sup>100</sup> JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS* 128 (1996) (describing IP laws as being constructed around the idea of rewarding an "individual, transformative, original genius").

<sup>101</sup> See Aman K. Gebru, *International Intellectual Property Law and the Protection of Traditional Knowledge: From Cultural Conservation to Knowledge Codification*, 15 ASPER REV. INT'L BUS. & TRADE L. 293, 315 (2015) (outlining the need to incentivize the codification of traditional knowledge for preservation and future use); Dan L. Burk, *The Role of Patent Law in Knowledge Codification*, 23 BERKELEY TECH. L.J. 1009, 1017 (2008) (describing the various features of the patent system that encourage the codification of tacit knowledge).

<sup>102</sup> Laurie Anne Whitt, *Indigenous Peoples, Intellectual Property & the New Imperial Science*, 23

Despite these challenges, there is some low IP protection for indigenous fashion in the United States. Since the originality requirement for copyright protections—a modicum of creativity<sup>103</sup>—is a low bar, minor improvements on pre-existing indigenous expressions can get protection. The low IP protection available to mainstream fashion can also protect indigenous fashion. Furthermore, given the recent changes in case law dealing with design copyrightability, formal copyright law serves as one more tool available to indigenous fashion designers.<sup>104</sup> In *Star Athletica, LLC v. Varsity Brands, Inc.*, the U.S. Supreme Court affirmed that fashion designs can receive copyright protection if they are separately identifiable and are “capable of existing independently” of the useful article in which they are embedded.<sup>105</sup> While the full impact of the decision is still being examined, the fact that the Supreme Court allowed for some form of protection for designs will open the door for protection for indigenous designs as well, that is if they fulfill the other requirements of copyrightability.

Furthermore, trademark protection may apply to indigenous fashion if there are distinctive designs used in commerce. Indigenous communities can use trademark rights for products or services offered by firms they control.<sup>106</sup> Indeed, a few resourceful communities have resorted to using IP laws to control the use of their cultural identity. For instance, in one of the few cases of its kind, the Navaho Nation brought a trademark infringement action against Urban Outfitters.<sup>107</sup> The lawsuit arose because Urban Outfitters used the “Navajo” name in its product line without authorization.<sup>108</sup> Although the dispute was confidentially settled out of court, it does seem that Urban Outfitters recognized the validity of the “Navajo” mark as being distinctive.<sup>109</sup> Indigenous communities can also use certification marks if their products have a specific geographic origin

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OKLA. CITY U. L. REV. 211, 250 (1998) (outlining the ways in which intellectual property laws are used as a way of excluding indigenous people from the benefits of their genetic resources, traditional knowledge, and cultural expressions).

<sup>103</sup> *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

<sup>104</sup> See *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017); see also Robert C. Denicola, *Imagining Things: Copyright for Useful Articles After Star Athletica v. Varsity Brands*, 79 U. PITT. L. REV. 635, 640 (2018) (providing a comprehensive review of the history, meaning, and implication of the Supreme Court's decision in *Star Athletica*).

<sup>105</sup> *Star Athletica*, 137 S. Ct. at 1007.

<sup>106</sup> See Sari Sharoni, *The Mark of a Culture: The Efficacy and Propriety of Using Trademark Law to Deter Cultural Appropriation*, 26 FED. CIR. B.J. 407, 431 (2017) (examining the efficacy of trademark law as a tool against cultural appropriation).

<sup>107</sup> *Navajo Nation v. Urban Outfitters, Inc.*, 935 F. Supp. 2d 1147 (D.N.M. 2013).

<sup>108</sup> *Id.*

<sup>109</sup> David Schwartz, *Navajo Nation Settles Trademark Suit Against Urban Outfitters*, REUTERS (Nov. 18, 2016), <https://www.reuters.com/article/us-navajo-urbanoutfitters-idUSKBN13D2QA> [<https://perma.cc/6QVF-PMNV>].

or collective marks if they are represented by an association. Additionally, the relatively recent and related concept of geographical indications could help indigenous communities capture some of the commercial value associated with a community's name.<sup>110</sup> Geographical indications protect products that derive their qualities from and are attributable to their geographic origins.<sup>111</sup> While these qualities are at times protected by certifications marks, some jurisdictions have separate protection for geographical indications.

Besides formal IP laws, indigenous fashion could also be protected under the Indian Arts and Crafts Act (IACA) of 1990.<sup>112</sup> The U.S. Congress enacted the IACA intending to curb misrepresentations in the selling of Indian art.<sup>113</sup> The act includes a civil and criminal penalty for fraudulent claims or suggestions that a commercial product is of "Indian" origin.<sup>114</sup> The act has been very controversial because of its vague scope, its neglect of the dialogical nature of indigenous identity creation, and its use of litigation as a solution (which seems to be unworkable), resulting in some scholars calling for significant amendments.<sup>115</sup> One suggested amendment is a change from using public prosecution for criminal and civil violations into a certification mark type of system, which has been used in many other areas of manufacturing.<sup>116</sup> The act is still active and has been used in several complaints brought by Native American communities and the U.S. Attorney General's office.<sup>117</sup> Even if the amended version of the law, with clear penalties, is laid out, it is unlikely it would

<sup>110</sup> J. Janewa Osei-Tutu, *Protecting Culturally Identifiable Fashion: What Role for GIs?*, 14 FIU L. REV. 571 (2021) (comparing traditional clothing to items that are typically protected by the use of geographical indications, such as wine and food, and positing that both are similarly situated as artifacts of cultural heritage).

<sup>111</sup> See Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPS] art. 22(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (as amended Jan. 23, 2017) ("Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.").

<sup>112</sup> Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 Stat. 4662 (current version at 25 U.S.C. § 305–305f (2018)).

<sup>113</sup> 25 C.F.R. § 308.2(a) (2021) (stating that the IACA board is established to "insure the widest distribution of genuine Indian handicraft products, and to protect the various enterprises organized by individual Indian craftsmen, or by groups of Indian craftsmen . . .").

<sup>114</sup> 25 U.S.C. § 305d (2018).

<sup>115</sup> See, e.g., William J. Hapiuk, Jr., Note, *Of Kitsch and Kachinas: A Critical Analysis of the Indian Arts and Crafts Act of 1990*, 53 STAN. L. REV. 1009, 1066 (2001) (highlighting the shortcomings of the IACA and suggesting several changes, including refocusing of the act toward a trademark-like cause of action).

<sup>116</sup> *Id.* at 1066–69.

<sup>117</sup> See, e.g., Lillia McEnaney, *5 Charged with Selling Non-Genuine Native Goods: A Violation of the Indian Arts and Crafts Act*, CTR. FOR ART L. (Aug. 5, 2016), <https://itsartlaw.org/2016/08/05/5-charged-with-selling-non-genuine-native-goods-a-violation-of-the-indian-arts-and-crafts-act/> [<https://perma.cc/93N8-WL7Q>].

lead to more convictions given that, historically, there have only been few convictions.<sup>118</sup> Since there are various anecdotal reports of grave violations of the law having mostly gone unpunished, the practice of copying of indigenous fashion designs may not be impacted by this law. Users could easily argue that they were only inspired by the indigenous design, and therefore, did not copy it.

With this general summary of the interactions between intellectual property law and indigenous fashion provided, we can now focus on examining whether the piracy paradox is present in the context of indigenous fashion.

B. *Does the Piracy Paradox Apply to Indigenous Fashion?*

The availability of unauthorized copying is at the heart of the piracy paradox thesis. Copying of fashion designs is not only an accepted practice but also an essential component driving creativity in the fashion industry.<sup>119</sup> One of the most vital pieces of evidence for the piracy paradox thesis is that designers rarely use the low IP protection available in the United States.<sup>120</sup> The same behavior is observed in the European Union, a jurisdiction providing more robust protection.<sup>121</sup> This unauthorized copying, coupled with fashion's cyclical nature, encourages modern designers to create new designs. Analysis of the piracy paradox in the context of indigenous fashion requires examination of whether some of the status-conferring, positional, and cyclical nature of mainstream fashion are also present in indigenous fashion.

As discussed earlier, some status-conferring features can indeed be seen in many indigenous cultures. However, their function may be different in meaningful ways. The status they confer tends to be one of hierarchy or role within the indigenous community, rather than a form of signaling wealth or a sense of fashion. For instance, the war bonnet, which was popularized by Hollywood movies, is a military headdress worn by male chiefs belonging to American Plains Indian Nations who have earned great respect in their community.<sup>122</sup> The red caps used in the Nigerian Igbo culture signify that the wearer has attained the coveted

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<sup>118</sup> *Id.*

<sup>119</sup> Raustiala & Sprigman, *supra* note 1, at 1717.

<sup>120</sup> *Id.* at 1698–99 (describing fashion copying as a “free-for-all,” despite the fact that the “three core forms of IP law—copyright, trademark, and patent—provide only very limited protection for fashion designs”).

<sup>121</sup> *Id.* at 1735 (“European law, an amalgam of national laws and European Union law, generally protects fashion designs from copying. Yet, we do not see evidence, in either the form of lawsuits or the absence of design copying, that the behavior of fashion industry firms changes much from one side of the Atlantic to the other.”).

<sup>122</sup> *The War Bonnet: Yesterday and Today*, 14 MONT. MAG. W. HIST., Spring 1964, at 82.

position of chief, a position achieved after fulfilling several customary requirements.<sup>123</sup> The role that these cultural symbols play is significantly different from symbols of a particular season's fashion trend.

The cyclical feature of mainstream fashion can also be observed in indigenous fashion. Anecdotes and trends show that members of indigenous communities have dynamic tastes in fashion as the younger generation grows up interacting with new forms of culture within and outside of the community.<sup>124</sup> However, indigenous fashion tends to follow a much slower pace as compared to mainstream fashion. While mainstream fashion's cycles may be seasonal, the cycles of indigenous fashion seem to be generational.<sup>125</sup> The difference in pace could be a result of differences in priorities. Indigenous fashion prioritizes tradition and consistency with the past, while mainstream fashion prioritizes rule-breaking and transformation.<sup>126</sup> These significant differences between indigenous fashion and mainstream fashion mean that the piracy paradox may not work as it does in mainstream fashion.

This observation comes with a major caveat: globalization, the related spread of capitalism, and the impact of dominant cultures can be expected to close the gap between indigenous and mainstream fashion preferences gradually.<sup>127</sup> Indigenous fashion taking part in the global economy will increasingly look more like mainstream fashion, and in that respect, the piracy paradox thesis may hold. There is already some evidence that a significant segment of the younger generation of indigenous peoples and local communities seems eager to assimilate with modern cultures.<sup>128</sup>

While globalization's impact will increasingly become apparent, the cultural appropriation experience tells us that indigenous communities have been and continue to object to the unauthorized use of their artistic designs. As the cultural appropriation section outlined earlier, widespread and unauthorized copying of indigenous fashion is already taking place.<sup>129</sup> Like copying in mainstream fashion, cultural appropriation is

<sup>123</sup> Admittedly, the use of the red cap as a sign of chieftom has increasingly reduced since it is used by several members of the Igbo community who have not achieved the status of chief. Chijioke Okoronkwo, *Checking Abuse of "Red Cap" and Igbo Chieftaincy Institution*, PREMIUM TIMES NIGERIA (Feb. 14, 2014), <https://www.premiumtimesng.com/news/155154-checking-abuse-red-cap-igbo-chieftaincy-institution.html> [https://perma.cc/83EB-57K9].

<sup>124</sup> See Appiah, *supra* note 22.

<sup>125</sup> Metcalfe, *supra* note 19, at 31 (highlighting the transmission of cultural symbols through successive generations).

<sup>126</sup> See generally Merry, *supra* note 65, at 585 (describing how cultural appropriation involves taking cultural expressions and changing their tempo and context).

<sup>127</sup> See MARGARET MAYNARD, DRESS AND GLOBALISATION 32–34 (2004).

<sup>128</sup> See *id.* at 70; Appiah, *supra* note 22.

<sup>129</sup> See *supra* Section I.C on Cultural Appropriation.

mainly done without attribution to and consultation with the source community. It is common for famous fashion designers to freely copy indigenous designs or use them as inspiration. Often the use of indigenous names or designs does not involve any partnership or collaboration.

As outlined earlier,<sup>130</sup> indigenous fashion that is open to commercialization may allow for some freedom where fashion designers could include indigenous designs or be inspired by them. These types of uses do not come without risk, however. Given the long history of indigenous peoples' oppression at the hand of dominant cultures, fashion designers should be cautious in their approach. In this regard, the establishment of ethical guidelines may be helpful in creating a win-win situation. If these guidelines result from broad consultation with various indigenous communities, they could inspire confidence among indigenous communities and provide much-needed clarity for the fashion industry. Given the diversity of perspectives among indigenous communities, any guidelines should involve proper consultation before any planned use of indigenous designs and respect for such communities' customary and formal rules.

However, if the source community deems the indigenous fashion to be sacred or involves designs with restricted use, fashion designers should abide by ethical obligations to consult with the relevant indigenous community. The use of Ghanaian *kente* design in the collaboration between Louis Vuitton and Virgil Abloh is an excellent example of how copying indigenous fashion may be different from copying in mainstream fashion.<sup>131</sup> The fact that Ghanaian law protects indigenous fashion, such as the *kente* design, and that Ghanaians felt strongly about the unfairness of Abloh's use, tells us that the piracy paradox does not necessarily hold in the context of sacred or restricted indigenous fashion. The use of indigenous fashion must involve proper consultation with indigenous communities to ensure the copying or inspiration does not offend or violate customary rules. Collaborating with a member of an indigenous community may be appealing and is in some respects a step in the right direction. However, such collaborations must not be reduced to "tokenism" or an attempt to game the system.<sup>132</sup>

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<sup>130</sup> See *supra* Sections I.A–I.B (discussing indigenous fashion open to commercialization and one closed to it).

<sup>131</sup> See discussion *supra* notes 57–64 and accompanying text.

<sup>132</sup> See Caroline Casey, *Tokenism Versus Action: The Fashion Industry May Talk the Talk, But Do They Walk the Walk*, FORBES (Mar. 3, 2021), <https://www.forbes.com/sites/carolinecasey/2021/03/03/tokenism-versus-action-the-fashion-industry-may-talk-the-talk-but-do-they-walk-the-walk/> [https://perma.cc/YA32-337T]; Claudia Harmata, *Naomi Campbell Talks Tokenism in the Fashion Industry, Says 'It Needs to Change' from Top to Bottom*, PEOPLE (July 29, 2020), <https://people.com/style/naomi-campbell-talks-tokenism-fashion-industry/> [https://perma.cc/86YC-W9XR].



Suppose unauthorized copying along the lines described in the piracy paradox thesis becomes the norm in relation to indigenous communities. The result will be that the resourceful and leading fashion houses worldwide would benefit from the “free” source of creativity they will find in indigenous fashion. In contrast, the source communities will not receive attribution or reap any benefits. The piracy paradox works in a cyclical relationship between resourceful parties that can benefit from the open space of mutual copying. A party with limited ability to take advantage of the pool of artistic expressions will most probably give more than it can take.

### III. FOSTERING A HARMONIOUS FUTURE

The power imbalance between indigenous people and titans of mainstream fashion calls for various approaches to level the playing field. These approaches should include a buffet of strategies, including legal interventions, the development of ethical standards, and the utilization of corporate social responsibility policies. These interventions should allow indigenous fashion that is open for commercialization to flourish as an integral part of the fashion world. If these interventions are put in place, the piracy paradox thesis may apply here, and a low-IP equilibrium may be sustained in indigenous fashion. The major types of interventions are explained below.

#### A. *Recognition of Indigenous Cultural Rights*

Various indigenous communities, advocates, and scholars have been calling for the recognition of indigenous cultural rights.<sup>133</sup> These calls take various forms and target local, national, and international levels of governance. While a holistic examination of the legal attempts is outside the scope of this Article, some examples are worth highlighting. There is a wide range of success that advocates have achieved, which is a source of lessons on designing proper governance structures.

Some scholars oppose the recognition of any “cultural rights” in indigenous expressions. The objections stem from a concern that legal protection of indigenous expressions could disrupt the freedom of discourse for the public and commodify indigenous cultures.<sup>134</sup> Additionally, there is anxiety around laws presuming indigenous expression to be static and

<sup>133</sup> Tsosie, *supra* note 44, at 354; *see also* Patrick Walker & Clarine Ostrove, *The Aboriginal Right to Cultural Property*, 1995 U. BRITISH COLUM. L. REV. 13 (rejecting the use of case-by-case litigation to block the sale of cultural artifacts and instead outlining the need for a constitutionally recognized property rights in cultural artifacts).

<sup>134</sup> Tsosie, *supra* note 44, at 347–54.

ignoring diversity of indigenous identity development.<sup>135</sup> Anthony Appiah, for example, forcefully argues that any attempt to conserve culture in its authentic form is futile because there is no authentic culture, and cultures remain in a constant state of change.<sup>136</sup> While these concerns are worth addressing, legal systems proved malleable in addressing similar concerns present in Western communities where culturally significant fashion designs are legally protected and do still change over time.<sup>137</sup> The calls for recognizing a narrow cultural right can withstand these important concerns, and therefore, should be considered.<sup>138</sup>

Considerations of cultural rights can take place at various levels. To the extent local governance structures allow for the recognition of new forms of rights, such forms of government should attempt to consult with indigenous communities in the locality. The benefits of such consultation may be several. First, the right of indigenous peoples over their culture has already been recognized as a human right.<sup>139</sup> Thus, local governments recognizing cultural rights should ensure they recognize the inherent value of creating equitable relationships. Second, mutually respectful forms of communication would improve the legitimacy of the local government.<sup>140</sup> Additionally, if the locality is known for its distinctive indigenous presence, achieving a harmonious relationship between the indigenous and local governments would encourage tourism and lead to socio-economic and political benefits.<sup>141</sup>

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<sup>135</sup> See generally Hapiuk, *supra* note 115, at 1033–36 (discussing the various negative reactions to the Indian Arts and Crafts Act among members of various Native American communities).

<sup>136</sup> See generally Appiah, *supra* note 22.

<sup>137</sup> The latest developments in copyright law already recognize exclusive ownership of fashion designs as long as those designs can be perceived separately from the underlying useful article. See *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017). The fashion industry seems to continue in its usual dynamic nature even after such significant changes.

<sup>138</sup> See Tsosie, *supra* note 44, at 356 (examining the various types of arguments for and against the recognition of cultural rights, and concluding that a diverse set of legal interventions could address the challenges of cultural appropriation).

<sup>139</sup> See generally Sherry Hutt & C. Timothy McKeown, *Control of Cultural Property as Human Rights Law*, 31 ARIZ. ST. L.J. 363 (1999) (discussing the activism around Native American ownership of cultural property by focusing on legislative lobbying in the 1980s); John Henry Merryman, *Cultural Property, International Trade and Human Rights*, 19 CARDOZO ARTS & ENT. L.J. 51 (2001) (outlining the impact of free trade and human rights on the recognition of cultural property rights).

<sup>140</sup> James Youngblood Henderson, *Dialogical Governance: A Mechanism of Constitutional Governance*, 72 SASKATCHEWAN L. REV. 29 (2009) (highlighting the value of dialogical governance inclusive of Aboriginal peoples as a tool for improving legitimacy of governance structures).

<sup>141</sup> The First Nations of British Columbia, Canada have benefited from the tourism in Vancouver. The Maasai in Kenya and Tanzania are globally recognized. These examples seem to be a concerted effort by the local governments and indigenous communities to highlight the unique cultural traits of the communities. See also Kaowen Grace Chang, Hungju Chien, Hungyao Cheng & Hsin-i Chen, *The Impacts of Tourism Development in Rural Indigenous Destinations: An Investigation of the Local Residents' Perception Using Choice Modeling*, SUSTAINABILITY, Dec. 2018, at 1 (presenting empirical research revealing the mainly positive response that local communities have to aboriginal tourism); Anna Carr, Lisa Ruhanen & Michelle Whitford, *Indigenous Peoples and Tourism: The*

National-level governance is also an essential aspect of legal intervention to bring about equitable treatment. As outlined above, U.S. law includes a specific act designed to protect Native American cultural expression, known as the Indian Arts and Crafts Act.<sup>142</sup> Despite the many complaints brought under the act, only a handful have been pursued fully. This lack of enforceability seems to be shared by national laws in other countries. For example, most countries in the Global South have enacted legislation that would protect indigenous fashion.<sup>143</sup> Despite the plethora of national legislation, indigenous communities have not succeeded in controlling the use of their fashion.<sup>144</sup> Lessons from these experiences should inform strategies on how to create a feasible legal system that empowers source communities without discouraging outsiders who intend to engage with them.

One of the few indigenous communities to succeed on this front are the Māori people in New Zealand, who have stronger standing in their country relative to aboriginal peoples in neighboring Australia or other parts of the world.<sup>145</sup> The Māori people have enjoyed stronger socio-economic and political status and have benefited from the value generated by their culture, in part because of the legal protection given to them under the laws of New Zealand.<sup>146</sup> The governments of India and South Africa have created legal systems that have somewhat enabled their indigenous communities to capture and benefit from their cultural expressions.<sup>147</sup> These legal systems empower local communities to use domestic laws and bureaucracies, including licensing and prior informed

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*Challenges and Opportunities for Sustainable Tourism*, 24 J. SUSTAINABLE TOURISM 1067 (2016) (discussing the potential of tourism to create socio-economic benefits for the local communities).

<sup>142</sup> Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 Stat. 4662 (current version at 25 U.S.C. § 305-305f); *see also* discussion *supra* notes 112-118 and accompanying text.

<sup>143</sup> The World Intellectual Property Organization, an agency of the United Nations, documents laws dealing with traditional knowledge, traditional cultural expressions, and genetic resources. The database has documented several national laws protecting traditional cultural expressions, which would include indigenous fashion. *Traditional Knowledge, Traditional Cultural Expression & Genetic Resources Laws*, WORLD INT'L PROP. ORG., <https://www.wipo.int/tk/en/databases/tklaws/> [https://perma.cc/DSK7-CH7M] (last visited Apr. 12, 2021).

<sup>144</sup> *See generally* ENYINNA NWAUCHE, THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS IN AFRICA 97 (2017) (outlining the negative or defensive protection and positive protection of traditional cultural expressions in various African countries).

<sup>145</sup> Kelly Buchanan, *Protection of Indigenous Heritage: New Zealand*, LIBR. OF CONG., <https://www.loc.gov/law/help/indigenous-heritage/newzealand.php> [https://perma.cc/BJ3T-KPA7] (last updated Dec. 30, 2020).

<sup>146</sup> *The Kiwi Model*, THE ECONOMIST, Dec. 1, 2018, at 65 (highlighting the key differences between the Māori in New Zealand and Aboriginal communities in Australia).

<sup>147</sup> *See* National Heritage Resources Act 25 of (1999) (S. Afr.); P.V. VALSALA G. KUTTY, WORLD INTEL. PROP. ORG. [WIPO], NATIONAL EXPERIENCES WITH THE PROTECTION OF EXPRESSIONS OF FOLKLORE/TRADITIONAL CULTURAL EXPRESSIONS: INDIA, INDONESIA AND THE PHILIPPINES 19-21 (2002), [https://www.wipo.int/edocs/pubdocs/en/tk/912/wipo\\_pub\\_912.pdf](https://www.wipo.int/edocs/pubdocs/en/tk/912/wipo_pub_912.pdf) [https://perma.cc/CHQ6-J2UP].

consent, to control use of their traditional cultural expressions. These types of experiences should be modeled as best practices to establish meaningful protection of indigenous fashion.

At the international level, advocates of indigenous cultural rights have seen some success. In particular, the recognition of cultural rights is part of the United Nations Declaration on the Rights of Indigenous Peoples (The Declaration).<sup>148</sup> While the Declaration addressed a diverse set of issues, one of the rights it recognized is indigenous communities' tangible and intangible cultural rights.<sup>149</sup> Along the same lines, a legal framework to recognize cultural rights is currently being discussed at the World Intellectual Property Organization (WIPO).<sup>150</sup> Although long and contentious,<sup>151</sup> the WIPO deliberations have focused on formulating an international treaty that may provide *sui generis* protection for traditional cultural expressions, including indigenous fashion.<sup>152</sup> Serious deliberations have been taking place since 2001, and the stage seems ready for the signing of a binding international treaty that would recognize intellectual property law-like protection for traditional cultural expressions.<sup>153</sup> If a binding international treaty is signed by some of the major economies of the world, indigenous communities may be able to use the protection offered by such treaty to engage with the mainstream fashion world confidently. Of course, there will still be resource constraints that will delay any significant behavior changes, at least in the short term. As long as these rights do not have a chilling effect on mainstream designers intending to use indigenous fashion, something resembling the piracy paradox can be expected to flourish. The closer the cultural rights resemble the low-IP equilibrium, the likelier the piracy paradox thesis to work in the indigenous fashion context.

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<sup>148</sup> G.A. Res. 61/295, annex, U.N. Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

<sup>149</sup> *Id.* Art. 11.

<sup>150</sup> See TRADITIONAL KNOWLEDGE BRIEF, *supra* note 3.

<sup>151</sup> See generally Justin Hughes, *Traditional Knowledge, Cultural Expression, and the Siren's Call of Property*, 49 SAN DIEGO L. REV. 1215, 1224 (2012) (applying the various justifications for intellectual property rights to claims of ownership over, among other things, traditional cultural expression).

<sup>152</sup> See TRADITIONAL KNOWLEDGE BRIEF, *supra* note 3; see also *Inter-Governmental Committee (IGC)*, WORLD INTEL. PROP. ORG., <https://www.wipo.int/tk/en/igc/> [<https://perma.cc/X4V4-5BAM>] (last visited Apr. 20, 2021) (providing frequent updates on the work of the Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)).

<sup>153</sup> See WORLD INTEL. PROP. ORG. [WIPO], REPORT ON THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE (IGC) (Sept.–Oct. 2019), [https://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc\\_mandate\\_2020-2021.pdf](https://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_mandate_2020-2021.pdf) [<https://perma.cc/FUA2-K93M>]; see also *IGC: What Is Happening Now*, WIPO, <https://www.wipo.int/tk/en/igc/snapshot.html> [<https://perma.cc/SSC9-D2JF>] (last visited Apr. 20, 2021).

Aside from the traditional calls for legal intervention, there is relatively recent advocacy to create a “knowledge commons” approach to the expressions of indigenous communities.<sup>154</sup> The knowledge commons concept revolves around communally owned information resources governed by rules set by members of the community. Advocates of the knowledge commons movement seek to apply the concept to create an open system of traditional cultural expressions for non-commercial use as an alternative form of engagement.<sup>155</sup> Since the focus of a traditional knowledge commons movement has been on outsiders’ non-commercial use, it may be hard to imagine the unrestricted use of indigenous fashion by outsiders for profit. Because of the mainstream fashion industry’s for-profit nature, a collaboration with indigenous communities under a knowledge commons approach may be challenging. To be clear, the knowledge commons approach allows for a tiered form of interaction, which includes commercial transactions.<sup>156</sup> However, it also requires some form of social cohesion as a form of enforcement of community rules, which currently does not exist between indigenous communities and mainstream fashion designers.

#### B. *Professional Ethics and Corporate Social Responsibility*

Aside from legal intervention, the creation and maintenance of ethical standards could enable indigenous fashion to participate in the global fashion world. These could include development of professional ethics standards among fashion designers, which may create expectations of attribution to indigenous communities and use of corporate social responsibility standards for mainstream fashion houses. The first factor—professional ethics—has worked well in other interactions with indigenous communities. For example, the creation of ethical standards among

<sup>154</sup> The concept of “knowledge commons” is a recent phenomenon and is mostly at the academic stage. See Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657 (2010). For application of the knowledge commons literature in the context of indigenous communities, see Krishna Ravi Srinivas, *Protecting Traditional Knowledge Holders’ Interests and Preventing Misappropriation—Traditional Knowledge Commons and Biocultural Protocols: Necessary but Not Sufficient?*, INT’L J. CULTURAL PROP. 401 (2012). For attempts at enabling the knowledge commons framework in the digital form, see the various licensing initiatives created by Local Contexts, a website hosting several various types of knowledge commons licenses. LOCAL CONTEXTS, <https://localcontexts.org/> [https://perma.cc/VUX4-BJZT] (last visited May 17, 2021); see also Halperin, *supra* note 94.

<sup>155</sup> See ELAN ABRELL, KABIR SANJAY BAVIKATTE, GINO COCCHIARO, HARRY JONAS & ANDREW RENS, INT’L DEV. L. ORG. & NAT. JUST., *IMAGINING A TRADITIONAL KNOWLEDGE COMMONS* (2009), <https://naturaljustice.org/publication/imagining-a-traditional-knowledge-commons/> [https://perma.cc/E32D-9LTK].

<sup>156</sup> See generally BRETT M. FRISCHMANN, MICHAEL J. MADISON & KATHERINE J. STRANDBURG, *GOVERNING KNOWLEDGE COMMONS* 16–18 (2014) (developing a multi-tier framework for knowledge commons).

archaeologists and archivists has enabled researchers to work in harmony with local communities.<sup>157</sup> The establishment of similar ethical standards among fashion designers may be similarly helpful.

Granted, ethical standards dealing with copying or attribution are weak in the fashion industry since, as the authors of the piracy paradox thesis suggest, the fashion industry has tolerated copying for almost a century.<sup>158</sup> Although the culture of tolerating copying presents a challenge to a framework that would limit some copying, a tiered ethical standards framework within the fashion industry might be the solution: fashion houses can continue to copy each other as they have for decades, but they would be bound by unique ethical standards of prior consultation, consent, and collaboration when it comes to copying indigenous fashion.

Additionally, the risks of cultural appropriation may be addressed by using corporate social responsibility initiatives. Corporate social responsibility has managed to influence decision-making at the firm level in other scenarios, such as environmental preservation and respect for human rights.<sup>159</sup> The practice has become immensely valuable, given the power of public opinion in the age of digital technologies and social media. An excellent example of the impact of public opinion is how the former Washington Redskins changed their name to the Washington Football Team despite benefiting from trademark law's protections for their old name.<sup>160</sup> Given the sensitivity with which firms protect their brands, corporate social responsibility may be an effective tool to encourage mainstream fashion firms to provide some level of recognition or attribution to indigenous fashion designers or communities.

To summarize the recommendations provided above, indigenous fashion would benefit from legal and extra-legal intervention to manage the historically contentious relationships between indigenous communities and outsiders who seek to use indigenous fashion. These interventions should take the form of recognizing narrow but enforceable rights

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<sup>157</sup> See Anthony L. Klesert & Shirley Powell, *A Perspective on Ethics and the Reburial Controversy*, 58 AM. ANTIQUITY 348 (1993) (advocating for the creation of a professional ethical standard in anthropology that respects the communities being studied); see also Stephanie Russo Carroll et al., *The CARE Principles for Indigenous Data Governance*, 19 DATA SCI. J. 1 (2020) (discussing ethical standards—"The CARE Principles"—in managing data related to indigenous peoples).

<sup>158</sup> Raustiala & Sprigman, *supra* note 1, at 1717–18.

<sup>159</sup> See generally Lee Burke & Jeanne M. Logsdon, *How Corporate Social Responsibility Pays Off*, 29 LONG RANGE PLAN. 495 (1996) (outlining the various benefits of corporate social responsibility: centrality, specificity, proactivity, voluntarism, and visibility); J. Janewa OseiTutu, *Socially Responsible Corporate IP*, 21 VAND. J. ENT. & TECH. L. 483 (2018) (arguing for the adoption of corporate social responsibility in the enforcement or non-enforcement of intellectual property rights).

<sup>160</sup> Carpenter, *supra* note 83.

of indigenous communities to control the use of their sacred and restricted cultural symbols, the development of ethical standards, and the practice of corporate social responsibility to ensure fashion houses do respect the legal and ethical standards. Through these interventions, the much-needed healing of past wounds could occur, followed, perhaps, by an era of mutual respect and collaboration.

#### CONCLUSION

The main reason for recognizing intellectual property rights is that it is easy to copy expressions, which require significant resources to create. In the absence of exclusive IP rights, creators and inventors would be unable to recoup their investments, leading to a reduced interest in creativity. The piracy paradox thesis offered the mainstream fashion industry as a critical exception to this conventional thought. It revealed that widespread copying of designs takes place in the industry, and rather than discouraging creativity, it is the reason for the robust levels of creative expression.

This Article analyzed the applicability of the piracy paradox thesis in the context of indigenous fashion. It categorized indigenous fashion into those open to commercialization and those that are closed to it. In so doing, the paper allows for a tiered analysis. The piracy paradox thesis may hold in the context of indigenous fashion that is open to commercialization. Because of globalization and its impacts on culture, indigenous community members may behave in the same way as mainstream fashion designers when it comes to some types of indigenous fashion symbols. However, even in this context, mainstream fashion designers must be cautious not to violate the standards and expectations of indigenous communities and the general public, given the troubled history underlying such relationships.

On the other hand, some indigenous fashion symbols may be closed to commercialization for reasons such as the sacred nature of some indigenous cultural expressions. The piracy paradox does not seem to be applicable in such instances. Unauthorized copying of indigenous fashion is already taking place on a large scale, and rather than being tolerated, it has given rise to the hot-button issue of cultural appropriation.

The Article concludes by suggesting some measures that can create a harmonious relationship between mainstream fashion designers and indigenous communities. These measures include recognizing narrow but enforceable legal rights that allow indigenous communities to control the use of their cultural expressions, the development of professional, ethical standards for mainstream fashion designers, and the practice of corporate

social responsibility. These measures can ensure that fashion houses comply with the expectations of both indigenous communities and the public.