Cultural Appropriation: A Gap in the Law?

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The Jamaican Jerk seasoning. Halloween. Kendall Jenner's new Tequila brand. The mascot of the Washington Redskins. Rugby. Victoria's Secret Fashion Shows. Yoga. Mickey Rooney in *Breakfast at Tiffany's*. These things seem to have little in common apart from being perceived to be part of our Western culture. Yet, another feature unites them: they have all been subject to allegations of cultural appropriation.

This article explores the issue of cultural appropriation and the harm it can cause to indigenous communities in particular. It will explain how this problem exposes a gap in intellectual property law and set out the two main approaches to fill this gap. A comparative analysis of different jurisdictions' attempts to resolve the issue will reveal the complexities of finding a satisfactory solution. The article will conclude with the argument that despite these difficulties a legal solution is desirable. Reliance on extra-judicial initiatives should no longer be the only way this area is regulated. Instead, legislative action by the world community is needed.

Cultural appropriation? Cultural borrowing? Cultural appreciation? Defining 'cultural appropriation'

An effective legal framework requires a clear definition of the issue that it seeks to regulate. This is where the problem starts. It is difficult to draw a line between 'cultural borrowing' and 'cultural appreciation' on one hand and 'cultural appropriation' on the other.

Countless definitions of 'cultural appropriation' have been put forward by scholars, artists, and political activists. Defining the concept goes back to the fundamental questions of 'What is art?' and 'How far can art go?'. Opinions as to the correct description are formed by individuals' experiences and socio-economic environment as well as personal conceptions of art and culture. Resolving it would go far beyond the parameters of this article.

Therefore, the definition set out by Brigitte Vézina will be used henceforth: cultural appropriation is the taking by a member of a dominant culture of a cultural element from a minority culture without consent, attribution, or compensation.[1]

The harm caused by cultural appropriation

The harm cultural appropriation can cause is best understood when illustrated with an example. In 2012, Urban Outfitters launched a Navajo-branded clothing and accessories line.[2] Amongst other items, the line included so-called 'Navajo panties' as well as a liquor flask, all imprinted with patterns distinctive of the Navajo Nation, a tribe of Native Americans located across parts of Arizona, Utah, and New Mexico. Urban Outfitters had not sought permission for the use of the patterns or the name, nor had it attributed them to the culture from which they originated. The Navajo-branded flask was particularly controversial as alcohol was prohibited in the Navajo reservation. Urban Outfitters' use was thus seen as making a mockery of the Nation's cultural traditions. Similarly, the underwear was considered as an affront to the historical and spiritual origin of the patterns. The tribe filed a lawsuit against the fashion brand, claiming, amongst other things, compensation for what it described as 'derogatory and scandalous' use of the Navajo name and patterns.

The case of the 'Navajo panties' encapsulates the wider issue of cultural appropriation and how harmful it can be. As George Nicholas, Professor of Archaeology at Simon Fraser University, Canada, explains, indigenous peoples like the Navajo tribe have historically had little control over their heritage. As a result of colonialism and Western missionary work, many of these peoples were forced to leave behind their lands, languages, and religions, along with their cultural traditions and lifestyles.[3] The cultural heritage that still exists may be a community's last remaining

1 Brigitte Vézina, 'Curbing Cultural Appropriation in the Fashion Industry' CIGI Paper 213 (April 2019).
2 'Navajo Nation sues Urban Outfitters for trademark infringement' *Guardian* (London, 1 March 2012).
3 George Nicholas, 'Confronting the Specter of Cultural Appropriation' SAPIENS Anthropology Magazine (5 October 2018).

connection to its origin. Taking it without permission and putting it out of context disrespects the values that often underlie this heritage, which is often considered sacred or connected to ideas of morality and spirituality.

Western companies who commercialise indigenous culture without granting the communities a share of the profit generated by their involuntary contributions exacerbate the problem. This is particularly harmful for groups that live at the margins of society, struggling to fit into the modern Westernised world and routinely subject to overt and systemic discrimination and racism. Many indigenous societies share this bitter fate, whose severity was recognised by the UN in describing indigenous groups as one of the world's most vulnerable groups of people.[4]

By denying those groups to benefit from their own cultural heritage, companies profit off the back of the most vulnerable. This further marginalises groups for whom the commercialisation of cultural heritage might be their only way to escape the dwindling spiral into poverty.

A gap in the law? Obstacles in intellectual property law

Whenever we find out about an injustice, our natural response is to look to the law to regulate it. Here, similarly, problems arise. Our current intellectual property law system, with its concepts of copyright, trademarks, and patents (amongst other mechanisms), offers protection to artists and inventors. Broadly speaking, it prevents use of creations and inventions without permission and offers compensation in the event of misuse. Each concept exhibits flaws and loopholes, as with most legal frameworks developed over time. Overall, however, the system succeeds in many cases to offer at least some form of protection to artists and creators who are operating in the Western commercialised world. On its face, one may think this to be an ideal system for solving the issue of 'cultural appropriation' and protecting indigenous culture. But a closer look reveals a sobering reality.

Intellectual property law is informed by a range of fundamental principles, on the basis of which it protects creations of the human mind. Almost all of them are based on Western ideas of creativity and ownership, and an underlying purpose of facilitating the commercialisation of creations. Three foundational concepts of intellectual property law illustrate this.

Originality

A key prerequisite of copyright protection is the requirement of originality. Across most jurisdictions, a musician needs to show that their piece of music is 'original'; the same goes for an artist's painting and a writer's writing.[5] Definitions of 'originality' vary, but generally it requires authors to prove that their works are their own intellectual creation,[6] expressing their individual creativity,[7] and are not copied.[8]

It will be a rare case that indigenous peoples' heritage is able to satisfy this requirement. Most cultural traditions have been passed down from generation to generation. Their purpose is to keep alive what was created centuries ago, to preserve rather than create; for the community, not for an individual.[9] Because of its very nature, indigenous culture will fall outside of what the law considers 'original' and thereby fail to qualify for protection offered by intellectual property law.

Ownership

A further key principle of intellectual property law is the concept of ownership, which entitles the holder of an intellectual property right to a number of actions and remedies. Generally, such rights are for the owner's personal benefit, to reward their efforts put into the creation, to incentivise future innovation, and to protect their work from derogatory and unauthorised use.

Again, indigenous cultural heritage will rarely fit this framework. Indigenous groups are often organised around a clan or a wider community; this sits at odds with the idea that only individuals can own intellectual property rights and benefit from them.[10] So far, intellectual property law rejects the idea of communal ownership in any form that would enable groups such as the Navajo Nation to hold the benefit of intellectual property rights communally.[11]

Time limits

Finally, most intellectual property rights offer protection for a limited period of time only. For example, in the UK and the EU copyright for most types of work ceases 70 years after the death of the author.[12] This is so that the creation can become part of the 'public domain', wherein it may become freely available for artists to copy, alter, and commercially exploit, and hence facilitate future innovation and creation. A framework built around time limits is of little help to indigenous people who are seeking indefinite protection of their cultural heritage that is rooted in thousands of years of history.[13]

The above examples are but illustrations of the inherent inaptitude of the system of intellectual property law to regulate issues of cultural appropriation. Consequently, a different approach is needed.

Filling the gap: Amending what is, or creating a sui generis system?

Academic opinion is divided on the best way to address the concerns of indigenous people. Governments, too, have differed in attempts to offer at least some form of protection. Two approaches have emerged. One seeks to make space within the current intellectual property law system to accommodate for concerns of cultural heritage (I will refer to this as the 'amendment approach'). Alternatively, proposals have

4 'Indigenous Peoples at the United Nations' United Nations, Department of Economic and Social Affairs, Indigenous Peoples <www.un.org/development/desa/indigenouspeoples/about-us.html>.

5 eg Copyrights, Designs and Patents Act 1988 (UK) s 1(1).

6 Case C–5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569, para 37.

7 ibid, paras 45–46.

8 *University of London Press v University Tutorial Press* [1916] 2 Ch 601, 608–609.

9 Brigitte Vézina, 'Ensuring Respect for Indigenous Cultures: A Moral Rights Approach' CIGI Paper 243 (March 2020) 11.

10 RL Gana, 'Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property' (1995–96) 24(1) Denver Journal of International Law & Policy 109, 132.

11 Vézina (n 9) 12; *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481.

12 See Copyrights, Designs and Patents Act 1988 (UK) ss 12–15A, and Directive 2006/116/EC.

13 RL Okediji, 'Traditional Knowledge and the Public Domain' CIGI Paper 176 (15 June 2018).

been made to create a separate legal system from scratch that operates outside intellectual property law—a so-called 'sui generis regime'.

Comparing attempts made by different jurisdictions to implement either of the two approaches shows the great difficulties of resolving the issue of appropriation of indigenous culture. A look at amendments of the existing system suggests that finding a solution within the existing IP framework is likely only ever to provide a makeshift solution—one that falls short of providing satisfactory protection to cultural heritage. Likewise, whilst promising attempts have been made to create a new system, such systems, too, are inevitably flawed because of the great complexity of the underlying issue. It is therefore unclear whether a large-scale, universal sui generis system could work.

The amendment approach: Australia and South Africa

The Australian *Indigenous Communal Moral Rights Bill* (2003) opted for the amendment approach. Motivated by a number of cases involving cultural appropriation of Aboriginal art,[14] the Australian government aspired to alter the existing copyright system to accommodate the concerns of indigenous people. Although the Bill was never passed into law because of a change in government, the draft legislation is nevertheless an interesting illustration of the hurdles that legislators have to overcome when amending the existing system to regulate issues of cultural appropriation.

Amongst other changes, the Bill sought to overcome the individual ownership hurdle by incorporating community ownership. Groups of people would be allowed to hold ownership jointly to their cultural heritage. Despite this, the Bill's introduction of community ownership received strong criticism. To overcome issues such as ownership, the Bill contained a series of requirements that indigenous communities needed to fulfil before their works of art, literature, or music could receive any protection. Copyright protection was thus not automatic, as opposed to the traditional copyright in Western systems, but tied to additional hurdles.[15] While this facilitated certainty and prevented an 'overkill of rights', which it was feared would lead to a decrease in value of individual rights, the requirements received strong criticism for being too onerous. In many cases, they rendered the new framework wholly impractical for indigenous communities to rely on.[16]

South Africa, too, took the amendment approach and over the years passed a number of legislative Acts seeking to make space for the concerns of indigenous communities.[17] Unlike the stringent requirements contained in the Australian Bill, South Africa incorporated wide-sweeping definitions and a system with low thresholds for copyright protection. On its face, this seemed like a welcome development, paving the way for the generous rights protection for which the communities had pleaded for decades.

Nevertheless, the amendments were strongly criticised by lawyers who were concerned that the imprecise definitions and generous requirements caused significant uncertainty.[18] It was argued that whilst such a system may restrict Western companies in their use of indigenous culture, its overly generous approach could end up working against the very people it sought to protect. Absent clear requirements that helped to establish which group was the rightful creator or community of origin of a relevant work, disputes amongst indigenous communities did not seem far off. This was a reason for concern particularly where the true place or group of origin is difficult to ascertain, as for example is the case for folklore passed down generations by word of mouth. A wide-sweeping copyright system that fuels tribal disputes can hardly be seen as a satisfactory answer to the century-old problem of cultural appropriation.

The Australian and South African attempts illustrate the difficulties of altering the existing system in a way that achieves sufficient protection without risking certainty, the value of individual rights and other undesirable side effects.

A sui generis approach: New Zealand

New Zealand attempted to create a new, sui generis system when it passed the Haka Ka Mate Attribution Act 2014.[19] The Act created a legal regime for the protection of the haka *Ka Mate*, a particular form of the traditional haka dance which is central to Māori culture. It gave the tribe of the Māori community who had invented this version of the dance a right to attribution. This means that (most) use of the dance requires prominent attribution of its origin. For example, filmmakers who wish to include this haka in their films are obliged to include a statement that identifies the chief and the tribe that invented it; failure to do so entitles the chief to an action of enforcement.[20]

The Act was welcomed by the legal and artist community and seen as a demonstration of how a sui generis regime is well-suited to tackle the issue of appropriation of indigenous culture.[21] However, as with the amendment approach, this solution is not without flaws. The new regime only concerns one specified Māori tribe and only for one particular part of its cultural heritage. It remains to be seen whether New Zealand's pilot Act will be as effective when extended to indigenous communities at large.

Further, attribution alone does not protect against disrespectful use which continues to be unregulated. Although it may have this effect indirectly by deterring companies who wish to avoid public outcry after mocking indigenous culture while attributing it to its community of origin, this is highly speculative and less likely to apply to small companies with little media attention.

Finally, this form of a sui generis system anticipates a piecemeal approach by which only clearly identifiable works and sources of origin are applicable for protection. As mentioned earlier with reference to folklore, such clear identification is not always possible, and many cultural assets will not fit the frame.

The advantages of this solution are that it avoids confusion of the existing IP law system as well as any side-effects of removing the

14 See *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481; *Bulun Bulun v R&T Textiles* (1998) 41 IPR 5; *Milpurrurru v Indofurn Pty Ltd* (1995) 30 IPR 209.

15 Patricia Adjei, 'IP Australia and Traditional knowledge consultation process' <www.ipaustralia.gov.au/sites/g/files/net856/f/ submission_-_patricia_adjei.pdf>.

16 Samantha Joseph and Erin Mackay, 'Moral Rights and Indigenous Communities' *Arts and Law Centre Australia* (30 September 2006).

17 See Intellectual Property Laws Amendments Act 28 of 2013 (SA).

18 Wim Alberts and Rachel Sikwane, 'South Africa: Intellectual Property Laws Amendments Bill for Indigenous Rights' (*Mondaq*, 21 November 2001).

19 Haka Ka Mate Attribution Act 2014 (NZ), 2014 No 18.

20 New Zealand Ministry of Business, Innovation & Employment, *Haka Ka Mate Attribution Act 2014 Guidelines* (NZ) 2014

21 Earl Gray, 'How Indigenous Rights and Intellectual Property Can Work Together' *INTA Bulletin* (15 April 2019).

obstacles inherent in the current regime. And whilst the approach's piecemeal fashion may appear unattractive at first, any aspiration to offer protection to all and any cultural heritage—even that which did not originate from one single, identifiable source—will inevitably risk an overly generous system, entailing similar problems like the South African amendments.

International community

The examples of Australia, South Africa, and New Zealand show that states have recognised the need for protection of indigenous culture. Despite such efforts, however, national legislatures continue to struggle to find satisfactory solutions.

In light of this, the World Intellectual Property Organisation (WIPO), an agency of the UN and the global forum for intellectual property policy, has long recognised the need for an international solution. Discussions by the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) about an appropriate framework first started 40 years ago.[22] Despite many years in deliberation, the Committee is yet to put forward its solution.

From the IGC's discussions, which led to the Draft Articles on the Protection of Traditional Cultural Expressions, one can infer that the Committee is pursuing a solution within the existing IP framework—the amendment approach. Commentators have suggested that it is unlikely that the Committee will introduce a sui generis regime. Brigitte Vézina argues that this is because a new system would dramatically change the way the Western world is able to interact with indigenous cultural heritage. A sui generis regime that offers strong protection could curtail many common practices across various different sectors of the economy and in society as a whole.[23]

This is an important point. We, as Western society, have become accustomed to borrowing and taking inspiration from other cultures—zombie Halloween costumes, yoga, and the Jamaican Jerk seasoning are but a few examples. An entirely new regime comes with the risk of compromising cultural exchange for the sake of protection. The question is whether we are ready to recognise the harm that this cultural exchange can do to indigenous societies and how far we are willing to let that risk curtail our freedoms in order to protect their heritage.

For now: Education and consumer responsibility

Whilst the law has been struggling to deal with the issue, others have taken action. An example of an initiative seeking to put control over cultural heritage back into the hands of indigenous people is Local Contexts, an organisation which offers customisable labels that can be attached to cultural heritage.[24] The labels allow each community to express specific conditions and guidance for using their cultural traditions. Local Contexts is currently in the early stages of developing an extra-legal licensing concept that will enable communities to commercialise their cultural heritage where intellectual property law fails to do so. The fact that a non-governmental organisation is developing what international legislative bodies have so far failed to accomplish is further testament to how far the law is lagging behind.

The IPinCH research project educates those involved in the intellectual property system about the issue of appropriation of indigenous culture.[25] A wide range of resources and information factsheets are available with information for creators, artists, and companies on the issue and advice on how to think about it. George Nicholas, who is also leader of the IPinCH project, suggests that such education efforts and as well as consumer responsibility are the best ways to tackle the issue of cultural appropriation. He pleads for a change in consumer behaviour with greater awareness of cultural origin, similar to the recent shift towards locally grown foods and sustainably produced products.[26]

It is certainly true that education and greater consumer awareness are key to tackling cultural appropriation. However, this is no excuse for national and international legislative bodies to abandon efforts to provide a legal solution. If anything, initiatives like Local Contexts and IPinCH emphasise the need for the law to finally catch up, either by amending the existing system in a satisfactory manner or by introducing a new system. They should be treated as starting signals of what needs to be a wide-sweeping reform of the international intellectual property law regime.

Conclusion

As this article has shown, cultural appropriation is a phenomenon that reveals a gap in the law, one that legislators around the world have so far struggled to close. It may be one of the most complex problems the intellectual property system has to grapple with. Resolution is urgently needed, especially in light of ever-increasing intercultural exchange fuelled by globalisation and social media.

The Navajo Nation was lucky. 15 years after Urban Outfitters first launched its 'Navajo line' the two parties settled and entered into an agreement for future collaboration.[27] But indigenous communities should not have to engage in decades of legal fighting to establish whether they have any claims to what is their very own cultural heritage—a fight that only few communities are able to engage in, with others being left uninformed about their rights and options of enforcement. It remains to be seen at what point the international community will finally step up and provide satisfactory legal protection. One can only hope that it is sooner rather than later.

22 UNESCO & WIPO, *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action* (1982).
23 Vézina (n 9) 20.
24 <https://localcontexts.org>.
25 <http://www.sfu.ca/ipinch/>.
26 Nicholas (n 3).
27 Nicky Woolf, 'Urban Outfitters settles with Navajo Nation after illegally using tribe's name' *Guardian* (London, 19 November 2016).