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**Who Wore it Better? Cultural Appropriation
in the Fashion Industry**
How International Law Fails to Safeguard Indigenous Peoples' Traditional
Clothing

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Abstract

This thesis explores the issue of cultural appropriation in the fashion industry, with a specific focus on the appropriation of Indigenous Peoples' traditional clothing, offering an extensive analysis that is currently missing. Fashion designers commonly draw on Indigenous Peoples' artistic expressions. In most cases, this is done without an agreement with the respective Indigenous group that created the artistic expressions, and the fashion industry profits at the expense of Indigenous communities. By applying a socio-legal approach combined with a critical legal analysis, the thesis examines the harm this behaviour causes to Indigenous Peoples and whether International Law can offer protection. Ultimately, the analysis will show that Western legal frameworks fail to protect Indigenous Peoples' traditional clothing from fashion appropriation. Even the latest legal protection mechanisms, the Draft Articles on the protection of TCEs, will prove insufficient while still in negotiation. A structural exclusion becomes evident, bringing to light the need for alternative approaches. In a final step, the thesis presents an extra-legal tool and, in doing so, introduces six core values to consider in efforts to address fashion appropriation.

Keywords: Cultural Appropriation, Fashion, Indigenous Peoples, Traditional Cultural Expressions, Intellectual Property Law, International Cultural Heritage Law, International Human Rights Law

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1 Introduction

1.1 Presentation of the Topic

In terms of fashion, we, as a society, are currently in a phase of so-called micro fashion trends. These are usually fashion trends spread by consumers via social media – and as the name suggests, they usually do not reach a broad audience and disappear just as quickly as they appear (Reilly and Hawley, 2019, p. 90). However, some of these trends cause more of a stir than others and some even break beyond the sphere of social media. In June 2024, *Harper's Bazaar* published an article entitled: “Why South Asian TikTokers are fuming, as are we...about yet another piece of co-opted cultural clothing.” (Agarwal, 2024). This article refers to a micro fashion trend that became popular on the social media platform TikTok. The trend is, wearing – according to a simplified Western terminology – a long summer dress in combination with a scarf – or for the purpose of offering a more precise description – “midi and full-length floral dresses with sheer and semi-sheer scarves draped across their chest.” (Agarwal, 2024).¹ For one unfamiliar with the topic, the issue might not be immediately obvious. The reason why this trend has made headlines is the fact that it was White women from Western countries that promoted this look and not only that, but it was promoted as being typically European and therefore particularly desirable: “The vibe, the aura, what is it? It's very European, it's very classy.” On social media, almost nothing is left uncommented for long, and this case was not an exception. “The vibe is Desi, the aura is South Asian. That's a dupatta, that's a chunni,” replied @Meghana, an Indian-American TikTok user (Agarwal, 2024). In fact, this style of clothing does not originate in Europe; rather it is a traditional form of dress for South Asian women, where a shoulder-draped scarf forms part of their everyday attire (Singh, 2024).

This case illustrates an example of modern forms of cultural appropriation in the fashion industry. While the context may appear contemporary, the underlying dynamics are the same as in more well-known examples, such as the French luxury fashion house *Dior* incorporating designs from Mexican Indigenous communities in their Cruise collection in 2018 (Raustiala and Springman, 2023, p. 1).² In instances of cultural appropriation in the fashion industry,

¹ In this thesis, the term “Western” refers broadly to non-Indigenous cultural, social, legal and economic systems. A thorough definition of Indigenous Peoples will be given in Chapter Two.

² To see images of it, see Iredale, J. (2017, May 12). *Dior Cruise 2018. Women's Wear Daily*. <https://wwd.com/runway/resort-2018/los-angeles/christian-dior/review/>

Western fashion brands adopt stylistic elements and designs originating from non-Western cultures.

The reaction of South Asian women on social media has made it clear that incorporating traditional clothing into the Western fashion market should not be done without careful consideration. In this case, the primary criticism was the failure to acknowledge the clothing's cultural origins. However, cultural appropriation in the fashion industry takes many forms and brings with it a range of complex issues. This thesis seeks to provide a deeper understanding of how cultural appropriation in the fashion industry is harmful, explore the current absence of legal mechanisms to address it, and ultimately outline key lessons for meaningfully confronting fashion appropriation.

1.2 Methodological Note

This thesis adopts a socio-legal approach, combined with a critical legal analysis to examine the limits of existing legal frameworks. It concludes with policy-oriented recommendations grounded in practice-based insights. A socio-legal approach means examining the law together with the society in which it operates. The aim is to understand how the law affects people in practice (Schiff, 1976, p. 287). To do this, the thesis draws on academic literature in social sciences and law, as well as on legal documents. Academic literature on the broader concept of cultural appropriation has served to contextualise the issue and establish a theoretical foundation, while individual academic journal articles focusing on fashion-specific cases have facilitated the application of this broad concept within the context of the fashion industry. Legal documents are not only subject to analysis but also serve to delineate and define the boundaries of the topic. Interviews with, and data analysis about, Indigenous Peoples are not part of the thesis as the focus is not to examine individual groups of Indigenous Peoples but rather to conduct a broader analysis of the legal framework in practice. This approach aims to avoid generalising from the situation of a single group of Indigenous Peoples to all Indigenous Peoples. However, references to specific Indigenous groups are presented as illustrative examples. In addition to academic sources, this thesis also draws on personal experience and observations related to the topic. Furthermore, online research on social media platforms was conducted to identify recent cases of cultural appropriation in the fashion industry. These sources helped to include the ongoing discourse and modern practices in the academic discourse.

1.3 Research Gap and Objective

Cultural appropriation does not only exist in the fashion industry, but also in the fields of music, art and literature. Thus, extensive research on cultural appropriation as a concept already exists. Philosophers, legal scholars and practitioners, and sociologists have explored the topic from various perspectives. What remains missing, however, is a comprehensive and in-depth examination of cultural appropriation in the fashion industry; how it causes harm, why existing legal protection mechanisms fail, and, lastly how this failure needs to be confronted. Thus, this thesis seeks to close that gap by moving away from a broad, general analysis of cultural appropriation and focusing specifically on instances of fashion appropriation. This will be done by analysing the harm caused by fashion appropriation, along with the structural shortcomings of Western legal frameworks. By ultimately presenting six key lessons that must be considered when attempting to address fashion appropriation effectively, the thesis aims to serve as a practical guide for policymakers, legislators and the fashion industry itself.

1.4 Relevant Note and Working Definitions

Notably, for the purposes of this analysis, the term Indigenous Peoples, rather than “First Nations”, will be employed in accordance with the relevant legal mechanisms under review as well as most of the academic literature used. This is done in reference to Chelsea Vowel’s book *Indigenous Writes* (Vowel, 2016, Chapter 1) in which she emphasises that especially the additional “s” in the term “Indigenous Peoples” is regarded as highly significant as it shows the diversity among different Indigenous groups. As this thesis does not concentrate on one specific group of Indigenous Peoples, but aims to adopt a general approach, the additional “s” will be applied. Further, the term Indigenous Peoples will be used with capital letters in the English language, as it would be done for any other nationality.

Before delving into the topic of cultural appropriation, it is also necessary to define a working understanding of the meaning of “culture” and “cultural appropriation”. A point of reference is Sir Edward Burnett Tylor, who defined “culture” as “that complex whole which includes knowledge, belief, arts, morals, law, custom, and any other capabilities and habits acquired by man as a member of society” (Tylor, 2010, p. 1). According to the *Oxford English Dictionary*, “cultural appropriation” is defined as “the act of copying or using the customs and traditions of a group or culture that is not your own, in a way that is considered to show a lack of respect or understanding” (Oxford University Press, 2025).

1.5 Structure of the Thesis and Guiding Questions

This definition of cultural appropriation is a useful starting point as it clearly illustrates the relevant attributes of the behaviour under discussion and serves as the basis for the structure of the thesis: First, there needs to be an object of appropriation, that is, traditional clothing by Indigenous Peoples. Secondly, there needs to be an act of injury that is, the incorporation of traditional designs by Western fashion companies into their collections. Ultimately, harm arises from this act to the original owners of the object, namely Indigenous Peoples. The following chapters are structured accordingly.

Chapter Two examines the object of appropriation at the centre of this thesis, traditional clothing by Indigenous Peoples. Chapter Three, titled as act of injury, focuses on the key elements that differentiate an act of injury from mere inspiration in the fashion industry, such as the involvement of two cultural groups and a power imbalance. For this, we will draw on academic literature and legal documents to provide a broad and comprehensive background on the topic. Chapter Four consists solely of a preliminary summary on the matter intended to provide an overview before Chapter Five addresses the first research question, namely, how fashion appropriation causes harm to Indigenous Peoples. After this, we will move on to answering the central research question in Chapter Six, specifically, how current Western legal mechanisms fail to adequately protect Indigenous Peoples from fashion appropriation. Throughout these chapters, interim conclusions will support a deeper and more structured understanding of the topic. Finally, in Chapter Seven, we will present six values that should be considered when seeking to combat fashion appropriation in a meaningful way. This final chapter includes a case study that demonstrates how such an approach can be implemented in practice.

2 Object of Appropriation: Traditional Clothing of Indigenous Peoples

2.1 Introduction

In Chapter Two we aim to develop an understanding on the nature of what is being appropriated – specifically, traditional clothing of Indigenous Peoples. Accordingly, the chapter is divided into two main parts: (a) Indigenous Peoples, as being the ones the object under discussion belongs to, that is, (b) their traditional clothing.

2.2 Indigenous Peoples

2.2.1 *Whose Clothes? Defining Indigenous Peoples*

Clarifying the term Indigenous Peoples is particularly important when assessing legal protection mechanisms, as such mechanisms are only applicable if the state in question recognises the actual existence of Indigenous Peoples within its territory. As a matter of fact, definitions have legal consequences (Lehman, 2006/2007, as cited in Barten, 2015, p. 2). The definition of Indigenous Peoples thus entails certain legal obligations on the part of the state. Hence from a historical perspective, there have been ongoing international disagreements regarding the matter and especially whether and how to differentiate between ethnic minorities and Indigenous Peoples (Sanders, 1999, pp. 4-5). Some approaches, among which most prominently the definition issued by World Bank in 1991 in its Operational Directive 4.20, aimed at adopting a broad and inclusive definition (World Bank, 2003). It includes “indigenous ethnic minorities” and concentrates on their vulnerability and their historical connection to the land. For members of these groups, the definition requires self-identification and recognition by others as part of the group (Sanders, 1999, p. 7).

Additionally, there is the approach of deliberately avoiding a fixed definition as seen in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) (2007). Nevertheless, UNDRIP provides an indication of what constitutes Indigenous Peoples in its Article 26(1) and (2): the original habitation of the land and the reliance on the land for the way of living (Barten, 2015, p. 8).

Still, this is solely an indication, not a clear definition and one is easily led to believe that the United Nations have not yet agreed on a definition. This is however only partly true. The United Nations, through the Chair of the Working Group on Indigenous Populations, Erica-Irene Daes, essentially adopted the definition presented in the so-called “Cobo Report” of 1987 through a published note in 1995 (Daes, 1995).³ This definition is recognised as a fundamental principle and widely adopted by the United Nations, its specialised agencies, and various regional intergovernmental organisations (Sanders, 1999, p. 8). It goes as follows:

379. Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other

³ Erica-Irene Daes served as Chair of the UN Working Group on Indigenous Populations from 1984 to 2001.

sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

380. This historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:

- (a) Occupation of ancestral lands, or at least of part of them;*
- (b) Common ancestry with the original occupants of these lands;*
- (c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);*
- (d) Language (whether used as the only language, as mother tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);*
- (e) Residence in certain parts of the country, or in certain regions of the world;*
- (f) Other relevant factors.*

381. On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group) (Cobo, 1987, para. 379 - 381).

The definition incorporates both objective and subjective elements. To be recognised as Indigenous Peoples, a group must have a historical connection to the land dating back to pre-invasion or pre-colonial periods, which constitutes the objective element. In addition, the group must perceive itself as distinct and seek to maintain that distinctiveness, which constitutes the subjective element. This definition further emphasises the importance of self-identification; however, it also makes clear that membership in a group that is defined as Indigenous Peoples requires both self-identification of the individual and consent of the group (Barten, 2015, p. 8).

To clarify the distinction of Indigenous Peoples and minorities, it needs to be said that there is no internationally recognised definition of minorities; however, the one proposed by

UN Special Rapporteur Francesco Capotorti is widely accepted (Barten, 2015, p. 6).⁴ It goes as follows:

A group numerically inferior to the rest of the population of a State, in a non dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language (Capotorti, 1977, para. 568).

This definition may have its points of criticism (Barten, 2015, pp. 6-8). However, for the purpose of distinguishing it from the concept of Indigenous Peoples, it will suffice for now. While a historical connection to territory is a central element in all commonly accepted definitions of Indigenous Peoples, such a connection is not typically required in the case of minorities. Conclusively, this forms the key aspect that defines the special status of Indigenous Peoples in International Law and allows for a distinction regarding minorities.

2.2.2 Legal Status of Indigenous Peoples in International Law

After having selected the definition used to identify Indigenous Peoples, it is essential to examine how being identified as such, influences the protection offered under International Law. The international community has long grappled with fundamental questions such as: Is protection through general human rights sufficient to safeguard Indigenous Peoples' rights? Or should they benefit from specific rights like those granted to minorities? Or, more fundamentally, should they possess their own legal subjectivity within the international legal system enabling them to make decisions for themselves, rather than being entirely subject to the authority of the government that is internationally recognised as sovereign over the territories in which they live? The historical development of this debate, along with the persistent challenges it continues to raise, forms a crucial foundation for understanding why international legal instruments still often fail to adequately safeguard the rights of Indigenous Peoples, including the protection of their traditional clothing from cultural appropriation.

To begin with, the right to self-determination serves as the cornerstone of contemporary legal protection for Indigenous Peoples (Anaya, 1996, p. 75). The core of the right of self-determination could be described as “the right of a community which has a distinct character

⁴ Francesco Capotorti served as Special Rapporteur for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities from 1973 until the completion of his 1977 report.

to have this character reflected in the institutions of government under which it lives” (Brownlie, 1988, p. 5). While the right to self-determination technically existed from the early days of International Human Rights Law (IHRL) as it was explicitly written into the most important international human rights instrument, the *Charter of the United Nations* (1945) (Article 1(2)), as well as later in the *International Covenant on Civil and Political Rights* (ICCPR, Article 1(1)) (1966) and *International Covenant on Economic, Social and Cultural Rights* (ICESCR, Article 1(1)) (1966), the international community did not extend its application to Indigenous Peoples. Against the backdrop of the decolonisation process, self-determination was understood primarily as a right of colonised populations to achieve independence from external rule (Anaya, 1996, p. 81). “Peoples” was therefore defined through a territorial prism, describing colonial borders, rather than a traits prism that would define people by their shared characteristics, which do not necessarily align with colonial borders (Barten, 2015, p. 3). As a result, self-determination of peoples was equated with the establishment of sovereign states. Indigenous Peoples were viewed as part of the broader national population – rather than distinct communities with unique needs (Anaya, 1996, p. 81).

Setting aside the political unwillingness to grant rights to Indigenous Peoples, often driven by fears of territorial loss in newly established sovereign states (Åhrén, 2016, p. 120) the individualistic and liberal understanding of human rights at this time enabled such an interpretation. Thus, two steps are needed to be taken to make a just protection for Indigenous Peoples possible. *First*, it was required to move beyond the narrow interpretation of human rights as solely individual rights and acknowledge the existence of collective rights. *Secondly*, it was essential to move beyond the notion of Indigenous Peoples as merely part of a largely homogeneous national population. Notably, these two developments are deeply interconnected: the recognition of Indigenous Peoples as distinct communities is inherently linked to the acknowledgment of collective rights as it happens through the granting of such rights. For this reason, the following section will first examine the necessity of collective rights for Indigenous Peoples, followed by a historical overview of the key developments that have led to the current legal status of Indigenous Peoples (Anaya, 1996; Åhrén, 2016).

Rethinking Human Rights: From Individual to Collective Rights. In Western liberal thought, human rights are typically understood through the lens of liberal individualism, which frames the relationship as one between the state and the individual – a “state-individual dichotomy” (Åhrén, 2016, p. 81). On the example of property, when it comes to protecting it,

it centres on the ownership of one specific individual, what is commonly understood as “the right to private property”. The individual is granted certain rights in relation to the object most notably, the right to exclude others from its use (Waldron, 1988). It is precisely this dual structure of rights that failed to adequately address the specific needs and realities of Indigenous communities (Åhrén, 2016).

Indigenous Peoples have a unique need for protection and recognition that stems from their deep-rooted connection to ancestral lands and natural resources, which they claim not on an individual basis, but collectively, as a group. On the example of property this means they embody alternative conceptions of the Western construct of private property, understood as collective ownership or common ownership.⁵ In systems of collective or common ownership no individual holds exclusive rights to a particular object or land; instead, the community possesses access and usage rights. Within such a framework, every member of the community is entitled to use it or benefit from it (Waldron, 1988, p. 40).

Thus, if the Western human rights system grants rights exclusively to individuals, and Indigenous Peoples do not traditionally conceptualise rights in such individualistic terms, it follows that they are structurally excluded from fully benefiting from these rights. To properly safeguard Indigenous Peoples’ rights, a critical engagement with the human rights system seemed necessary – an engagement that questions its structure and underlying nature. The goal should be to close the protection gap faced by Indigenous Peoples through an expansion or re-evaluation of human rights in line with their original purpose – granting rights that elevate people’s situation – rather than using human rights as a tool to justify exclusion or disadvantage. While human rights, in their traditional individualistic interpretation, may satisfy the need for equal treatment within a homogenous society, they fail to address the specific justice claims of Indigenous Peoples – particularly the claim to self-determination (Dahre, 2008; Kennedy, 2002).

Recognising Indigenous Peoples as a Distinct Group. Owing to their uniqueness, the need to recognise Indigenous Peoples as distinct communities has long been present but has only gradually developed in International Law. Initially, the so-called “assimilation approach” dominated, as reflected in the International Labour Organization (ILO) Convention No. 107,

⁵ For the purposes of this thesis, it is sufficient to focus on the relevant commonalities between these two slightly different systems, rather than their distinctions, especially because Indigenous Peoples do all have slightly different forms of societal organisation ownership (Hamilton, 2016).

Indigenous and Tribal Populations (1957), which aimed at integrating Indigenous Peoples into mainstream society (Göcke, 2017, p. 20). A turning point came with the already mentioned *Cobo Report* (1987) that introduced the concept of “ethno-development” and was the first to advocate for Indigenous Peoples’ self-governance. Building on this, the ILO Convention No. 169, *Indigenous and Tribal Peoples Convention* (1989), became the first legally binding instrument to recognise Indigenous Peoples as distinct group with collective rights, although it expressly excluded the right to self-determination (Åhrén, 2016, p. 95).

In parallel, developments in minority rights during the 1990s, most notably the *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (1992) contributed to the emergence of a discourse on the collectivisation of rights. However, the rights granted under this framework remained individual in nature, and again, it is crucial not to overlook the significant differences between the needs of minority groups and those of Indigenous Peoples. Thus, further development was needed. A significant step in this process was the interpretation of Article 27 ICCPR by the UN Human Rights Committee which played a key role in establishing a collective dimension to individual rights (Åhrén, 2016, p. 91).

Altogether, these developments gradually laid the groundwork for the contemporary recognition of Indigenous Peoples’ right to self-determination under International Law. Thus, while the Indigenous human rights discourse already began in the 1970s with the authorisation of the Cobo Report, an explicit acknowledgment by states did not emerge until 2007, with the adoption of UNDRIP (Åhrén, 2016, p. 96). Article 3 UNDRIP explicitly affirms what had been developed and articulated over the preceding decades, namely the recognition of the right to self-determination for Indigenous Peoples.

With the adoption of Article 3 of UNDRIP the discussion on whether the right to self-determination applies to Indigenous Peoples has been effectively settled. The language of Article 3, which closely mirrors the right of self-determination granted in the ICCPR and ICESCR, affirms that this is not a separate or lesser version, but the very same right as previously established under International Law. However, Article 4 UNDRIP makes clear that the self-determination granted to Indigenous Peoples is only related to their internal affairs and does not have an external dimension, meaning it is exercised within state boundaries. Such states’ concerns that granting said right could lead to territorial losses were even expressly addressed through the inclusion of Article 46(1) UNDRIP.

Summing up, the most outstanding factor in identifying Indigenous Peoples is their historical connection to their land that is maintained collectively. Ultimately this has led to their self-determination within the International Law. From the Indigenous People's approach to land and natural resources, we have identified their need for the granting of collective rights (Barten, 2015). The collective understanding of Indigenous Peoples, however, is not limited to their approach regarding the lands and natural resources but further becomes evident in the way they approach their art, including their traditional clothing.

2.3 Traditional Clothing

The term traditional clothing may immediately evoke certain images, but it requires a more detailed examination: What attributes are necessary for something to be regarded as traditional clothing for this discussion? How does it interact with related terminologies such as Traditional Cultural Expressions, Folklore, and Cultural Heritage? And specifically in the context of cultural appropriation, are there any considerations due to the nature of the object itself?

2.3.1 *Traditional Clothing: Defining the Term*

Traditional Cultural Expressions (TCEs). The terms Traditional Cultural Expressions and Folklore are largely synonymous – a fact that becomes particularly clear when analysing relevant legal instruments. However, the term Folklore has increasingly been replaced by TCEs, as Folklore carries with it negative connotations (Boateng, 2011, p. 12). International Law does not offer a clear definition for TCEs, which makes it necessary to have a closer look at the two legal instruments that explicitly address them: the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (CDCE) (2005) and the UNDRIP. Article 4(3) CDCE, in conjunction with Article 4(2) CDCE provides a deeper insight into the understanding of cultural expressions. Cultural expressions are defined as “expressions that result from creativity of individuals, groups or societies that have a cultural content” (CDCE Article 4(3)). Cultural content itself is further defined as referring “to the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities” (CDCE Article 4(2)). While cultural expression in Article 4 CDCE is explained without the aspect of “traditional”, the preamble of the CDCE mentions TCEs with a specific reference to Indigenous Peoples and minorities (CDCE, Preamble, p. 2). Additionally, Article 31(1)

UNDRIP which targets to Indigenous Peoples, explicitly refers to TCEs (Martinet, 2019; Lenjo, 2017).

Furthermore, a look into the meaning of the word “tradition” may be of aid when identifying the key attributes of TCEs. The *Oxford English Dictionary* defines “tradition” as “[t]he action of handing down (especially orally) statements, beliefs, legends, customs, etc., from generation to generation; transmission of customs or beliefs from age to age” (Oxford University Press, 2025). TCEs are passed down through generations within a specific community. They represent a continuation of intellectual and creative activity from the past into the present, embodying both historical depth and contemporary relevance. What distinguishes them from other forms of cultural expressions is precisely this traditional aspect rooted in “intergenerational transmission” (Martinet, 2019, p. 11).

Moreover, the development of International Intellectual Property Law marked a significant indication of which characteristics are considered essential for TCEs. In 1967, the revised *Berne Convention for the Protection of Literary and Artistic Works* (Berne Convention) (1967), the main international treaty that aims at protecting Intellectual Property, for the first time included a provision under Article 15(4) that required signatory states to provide protection in their national legal systems for “unpublished works of unknown authorship”. The provision was added at the request of newly sovereign states that had emerged following decolonisation. These states criticised the general framework of the Berne Convention for failing to protect their folklore, which was instead treated as part of the public domain and thus considered free for anyone to use. The Berne Convention responded to this criticism insofar as it does not explicitly name the protection of Folklore but nonetheless protects it under the category of “unpublished work of unknown authorship” (Martinet, 2019, p. 7). From this, it follows that TCEs are not to be associated with a specific individual but typically refer to a collective entity (Martinet, 2019, p. 11). The case of *Yumbulu v Reserve Bank of Australia* (1991) serves to further illustrate that collective essence of TCEs. An artist being member of an Indigenous clan claimed that the print of the “Morning Star Pole” on the Australian banknote breached his copyright. In the first step the court acknowledged his copyright but finally decided that it has been lawfully transferred and therefore the claim was rejected. The artist has sold his right to the Aboriginal Artist Agency which in turn gave the rights to the Reserve Bank of Australia. The artist claimed that he had not known the scope of this transmission and that he would not have agreed with that if he had. While the court found that Australian law does

not sufficiently acknowledge Indigenous worldviews regarding reproduction rights, it did not change the outcome and the right to produce the motif rested with the bank. The Indigenous clan criticised the artist's careless behaviour in this case (Janke, 2003, p. 61). He had gone through various ceremonies within the indigenous community where he was taught the symbolism and meanings of the motifs and was finally rewarded with the authority to paint such and thus, had the duty to protect the motifs from derogative reproduction which he evidently failed (Blakeney, 1998, p. 986).

In closing, three aspects are identified as defining attributes of TCEs: Expressing “cultural content”, carrying “a collective essence” and being traced back to an “intergenerational transmission” (Martinet, 2019, pp. 9-11). Today, the World Intellectual Property Organization (WIPO) when defining TCEs gives examples that include beside traditional music, performances, narratives, names and symbols or architectural forms, also “designs” (WIPO Glossary, 2024, p. 41). One of the earliest attempts of defining TCEs was done in the *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* (Model Provisions) (1985). It defines Folklore as “productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community” and offers examples that include “jewellery, textiles and costumes whether or not reduced to a tangible form” (Model Provisions, 1985, Part II, Section 2, IV).

Traditional Clothing in the sense of the thesis, thus, is clothing that falls under the definition of TCEs. This includes, for instance, tribal ceremonial garments, Indigenous clothing and jewellery worn by Indigenous Peoples in their everyday lives as well as the special pattern design of these garments (Vézina, 2019, p. 1; Lenjo, 2017; Steffe, 2023).

Traditional Knowledge. The relationship from TCEs to Traditional Knowledge (TK) is not always quite clear, especially when it comes to traditional clothing. Generally, one could say that TCEs are based on TK (Boța-Moisin, 2023, p. 95). The decisive difference between TCEs and TK lies in the fact that TCEs focus on the cultural aspect, while TK refers to intellectual achievement, which includes know-how, practices, and innovations. While TK and TCEs have similarities in terms of the collective aspect and the aspect of long-standing tradition, TK does not necessarily carry a distinct cultural component. However, caution must be exercised when attempting a strict separation of TCEs and TK, as they do overlap in many

instances, for example, when TK refers to the manufacturing techniques of clothing. In this case, TK describes the craftsmanship, while TCEs refers to the culturally influenced design or pattern of the garment. TK can therefore refer to cultural components, although this does not need to be the case (Martinet, 2019, p. 9). Accordingly, the WIPO Glossary even differentiates in the definition for TK between a broad interpretation of TK, which includes TCEs, and a narrow definition of TK, which refers to knowledge and thus excludes TCEs (Pergantis and Zois, 2022, p. 28; WIPO Glossary, 2024, p. 12).

Intangible Cultural Heritage. Cultural Heritage is a broad concept that encompasses both the protection and preservation of TCEs and TK, but is not limited to them (Martinet, 2019, pp. 7-10). Cultural Heritage, on its part, safeguarded through Cultural Heritage Law, aims at preserving the shared culture of nations or humanity for future generations. Importantly, Cultural Heritage first existed only on national level, while over time it became an international issue. Today, national and regional cultural laws are often shaped by, or aligned with international legal frameworks. While on an international level different conventions outline different specifics, cultural heritage law never protects the rights of individuals but rather focuses on preserving what is considered the collectively held cultural goods of a nation (Stamatoudi, 2022, pp. 9-10). The first international document that laid the foundation for International Cultural Heritage Law, the UNESCO *Convention Concerning the Protection of the World Cultural and Natural Heritage* (1972), focuses exclusively on monuments, buildings, and sites and leaves no room for the protection of TCEs nor TK. This highlights an important distinction between tangible and intangible cultural heritage. According to the *Oxford English Dictionary*, “intangible” refers to something that is incapable of being perceived by the senses; as in lacking physical substance. “Tangible” on the other hand is defined as being “perceptible by touch, as in being physically real” (Oxford University Press, 2025). It was only with the adoption of the UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage* (2003) that Intangible Cultural Heritage became an explicit focus of international protection.

The question remains, however, whether traditional clothing in the sense of TCEs can be considered as Intangible Cultural Heritage as neither the term TCEs nor TK appears in the UNESCO Convention 2003. Nevertheless, the WIPO definition of TK refers to Intangible Cultural Heritage and includes TCEs in its broadest sense (WIPO Glossary, 2024, p. 12). The

UNESCO List of Intangible Cultural Heritage also provides evidence that traditional clothing is protected as Intangible Cultural Heritage.⁶

To summarise, traditional clothing of Indigenous Peoples is considered as TCEs. Thus, traditional clothing is a form of cultural expression among Indigenous Peoples that has been passed down through many generations. Furthermore, ownership on this expression is not understood individually, but collectively. It is important to keep in mind these key attributes of the object under discussion. Later, it will be shown that these very attributes are the reason why harm occurs, and why Western legal mechanisms fail to safeguard it from appropriation. While traditional clothing often incorporates TK, such as production skills and techniques, this thesis intentionally limits its scope to traditional clothing as cultural expression. This distinction is particularly important for the legal analysis that follows in Chapter Six. Addressing TK would require engagement with a different set of legal protection mechanisms, which fall outside the scope of this thesis. Although TK and TCEs are deeply intertwined, separating them analytically helps clarify the specific gaps in protection that arise when traditional clothing is treated primarily as an artistic or symbolic expression.

2.3.2 Traditional Clothing in Practice: The Maasai's Traditional Attire

One prominent example of traditional clothing that illustrates the identified attributes of TCEs comes from the Maasai, the semi-nomadic, Indigenous Peoples who mainly live in central and southern Kenya and northern Tanzania (Hamilton, 2021 p. 38). The Maasai are widely known for their unique customs and the distinctive clothing they wear (Hamilton, 2021, p. 38) and thus rather unsurprisingly have already been the target of cultural appropriation by Western fashion designers on several occasions (Vézina, 2019, p. 5).

⁶ To see the official lists, see United Nations Educational, Scientific and Cultural Organization. (n.d.). *Intangible cultural heritage lists*. UNESCO. <https://ich.unesco.org/en/lists>

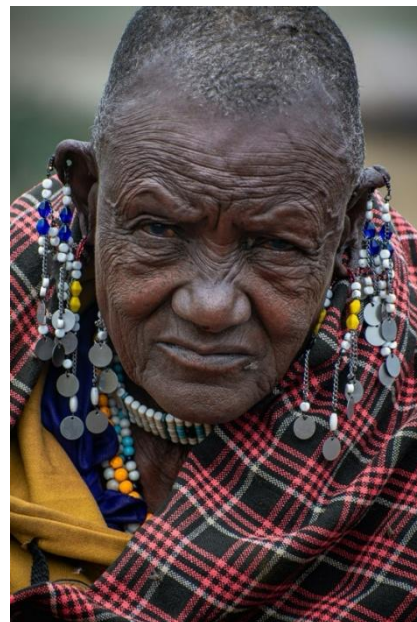
Even to the untrained eye, Maasai fashion is unmistakable and clearly identifiable: colours such as red, blue or black appear in the form of block, stripe or check patterns, beaded jewellery, and especially, their traditional garment called a *shuka*, a piece of cloth that they wrap around their bodies (Jern, 2023, p. 25; Hamilton, 2021, p. 38).



Maasai tribesmen in southern Kenya gather to welcome visitors to their village (Barcarolla, 2023).



Left: Man with black metal rod standing in the desert during daytime, Arusha, Tanzania (Rui, 2018).



Right: A portrait of an elder Maasai woman (Antsiferov, 2025).

What is not recognisable to the Western eye is the Maasai's demand on their clothing, as this goes far beyond practical everyday needs and aesthetics. The clothing and the characteristic jewellery reflect central cultural characteristics of their identity and follows very specific social rules. Rules exist that determine which garments may be worn on which occasions, at what social rank, and at what age. Maasai are only permitted to wear certain garments once they have reached a particular age and have undergone specific ceremonies that mark a change in their social status (Njoroge, 2000, p. 309). This serves as a public statement about the individual wearer and may indicate ethnic affiliation, gender, clan or group membership within the Maasai community, and, in the case of women, may even signify motherhood (Jern, 2023, p. 24). Their distinct jewellery carries symbolic meaning too, one that expresses their traditional way of life: the movement of the jewellery on the body is associated with the movement of cattle as well as with the sounds of flowing water. Even the distinct colour code of the jewellery is by no means random, as the women who produce it must follow strict rules based on the colours of the rainbow (Njoroge, 2000, p. 339-370). It becomes evident that the way the Maasai People are dressed shows their membership to the group. Furthermore, individual attributes associated with the person that is wearing the garment or jewellery are shown through the clothing. The potential for individuality and self-expression, however, is limited. It is not the person that is wearing the clothes, that decides how they want to express themselves with their clothes. It is the community that based on rules that originated generations ago that decides how one must dress. The clothes shall express the individual's status within the society, and again the collective aspect of traditional clothing is visible.

Summing up, traditional clothing carries symbolic meaning and is used by Indigenous Peoples to express their cultural identity. The example of Maasai's traditional clothing shows that it needs to be understood in connection with the environment and the society in which the wearer lives. Traditional clothing expresses the culture that is closely connected to its surrounding nature and the people's way of living. In the Western fashion industry, clothing is – as one could frame it – reduced to its aesthetics. The design or the style seems to be aesthetically pleasing, and one might hope to start another micro fashion trend. This, however, leads to damage by those who do appreciate the items of clothing for more than just their looks. The next chapter, hence, will take a closer look at the specific behaviour, the act of injury, that ultimately proves to be harmful Indigenous Peoples.

3 The Act of Injury: From Tradition to Trend

3.1 Introduction

When I was choosing my thesis topic, the first thing that came into my mind, was a gift that I had received years ago on a holiday in Zanzibar, Tanzania. It was a traditional Maasai *shuka*. A group of young Maasai that I had made friends with had gifted it to me. I was delighted and happily brought this piece of clothing back home to Austria with me – with the intention to use it as a scarf. Back in those days, it did not even occur to me that what I did could be considered as an act of cultural appropriation. And while, on a positive note, it was a gift of Maasai, which implies that it was given to me with their consent, I was still unaware of the cultural meanings and symbolism behind the *shuka*. The reason why I am telling this story is to show that the act of injury can take different forms. And it is exactly this “multidimensionality” that gives rise to several complex issues (Ziff and Rao, 1997, p. 2). In the following chapter, we touch upon the complexity of the topic and introduce relevant terminology and classification to narrow down the topic.

Furthermore, especially in the fashion industry, the claim is brought up that the behaviour itself is not an act of injury at all but rather represents an expression of acceptance, appreciation and even celebration of the culture in question. When I brought the *shuka* home with me, one might argue that I was even honouring the Maasai culture. According to this perspective, acts of cultural appropriation are viewed as something inherently positive. Once more, we were gifted with another intellectual buzzword. We are speaking of “cultural appreciation” (Vézina, 2019, p. 2). It therefore is regarded necessary to identify key attributes that identify an act of injury in the fashion industry as such. Thus, the following guidance shall help to determine whether and for what reasons a fashion trend is considered as an act of injury in the context of cultural appropriation. However, before doing so, it is necessary to introduce some conceptual classifications and terminology on the matter.

3.2 The Act of Appropriating: Conceptual Classifications and Terminology

Fashion Appropriation as Content Appropriation. First, Young distinguishes between “object appropriation” and “content appropriation”. Object appropriation refers to the act of taking possession of objects from other cultures without creating a new object. In contrast to this, content appropriation is exercised mostly by artists and happens in relation to an intangible object, an idea. An entirely new object is produced that is, however, based on an already

existing object of another culture. Furthermore, he distinguishes “subject appropriation”, which refers to a behaviour and not necessarily to a specific object. It happens when someone displays a culture different from their own (Young, 2008, pp. 5-9).

Accordingly, when I brought back the *shuka* I could have been confronted with the accusation of having committed object appropriation. And if I finally had decided to wear the *shuka* the way the Maasai do, I could have been further confronted with the accusation of having committed subject appropriation. This, because I am not Maasai and dressing as if I was, is displaying a culture different from my own. The luxury fashion house *Louis Vuitton*, however, engaged in content appropriation when their Spring Collection 2012 titled “Maasai” was based on Maasai designs.⁷ They made use of an idea – an intangible object – that already existed (Lenjo, 2017; Steffe, 2023). Unlike the original garment, however, the newly produced garment lacks any symbolism. It quite obviously does not serve to express the cultural identity of the fashion designer or the wearer. This serves as a clear indication that the meaning of clothing in the Western fashion industry is quite different to that within Indigenous communities. Clothes in the Western understanding are meant to express one’s individual identity rather than a status in connection with the society (Pozzo, 2020, p. 2).

Following this, this thesis shall primarily focus on instances of content appropriation by Western fashion designers.

Further Conceptual Classifications: Between Style and Motif Appropriation. In the example of *Louis Vuitton* appropriating Maasai design, not only do the colour design and colour patterns clearly show overlap, so does the title of the collection. At the very least, the designer could perhaps even be given credit for quite openly acknowledging the appropriation. This, however, is not always the case. And often it is not the entire garment that has been adopted one-to-one, but only individual design elements. It therefore can be hard in practice to distinguish if an act of cultural appropriation has been committed (Vézina, 2019, p. 11).

Young offers further conceptual classification. He distinguishes between *style appropriation* – i.e. the adoption of an entire cultural style – and *motif appropriation*, in which only certain cultural motifs are adopted, such as the Maasai design (Young, 2008, p. 6). While the concept of motif appropriation in fashion is relatively clear, the notion of style appropriation

⁷ To see images, see Nation Media Group. (n.d.). *In pictures: Louis Vuitton’s Maasai fashion*. Nation.Africa. <https://nation.africa/kenya/life-and-style/in-pictures-louis-vuitton-s-maasai-fashion-688872>

proves to be more complex and nuanced. As an example of style appropriation, Young cites a Western musician who composes his own piece but uses the distinct jazz style that originates from another culture. For motif appropriation, he cites Picasso who takes up African mask motifs in *Les Femmes d'Alger (O. J. R. Version O)* (1907) but uses them in his own artistic style (Young, 2008, p. 6).

Translating Young's example of jazz music for style appropriation into fashion, one could argue that it refers to the way the clothes are produced, e.g. the type of fabric, the machines, the production technique. However, since this is in most cases not recognisable, unlike in music where you can most certainly hear it, this translation is not satisfying for me. Transferring Young's example to fashion, I would argue, style appropriation is a case in which the new clothing is substantially similar – perceptible to everyone – to the style of the traditional clothing but is still not the exact same garment (Nute, 2019, as cited in Boța-Moisin, 2023, p. 97). Such an example for style appropriation in the fashion industry was presented in the introduction: The style of the evening dress that went viral on TikTok resembles the South Asian *dupatta*. The similarities, however, do not form any colour code, nor is any specific motif adopted but still are perceptible to everyone.

3.3 Fashion Appropriation: Identifying Key Attributes to Draw the Line

“Anyone can dress, how they want!”; “This is not cultural appropriation!”; “It’s literally just a scarf!”; “I don’t see the issue...”; “Why can’t we just wear what we think is pretty?”; and “So, Asian women can’t wear jeans now?” – pages could be filled with opinions people published on TikTok about the South-Asian dress that was under scrutiny for cultural appropriation. The internet, as a reflection of society, is deeply unclear about what counts as cultural appropriation, where the issue lies and where to draw the line.

As a matter of fact, transfer of culture can happen in different directions, and under completely different circumstances. When Asian women wear jeans and when White women promote the traditional *dupatta*, what we are dealing with is the different “modes of appropriation” (Ziff and Rao, 1997, p. 1). From this broad reach of the topic follows that behaviour that some might describe as cultural appropriation appears to be entirely unproblematic to others. And while there exists quite a bit of academic literature on this topic, even scholars do not completely overlap in the aspects they identify. Some consider certain elements necessary to classify an act as an act of injury, while others allow for a somewhat

broader range and distinguish between very wrongful acts of appropriation and less wrongful acts of appropriation. In the following, thus, key attributes of the act of injury in instances of fashion appropriation will be identified.

3.3.1 *The Act of Taking*

Artistic Director of luxury fashion house *Christian Dior* in the late 80s was the Italian designer, Gianfranco Ferré. It is said, that on one of his many trips to India he “had fallen in love with the country”. He studied the local craftsmanship, the textiles and textile design – influences that later became visible in his work for the luxury fashion house *Dior* (Pozzo, 2020, p. 6). The “architect of fashion” as he would be called received numerous awards for his “groundbreaking” and “original” work (Knowing the Architect of Fashion, 2025). *Dior* is by no means an exception. Fashion designers always get “inspired” by other cultures. So, the question remains, is this an act of injury? Or is what is happening in the fashion world just “creative re-interpretation” and thus, part of the artistic process? (Pozzo, 2020, p. 6) Let us examine more closely what constitutes the act of injury in instances of cultural appropriation.

With the background knowledge that the etymology of the word “appropriate” stems from the Latin term *proprium*, meaning “one’s own” (Shugart, 1997, p. 210) one can describe cultural appropriation as “[t]he taking - from a culture that is not one’s own – of intellectual property, cultural expressions or artifacts, history and ways of knowledge.” (Resolution of the Writers’ Union of Canada, approved June 1992, as cited in Ziff and Rao, 1997, p. 1).

The common aspect within this multidimensional behavioural trend is that “[t]he styles, forms, images, and topics were chosen by the various (appropriating) artists presumably because there is something evocative about them. Each such case is an instance of a current actor drawing on the creations of others.” (Ziff and Rao, 1997, p. 4). The act of appropriation, understood as the “taking” of a cultural good, does not necessarily involve a physical transfer (Lenard and Balint, 2019, p. 337). In short, the “taking” is considered as the act of drawing on the creations of others. This aspect constitutes a necessary condition for a behaviour to be considered as cultural appropriation (Ziff and Rao, 1997, p. 4). Call it inspiration if you like. But what we observe in the fashion industry is ultimately nothing else than drawing on the creations of others. What is taken away is the idea behind traditional clothing understood as TCEs. Calling it “inspiration” is a merely glossing over of the fact that the action remains the same as described in the introduced definition of cultural appropriation.

3.3.2 *Two Distinct Cultural Groups: Fashion Industry vs. Indigenous Peoples*

Furthermore, the act of “taking” suggests that there is a relationship between individuals or groups, between which said “taking” occurs. Thus, essential to identifying an act of injury is the distinction between these two groups: “the insiders” and “the outsiders” (Ziff and Rao, 1997, p. 3). The question is, which groups face each-other in cases of cultural appropriation in the fashion industry? On the one hand, Indigenous Peoples – whose particularities we have already outlined, and on the other, the fashion industry – consisting of fashion companies and consumers. Per definition, what matters for an act to be identified as an act of injury is the fact that the facing groups have different cultural backgrounds. The decisive point is that the Western fashion industry remains largely dominated by White people (Mulvaney, 2013). However, the idea of the existence of two different cultural groups needs to be applied carefully.

Overcoming Cultural Essentialism: It must be stressed that this approach of forming two distinct cultural groups itself raises concern as it embodies the idea of cultural essentialism. Insiders and outsiders can only be distinguished if one adopts and follows the essentialist idea of stable, static cultures with certain characteristics – an idea that is based on exclusion and cements existing, marginalising structures (Matthes, 2016). Accordingly, the idea of “transculturation” assumes that there is no strict demarcation between cultures to establish a more realistic approach to the contact between cultures, especially in a highly globalised society (Rogers, 2006, p. 491). Rather, the exchange between cultures basically results in hybrid cultural products, which is due to globalisation. However, Rogers also recognises that the identification of cultural appropriation is very difficult without the concept of distinct cultures. Therefore, he takes a practical approach and considers the concept of culture to be applicable in the context of cultural appropriation (Rogers, 2006). While this is certainly one practical way to address the problem, Erich Hatala Matthes, in his article “Cultural Appropriation Without Cultural Essentialism?” (2016) proposes an approach that seeks to solve this issue and allows for the identification of cultural appropriation without relying on the concept of distinct cultures. As a solution to this dilemma, Matthes proposes not to focus on the identification of “insiders” and “outsiders” when analysing cultural appropriation, but instead to recognise the underlying structural system of oppression as a decisive aspect of cultural appropriation.

According to this idea, the presence of a power imbalance between the facing groups leads to the act of taking being an act of injury. The fashion industry is a massive, multitrillion-dollar enterprise that operates globally (Lenjo, 2017, p. 139). The luxury brand *Louis Vuitton* was ranked the most valued fashion brand in the year 2024 with a brand value worth 41.6 billion US Dollars (Fashion United International, 2025). Meanwhile, it is said that 80 % of Maasai live below poverty line (Jabbar, 2014). The economic contrast and the resulting power imbalance between the groups facing each-other could hardly be greater.

In essence, I argue in favour of following Matthes' approach and opt for refraining from a strict division into two cultural groups but rather focus on the existing power imbalance that itself constituted a relevant aspect and therefore will be elaborated below. However, I would like to add a caveat at this point: In order to ensure a connection to the academic literature in which most authors continue to assume the existence of two cultural groups, this essentialist idea is taken up again below.

3.3.3 Power Imbalance: The Politics behind Fashion Appropriation

Provocative counter-questions on TikTok, such as “Are Southeast Asian women no longer allowed to wear jeans?”, while falsely ignoring the fact that Western clothing is not regarded as TCEs, still illustrate the complexity of the issue. How is power imbalance understood in the context of fashion appropriation? And what needs to be taken into account?

Asymmetrical Relationship. Cultural appropriation is a form of communication between two distinct cultural groups. When intergroup communication occurs and a relationship is built, the differing political identities of the people involved play a crucial role. Thus, the political context in which cultural appropriation takes place is decisive (Ziff and Rao, 1997, p. 476; Fiske, 1991). Cases of cultural appropriation are based on an existing power imbalance, a dominant group adopts elements of a subordinate group, and thus, an asymmetrical relationship exists. If, however, behind a symmetrical power relationship one argues in favour of cultural appropriation, the central, political aspect of the issue is ignored (Ziff and Rao, 1997, p. 5).

The power asymmetry in stances of cultural appropriation of traditional clothing can be traced back to the legacy of colonialism. French colonial history offers an example for how colonialism and cultural appropriation in fashion come together. During the French conquest of Algeria, in the very heart of the fashion world, Paris, wearing Arab clothing came to be seen

as highly fashionable (Root, 1997, p. 233). Accordingly, Van Leeuwen offers a definition of cultural appropriation that seems particularly interesting, as he establishes a direct link to colonialism: “Cultural appropriation is where people from a group that oppressed or oppresses another group mimics or represents cultural artefacts or manners of the oppressed group in a way that expresses or reinforces psychological elements of the racist ideology inherent in the colonialist project responsible for the oppression” (Van Leeuwen, 2015).

Importantly, however, today this power imbalance – rooted in colonial history – manifests in various forms, including economic power as well as social power, like the domination of Western beauty standards (Lenard and Balint, 2019, p. 344).

Cultural Assimilation. Furthermore, not only the existence of power imbalance but the direction in which power is exercised is crucial. In cases where, for example Indian women wear hoodies in everyday life, a power imbalance exists, but the transmission of cultural elements flows in the opposite direction, from dominant to marginalised cultures. What we are seeing is the “multi-directionality of cultural processes” and that “cultural appropriation can be construed to have a complementary opposite: cultural assimilation” (Ziff and Rao, 1997, p. 5). Consequently, cultural assimilation describes the dynamic in which a subordinate group adopts cultural elements of the dominant group under coercion or social pressure.

A historical case of cultural assimilation in the fashion industry stems from Britain’s colonial past. Before the British rule in India, Hindu dressed mostly in their traditional clothing. It was a reaction to the rule of the British empire that people started to adapt their clothing style to their coloniser. The assimilation, however, did not stem from admiration for the Western fashion, but was used as a tool to signal cooperation from which wealthy and influential men in India hoped development (Hendrickson, 1998).

Diverging Perspectives. While many scholars regard a power imbalance as a constitutive attribute, for Lenard and Balint (2019) the existence of a power differential is not necessary to classify a behaviour as cultural appropriation. Rather, in their view, it is a matter of so-called “amplifiers”, i.e. reinforcing factors that make a behaviour appear more morally reprehensible. They point out a central aspect that supports their decision to define the power relationship as an “amplifier” and not as a necessary condition. The individual person who “appropriates” is held responsible for the systemic structure of inequality and oppression at that moment, while all others who are equally responsible for the existence and maintenance

of the power structure pull themselves out of the affair. Hence, they argue “the moral blame” lies with one person.

However, if the power imbalance is standardised as an “amplifier” rather than a necessary condition, it becomes clear that the behaviour – which can be reprehensible in itself even without a power relationship – becomes even more problematic, not because of the individual action of the person, but because of the structural conditions in which it takes place (Lenard and Balint, 2019, p. 343-345). In common parlance, cultural appropriation is now associated – albeit often implicitly and unconsciously – with a power imbalance, and if one goes so far as to claim that such an imbalance does not necessarily exist, there is a risk of lending too much argumentative legitimacy to provocative counter-questions such as “So Indigenous Peoples are no longer allowed to wear hoodies?”. A linguistically and conceptually clear demarcation therefore seems necessary to me in order not to dilute the debate.

Where We Stand. If we decide to follow an analysis that rejects cultural essentialism, so far, we have established two relevant attributes to identify a behaviour as fashion appropriation: *First*, the act of drawing on another’s creativity – as the taking of traditional clothing – and *second*, that this taking occurs within a power imbalance where those in the dominant position take from those without it. Accordingly, if South Asian women adopt a Western fashion trend, it is not considered as an act of injury and fashion appropriation but can be more accurately understood as an act of cultural assimilation. Acts of cultural assimilation are problematic in a different way. It becomes problematic because it suggests that European fashion is more desirable or superior, a notion that stems from a colonial world view. One may even argue that this phenomenon represents a subtle form of neo-colonialism.

While the example of the Maasai *shuka* that was gifted to may not constitute a classical example of fashion appropriation as it is not content appropriation and not directly linked to the Western fashion industry, it nevertheless illustrates an important point: if we were to stop the analysis here, I committed an act of injury when I accepted the Maasai *shuka*. But would it have been better if I had rejected the gift? Should I have told them, that I try not to engage in cultural appropriation and therefore cannot accept the gift? Clearly, the situation is more complex than that and thus deserves a deeper analysis.

3.3.4 *Beyond the Basics: The Role of Contestation, Consent, and Intention?*

Consent and Contestation. Scafidi argues that the lack of consent is a key element in order to identify a behaviour as an act of injury (Scafidi, 2005, p. 9). However, acquiring consent comes along with logistic issues. The question will always remain open who is authorised to give consent (Lenard and Balint, 2019, p. 340).

An interesting topic from the fashion world gives insight into this: The 2018 MET Gala Ball adopted a Catholic theme, with guests encouraged to dress in ways that reflected this motif and allegedly the Vatican gave their consent. However, many Catholics who themselves have not given their personal consent disagreed and accused celebrities attending the Met Gala in outfits carrying relevant catholic symbols of cultural appropriation (Griffen, 2018). While the hierarchy in Catholic church may appear quite clear – with the Pope and the Vatican at the top – still discussions followed if the Vatican was able to speak for all individual Catholics. Besides this example, I recall the Australian case of the Indigenous artist that has sold his rights to produce a traditional motif although this was not approved by this community (Yumbulu v Reserve Bank of Australia, 1991). It becomes relatively obvious that asking for the requirement of consent is not easily feasible in practice.

Accordingly, Lenard and Balint identify another aspect that forms a condition to be able to classify a behaviour as an act of injury, and that is the contestation by those from whom the goods are appropriated, thus the Indigenous Peoples as owners of the traditional clothing. They, however, make clear that not any kind of contestation but rather only “meaningful contestation” matters and it “(...) is meaningful if it is sustained over time, by multiple members of the culture from whom the symbol or practice is being appropriated, and if culturally specific justifications or explanations are at the heart of the dispute” (Lenard and Balint, 2019, p. 340).

But what is happening when contestation is regarded necessary, is, that the cultural group that is being the victim of appropriation is asked to reclaim their own cultural goods. While Lenard and Balint (2019, p. 340) do mention that oppressed cultural groups that are victims of appropriation might be engaged in alternative seemingly more relevant political activities and I strongly agree with this point, this argumentation is further unsatisfying due to two points: *Firstly*, it illustrates a classic reversal of accountability; responsibility is shifted to those from whom something has been taken, rather than to those who have taken it. *Secondly*, this approach would not prevent cultural appropriation from taking place in the first place. It

can only lead to the behaviour being stopped after it has already happened and harm had already been done.

Hence, I argue against stating contestation as being a necessary requirement to identify an act of injury. It has been made clear that the requirement of consent comes along difficulties. The fact that one person has given their consent to make use of a traditional piece of clothing does not necessarily mean this has been approved by their community, neither does it say anything about the way the item shall be used to avoid harm. If we invoke consent to justify cultural appropriative behaviour, it is essential to ensure that consent is acquired in a meaningful and considerate manner. This includes, closely examining what forms of interaction are covered by the given consent and who is authorised to give consent.

Building on this, the next critical question is whether the appropriator must be conscious of the potential harm or problematic nature of their actions. In short, does the appropriator have to act with intention?

Intention. Surely, *Dior's* artistic director did love India. Surely, he did not think that what he did was wrong. And I believe it when the White women on TikTok claim that they did not know better in the first place. But does the lack of intention excuse one's behaviour? Lenard and Balint state that knowledge is a condition for a behaviour considered an act of injury. What is meant by knowledge in that regard is the knowledge about the cultural value of the product: "cultural appropriation is an act knowingly conducted by an appropriator (...) where one knows that the practice or symbol is central to the culture of others". However, they specify that "culpable ignorance" forms an exception, meaning if someone could "reasonably be expected to have knowledge" but they have not, this does not form a valid excuse for an appropriative behaviour (Lenard and Balint, 2019, p. 342).

Within this line of argumentation, one thing is left aside, and that is the society we are living in. We not only live in a society of micro-fashion trends (Reilly and Hawley, 2019, p. 90), but in a knowledge society. In the digital age everyone can at any time and any place get information about anything (David and Foray, 2001, p. 3). Under these circumstances, I strongly oppose the mere existence of something called *inculpable* ignorance.

4 Preliminary Summary

Extensive academic literature on the matter and legal documents have helped us to identify the special role of Indigenous Peoples in society and in International Law. Due to their distinctiveness, which comes from their connection to their ancestral land and their unique way of living in connection with it, they were finally granted with the internal right to self-determination. Further, we have looked more closely at the object of appropriation and outlined that traditional clothing by Indigenous Peoples has certain special attributes: a strong cultural significance, a collective claim and transgenerational transmission. Thus, the traditional clothing of Indigenous Peoples' is considered TCEs in international legal terminology. Just above, we have narrowed down the topic of cultural appropriation to the more specific form of content appropriation and provided insights into relevant terminology regarding fashion appropriation, such as style and motif appropriation. Furthermore, we have identified key attributes that define an act of injury and distinguish it from common concepts like cultural assimilation or cultural appreciation. The key attributes of an act of injury in cases of fashion appropriation are, first, the taking of TCEs, and second, two cultural groups with an existing power imbalance. Further, we have established that contestation of Indigenous Peoples is not necessary for an act to be considered problematic, and that requirement of consent has proven difficulties in practice. Lastly, we have concluded that a lack of knowledge does not excuse an act of injury in the fashion industry.

After having acquired the necessary background on the matter, we now turn to our first research question: How the act of injury in instances of fashion appropriation causes harm to Indigenous Peoples?

5 How Fashion Appropriation Causes Harm

5.1 Harm Comes in Different Cuts

A brief online search for the terms “land grabbing” and “Indigenous Peoples” reveals that the most recent article on the topic was published the exact same day. Another article from March 2025 says “Hundreds of Indigenous people (...) in Indonesia are demanding an end to government projects that have seized their lands, fuelled violence, and stripped them of their rights” (Jong, 2025). The politics towards Indigenous Peoples remain cruel and discriminatory to this day. At the same time, @noorkhleif states in a comment on TikTok “All they’re asking for is some credit!”. The *Independent* headlined an article on the Maasai and Louis Vuitton case stating: “Their name and image is estimated to be worth billions of dollars” (Jones, 2017).

This brief outline is meant to offer just a first glimpse into the fact that cultural appropriation is “more than just a buzzword for intellectuals” (Mays, 1994, as cited in Ziff and Rao, 1997, p. 8). Furthermore, what it reveals is that the range of harm experienced by Indigenous Peoples is extensive and is described and categorised in varying terms by various scholars, but essentially, it can be grouped into three main categories: moral harm, political harm, and financial harm. Accordingly, the next section will follow these categories and outline how cultural appropriation in the fashion industry is harmful towards Indigenous Peoples.

5.2 The Moral Harm

5.2.1 *Traditional Clothing is More Than “Just Clothes”*

We have seen that traditional clothing holds deep cultural meaning and symbolism for Indigenous Peoples. And while we have outlined how this understanding differs significantly from the perspectives within the modern Western fashion industry, it may still be unclear – particularly from a Western point of view – how cultural appropriation results in what is often referred to as “moral harm”. Young, however, explicitly clarifies that cultural appropriation entails “a question of morals” (Young, 2005, p. 138). Therefore, we aim to shed light on the nature of the moral harm resulting from cultural appropriation in the fashion industry.

Communal Identity as Foundation. To begin with, the foundation of what is experienced as moral harm is the Indigenous Peoples’ sense for a communal identity that differs fundamentally from the individual understanding of identity within the Western society. The remarks on TCEs clearly illustrate that within Indigenous communities clothing is used to

display and express the Indigenous Peoples' cultural identity. TCEs often convey a message, the clothes of Indigenous Peoples function as a means of communication and are capable of signalling to outsiders that the individual belongs to a cultural group (Kuumba and Ajanaku, 1998). TCEs, thus, are in the position to help strengthen the sense of belonging within the cultural group and help to strengthen the "community pride" (Mosley et al., 2024, p. 300). In an Indigenous worldview, the sense of belonging to a community is crucial for the formation of identity: "A person must be integrated into a society, not simply stand alone as an individual, in order to be fully human" (Durham, 1993, as cited in Weaver, 2001, p. 245). Further emphasised is this connection between the individual and the community through their shared history and their communal, sacred land (Weaver, 2001). It is this strong identification with the community that forms the foundation for the moral harm caused by cultural appropriation. The individual members identify themselves with their community, and thus, any harm done to the communal identity is hurtful to its members.

The Two Dimensions of Moral Harm. Moral harm emerges in two dimensions: one that plays out externally, in how the broader society perceives the appropriation, and one that unfolds internally, within the community itself, mostly invisible to others.

Less common in the modern fashion industry, but still worth a closer look, is the external, moral harm. It results from the fact that Indigenous Peoples' cultural identity is conveyed to the external through their traditional clothing. The distinct group identity becomes perceptible to others and a "collective image" of the respective culture in society emerges (Ziff and Rao, 1997, p. 11).⁸ In the case of cultural appropriation cultural forms of expression of the subordinating group are adopted by the dominant group, which inevitably leads to a mixing-up and, thus, a change of the collective image. The actual problem here lies not in the adoption of culture per se, but above all in *how* it is done. The representation may be misleading or inaccurate or even derogatory, and, as a result, harmful. Ziff and Rao express this very vividly stating that: "tears can appear in the fabric of a group's cultural identity" (Ziff and Rao, 1997, p. 9).

An extreme example of a case misappropriation is the *swastika* symbol that originates in Indigenous cultures all over the world and was eventually used by Nazi Germany and printed

⁸ One may not forget that this understanding displays an essentialist understanding of culture and must be critically scrutinised, since it can reinforce stereotypes and perpetuate existing inequalities caused by power relations (Rogers, 2006, p. 489).

on clothing. This case went so far that the sign until today cannot be used by Indigenous Peoples without creating a connection to the cruel crimes that were committed in Europe in the Second World War (Ziff and Rao, 1997, p. 12). Surely this represents an extreme example, but still, cultural appropriation carries the capacity to hurt the cultural identity of Indigenous Peoples. Most likely, if it is done in an inconsiderate and derogatory way which occurs if no knowledge has been acquired prior to an act of appropriation.

Within the fashion industry, however, more common is the second dimension of moral harm, the internal harm that is created within the community, and, thus, is invisible to others. A famous example for this is the fashion brand *Urban Outfitters* using traditional Navajo Nation designs in their collections and printing them on underwear (Boța-Moisin, 2023, p. 97).⁹ In this case the collective image has not been destroyed, but still the printing of the traditional design on underwear was proofed to be morally harmful to the Indigenous Peoples. The symbolism and sacred meanings were completely ignored by the fashion brand. Additionally, the fact that the motif has been printed on underwear has been regarded morally harmful, as the Navajo Tribe has been fighting problems of sexual violence for years (Lamartina, 2017, p. 2). The usage of their design in an ignorant manner produced a moral harm that the community had to deal with for years until the case had been legally settled (Choi, 2018; Lamartina, 2017).

Clearly, the external dimension of moral harm is not to be excused in any case. And as I stated that *inculpable* ignorance does not exist in a knowledge society, the invisibility of the second dimension of moral harm does not serve as an excuse either. Once again, it comes down to taking responsibility (Lamartina, 2017, p. 3). Historically, and continuing to this day, the West has expected Indigenous Peoples to conform to its borders, norms and values across nearly all areas of life. At the very last now, fashion designers and we as consumers must acknowledge the moral harm that may result from our own actions.

5.3 The Political Harm

5.3.1 Behind Fashion Trends Lie Politics

The case of *Urban Outfitters* using Navajo Design is just one example of the “tribal trend” being in fashion in the 21st century. Fashion brands globally have been using Indigenous designs not only to sell clothes, but to sell an idea of nostalgia, spirituality and connection to

⁹ To see images, see Cowles, C. (2011). *Urban Outfitters in trouble for selling 'Navajo' panties and flasks*. The Cut. https://www.thecut.com/2011/10/urban_outfitters_in_trouble_fo.html

nature – through Indigenous clothing Western fashion brands sell an escape from everyday life to Western fashion consumers (Fowler, 2013, p. 44-45). While the “tribal trend” serves as an escape for Western fashion consumers and thus easily attracts buyers, it reinforces racist stereotypes of Indigenous Peoples (Fowler, 2013). As a matter of fact, racism forms a particularly serious form of harm within the concept of fashion appropriation. Not only is there a high overlap between patterns of behaviour that are recognised as cultural appropriation and racism (Mosley et al., 2024), but racist acts, like acts of appropriation, make use of a system of asymmetrical, race-based power relations that reinforce inequality between groups (J.M. Jones, 1997, cited in Mosley et al., 2024).

Reinforcing Racist Stereotypes. By marketing Indigenous Peoples as nostalgic, spiritual, and living in harmony with nature, the Western fashion industry creates a narrow, predefined picture of Indigenous Peoples. Those who conform to this picture are accepted, whereas those who do not, are rejected. A modern Indigenous person who wants to be both, modern and traditional at the same time does not fit within that picture. Indigenous Peoples that are successfully economically integrated into the Western market while not having given up their Indigenous culture and identity do not work within the stereotype that is promoted by the fashion industry. *First*, this negatively affects identity formation of modern Indigenous Peoples as they are forced to comply with a predefined identity that is created by the West. *Second*, it contributes to racist discrimination against those who do not comply with that created image. Indigenous Peoples who participate in the market are confronted with racist hostility, a hostility that is reinforced by the stereotypes perpetuated by the fashion industry (Fowler, 2013). Additionally, acts of stereotyping cultural groups are often accompanied by a tendency to simplify those cultures – an ideological pattern that once served to justify colonial rule (Van Leeuwen, 2015). Indigenous designs are presented as being simple while the complex system that often lies behind them is ignored. For instance, the *koru*, a central design feature of traditional Maori art, was increasingly used by non-Maori artists to a degree that it has been integrated in educational programmes in New Zealand. However, the Maori art was regarded as a sort of art so simple that it has been integrated in elementary school programmes. The assumptions were that even a child could create this kind of art, while its significant and complex cultural meanings were completely ignored (Shand, 2002, pp. 48-50).

Fading distinguishability. Furthermore, with the phenomena of overlapping cultures the risk emerges that groups that had been once distinct cultural groups may no longer be

clearly distinguishable from one another (Ziff and Rao, 1997, p. 9-11). At this point, I may recall that it was Indigenous Peoples' distinguishability to the Western society that created the need and finally led to the right to self-determination. Losing distinguishability, thus carries the risk of losing hard-won political power. Members of every cultural group have common political claims because these cultural commonalities inevitably give rise to shared political demands, that is "The Worth of the Difference" (Ziff and Rao, 1997, p. 9-11). The opposite approach, the one that promotes a "cosmopolitan worldview" that strives for cultural unity, risks having a negative impact on policies for oppressed groups. The thinning out of the diversity of cultural groups through cultural appropriation could not only weaken cultural identity but further harm political identity (Ziff and Rao, 1997, p. 9). If cultural appropriation – as formulated by Rogers in the context of the concept of transculturation (Rogers, 2006) – is justified, the political force underlying the existence of clearly defined cultural groups is missed.

5.4 The Financial Harm

5.4.1 *One's Gain is Another One's Loss*

The presentation of the financial implications of fashion appropriation helps promote an understanding of the illegitimacy of cultural appropriation (Mosley et al., 2024) in the Western fashion world. While moral and political harm may be difficult to grasp from a Western worldview, financial harm – although in ordinary discourse not necessarily linked to fashion appropriation – is often easier to understand. Fashion appropriation is not only understood as a moral or political problem – and hence as something more abstract – but further as a breach of property rights (Brunk and Young, 2009), which, as a matter of fact, are regarded highly valuable in a society based on liberal, individual rights.

Wrongful Financial Benefit. As a matter of fact, luxury fashion house *Louis Vuitton* sold the *shuka* at a price more than 30 times higher than what Maasai people typically ask for from tourists – in 2017, \$77 compared to \$2,500 (Jeffrey, 2021, p. 32). The financial harm arises from the fact that the financial benefit derived from the Indigenous Peoples traditional clothing does not – or not fully – accrue to the Indigenous communities who created the product, but rather to a fashion brand that makes unlawful use of said product (Scafidi, 2005). That wrongful financial benefit results in a loss, a financial disadvantage, for the Indigenous Peoples that are the victims of the appropriation. *Louis Vuitton* is only one of many fashion

brands that made use of Maasai designs and, it is thus estimated that the Maasai have incurred financial losses of millions of dollars through acts of appropriation (Jeffrey, 2021, p. 33).

Impact of Commodification. The financial damage roots in the fact that commodification is omnipresent in our society and does not stop at the consumption of cultural goods (Scafidi, 2005, p. 8). The term commodification describes that a product is offered for exchange (Rogers, 2006, p. 488). When referring to goods that are intended for exchange on the market, one speaks specifically about *commodities* (Jackson, 1999). This inevitably leads to Marx' remarks in *Capital: A Critique of Political Economy, Volume I* ([1867] 1990): As a commodity in a capitalist mode of production, Marx distinguishes between the value that the product has (the use value) and the value that arises through participation in the market (the exchange value). In a capitalist society, the exchange value generally exceeds the actual use value. People, workers, are obliged to offer their labour force in exchange for wages to “capitalists”, owners of the means of production. The product created through the workers' labour is not destined for their own use, but for the use of the capitalist. This results in a separation between the workers and the product, Marx described this phenomenon as “alienation”. Ultimately, the exchange value is higher than the workers' wages, benefitting the capitalist and not the workers thus leading to the exploitation of the workers. Rogers traces a conceptual trajectory from Marx' analysis of the commodification of labour to the commodification of cultural products. What happens after the commodification of a cultural product is that the exchange value of the product is increased by the fact that it differs from other commodities due to the distinct value, the cultural value (Rogers, 2006, p. 488). The commodification of cultural products ignores that behind the commodification lies a culture leading to the exploitation of the culture itself (Ono and Buescher, 2001; Whitt, 1995). This is what we observe in the modern fashion industry. It is not labour force in the sense of Marx' understanding that is put in focus, but it is the Indigenous Peoples intellectual power that is exploited. Clothing items that are created by Indigenous Peoples are sold with a surplus for the fashion brand without any benefits for the Indigenous Peoples that created them.

It is, however, not uncommon for Indigenous Peoples themselves to participate in the market and offer their cultural products for sale. In those cases, the commodification is done by representatives of the culture. The seller of the product is equal to those who produce it and, thus, “alienation” does not occur, and the culture is not exploited for the benefits of “outsiders”. The crucial question, however, is to what extent this participation in the market is voluntary.

Often the economic conditions in today's capitalist market economy force Indigenous Peoples to enter the market themselves, especially if the cultural good has already been integrated in the market (Rogers, 2006, p. 490). If, Indigenous Peoples then decide to sell their products, the simultaneous commercialisation of the product by the Western fashion industry risks reducing Indigenous Peoples' opportunities on the market. However, an alternative perspective could be put forward as one could argue that marketing by fashion designers could positively influence the potential commodification of Indigenous Peoples' sales and thus even lead to higher profits (Ziff and Rao, 1997, p. 14).

Lastly, by multiplying the cases of fashion appropriation, commodification not only creates immense economic damage but further contributes significantly to the creation of the above-mentioned moral and political damage. Factually, in the process of commodification the cultural good will always be removed from its original context which inevitably gives rise to the previously mentioned risks of external and internal moral harm (Rogers, 2006). The "tribal trend", as being only one example of many other similar fashion trends, has showcased how fashion trends create political harm, and naturally, the more people consume, the more the racist stereotype is being reinforced.

5.5 Conclusion: More Than Just an Intellectual Buzzword

Conclusively, rightfully accusing someone of cultural appropriation "simply because they are wearing something" is not just about throwing around an intellectual buzzword to feel morally superior. Likewise, a fashion designer incorporating Indigenous designs into their collection is not merely engaging in artistic reinterpretation. Harm occurs – and it is real.

This harm not only affects Indigenous Peoples internally but also has political and economic dimensions. The moral harm arises from the fact that Indigenous Peoples' belonging to their community is crucial for their identity building. This communal identity is expressed through their traditional clothing, which therefore carries significant cultural meaning. Displaying traditional clothing in an inappropriate and inconsiderate way in the Western fashion world could destroy the external picture of Indigenous culture to an extent that they no longer are able to make use of their cultural goods. Further, the risk emerges that the fashion brand ignores the cultural significance of the traditional clothing and hurts Indigenous Peoples' feelings by offering clothing that seems derogative and inappropriate. Furthermore, fashion appropriation reinforces racist stereotypes. It is the Western fashion world that dictates how

Indigenous Peoples are portrayed, thereby infringing upon their right to self-determination. Further, fashion appropriation risks blurring out cultural distinctiveness; a trait that is relevant for Indigenous People's political power. Lastly, financial harm occurs: The Western fashion industry is making money from the intellectual exploitation of Indigenous Peoples. It becomes clear that Indigenous Peoples must have means to resist such appropriation. Today, this is typically attempted through legal mechanisms. Thus, the extent to which these are effective will be examined in the next chapter.

6 Combat Fashion Appropriation through Law: Examining International Law

6.1 Trying to Fit International Law

This chapter provides an overview of existing legal protection mechanisms for Indigenous Peoples in the context of cultural appropriation of TCEs with a particular focus on the protection of traditional clothing. Various regimes – albeit mostly indirectly – address the protection of traditional clothing of Indigenous Peoples. Thus, in the following chapter, the regimes of International Cultural Heritage Rights (ICHR), International Intellectual Property Rights (IIPR) and the International Human Rights Law (IHRL) will be examined in terms of their positive and negative aspects. The aim is to identify and critically evaluate the full range of potentially relevant legal instruments, analysing their scope of application, their effectiveness, and their inherent limitations. Ultimately, the chapter will address the draft instrument currently under negotiation within the Intergovernmental Committee (IGC) of the World Intellectual Property Organization (WIPO), which is explicitly intended to provide protection for TCEs against misappropriation and misuse. Although administered by the IGC, which is a committee within the organisation of the WIPO and thus, at first glance, appearing to fall within the framework of IIPR, it is, in fact, based on a different conceptual approach (Alves, 2025). Precisely because it has not yet entered into force and aims at following a distinct rationale from IIPR, it will be examined separately at the end of this chapter regarding its potential to close the gaps identified within the other presented regimes. However, it should be anticipated that none of the regimes, including the proposed IGC instrument, appears to be truly suitable for the effective protection of Indigenous TCEs. For this reason, the final chapter will introduce an alternative protection mechanism beyond the limits of formal legal frameworks.

6.2 International Cultural Heritage Law

6.2.1 Introduction

In March 2016, the congress of the state of Oaxaca, a region in southwestern Mexico, declared the traditional designs of the Mixe People, the Indigenous community of Santa María Tlahuitoltepec, as Intangible Cultural Heritage in accordance with the UNESCO Convention 2003.¹⁰ This occurred shortly after another case of cultural appropriation in the fashion industry came to light. *Isabel Marant*, the French luxury designer, had appropriated designs from the Mixe People to create a distinctive look in her Spring/Summer 2015 Collection titled “Étoile”.¹¹ A blouse within this collection appears to have a striking resemblance to the *huipil*, the traditional blouse worn and produced by the Mixe People for over 600 years. The fact that the designs were declared as regional Intangible Cultural Heritage shortly after this case came to light suggests that such recognition could have prevented the appropriation. However, this is not entirely the case as a declaration of Intangible Cultural Heritage carries more of a symbolic than protective value for cases of fashion appropriation (Vézina, 2019, p. 2-3).

6.2.2 Examination of International Cultural Heritage Law

Symbolic Power. One of the reasons this is the case is that ICHL’s purpose, by its nature, is not the protection of cultural heritage from misuse or misappropriation. Rather, its aim is to preserve culture and safeguard it for future generations. On an international level, the enforcement of rights in this regime is limited to the international community, recognising that the traditional designs are worthy of protection (Stamatoudi, 2022, pp. 9-10).¹² This symbolic power can have an impact. We have outlined that Western fashion designers appropriate designs belonging to Indigenous Peoples because they are unaware of the origins and cultural significance behind it. Recognising designs as cultural heritage can help to raise awareness within the fashion world and, in turn, help to prevent cases of misappropriation (Vézina, 2019, p. 15).

¹⁰ The designs are not considered as Mexico’s Intangible Cultural Heritage by UNESCO but recognised by regional authorities as protection worthy within the State (De Redaccion Sureste ADN, 2016).

¹¹ Following public backlash, the designer withdrew the garment from sale. To see images, see Conlon, S. (2015). *Isabel Marant faces plagiarism claims over traditional Mexican designs. Vogue UK.* <https://www.vogue.co.uk/article/isabel-marant-plagiarism-claim-santa-maria-tlahuitoltepec-oaxaca>.

¹² While national regimes are often shaped by International Cultural Heritage Law (ICHL) and therefore are similar, still there might be differences within the various regimes, which is why the analysis concentrates on ICHL.

However, ICHL does not grant any authority to act against the use of culture by third parties (Alves, 2025). Hence, it can already be concluded that the regime is not suitable for combatting cases of cultural appropriation in the fashion industry, where the main issue lies in the fact that the designs are taken away by third parties. Notably, Western fashion designers also cannot effectively protect their designs from unlawful use under ICHL, suggesting that, at least in this respect, the regime does not discriminate against Indigenous Peoples. Western fashion designers, however, are not dependent on ICHL to protect their designs from unlawful use as we will later conclude.

Exclusion of Indigenous Peoples. Nevertheless, when considering the complexities of ICHL and the barriers to access, it ultimately results in indirect discrimination, as even the symbolic power offered by the regime remains limited for Indigenous Peoples. Two central aspects deserve particular attention in this context: *firstly*, the role that Indigenous Peoples play or, more precisely, they do not play and *secondly*, the Western-influenced worldviews that are clearly reflected in the understanding of culture.

“The congress of the province of Oaxaca issued a cultural heritage declaration proclaiming the Mixe People’s traditional designs, embroidery (...) as intangible cultural heritage in accordance with the United Nations Educational, Scientific and Cultural Organization (UNESCO)” (Vézina, 2019, p. 3). This passage effectively illustrates the underlying issue: the declaration was not made by the Mixe People themselves, but by the state authorities of Oaxaca. As a matter of fact, ICHL fails to meaningfully include Indigenous Peoples in its processes (Sharma, Sharma, and Devashrita, 2024, p. 3729). ICHL is predominantly based on the will of states, while the substantive addressees are often cultural groups within the contracting states (Francioni, 2011, p. 14). Indigenous Peoples are not recognised as an independent group with specific needs within ICHL. All that is left to do for Indigenous Peoples is advocating for the protection of their cultural heritage; the state however has the last word (Alves, 2025, Chapter 2). The rules on what is considered worthy of protection, and the following decision process is, however, complex to grasp if one is unfamiliar with ICHL (Eichler, 2021 p. 794). Thus, even the opportunity to advocate for the protection demands high resources that are often unavailable to Indigenous communities. The fact that they must rely on state structures to access this protection mechanism, and that the process itself is complex and demands high resources, not only renders the symbolic power of

the regime ineffective but ultimately represents a limitation on their self-determination (Sharma, Sharma, and Devashrita, 2024, p. 3729).

Western Understanding of Culture. On a positive note, ICHL leaves room for a certain number of Indigenous Peoples' worldviews, as its protection scope respects the collective nature of heritage and its transmission from generation to generation (Waelde, 2022, pp. 329-330). However, its underlying conception of culture remains fundamentally rooted in a Western perspective since, above all, culture is protected as a remnant from the past with historical value (Alves, 2025, Chapter 2). This "linear understanding" of time contradicts with Indigenous Peoples "circular understanding" of time, where culture is understood as both, the past and the present (Boateng, 2011, p. 45). Especially so, when we speak about traditional clothing, it is important to refrain from making this rigid separation between historic and contemporary cultural expressions. Indigenous fashion, the term used to describe the contemporary interaction with traditional clothing by Indigenous Peoples, is based on constant interaction with the artistic expressions that have been passed down over generations. Still, the engagement with the designs is happening in the present, as part of a modern fashion. "Fashion today serves as a form of cultural continuity for First Nations people" (Hall, 2020), and thus traditional clothing is not simply a rigid relic of the past. Due to the narrow understanding of culture within ICHL, the recent modifications to traditional clothing through contemporary engagement with it might result in a denial of protection in the specific case (Alves, 2025, Chapter 2).

What is more is, that ICHL does not offer a uniform protection structure for culture, but consists of numerous individual systems, each covering different aspects of culture (Schreiber and Urbinati, 2024). This fragmented understanding of culture, especially the separation between tangible and intangible cultural heritage, is at odds with the Indigenous perspective. Within Indigenous communities, cultural expressions that result in tangible products are inherently connected to their intangible cultural meaning (Kurin, 2004, p. 70). Thus, when it comes to the protection of clothing, this could lead to the garment itself being protected as tangible cultural heritage and the cultural significance of the designs as intangible cultural heritage (Alves, 2025, Chapter 2). Not only does this fail to represent Indigenous perspectives but further it contributes to the complexity of the recognition process.

6.2.3 Conclusion

In theory, thus, the symbolic power of ICHL could help to raise awareness within the fashion industry about traditional designs, their origins and their cultural significance. This, in turn, could discourage fashion designers from using such designs without permission and prevent cases of fashion appropriation from happening at its source. However, the effectiveness of this approach still relies on the fashion designers' willingness to comply. Importantly, ICHL itself does not offer protection mechanisms that have the potential to prevent appropriation. Even the use of its symbolic value comes with significant challenges for Indigenous Peoples. The regime's limited accessibility for Indigenous Peoples, along with the Western perspectives it inherently reflects pose significant barriers. Even if it may help prevent certain cases of fashion appropriation on an individual level, no general benefit can be derived from it in its present form.

6.3 International Intellectual Property Law

6.3.1 Introduction

"Intellectual property protection is a fundamental dimension of autonomy," says Angelica Aspucac, a leading advocate of the National Movement of Maya Weavers.¹³ The association, based in Guatemala, works to secure legal protection for the textile art of the Maya communities. In February 2017, the group introduced a legislative initiative aimed at reforming Intellectual Property Law to better accommodate the protection of their traditional designs (Picq, 2017). Undoubtedly, this raises the question of whether Intellectual Property Law, in its current form, is suitable for protecting the designs of Indigenous Peoples.

In principle, Intellectual Property Law aims to safeguard the products of an individual's creativity and intellect in the fields of industry, literature, art, and science. Thus, in the centre of protection is the creator's recognition and the exclusion of others from unjustly claiming authorship or benefiting from that recognition (Stamatoudi, 2022, pp. 8-9). The concept of intellectual property is based on the notion of "real and personal property" and grants a certain degree of exclusivity to an individual. It seeks to protect individual economic interests within a capitalist market system, thereby creating incentives for increased innovation. Thus, in contrast to ICHL, I IPL, does not focus on the preservation of culture and existing cultural

¹³ In 2024, Angelica Aspucac made history as the first Indigenous leader of Sacatepéquez since Spanish colonisation.

products but rather on the creation of new ones (Menell and Scotchmer, 2007, pp. 1476-1477; Waldron, 1988). By doing this IIPL reflects the spirit of our times. It is precisely this allure of innovation and the urge to constantly create new and distinctive designs that leads Western fashion designers to engage in cultural appropriation in the first place (Pozzo, 2020, p. 3).

Still, at first glance, IIPL with its focus on the economic value appears to be able to prevent at least the occurring financial harm. However, the very fact that IIPL is grounded on such individual, economic principles will ultimately prove to be inadequate for ensuring traditional clothing being sufficiently protected (Alves, 2025, Chapter 3). And while IIPL generally proves to be highly flexible and versatile in its application and the scope of IIPL can be and, as a matter of fact, has been significantly expanded in recent decades, this expansion served mostly corporate interests, rather than necessarily benefiting Indigenous Peoples (Graham and McJohn, 2005, pp. 315-316).

Further, a key characteristic of IIPL is that it comprises multiple forms of intellectual property, each designed to protect different aspects – such as patents, copyrights, and trademarks (Menell and Scotchmer, 2007, pp. 1476-1477). The following legal examination focuses on the most relevant forms of intellectual property law for the protection of TCEs: copyright and trademark law (Alves, 2025, Chapter 3). While patent law is an important component of IPL in general, it will not be a focus of this discussion as it plays little to no role in the protection of artistic designs, symbols, literature, or music (Paterson and Karjala, 2003, p. 645). Accordingly, the first area of IIPL to be analysed regarding the protection of TCEs is Copyright Law followed by an examination of Trademark Law.

6.3.2 Examination of International Copyright Law

First, it is important to recognise that Copyright Law is not uniform; its structure differs between jurisdictions, shaped by both international and national legal frameworks (Zografos, 2010, p. 45). Nevertheless, central basic principles remain relevant across the board. A detailed discussion of the individual differences does not appear necessary at this point, especially not if the elements essential for the protection of traditional clothing are fundamental components. Therefore, the analysis will concentrate on the international rules on Copyright Law.

The Berne Convention. Copyright Law, as the name itself already suggests, grants a so-called „author“ the right to re-use (as in „copying“) an artistic work and, at the same time,

prohibits the re-use of that work by anyone other than the author (Paterson and Karjala, 2003, p. 638). In International Law, the Berne Convention (1967) is of particular importance as it is the oldest international convention dealing with the rights of authors of artistic works. Further, it is the first convention to include the protection of traditional forms of cultural expression, albeit not from the outset and not explicitly named, but ultimately nevertheless (Lucas-Schloetter, 2004 p. 266; Ricketson, 1987). The Berne Convention lays down minimum standards for copyright protection between the contracting states. Together, these contracting states form the so-called Berne Union (WIPO, 2010, p. 22).

The Berne Convention standardises what falls within the scope of copyright, primarily stating that „any production in the literary, scientific or artistic field“ is protected (Article 2(1) Berne Convention). Evidently, traditional clothing is not explicitly mentioned in this enumeration. This exclusion is rooted in the Western lens through which traditional clothing has been perceived – as historical, static remnants from the past. Copyright Law, in contrast, should incentivise innovation and protect novel creations. Consequently, the need for legal protection of traditional clothing was not acknowledged within this framework in the first place (Boateng, 2011, p. 46). Eventually, however, another paragraph was added, Article 15 Berne Convention, that refers to the protection of „unpublished works of unknown authors“. Its aim was to target explicitly the protection of TCEs (Zografos, 2010, p. 44). Hence, traditional clothing of Indigenous Peoples falls within the scope of protection.

However, although the Berne Convention appears to acknowledge the significance of Indigenous Peoples' TCEs by ultimately dedicating an article to their protection, this seemingly supportive approach becomes less convincing when the distinct characteristics of TCEs are assessed in the light of the law's formal requirements (Paterson and Karjala, 2003, p. 638). What becomes visible is the “second-class status” of TCEs within International Law (Boateng, 2011, p. 12).

Second-Class Status. First and foremost, the claim that TCEs occupy a second-class status is becoming clear by the fact that the obligation to protect them is based on voluntary engagement, vaguely formulated and marked by significant legal uncertainty. The Berne Convention stipulates that a competent authority should be established in the respective member states to represent TCEs as they cannot be assigned to an author (Zografos, 2010, p. 47; Ricketson, 1987, p. 315). It remains however unclear how this authority should be structured and how its representative function should work in detail. These decisions are left to

the national legislation of the signatory states (Lucas-Schloetter, 2004, p. 267). The signatory states are even free to decide whether to set up such an authority at all as there is no obligation to do so (Ricketson, 1987, p. 315).

Requirement of Originality. Further it is the requirement of originality that is in the way of an adequate protection. It has become a general principle that the expressions that are protected within the scope of Copyright Law need to carry a certain degree of creative originality (Zografos, 2010, p. 10). The Berne Convention refrains from clearly defining the threshold that must be reached to be regarded as „intellectual creation “– i.e. what quality or standard is required (Ricketson, 1987, p. 231). In many cases, however, traditional clothing will fail to meet the threshold because they are based on pre-existing works and have been handed down over generations (Zografos, 2010, p. 46). Ironically, it is precisely one of the defining features that renders the protection mechanism, that expressively includes TCEs, ineffective (Paterson and Karjala, 2003, p. 639).

The challenge is further intensified when the originality requirement is considered fulfilled in contemporary artistic works by Western artists, even if their work is based on TCEs and has only been slightly adapted (Zografos, 2010, p. 46; WIPO Report, 2010). Particularly in the fashion industry where the use of Copyright Law due to a high level of competitiveness is gaining importance this results in a notably unfair outcome to Indigenous Peoples. The creative output of Western fashion designers based on TCEs may well fall under copyright protection – while the underlying TCEs may not necessarily enjoy the protection. In fact, the National Movement of Maya Weavers started their work precisely because cases of Western designers claiming property rights on Maya peoples’ textile designs threatened the Indigenous community (Kedron, 2024). Technically, contemporary fashion designers from Indigenous communities, too, can benefit from this copyright protection if their work is based on TCEs (Zografos, 2010, p. 48; WIPO, Report 2010). This, however, still fails to recognise the community-based nature of indigenous cultures. The recognition and the economic gain made possible by copyright would benefit the designer but not the community as a whole (WIPO Report, 2010, p. 25).

Individualism in Copyright Law. What is more is that copyright is based on the notion of an individual “author“ (Ricketson, 1987, p. 174). While the Berne Convention appears at first glance to accommodate the characteristics of TCEs by providing for the protection of

“unpublished works of unknown authors” with its Article 15 this provision has proven to be only partially effective in practice for Indigenous Peoples.

As a matter of fact, the norm itself is formulated in a clearly individualistic manner as it suggests the existence of an “author”. Thus, the terminology, already fails to acknowledge the need for collective claims of indigenous communities (Lucas-Schloetter, 2004, p. 267). Indigenous communities usually regard ownership of their traditional clothing as communal (Boateng, 2011, p. 37). Even if there may be some sort of recognition for the individual’s contribution to a specific design, for example, the right to name the design, the creative work is above all understood within its historic, cultural and social context. Thus, recognition is not attributed to the individual alone but rather interpreted as part of the cultural context of the Indigenous community (Boateng, 2011, p. 45-48).

Accordingly, one of the central demands of the Maya Weavers is the implementation of collective intellectual property rights and the recognition of Indigenous communities as rightful authors. It has been one of their main concerns that Western fashion designers who assert individual ownership could claim copyright on Maya designs while the Indigenous communities whose ownership is communal could not (Kedron, 2024).

It must, however, be noted that, the understanding of only an individual as an author within Copyright Law is no longer quite so strict. A group of individuals is certainly able to have their works protected as part of an entrepreneurial collaboration. If, however, the organisation takes place outside the market economy, the current intellectual property system does not offer adequate solutions (Posey and Dutfield, 1996, pp. 83-84). The collective aspect that is incorporated in current IIPPL serves the market interests but not Indigenous Peoples’ needs. Hence, the recognition of communal authorship is understood more as recognition of a group of several individuals where each of them is clearly identifiable. Within Indigenous communities the recognition cannot be assigned to several individuals that simply form a group, but rather lies in the community as whole, that includes the living as well as the descendant. Thus, in this understanding, identification of all contributors is not feasible (Boateng, 2011, p. 36, p. 44, p. 54).

Temporal Limitation. Another key aspect of copyright protection is its temporal limitation. The rationale behind this provision is rooted in the promotion of innovation. After the expiration of protection, the previously protected work enters the public domain and

becomes freely available for use and thus can promote innovation (Paterson and Karjala, 2003, p. 641). Typically, copyright remains in effect for the lifetime of the author plus 50 years after their death (Posey and Dutfield, 1996, p. 83). Within the Berne Convention no exception of time limit is made for the protection of TCEs (Ricketson, 1987, p. 315; Lucas-Schloetter, 2004, p. 267).¹⁴

Considering the characteristic attributes of TCEs the 50 years time limit has already been passed long time ago. Thus, traditional clothing typically forms part of the “public domain” and are not anymore granted protection (Boța-Moisin, 2023, p. 100). The Berne Convention only applies to work that has not been yet in public domain when the Convention has come into force, which TCEs certainly have (WIPO Report, 2010, p. 37). Accordingly, Western fashion designers can legally use traditional clothing that falls within the public domain. Later, we will see that this argument is invoked in cases of fashion appropriation. Further, the temporal limitations contradict with Indigenous Peoples’ understanding of their work (7.2.2). They strongly appreciate their descendant artistic creations and recognise that these have a deep influence on their contemporary creative output (Boateng, 2011, p. 36, p. 42). Thus, to generate effective protection, the time limit for protection for traditional clothing needs to be erased as it contradicts the underlying idea behind TCEs (Zografos, 2010, 47; Posey and Dutfield, 1996, p. 83). These claims usually go hand in hand with the claim of a retroactive protection, meaning that traditional clothing that have technically already been in public domain should be able to be protected again (WIPO Report, 2010, p. 39).

Positive Developments. While at this point it has already become quite evident that copyright in its current form is not the right tool to protect TCEs from misappropriation, still it offers some positive take-aways. Although the underlying idea of IIPL has been safeguarding economic interests, the protection that is granted through copyright law generally is quite broad and not limited to the prevention of economic harm but entails the protection of certain moral rights (Zografos, 2010, p. 48). Moral rights are rights that aim at protecting the authors non-economic interest (Lucas-Schloetter, 2004, p. 298). They focus on safeguarding the author’s personality and the integrity of their work. For instance, Article 6bis of the Berne Convention states that the author of a work is granted the right to claim authorship and the right to speak up against a derogation of the work that could contribute in a bad way to its honour (Zografos,

¹⁴ Article 7(1) Berne Convention referring to the time limit of anonymous or pseudonymous authors is applied to protection of TCEs as well.

2010, p. 48; Paterson and Karjala, 2003, p. 642). This, while it offers valuable insights into how protection mechanisms might begin to address moral harms, does not change the fact that its applicability to TCEs remains inadequate (Zografos, 2010, p. 48; Vézina, 2019, p. 14).

Outcome. To conclude, Copyright Law's focus on innovation combined with the Western perspective that traditional clothing is merely a remnant of the past, often results in the scope of application not even being met. Furthermore, even when the requirements are met, the emphasis on individuality embedded in Western IIPL makes it difficult for Indigenous communities to protect their communal ownership on designs. Lastly, the temporal limitation often stands in contrast to Indigenous understanding of culture. In fact, the Western notion of protection appears, however, to be less realistic than Indigenous conceptions. From the Western perspective, individual ownership as well as the requirement of originality erases the social context and the community's contribution to an individual's work. The Indigenous view, however, acknowledges that innovation is never the result of individual effort, but a collective creation (Boateng, 2011, pp. 47-48.)

6.3.3 Examination of International Trademark Law

Earlier, we introduced a case of fashion appropriation involving Urban Outfitters. The fashion brand was accused of using traditional designs belonging to the Navajo Nation. Suffering from harm, the Navajo Nation did not want to accept that and filed a lawsuit for trademark infringement against Urban Outfitters (*Navajo Nation v. Urban Outfitters, Inc.*, 2013). While, ultimately, the case was settled out of court, the court, in a first step, accepted the claim (Stockton, 2024, p. 112). This certainly highlights Trademark Law as another legal mechanisms within Intellectual Property Law worthy of closer examination. While the case of *Navajo Nation v. Urban Outfitters* is based on regional Trademark Law, however, this analysis focus on the basic common principles of Trademark Law and refers to national jurisdictions only when they serve as particularly illustrative examples.

In principle, Trademark Law is aimed at addressing commercial needs and serves as a tool to distinguish goods from one another in the marketplace. If one thinks of luxury fashion for example, the distinct designs of *Louis Vuitton* and *Burberry* are protected by a trademark (Barrère and Delabuyère, 2011, p. 308; Zografos, 2010, p. 53). The mere recognition of the design creates an immediate association with the company behind it and potential consumers associate the sign with specific knowledge and clear expectations of the product (Barrère and

Delabruyère, 2011). Clearly, the purpose of a trademark is commercial. In the centre of protection is the investment companies had in promoting their products (Paterson and Karjala, 2003, p. 666). Trademark Law was never designed to protect designs primarily used outside commercial contexts, as is often the case with traditional designs of Indigenous Peoples (Pak, 2011, p. 391). Nonetheless, the Navajo Nation's success in its lawsuit against Urban Outfitters offers a measure of hope that Trademark Law may still hold potential for protecting Indigenous clothing against appropriation. However, as we will see, isolated legal victories do not necessarily indicate that the regime is well-suited for safeguarding traditional clothing from misappropriation on a broad spectrum. Structural limitations within the regime undermine its effectiveness. However, still, certain positive insights can be drawn from the Trademark Law.

Paris Convention for the Protection of Industrial Property (1883) (Paris Convention).

For the international dimension of trademark protection, the Paris Convention is particularly relevant as it is the first major international treaty in this field with so far, most countries as member states. Its main objective is to harmonise national laws by establishing a minimum standard of protection among its members. It further offers the possibility to register trademarks not only in one's own country but further in other member states (Daes' Study, 1993 para 134; Pak, 2011, p. 394).

Lack of Requirement of Originality. First, on a positive note, unlike Copyright Law, Trademark Law does not require a threshold of originality. The broad scope of protection of Trademark Law requires only two prerequisites, firstly distinctiveness and secondly graphic representability. Thus, TCEs generally fall under the scope of trademark protection (Zografos, 2010). The requirement of distinctiveness refers to the designs being distinguishable from other products on the market (Barrère and Delabruyère, 2011, p. 308). Evidently, Indigenous Peoples traditional designs are distinctive. It is precisely their distinctiveness to any other product on the market that makes them become a victim of the modern fashion industry. In the case of *Navajo Nation v. Urban Outfitters*, for example, the fashion brand tried to argue that the name "Navajo", was generic and thus, not protected by US Trademark Law. The Court, however, disagreed with that point (Stockton, 2024, p. 106).

This, however, is outweighed when considering the requirement of formal registration that constitutes a central feature of Trademark Law. It is precisely the requirement of registration and its underlying Western principles that ultimately renders Trademark Law being largely unsuitable for Indigenous Peoples on a broad scale (Pak, 2011).

Registration Process and Commercial Use. A trademark, in contrast to copyright, which can exist independently of whether the entitled person is even aware of it, does not arise automatically. In most jurisdictions – with exceptions – a trademark requires an official prior registration as it is designed specifically to function within a market context. If not, a registration is formally needed, the requirement of continued commercial use is commonly stipulated (Pak, 2011, pp. 391-394; Leaffer, 1998). The problem that arises within the process of registration is two sided: *First*, the registration process is complex. Generally, Indigenous communities, however, are known to shy away from elaborated legal processes. This roots in a distrust of lawyers and a general sense of being at odds with Western-style institutions (Pak, 2011, p. 386). While the international community has made significant efforts to simplify the international trademark registration process, no comparable efforts have been undertaken to accommodate or address the specific needs of Indigenous Peoples (Pak, 2011, p. 395). *Second*, naturally a complex process comes with high costs. Going through the trademark registration process requires significant financial resources. Even international companies often struggle using trademarks due to the complexity and high costs involved (Leaffer, 1998, p. 18). Besides, the requirement of commercial use, too, is not suitable for Indigenous Peoples. They do not necessarily engage in commercial activities, neither do they necessarily want to do so (Pak, 2011, p. 391).

Economic Focus. Moreover, the requirements must be considered in the light of the Indigenous worldview. While it is possible for Indigenous communities to register a collective trademark (Daes, 1993, para. 146), Trademark Law, still, does not fully reflect Indigenous Peoples' worldviews. Instead, it remains rooted in a Western understanding of Intellectual Property Rights. This was vividly illustrated by the Law No. 20 (2000) in Panama that was introduced with the aim of preventing the misappropriation of the Indigenous Peoples traditional clothing, specifically, the *mola* of the Kuna people.¹⁵ Although it aimed to protect Indigenous Peoples' traditional clothing, it was heavily criticised. The reason for the criticism was that the law was grounded in economic interests, for example, it required a formal registration and commercial use. However, Indigenous Peoples' actual need for protection lies in preventing commercial activities of others, and not necessarily in participating in commercial activities with their clothing themselves (Pak, 2011, pp. 389-391). The law,

¹⁵ Full title: Law No. 20 of 26 June 2000 on the Special Intellectual Property Regime with Respect to the Collective Rights of Indigenous Peoples to the Protection and Defense of their Cultural Identity and Traditional Knowledge. 2000.

however, forced the *Kuna* people into engaging in commercial activities to prevent appropriation. This may prevent their economic harm but could still create moral as well as political harm. Further, it has an impact on their self-determination as they cannot decide freely if and to what extent they want to be commercially active. What they wanted, was solely that non-Indigenous peoples stop engaging in commercial activities with their clothing.

Positive Developments. Still, certain positive developments within Trademark Law have emerged over the years that may offer potential benefits for their protection. It is the possibility for third parties to request the cancellation of a trademark registration if valid grounds for opposition exist. This approach could, in principle, be a useful mechanism for Indigenous Peoples to oppose of Western designers registering trademarks based on TCEs. However, under the Paris Convention, cancellation proceedings are limited: the only recognised ground for cancellation is non-use of the mark, typically defined as a period of non-use ranging from three to five years, depending on the country (Article 5(C)(1) Paris Convention; Pak, 2011, pp. 384-394). Another principle of the registration system is that a trademark will not be registered if it is contrary to morality or public policy – an idea that is also reflected in the Paris Convention (Article 6quinquies (B)(3) Paris Convention; Zografos, 2010, p. 58). Of particular note in this context is the implementation of the *New Zealand Trade Marks Act (2002)*, which specifically uses the protections of Trademark Law to prevent non-Indigenous businesses from registering trademarks that resemble symbols from Maori culture or involve commercial use that is considered morally harmful from a Maori perspective (Pak, 2011, p. 387).

Conclusively, it certainly is a positive development that in the case of *Navajo Nation v. Urban Outfitters*, it was established that the Navajo Nation had registered several trademarks and further, that the requirement of commercial use was fulfilled. Importantly, however, one needs to keep in mind that the Navajo Nation is one of the largest Indigenous communities in the United States, with a vast territory and widespread recognition, and has furthermore engaged in commercial activities for years at this point (Stockton, 2024, p. 103). The comparison to the case of the *Kuna* people illustrates that Trademark Law does not work for all Indigenous communities. The structures within the regime are regarded unsuitable to meet Indigenous Peoples need for protection against misappropriation on a broad scale. Either they are unable to make use of the protection in the first place because the barriers to registration are too high, or they choose not to, because they do not wish to engage in commercial activities.

Outcome. To conclude, the complexities of Trademark Law are in the way a well-suited protection of Indigenous Peoples. The case of Navajo Nation v. Urban Outfitters has made clear that the work does not even end once registration and commercial use have been achieved. Rather, that is exactly where the hard work only begins. One must continuously protect the trademark against unlawful use – which, of course, results in further legal processes and requires more financial resources. The case has shown fashion brands’ willingness to engage in legal proceedings against Indigenous communities (Stockton, 2024, pp. 112-113), even though the wrongful appropriation was more than obvious.

6.3.4 Conclusion

Although in theory IIPPL aims to prevent the unlawful taking of another’s creative work, cases involving Indigenous Peoples’ designs cannot be effectively prevented through it. Most fundamentally, it becomes clear that IIPPL is an exercise of power (Boateng, 2011, p. 14). In cases of fashion appropriation, we are always dealing with a power imbalance. This power imbalance shows different forms and can even be embedded in the law itself (Ziff and Rao, 1997, p. 5). In this case, the power imbalance lies in the fact that IIPPL does not treat all objects equally. In fact, in one way or another, it results in the exclusion of traditional clothing by Indigenous Peoples (Boateng, 2011, p. 14). Thus, IIPPL is indirect discriminatory against Indigenous Peoples. Evidently, much work remains to be done to adapt IIPPL so that Indigenous Peoples can benefit from it equally. Due to colonialism, the Western form of IIPPL has been imposed even in countries where TCEs are widespread (Boateng, 2011, p. 10). It can be assumed that if these countries had been allowed to develop their own systems of protection mechanism, more progress would have been made by now.

6.4 International Human Rights Law

6.4.1 Introduction

While ICHL and IIPL have proven inadequate in protecting the rights of Indigenous Peoples in cases of fashion appropriation, the final legal framework to consider is International Human Rights Law (IHRL). IHRL, in its modern understanding, is regarded as a tool to combat “legal lawlessness”. Its purpose is, to critically analyse the existing law to prevent “that crimes are committed with the authorisation of law” (Piechowiak, 1999, p. 3). This is exactly what we are facing in cases of fashion appropriation. Technically, laws exist to prevent stealing intellectual creations; they are, however, not working for the protection of Indigenous Peoples’ creations. Thus, to overcome this discrimination, it is worth to take a closer look at the rights enshrined within IHRL and their capacity to safeguard Intellectual Property Rights of Indigenous Peoples. Admittedly, the connection between IHRL and fashion appropriation is not immediately obvious. Fashion designers are not typically associated with obligations under IHRL. Therefore, as a first step, a brief outline on how IHRL could theoretically impact cases of fashion appropriation shall help to reconcile these two fields.

IHRL is grounded in international treaties. These treaties obligate signatory states to guarantee certain rights to individuals residing within their territory. Accordingly, IHRL involves two primary actors: the state, as duty-bearers, and the human-beings, as right-holders. By nature, any legal system requires a third component – and authority to intervene in cases of non-compliance. In the context of IHRL, this role is fulfilled by treaty bodies. These treaty bodies function, in a sense, as “judges“ of IHRL: they monitor compliance with the treaties and may publish General Comments that serve as guidance to interpret the provisions for the states (Wheatley, 2018, pp. 10-11; Lesch and Rainers, 2023, pp. 378-401). Over time, it has even been established that, under certain conditions, individuals can submit complaints to a treaty body if a signatory state fails to meet its obligations under the conventions (Cantú Rivera, 2018; GC 17, para 25-29). Thus, in theory, if IHRL were to recognise that fashion designers are not permitted to use traditional designs of Indigenous Peoples, the signatory states would be required to implement this norm into their national legal systems. If they fail to do so, Indigenous Peoples whose designs have been appropriated could file a complaint with the relevant treaty body. The treaty body would then call on the state to incorporate and enforce the recognised right in its national legal framework.

6.4.2 *Examination of International Human Rights Law*

To begin with, within IHRL, the protection of traditional clothing grounded in the recognition of “cultural rights” as it constitutes a form of cultural expression (Alves, 2025, Chapter 4). Generally, cultural rights aim to allow people to practice their culture without discrimination (Bennoune, 2016, para. 9). However, an Intellectual Property Rights dimension can be found within the scope of cultural rights. It is precisely this intersection between cultural rights and IPR that is relevant for cases of fashion appropriation. For this analysis, we focus on the norms we consider to be most relevant, namely, Article 15(1)(c) of the ICESCR and Article 31 of the UNDRIP. In the following, these rights will be assessed in terms of their capacity to provide Indigenous Peoples with a tool to protect themselves against fashion appropriation.

Article. 15(1)(c) ICESCR. First, the ICESCR, as a universal IHRL document, applies to all people. It includes Indigenous Peoples; however, they are not granted a special role within this convention (Oguamanam, 2014, p. 271). Within the ICESCR, Article 15 grants a cultural right to people (Gitiri, 2015, p. 2). The IPR dimension within it is taken up by Article 15(1)(c) ICESCR. It stipulates the material and moral interests in connection with cultural expressions. With its *General Comment No. 17* (GC17, 2006), the CESCR, the Treaty Body that monitors the implementation of the ICESCR, helps to get a better understanding on what is meant by this provision.

Firstly, the GC17 makes clear that moral interest is to be understood the same as the moral rights that we have elaborated on in the section of Copyright Law (6.3.2). It grants the author of the product the right to object to any distortion, as well as the right to be recognised as the author. Further, material interest is to be understood as the author’s right to get economic compensation out of the product (GC17, 2006, para. 12). Thus, the moral as well as the economic harm resulting from fashion appropriation seem to be countered with this norm. Additionally, states have the duty to respect, protect and fulfil the rights enshrined in the ICESCR. The duty to protect means, that states must take actions to prevent that the granted right is being infringed by third parties (GC17, 2006, para. 30-34). Drawing on this, it becomes clear that cases of fashion appropriation of Indigenous Peoples’ traditional clothing, fall within the scope of this norm (Alves, 2025, Chapter 4). Moreover, keeping in mind what we have established so far, one point should however stand out here: it is the way the right is formulated, specifically, the reference to an “author”. While this gives the impression that individuals only can be granted with those rights, in the GC17 it is made clear, that the right can also be enjoyed

by groups of individuals or by communities (GC 17, 2006, para. 8). Furthermore, it is even said that to adequately protect this right for Indigenous Peoples, it might need the implementation of a form of collective authorship (GC 17, 2006, para. 32).

From this, it appears that IHRL has addressed precisely the topic under discussion. The issue with this regime, however, does not lie in the recognition of the right itself, but rather in how Indigenous Peoples can exercise it (Alves, 2025, Chapter 4). There is a crucial distinction between merely possessing a right and having a tool to enforce the right. First, the possibility of issuing complaints due to non-compliance with rights based in the ICESCR is limited. Individuals can only raise complaints if the state has signed the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (2008). Furthermore, the obligation arising from the ICESCR is formulated only in relative terms. States are merely required to work towards realisation of the right and to make progress regarding its realisation, but not to ensure its immediate and full implementation (Article 2(1) ICESCR). Lastly, and most importantly, the collective aspect of Indigenous communities is not well incorporated in the complaint mechanism either. The ICESCR allows communications from groups of identifiable individuals. This understanding of a group of individuals, however, still does not reflect Indigenous Peoples' understanding of a group and its communal ownership (Alves, 2025, Chapter 4).

Thus, even though the convention overcomes the individualistic understanding of right in its substantive law, the procedural law of the convention remains individualistic and ultimately prevents effective protection of Indigenous Peoples Intellectual Property Rights on their traditional clothing.

Article 31 UNDRIP. In contrast to the ICESCR, the UNDRIP targets specifically Indigenous Peoples. Thus, it recognises Indigenous Peoples as distinct legal subjects within the general populations (Barnabas, 2017). Second, within its Article 31(1) it becomes clear that the UNDRIP entails an IPR dimension. Its intellectual property dimension is undoubtedly understood as a collective right. This because Article 31 UNDRIP needs to be read in conjunction with the right to self-determination, a fundamental, collective right that is enshrined in Article 3 UNDRIP. Thus, Indigenous Peoples' right to control and dispose of their own cultural expressions is an integral part of their broader collective right to self-determination (Barelli, 2014, pp. 11-15). While this moving away from a solely individual understanding of rights, clearly represents a step forward, Indigenous Peoples nonetheless face

a similar challenge to what we have outlined above in relation to the ICESCR. It is, the soft law character of the UNDRIP that comes along with a lack of enforceability of the rights enshrined (Alves, 2025).

The UNDRIP is a soft law instrument and thus not legally binding for its signatory states. Further, unlike the ICESCR, the UNDRIP is not formally monitored by any permanent UN body and its implementation depends on the willingness of the states (Alves, 2025, Chapter 4). As a logical consequence, it does not offer enforcement mechanisms to Indigenous Peoples either (Barelli, 2014, pp. 5-7).

Positive Developments. Integrating Indigenous Peoples' IPR into the human rights framework affords access to its distinct normative features. One such benefit, for example, is that these IPR are not subject to any time limitations (GC17, para. 34). Recalling what we have outlined in the section of Copyright Law, IPR protection without a time-limit is a fundamental need of Indigenous Peoples. Further, fashion appropriation, is in fact, predominantly carried out by the private sector. While IHRL cannot directly oblige fashion designers to comply, GC17 has addressed this issue and at least emphasised that the private sector is urged to respect the right (GC17, para. 55). Lastly, considering the UNDRIP, although it is solely a soft-law document, it still can have impact on overall standards of International Law, and is not to be considered as being solely "non-law" (Barelli, 2014, p. 5). The UNDRIP, not only offers a distinct role to Indigenous Peoples within International Law and acknowledges the collective dimension of IPR, but moreover Indigenous Peoples were given a prominent role in the whole discussion process (Barelli, 2014, p. 7).

6.4.3 Conclusion

To conclude, the lack of enforceability means that neither the UNDRIP nor the ICESCR provides Indigenous Peoples with a concrete tool to claim their rights over traditional clothing. While the ICESCR technically allows an enforcement tool for individuals, due to the underlying Western individual understanding of it, it does not properly work for Indigenous Peoples. The UNDRIP does not offer any enforcement tools to individuals, and thus, cases of fashion appropriation cannot be evoked within it. Nonetheless IHRL taken steps in the right direction.

Now, that we have established that the three regimes, ICHRL, IIPL and IHRL are unsuitable to protect Indigenous Peoples traditional clothing from cultural appropriation, we turn to the most recent international project that discusses the exact issue.

6.5 IGC Draft Articles for the Protection of Traditional Cultural Expressions

6.5.1 Introduction

The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established in 2000 and is a forum that operates under the World Intellectual Property Organization (WIPO). Its main goal is to discuss and, most importantly, find an international legal solution to adequately protect IPR related to TCEs, TK, and Genetic Resources (GR) (WIPO, 2016). The *Treaty on the Protection of Intellectual Property, Genetic Resources and Associated TK* (2024) has been in force since May 2024. It refers to patents and requires applicants to disclose the group of Indigenous Peoples that provided the TK. Moreover, it is the first WIPO treaty to address the IPR dimension of TK and to include provisions specifically for Indigenous Peoples (Traditional Knowledge, 2024). Undoubtedly, this is a positive step for Indigenous Peoples. However, the scope of the treaty remains limited – most notably, it does not apply to TCEs. Thus, to ensure protection of TCEs against misappropriation, another treaty is currently being discussed within the IGC. So far, only *Draft Articles for the Protection of Traditional Cultural Expressions* (Draft Articles) (2025) exist. For this analysis, we will refer to the most recent version of the Draft Articles published in June 2025, agreed upon during the Fifty-First Session of the IGC, held from May 30 to June 5, 2025. When reading the Draft Articles, it is important to keep in mind that they do not yet reflect the finalised text. In many cases, multiple alternatives are presented, with the aim of merging differing opinions into a single proposal.

6.5.2 Examination of the *Sui Generis* Approach

At first glance, simply the creation of a dedicated forum to address these issues gives the impression that the international community has recognised the urgency to act and is now committed to finding solutions. The scope of the treaty clearly encompasses cases of fashion appropriation of Indigenous Peoples traditional clothing. So far, all suggested formulations of Draft Article 2, which refers to the “objectives”, refer – albeit using different language – to such instances. Upon closer examination, however, this approach falls short of offering a meaningful solution.

First, on a positive note, the aim is to move away from the strong focus solely on Intellectual Property Rights (IPR) and to develop a *sui generis* approach. The idea is to pursue a broad range of objectives, most importantly non-IPR-specific goals. In particular, Indigenous Peoples involved in the process strongly advocate for this shift, as they support a human rights-based approach, arguing that it better reflects their values, needs, and rights (Alves, 2025, Chapter 5). According to the points outlined above, this appears to be a positive development. The Western individualistic principles that strongly focus on economic profit within IIPR have proven to be an obstacle to the adequate protection for TCEs. Integrating IPR into the framework of IHRL carries several positive implications. However, the dominant role of member states within the process hinders the effective integration of Indigenous worldviews and consequently, the development of an effective protection mechanism (Alves, 2025, Chapter 5).

Exclusion of Indigenous Peoples. So far, we have established that Indigenous Peoples' self-determination and their distinct status within states are fundamental aspects of their identity. However, the IGC fails to meaningfully acknowledge this. The Draft Provisions recognise Indigenous Peoples as rights-holders, referred to as "beneficiaries" (Article 4 Draft Articles). However, the language remains vague, and it is still unclear what specific rights Indigenous Peoples will be granted. Further, the way Indigenous Peoples are permitted to participate in the negotiations is widely viewed as insufficient (Alves, 2025, Chapter 5). Indigenous Peoples are granted participation through the Indigenous Caucus during IGC sessions and can take part in meetings, share their views, and have their voices heard in the decision-making process (WIPO, 2016). However, this still constitutes only observer status. As observers, they can suggest changes to the proposed texts, but such suggestions are incorporated only if supported by member states (IWGIA, 2019). The mere fact that Indigenous Peoples are not granted decision-making power, with authority resting almost entirely in the hands of nation-states, raises serious questions about the actual value and effectiveness of their participation. Indigenous Peoples naturally advocate for a stronger role in these discussions, and indeed, meaningful participation is essential to integrating their worldviews into the process (Alves, 2025, Chapter 5).

Domestic Enforcement. Lastly, the enforcement of the rights enshrined in the Draft Articles remains primarily the responsibility of domestic institutions. However, how this enforcement will function in practice remains unclear (Article 6 Draft Articles) which leaves

considerable discretion to states, many of which may lack the political will, legal infrastructure, or resources to enforce these rights effectively. The fact that the Draft Articles are developed primarily by states, with only limited participation by Indigenous Peoples, reflects the ongoing reluctance of some states to fully commit to meaningful implementation.

6.5.3 Conclusion

To conclude, although this forum was established to address this specific issue, the ongoing exclusion of Indigenous Peoples, along with the uncertainty surrounding enforcement, gives the impression that this legal instrument may also prove unsuitable for effectively protecting Indigenous Peoples from fashion appropriation. As we have established, self-determination is the foundation of Indigenous Peoples' rights, and their exclusion from the drafting process significantly undermines this right.

6.6 Western Legal Mechanisms: Not the Perfect Fit

One thing is for certain: action must be taken to address cultural appropriation in the fashion industry. The harm it causes is multifaceted. It affects Indigenous Peoples' self-determination, undermines their political and economic power, and – not least – it is experienced as morally harmful, based to Indigenous Peoples' understandings of cultural identity.

First and foremost, we do not wish to deny that there have been developments at the international legal level. However, at the time of completing this thesis, no final text has been agreed upon, and negotiations are still ongoing. While the proposed WIPO treaty shows promising potential, it has also been subject to scholarly criticism. I thus refrain from either endorsing or rejecting the treaty's effectiveness before its final version is adopted. However, at this very moment, the treaty does not provide an effective legal mechanism for Indigenous Peoples to safeguard their traditional clothing. Existing legal frameworks, though well-established and in force, appear inadequate in addressing this issue either. The scope of ICHRL is primarily conservational in nature. IIPL, while providing some recognition of moral rights, predominantly prioritises economic interests. Although IHRL has made notable efforts, its underlying structure and understanding of rights fail to effectively accommodate the specific needs of Indigenous Peoples. The general application of Western legal mechanisms to Indigenous Peoples that exclude them from their benefits is a key factor that reinforces the already existing power imbalance. This imbalance, rooted in colonial history and ongoing

economic inequality, is not only maintained but further exacerbated through such structural exclusions.

Lastly and most importantly, the application of law is always inherently tied to issues of access to resources and legal support. Regardless of how the law itself is formulated or how helpful it might be, the law, by its very nature, is unable to address systemic inequalities (Boța-Moisin, 2023, p. 102). Hence, we conclude that access to justice generally remains a significant barrier for Indigenous communities. Offering financial support alone cannot solve this issue either. It has been outlined that a deep-rooted mistrust in Western institution often hinders Indigenous Peoples from making use of Western legal mechanisms. Naturally, this mistrust is only reinforced when Indigenous Peoples' voices are largely excluded from the very negotiations in which protection mechanisms are developed. Unfortunately, as we have seen, even the most recent initiatives demonstrate that Indigenous Peoples' participation in the negotiation process remains restricted. This exclusion certainly undermines their right to self-determination. Once again, decisions are being made over their heads; even on a matter that is intended to confront and challenge precisely that kind of behaviour. The irony of this is difficult to ignore.

7 A Positive Outlook: From Limitations to Possibilities

7.1 Empowering Alternatives: The Power of an Extra-Legal Tool in Practice

Nonetheless, our intention is not to paint an overly pessimistic picture. On the contrary, we aim to offer a constructive outlook. Given the challenges outlined throughout the thesis, it seems increasingly necessary to explore alternative approaches beyond legal frameworks to find meaningful and lasting solutions.

One such approach is illustrated by the “Oma Case”, which led to the development of a comprehensive online collection of images and information on the traditional clothing of the Oma People, known as the Oma Traditional Textile Design Database.¹⁶ The evolution of the case and its outcome will serve as a best-practice example for addressing and overcoming issues of fashion appropriation. Therefore, in the following chapter, we will draw on the key elements of the Oma Case, with the aims of *first*, offering a conclusion of the relevant findings

¹⁶ To see the database, see TAEC. (n.d.). Oma Traditional Textile Design Database. Retrieved June 22, 2025, from <https://oma.traditionaldesigns.la>. Access to the full content is limited and requires login credentials.

of the thesis, and *second*, demonstrating how this extra-legal approach can serve as a potential solution to the problems previously outlined.

At the outset, however, I would like to emphasise that this best-practice example should not be regarded as a panacea. Rather, it is intended to showcase how an extra-legal tool can be used to prevent Indigenous Peoples from the potential harms of misappropriation in the fashion industry without having to navigate the barriers of Western legal systems. This solution, referred to as a *sui generis* protection mechanism, however, does not aim to entirely prevent cases of cultural appropriation in the fashion industry from taking place. Instead, it aims to establish a framework that enables meaningful partnerships between the fashion industry and Indigenous communities (Boğa-Moisin, 2023, p. 99). Thus, we wish to clearly emphasise that we still advocate for the legal recognition and incorporation of effective tools that address the needs of Indigenous Peoples. Enshrining such mechanisms in law is essential for establishing clear responsibility and accountability.

7.2 Presentation of the “Oma Case”

7.2.1 Object of Appropriation: The Oma Peoples’ of Nanam Traditional Clothing

To summarise briefly, when seeking definitions and examining the development of the legal status of Indigenous Peoples, we have established that their distinctiveness compared with the rest of the state’s population is a fundamental characteristic. This distinctiveness typically stems from their deep connection to their land, natural resources, and their way of living. From this, the inherent need for a right to self-determination emerges. In short, it is the right to speak for themselves, rather than being subjected to a Western state institution. This right, however, covers various aspects of Indigenous Peoples’ lives, including the right to define one’s own identity. As we have outlined, the sense of identity within Indigenous communities differs from Western concepts. Identity within Indigenous communities is largely rooted in the sense of belonging to a community. Particularly relevant to the topic at hand is that this collective identity is often expressed through their traditional attire. Indigenous Peoples’ traditional clothing, thus, is more than just aesthetic; it carries deep symbolism and holds great cultural significance.

The Indigenous Peoples who have been victim of appropriation in the Oma Case are the Oma People of Nanam village. The Oma People are a group of about 2,800 people who live spread across eight villages; one of these villages is the Nanam village. It is in the remote

highlands of northern Laos with a population of 505 people. As is typical of Indigenous communities, the Oma People of Nanam maintain a way of life distinct from the modern, Western lifestyle. They primarily subsist on rice cultivation and animal husbandry (Boța-Moisin and Gujadhur, 2021, p. 5). Moreover, they have a strong sense of their cultural identity that is closely connected to their traditional attire. When asked in interviews: “What makes you Oma?”, the first answer to the question was: “The wearing of our handmade traditional clothing.” (Boța-Moisin and Gujadhur, 2021, p. 19).

Based on what has been outlined above, however, I hesitate to describe the traditional clothing of the Oma People. Given my limited knowledge, I could only offer a simplified description. This would not do justice to the complexity of craftsmanship and symbolism behind it and might even be perceived as morally harmful. However, as we know, a lack of knowledge does not serve as an excuse. Therefore, I must note that it is one of the key attributes of this best-practice example that sufficient background information and images of the Oma People’s traditional clothing are not freely available. Some images can be found in a report on the project (Boța-Moisin and Gujadhur, 2021), but I have deliberately chosen to avoid a general description of the clothing based on these images. What should be clear is that, for the Oma People, traditional clothing is a fundamental part of their identity, and consequently, of their self-determination.

7.2.2 *The Act of Injury: Max Mara’s Spring/Summer Collection 2019*

Good things can often come from bad situations. Unfortunately, this best-practice example is one such thing as it was triggered by an act of injury in the first place. It was the Italian luxury fashion house *Max Mara* that appropriated designs belonging to the Oma People. *Max Mara* is a global fashion company that operates in 105 countries, employs more than 5,000 people, and owns 10 different brands worldwide (IBM, 2022). In their Spring/Summer 2019 Collection *Max Mara* integrated clothing decorated with patterns that appeared identical to the traditional embroidery and designs of the Oma community.¹⁷ When informed of the situation, the Oma People of Nanam confirmed that they had no knowledge of the use of their designs and that no permission had been requested. *Max Mara*, however, argued that the designs falls

¹⁷ To see images of the collection, see Traditional Arts and Ethnology Centre. (2019, April 10). *Max Mara vs Laos’ Oma ethnic group: Fashion chain facing claims of textile plagiarism, design theft. The Laotian Times.* <https://shorturl.at/qtzFM>

within the public domain and can be used without consultation (Boța-Moisin and Gujadhur, 2021, p. 4)

7.2.3 Harm Caused to Oma People of Nanam

Based on what has been demonstrated throughout this thesis, it is not surprising that this did not leave the Oma People unaffected. On the contrary, it has clearly shown that both moral and economic harm were inflicted upon the Oma People. The political harm that we described is not directly felt by those it affects but rather becomes structurally apparent over time and through the years.

A major criticism raised by Oma representatives when examining images of the *Max Mara* replicas was that they were an inaccurate reproduction of their traditional designs. Specifically, they critiqued the incorrect placement of the motifs. Traditionally and thus, accurately, the respective motifs are used on women's headdresses, but *Max Mara* placed these motifs near the feet of the dresses. This misplacement distorts the cultural meaning and thus, created *internal moral harm* to the Oma People. Additionally, the Oma People of Nanam expressed their anger since the clothing was sold for hundreds of dollars and none of these financial benefits were shared with them, thus causing *economic harm* (Boța-Moisin and Gujadhur, 2021, p. 19).

7.3 Lessons Learned: Six Core Values for Combating Fashion Appropriation

Luckily, the Oma Case not only resulted in harm but also led to the development of a new approach aimed at preventing such harm from recurring. What makes this method unique is that it does not rely on Western legal mechanisms; instead, an extra-legal tool was created. Every step of the project – from its initiation to its completion – was considered relevant. From this process, we derive six values that must be acknowledged when seeking to develop tools that address cases of fashion appropriation.

7.3.1 The Value of a Cross-Disciplinary Approach

When outlining the failures of the different legal regimes, the thesis has made clear that the rigid thinking within separate disciplines does not meet the needs of Indigenous Peoples. As a matter of fact, only a cross-disciplinary approach could meet Indigenous Peoples' needs. From the Oma Case, we will learn how such a cross-disciplinary approach with different stakeholders and knowledge skills involved is valuable.

Cultural Heritage Work. First, cases of fashion appropriation are at a high risk of being overlooked. Typically, Indigenous communities will not be constantly searching for instances where their traditional clothing might be appropriated by Western fashion brands. Logically, then, in a first step, someone must uncover a case of fashion appropriation. And while International Cultural Heritage Law itself may not seem directly helpful, the work carried out by cultural heritage institutions – whose mission is to protect and preserve culture – can be important in this process. These institutions possess cultural knowledge, engage in cross-cultural work, and have proven themselves to be valuable actors in such cases. The detection of the theft by *Max Mara* was made by an employee of the Traditional Arts and Ethnology Centre of Laos (TAEC), a cultural heritage institute based in Laos. Furthermore, it initiated and coordinated the project and took on the role of mediator between the Oma People and other stakeholders.

Legal and Technical Expertise. Furthermore, legal as well as technical expertise has proven to be valuable in the process. The Cultural Intellectual Property Rights Initiative (CIPRI), a global advocacy platform, contributed with both its legal and campaigning knowledge. Additionally, TAEC worked closely with a web developer and a video and photography team to ensure that the needed technical expertise was present.

Indigenous Peoples' Knowledge and Experience. Lastly and most importantly, the knowledge and experience of Indigenous Peoples were essential building up the knowledge considered valuable to the process (Boța-Moisin and Gujadhur, 2021, p. 11).

7.3.2 *The Value of a Self-Reflection Process*

I may recall that the Artistic Director of *Chanel* “fell in love with India”. I may further recall that there is still the idea of “cultural appreciation” in the fashion industry. While our analysis above has shown that cultural appreciation as a concept simply does not exist in the presence of a power imbalance, the idea still circulates within the fashion industry. In many cases the root of the problem lies in a lack of awareness of the issue. We have learned that ICHL’s symbolic power could, in theory, benefit Indigenous Peoples to raise awareness on the matter, but its application to traditional clothing is limited. However, awareness building is crucial for initiating a process of self-reflection in educating designers and consumers on how to overcome fashion appropriation (Vézina, 2019, pp. 11-15).

Social Media Awareness Campaigns. We touched upon micro-trends on social media and how they contribute to cultural appropriation. While social media has shown its drawbacks, it has also proven to be an effective tool for quickly spreading awareness and reaching broad audiences. Awareness campaigns shared via social-media platforms can serve as a first step toward raising consciousness within the fashion industry.

Right, after the appropriation by *Max Mara* had been detected, TAEC made a dedicated effort to confront the company. They sent numerous emails and requested explanations, but *Max Mara* did not reply. Eventually, TAEC launched an online petition calling on *Max Mara* to remove the Oma designs.¹⁸ It was only after this that *Max Mara* finally responded. Technically, this alone demonstrates the power that public pressure generated through campaigns can have. However, there is another worth-mentioning outcome of the Oma Case: the creation of the #NotPublicDomain informative campaign. The campaign was communicated on social media platforms. It was launched as part of the Fashion Revolution Week and aimed to raising awareness (Boța-Moisin, 2023, p. 101).¹⁹

7.3.3 The Value of Acquiring In-Depth Knowledge

Earlier, we learned, that a lack of knowledge is not a valid excuse for engaging in cultural appropriation. Naturally, simply being aware that cultural appropriation as a concept exists, is far from sufficient. An additional and crucial step for designers is acquiring extensive knowledge about the respective Indigenous community and its culture. It is not sufficient to gain an understanding of the cultural significance of traditional clothing; it is also important to gain a deeper understanding of the respective Indigenous community. While some similarities may exist between Indigenous communities, we emphasise that each Indigenous community is unique, with their own traditions, values and internal structures. Thus, it is regarded equally important to get an understanding of the respective Indigenous community and become familiar with relationships within it (WIPO Consultation Draft, 2023, p. 3).

¹⁸ To view the petition, see Stop Selling Plagiarized Ethnic Oma Designs (n.d.). <https://www.change.org/p/luigi-maramotti-chairman-of-max-mara-stop-selling-plagiarized-ethnic-oma-designs>

¹⁹ Fashion Revolution is an NGO that was founded in 2014 after the collapse of the Rana Plaza garment factory. This tragedy resulted in hundreds of deaths and injury of workers. Fashion Revolution set up an online campaign based on the hashtag #WhoMadeMyClothes. The online campaign should ensure that the disaster would not be swept under the rug. Through a powerful online awareness campaign, the hashtag became the number one global trend on Twitter and has since received over 100 million impressions. The initiative has achieved significant success and demonstrates the impact that social media awareness campaigns can have. Such campaigns play a vital role in shedding light on problematic practices and thus, encouraging accountability within the fashion industry (Timmerman et al., n.d.).

Research, Trainings and Standardisation. One general suggestion on this matter is that fashion companies should be conducting thorough research on the issue and possibly even integrate it into the design and production process. Another step fashion companies could take is educating their employees by offering specialised in-house training sessions. Moreover, the Western fashion industry, as a community, should start adopting codes of ethics, norms, and guidelines to encourage designers to engage responsibly with Indigenous cultures (Vézina, 2019, p. 15). This could even involve the implementation of a cultural significance due diligence process. Such process would require to proactively investigate whether the cultural elements they plan to use hold particular significance for specific Indigenous communities and to adapt their use accordingly. All these measures can help designers develop a deeper understanding of the issue and minimise or even prevent harm to Indigenous Peoples (WIPO Consultation Draft, 2024, p. 2).

In many cases, fashion companies may not even know where to start. A helpful and needed resource is a tool that enables and facilitates collaborations between fashion brands and Indigenous communities and, at the same time, contains all information essential when incorporating traditional designs into Western fashion (Boța-Moisin, 2023, p. 104). The Oma Case has shown how an online database can provide a solution.

Digital Library. The Oma Traditional Textile Design Database serves as a digital library and a look-book. The idea was to create an extensive collection that includes all relevant information about the designs, motifs, and their cultural symbolism as well as the production methods and information about the cultural owners. This database allows designers access to all the information that helps prevent misrepresentation or uses not approved by the Oma People (Boța-Moisin and Gujadhur, 2021, p. 14). For example, the database showcases types of clothing worn by women, men, and children and when a clothing type is selected an audio recording of the name of the textile in the Oma People's language can be played, as well as extensive information is provided (Boța-Moisin and Gujadhur, 2021, p. 18).

While the Oma Traditional Textile Design Database may serve as a model project, it is important to proceed with caution when creating such digital libraries. Efforts to improve protection can, if not handled sensitively, unintentionally cause further harm. Pergantis and Zois (2022, p. 44) analyse the risks of a digital library in the context of the Indian Traditional Knowledge Digital Library (TKDL). Their insights, however, are equally relevant here and illustrate the broader challenges of digitizing TCEs. Particular attention must be paid to

avoiding violations of existing copyrights on traditional designs during the process of compiling and digitalizing the database. Additionally, since access is often strictly limited, care must be taken to ensure that this does not result in the exclusion of those who are, in fact, the rightful owners of the designs. For example, if the database remains active for many years and the internal structure of the respective Indigenous groups changes over time, there is a risk that some members could be excluded in the long term, despite their legitimate connection to it. Moreover, the digitalization of sensitive cultural data always carries the risk of cyberattacks, which could lead to the unauthorized spread of the designs. A database that centralises extensive information on traditional clothing becomes a highly valuable resource. If not managed with the necessary sensitivity, there is a serious danger that elements of it could unintentionally enter the public domain.

7.3.4 *The Value of a Fair Agreement*

We have established that contestation by Indigenous Peoples is not a necessary precondition to condemn an act of fashion appropriation, as doing so would unfairly shift the burden of responsibility onto the victims. At the same time, we recognise that obtaining consent in practice is often complex and challenging. I may recall the case of the Australian Indigenous artist who sold his copyright, or the public backlash after the Met Gala 2018. Nonetheless, seeking consent from Indigenous communities is a non-negotiable requirement for anyone wishing to incorporate their design. Thus, generally, it is highly recommended to reach out and establish an agreement on the terms of use with the original owners when using Indigenous Peoples' designs within the modern fashion industry (WIPO Consultation Draft, 2024, p. 5). The crux of the matter lies in the details: how consent is obtained, who is consulted, and whether the process respects the Indigenous communities' internal structure, rules and values.

Building Trust. Notably, building relationships and trust between negotiating parties is seen as a fundamental part of the process; this can take time and resources which the fashion company needs to accept (WIPO Consultations Draft, 2024, p. 4). A lot of time and effort needs to be made for making sure that the Oma People genuinely wish to engage in this project. The Oma cultural context was present in every step of the project (Boța-Moisin and Gujadhur, 2021, p. 13). Discussions within the community took place based on customary rules of decision-making. In coordination with the village chief, a series of consultations were organised over several days with different groups within the community. These separate meetings created space for open dialogue and helped reveal how various parts of the community may hold

different perspectives on the project (Boța-Moisin and Gujadhur, 2021, p. 12). Furthermore, the involved stakeholders took up extensive consultation sessions with the Oma People. They introduced the questions of risk and consent in general, and first verbal consent was obtained from different groups within the community to ensure general support (Boța-Moisin and Gujadhur, 2021, p. 13).

Moreover, it has been broadly recommended that any agreement with Indigenous Peoples must follow the principle of Free, Prior, and Informed Consent (FPIC), meaning that it must be ensured that the consent was given freely, properly informed before any act of appropriating takes place (WIPO Consultation Draft, 2024, p. 5). Recalling the relevance of moral rights, it has been established that not only consent on how the designs are used, but rules on acknowledgment and attribution to the relevant Indigenous community should be agreed on in advance (WIPO Consultation Draft, 2024, p. 6). Taking up these issues, the Oma Textile Database serves not only as an information resource but also as a legal negotiator.

3Cs Rule: Consent, Credit, and Compensations. First, the database is not freely accessible to the public; access is restricted and only granted following an agreement with the Oma People. In this context, the “3Cs Rule” is referenced: Consent, Credit, and Compensation. To go beyond the homepage, which only contains information about the project and a login page, fashion companies must first get in touch with the Oma People and must obtain FPIC. The database, thus, serves as a channel to initiate the first contact with the appropriate representatives of the community and thereby addresses the often-difficult question of who is authorised to speak on behalf of the group. Most importantly, the community explicitly expressed their willingness to collaborate on this database (Boța-Moisin and Gujadhur, 2021, p. 13). This consent was further documented through a written agreement between the Nanam Village leadership and TAEC. This signature process involved a line-by-line review of the FPIC together with the village chief and village leadership (Boța-Moisin and Gujadhur, 2021, p. 13).

Furthermore, an Access and Benefit-Sharing (ABS) mechanism was agreed on when setting up the database (Boța-Moisin and Gujadhur, 2021, pp. 8-11).²⁰ This means that the mentioned economic harm can be prevented and Indigenous Peoples can receive a fair and

²⁰ The principles of Access and Benefit Sharing (ABS) applied here are inspired by the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, which entered into force in 2014. However, the Nagoya Protocol does not apply to traditional clothing or cultural expressions.

equitable share of the benefits that fashion companies derive from their work (WIPO Consultation Draft, 2024, p. 7).

7.3.5 The Value of Participation and Promotion of Indigenous Peoples

As demonstrated throughout this thesis, the meaningful participation of Indigenous Peoples is essential in developing mechanisms that truly reflect and meet their needs. It has already been noted that the knowledge contributed by Indigenous Peoples is of great importance, and that trust needs to be built. However, this is not the only reason their participation is both valuable and necessary. It is crucial that Indigenous communities have a voice and are actively involved in every stage of a process that aims to prevent appropriation of their clothing.

On-going Involvement. The development of the Oma Traditional Textile Design Database took place through close and active collaboration with the Oma People. It has already been outlined that when setting up the agreement the meaningful participation of Indigenous Peoples is crucial. Most notably, however, participation must not end with the initial set up of an agreement but must be sustained. In the Oma Case, ongoing capacity-building efforts were put in place to make sure that the Oma People can continue to access and use the database in ways that suit their own needs even after the project was first initiated. This included, for example, the offer of specialised training in IT and data management (Boța-Moisin and Gujadhur, 2021, p. 16).

Moreover, having contributed to the reinforcement of harmful stereotypes, such as through the promotion of the so-called “tribal trend”, and thereby undermined the right of Indigenous Peoples’ self-determination, the fashion industry now bears a clear responsibility to acknowledge this harm and take proactive steps to counteract it.

Empowerment. It is crucial to move away from seeing Indigenous Peoples solely as the owners of traditional clothing passed down through many generations and instead recognise and promote them as active participants in the fashion industry – if they choose so (Vézina, 2019, p. 5). This means thinking beyond simply providing financial benefits in exchange for using traditional designs but also considering non-monetary benefits. These could include participation in product design and development, investment in community development programmes, and contributions to education and training (WIPO Consultation Draft, 2024, p. 7). The Oma Case reflects this approach, as the initial contact through the database enables the

Oma People to negotiate agreements on their own terms. These agreements include co-designing or even sharing their knowledge through workshops for the company (Boța-Moisin and Gujadhur, 2021, p. 18).

7.3.6 The Value of a Positive Protection Mechanisms

Lastly, and most importantly, what the Oma Traditional Textile Design Database does is to shift the power over their cultural expressions back to Indigenous Peoples. Rather than having to constantly fight for their rights which is typically the case with legal mechanisms, the database places the responsibility on the Western fashion industry. In contrast to a defensive protection mechanism which typically requires Indigenous Peoples to respond only after harm has occurred, the positive protection mechanism, requires fashion companies to invest time, effort and resources if they wish to use Indigenous traditional designs. Of course, setting up the database initially requires resources from Indigenous communities. However, it can prevent cases of fashion appropriation and harm from happening in the first place, contribute to safeguarding their cultural heritage and ensuring cultural continuity and promote Indigenous Peoples active role in the fashion industry (Boța-Moisin and Gujadhur, 2021).

However, it is important to recall that under Western IIP, traditional clothing and designs are frequently presumed to belong to the public domain and are therefore considered freely accessible. In practical terms, this means that fashion companies are, at least, legally, permitted to make use of the traditional clothes and designs without restriction and do not face legal consequences for doing so. As a result, once TCEs have entered the public domain, database systems must still rely on the goodwill of fashion companies to engage (Pregantis and Zois, 2022, p. 43). This underscores the critical importance of self-reflection processes and awareness campaigns.

7.4 Call to Action: All Kind of Measures Required

Notably, the system behind the database is not perfect. It is still mainly based on the willingness to cooperate from the fashion industry. While in the Oma Case, the database even entails legal implications, as the designs fall within the scope of Copyright Law and are therefore safeguarded under the Berne Convention (Boța-Moisin, 2023, p. 99), this is not always the case. From a legal perspective, the effectiveness of the Oma Traditional Textile Design Database remains dependent on the Western legal framework of copyright protection. This presents a significant limitation: if a traditional design does not meet the formal

requirements for copyright protection, the database alone may not offer sufficient protection. As a result, the database cannot fully address the structural gaps in protecting traditional clothing from appropriation (Boğa-Moisin, 2023).

Therefore, the final words of this thesis are a call to action. The WIPO agreement remains open, and it is important that the values the Oma Case has taught will be integrated in it. However, it is not an issue that can be solved by a single mechanism (Lalonde, 2019). The fashion industry must critically reflect on its own practices, and politics need to take up the issue and promote Indigenous Peoples' participation in processes to ensure their right to self-determination is granted. And lastly, in academia, the topic must be taken seriously and further explored – just as this thesis aimed to do.

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9 Appendices

9.1 List of Abbreviations

ABS	Access and Benefit-Sharing
CDCE	Convention on the Protection and Promotion of the Diversity of Cultural Expressions
CESCR	Committee on Economic Social and Cultural Rights
CIPRI	Cultural Intellectual Property Rights Initiative
FPIC	Free Prior Informed Consent
GC	General Comment
GR	Genetic Resources
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHL	International Cultural Heritage Law
IGC	Intergovernmental Committee
IHRL	International Human Rights Law
IPL	International Intellectual Property Law
ILO	International Labour Organization
IPL	Intellectual Property Law
IPR	Intellectual Property Rights
IWGIA	International Work Group for Indigenous Affairs
TAEC	Traditional Arts and Ethnology Centre
TCEs	Traditional Cultural Expressions
TK	Traditional Knowledge
UN	United Nations
UNDRIP	United Nations Declaration on Rights of Indigenous People
UNESCO	United Nations Education, Scientific and Cultural Organization
WIPO	World Intellectual Property Organization

9.2 Relevant Articles

Charter of the United Nations (1945)

Article 1(2) UN Charter

To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

International Covenant on Civil and Political Rights (1966)

Article 1(1) ICCPR

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 27 ICCPR

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

International Covenant on Economic, Social and Cultural Rights (1966)

Article 1(1) ICESCR

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 2(1) ICESCR

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Article 15(1)(c) ICESCR

The State Parties to the present Covenant recognize the right of everyone: To benefit from the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author.

Berne Convention for the Protection of Literary and Artistic Works (1967)

Article 2(1) Berne Convention

The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

Article 7(1) Berne Convention

The term of protection granted by this Convention shall be the life of the author and fifty years after his death.

Article 15(1) Berne Convention

In order that the author of a literary or artistic work protected by this Convention shall, in the absence of proof to the contrary, be regarded as such, and consequently be entitled to institute infringement proceedings in the countries of the Union, it shall be sufficient for his name to appear on the work in the usual manner.

Article 15(4) Berne Convention

In the case of anonymous and pseudonymous works, subject to the provisions of paragraph (1), the publisher whose name appears on the work shall be deemed to represent the author, and in such case the publisher shall be entitled to protect and enforce the rights of the author.

Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005)

Preamble CDCE

Recognizing that the diversity of cultural expressions, including traditional cultural expressions, is an important factor that allows individuals and peoples to express and to share with others their ideas and values, (...)

Article 4 (2) CDCE

'Cultural content' refers to the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities.

Article 4 (3) CDCE

‘Cultural expressions’ are those expressions that result from the creativity of individuals, groups and societies, and that have cultural content.

United Nations Declaration on Rights of Indigenous People (2007)

Article 3 UNDRIP

Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4 UNDRIP

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 26 UNDRIP

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

Article 31 UNDRIP

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

Article 46(1) UNDRIP

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

Paris Convention for the Protection of Industrial Property (1883)

Article 5(C)(1) Paris Convention

If, in any country, use of the registered mark is compulsory, the registration may be cancelled only after a reasonable period, and then only if the person concerned does not justify his inaction.

Article 6quinquies (B)(3) Paris Convention

Trademarks covered by this Article may be neither denied registration nor invalidated except in the following cases:

(iii) when they are contrary to morality or public order and, in particular, of such a nature as to deceive the public. It is understood that a mark may not be considered contrary to public order for the sole reason that it does not conform to a provision of the legislation on marks, except if such provision itself relates to public order.

Draft Articles for the Protection of Traditional Cultural Expressions (2025)

Article 2 Draft Articles: Original Facilitators' Alternative

The objectives of this instrument are to:

- (a) Provide effective and adequate protection of traditional cultural;
- (b) Prevent the erroneous grant of intellectual property rights over traditional cultural expressions; and
- (c) [Recognize Indigenous [Peoples] and local communities as holders of traditional cultural expressions.]

Article 4 Draft Articles: Alternative 1

Beneficiaries of protection under this instrument are Indigenous [Peoples] and local communities who hold, express, create, maintain, use, and develop [protected] traditional cultural expressions.]

Article 6 Draft Articles: Alternative 1

6.1 [Member States]/[Contracting Parties] may establish or designate a competent authority, in accordance with national law, to administer, in close consultation with the beneficiaries, where applicable, the rights/interests provided for by this instrument.

6.2 [The identity of any authority established or designated under Paragraph 1[should]/[shall] be communicated to the International Bureau of the World Intellectual Property Organization.]]