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# Pandora's Wardrobe: Traditional Cultural Expressions V. Fashion Brands

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## ABSTRACT

*In the world of fashion, designers increasingly draw inspiration from the concept of traditional cultural expression which is rooted in the heritage of indigenous and local communities. However, using these priceless cultural expressions without giving due credit and recognition raises moral and legal problems. The primary goal of this paper is to examine the need for traditional cultural expressions to be preserved within the fashion industry emphasizing its significance as both a form of artistic expression and a part of cultural legacy. In order to protect the rights of the communities from whom the design comes, this paper argues for the necessity of a legal framework similar to the sui generis system that acknowledges and preserves Traditional Cultural Expressions. This paper aims to illustrate the limitations of current intellectual property rules in promoting ethical practices in the business and maintaining cultural diversity. Protecting traditional cultural expressions in fashion as well as ensuring the sustainability and integrity of cultural heritage as a whole are the paper's main objectives.*

**Keywords:** *Traditional Cultural Expression, Fashion industry, Inspiration, Privatization, Sui Generis System.*

## I. INTRODUCTION

Fashion has long been intertwined with cultural expression, serving as the canvas for designers to showcase the rich diversity of traditions all over the world. As the fashion industry continues to proliferate, the need to protect and integrate traditional cultural expressions into modern designs has become increasingly important. Traditional cultural expression can be seen in textiles, motifs, and garments which are weaved in signifying the symbol of identity and acting as storytelling machines. However, the fashion industry has never failed to commodify them but unfortunately failed to acknowledge and compensate the community.

The exploitation of TCE undermines their cultural significance and poses a threat to their preservation. The question of whether traditional cultural expression belongs to the public domain or is the exclusive property of specific communities is a complex and contentious issue.

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The protection of traditional cultural expression in fashion is not only a matter of cultural justice but also a means of promoting sustainability and innovation in the industry. Valuing and preserving diverse cultural expressions will benefit both the industry and the ethnic community. Navigating the complexities of intellectual property is crucial and brands must prioritize the respectful portrayals of cultural designs. Initiatives proposed by the World Intellectual Property aim to protect traditional cultural expression was commendable but the efforts remain only on paper and implementation is inconsistent across various jurisdictions.

It is an undeniable fact that cultural expressions are the basic foundation upon which the fashion industry is built. As the industry continues to evolve, it is indeed the right time to ethically ensure the rights of indigenous and local communities.

#### **(A) Review of literature**

##### **1. *Inspiration Versus Exploitation: Traditional Cultural Expression at the Hem of the Fashion Industry* by Elizabeth M. Lego.**

The author of this paper provides a range of perspectives, with arguments advocating that the present IP laws are sufficient, while others call for a sui generis system. While acknowledging the various drawbacks present in the system, the author maintains that these issues do not necessarily warrant the establishment of a sui generis system. This position contrasts with the views of other scholars who argue that the sui generis system is necessary to address the unique characteristics of TCEs. The author's main argument is that there exists no clear pathway for addressing the identified gaps within the current systems to protect traditional cultural expression but sui generis is not the right path to walk upon.

##### **2. *Fashion Between Inspiration and Appropriation* by Barbara Pozzo**

In her work, the author traces the evolution of protective measures developed over time. She argues that while the appropriation often involves the exploitation of TCEs without permission or respect for their origins, appreciation, when done correctly can be a form of cultural exchange that honors the source. She proposes the legal tools to benefit both the communities that own the TCEs and those who seek to use them, ensuring that cultural expressions are protected while still allowing for their creative and respectful use in modern times.

##### **3. *Indigenous Peoples Innovation: The Branding of Traditional Cultural Expressions: To Whose Benefit?* by Daphne Zografos Johnsson**

In his examination, the author attempts to explore the current IP laws and their

effectiveness in safeguarding the indigenous people's traditional cultural expressions. He argues that an education campaign within these communities, coupled with the registration of TCEs can effectively serve as effective strategies for protection. The author further proceeds to advocate the mandatory use of defensive marks for commercial purposes. The the author also supports and respects the wishes of people by proposing an option that allows them to choose the level of protection that aligns with their cultural priorities

4. *Who Owns Culture?: Appropriation and Authenticity in American Law* by Susan Scafidi

The article is primarily focused on the United States and provides a detailed analysis of why it is essential to protect the TCEs. The author further discussed the foundational need for both defensive and moral rights which will essentially prevent the use of unauthorized works. The article then explores the effectiveness of the United Nations' declaration on the rights of Indigenous people in protecting the interests of the Indigenous communities. The article underscores the importance of international standards in reinforcing the rights of the indigenous people, including the protection of their TCEs.

5. *Curbing Cultural Appropriation In The Fashion Industry* by Brigitte Vezina

The author covers two significant cases that highlight the issues of cultural appropriation. In the case of Navajao v. Uban Outfitters case<sup>2</sup>, the Navajo sued the fashion giant for using the name Navajao without permission. The case revolves around how the use of Indigenous names and symbols by companies is a potential cultural misappropriation and highlights the inefficiency of current IP laws to handle this issue. In Marant v. the Mixie Community of Oaxaca Case, the French fashion designer was accused of using traditional designs from the Mixie community without their proper consent. The author suggests that IP tools, such as copyright and design rights could be leveraged to protect the community interest. The author highlights that the existing IP tools will be effective if the indigenous communities properly utilize it.

## II. TRADITIONAL CULTURAL EXPRESSION AND THE FASHION INDUSTRY

Traditional cultural expression can be understood as a means through which traditional cultures are expressed. It is also referred to as the “expression of folklore” which includes a wide array of artistic and cultural manifestations such as visual arts, designs, performances, and symbols. Traditional cultural expressions are integral components of the identity and heritage of

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<sup>2</sup> Navajo Nation v. Urban Outfitters, Inc., 935F. supp.2d 1147, 1155 (D.N.D. 2013)

Indigenous or traditional communities, but no statute specifically defines this word. “The traditional beliefs, myths, tales, and practices of a group of people, transmitted orally from one generation to another” is the definition of the word as originally used by William Thomas in 1846.<sup>3</sup> “Expression of folklore” was defined by UNESCO in 1982 as “providing model provisions for national laws on the protection of folklore against illicit exploitation and other prejudicial actions.”<sup>4</sup> It is a complicated and divisive matter to determine if traditional cultural expression is the sole property of some groups or if it is part of the public domain. Collection of resources that are publicly available and accessible for public use without any restriction and exclusivity under the recognized intellectual property laws are considered to be a part of the public domain according to the World Intellectual Property Organization. This definition leads to multiple interpretations, as the term public domain does not necessarily mean that the expressions are devoid of cultural significance or ownership. Cultural expressions, even in the public domain can still hold a deep meaning and connection for the communities from which they originate. It is essential to understand that just because a traditional cultural expression is publicly available that doesn’t mean they belong to the public domain, unless and until there is a continued existence and usage of it by a community.

Before entering into the actual issue, it is pertinent to establish an actual link between traditional cultural expression and the fashion industry. The incorporation of traditional cultural expressions into fashion designs has a long and complex history. In the past, the imposition of Westernized ideas led to the dismissal of traditionalized attire as “uncivilized”, while the colonized mimicked the fashion trends of their colonizers.<sup>5</sup> Fast forwarding to the present, everyone can witness the shift in the fashion industry. The comeback of traditional cultural expressions is evident from the ramp walks of high fashion shows to their glossy magazines. The unique designs of traditional people which were once discarded in the name of uncivilized are now accepted as grace and the most fashionable attire, standing as an undeniable testament to the supremacy of cultural expression.

The debate over ownership of TCEs ” is divided into two different views. In the first view, the proponents of a public domain argue for unrestricted access to TCEs to foster creativity and innovation, allowing for new artistic interpretations and cultural exchange. However, the other view of the Indigenous communities is that the TCEs should be protected as communal property. They contend that these expressions are not only restricted to artistic outputs but are

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<sup>3</sup> William Thoms, *Folklore*, ATHENAEUM, no.982,1846. pp 862-63

<sup>4</sup> UNESCO, *Recommendation on the Safeguarding of Traditional Culture and Folklore*, UNESCO (August 2007), available at [https://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_7/wipo\\_grtkf\\_ic\\_7\\_4.doc](https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_7/wipo_grtkf_ic_7_4.doc)

<sup>5</sup> Angela Sancartier, *Encyclopedia of clothing and fashion – colonialism and imperialism*, April 2, 2010.

integral to their cultural identity. The appropriation of designs by fashion designers is only with the motive of commercialization which potentially dislocates and dilutes the cultural meaning and erasure of the historical heritage. This raises an additional question why should knowledge that exists in the public domain or publicly available be privatized to a particular community, hindering the innovation? Furthermore, how do we determine the rightful ownership of such cultural ownership of such cultural expressions when multiple communities lay claim to the same design or tradition? The next chapter will delve into this issue.

### III. FROM CREATION TO CUSTODY: CLAIM ON CULTURAL EXPRESSION

Many Indigenous communities consider their jewelry and garments as an integral part of their cultural identity and heritage. For example, Massai, a Nilotic ethnic group inhabiting northern Kenya and Tanzania says that the color combination in their jewelry and garments indicates the status of the member in the community.<sup>6</sup> However, it is insufficient to satisfy the primary criteria for acquiring protection in existing intellectual property laws as it is not novel and cannot be identified as having been created by a particular individual. This is a clear example of the need for a *Sui Generis* system. But how does the community justify that the specific cultural expression belongs to them? The Zulu tribes of South Africa attempt to document their various cultural expression to justify their ownership.<sup>7</sup> However, the concept of tradition is more complicated. For instance, the beadwork of the Massai people was crafted using locally sourced materials such as clay, bones, and metals. But later, the Massai people incorporated glass beads which were introduced to them through trade. So, the beads used on the Massai jewelry are not exclusive to them rather they represent a blend of influences that assimilated over time.



Pic 1: Massai Tribes Bead Work



Pic 2: Emilio Pucci Spring runway, 2014

<sup>6</sup> Mohamed Amin, Duncan Willetts & John Eames, *"The Last Of The Massai"*, Camera Pix Publishers International, 2000.

<sup>7</sup> Mahoney, Michael R. "Racial Formation and Ethnogenesis from below: The Zulu case, 1879-1906." *The International Journal of African Historical Studies*, vol.36, no.3, 2003, pp. 559 -83

This evolution highlights the issue that the raw materials and techniques used in the beadwork cannot be claimed as a unique characteristic of the Massai people and becomes a complex task to identify the true owner. The author of “*Who Owns Culture?*”, Susan Scafidi said that “Traditional knowledge is not a standalone concept but very contextual”.<sup>8</sup> This assists in concluding that traditional knowledge deserves community enjoyment and assimilated resources together. So, it is essential from the community side to prove the continued and existing use of traditional cultural expressions to claim ownership and sufficiently prevent others from misusing and passing them off.

Communities can actively protect their cultural heritage by recognizing existing traditional cultural expressions as certification marks, collective marks, or trademarks. The story of Christian Louboutin which revolves around their iconic red shoes is one noteworthy example.<sup>9</sup> Likewise, traditional communities can make use of current trademarks to safeguard their traditional cultural expressions in the fashion sector. These groups can claim their ownership and maintain their identity by registering characteristics of their cultural heritage such as unique patterns, colors, and designs as trademarks. This strategy encourages innovation that pays homage to the sources of these expressions while also offering legal protection against unapproved usage and encouraging respect for the cultural heritage within the fashion industry.

#### **IV. WHERE DO WE DRAW THE LINE? INSPIRATION V. IMITATION**

Traditional cultural expressions embody the social and cultural expression and know-how skills and convey their core values and beliefs. Due to globalization and the boom of the internet, traditional cultural expressions are more like to be publicly available. This results in huge public attraction and observation. Naturally, designers are inspired by the designs and artworks they observe. There exists only a thin line between original and derivative works. In the international arena, there is no attempt to define the derivative work concerning traditional cultural expressions. It is noteworthy to mention that the Berne convention does not define the term “derived”, instead opting for the phrase “and other alternations” to encompass the derivative works.<sup>10</sup> This ambiguity raises questions like what constitutes a derivative work and the distinction between drawing inspiration from a culture and appropriating elements from it. For instance, in 2013, the fashion brand Nike faced significant backlash when it released the women’s workout leggings inspired by the traditional Samoan male tattoo known as *pea*’s.<sup>11</sup> The leggings which is

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<sup>8</sup> Scafidi, Susan. “*Who Owns Culture?: Appropriation And Authenticity in American Law.*” Rutgers University Press 2005.

<sup>9</sup> *Christian Louboutin S.A. V. Yves Saint Laurent Am., Inc.*, 778 F. Supp 449- 50 (S.D.N.Y. 2011)

<sup>10</sup> Berne Convention for the Protection of Literary and Artistic Works, Art 15(4), Sept 9, 1886.

<sup>11</sup> Brigitte Vezina, *Curbing Cultural Appropriation In The Fashion Industry*, Centre For International Governance

a collection of pro tattoo tech was criticized for appropriating the cultural heritage. The outcry was due to the significance in the Samoan society, where the pea's traditionally reserved for men and represented a rite of passage and their commitment to the cultural heritage. In response to the mounting pressure from the Somoan community arguing that the leggings trivialized their sacred tradition, Nike promptly withdrew the leggings from sale and issued an apology, stating that they did not intend to offend and regretted any insensitivity caused by the design choice.



Pic 3: Nike Tattoo leggings



Pic 4: Samoan Male Tattoo

In the realm of TCEs, the challenge lies in determining the boundaries of creative expression. As the TCEs often share common elements across different cultures defining the derivative works in this context may lead to unfair implications that stifle innovation and creativity. But the situation demands the legal landscape for precise definitions and the absence of the precise definition can result in frivolous claims and hinder the progress of artistic expression. More recently in 2019, Nike announced a special release of a sneaker called “Air Force 1 Puerto Rico” that features patterns of Guna culture in Panama.<sup>12</sup> However, the derivative work sparked outrage from the community for cultural inaccuracy and lack of consultation with the Guna community leading the fashion brand to cancel the sneakers launch. These instances particularly highlight the ongoing concerns regarding derivative works and cultural appropriation in the fashion industry. Moreover, the international community has yet to establish a clear definition of derivative works, which further complicates the legal framework surrounding TCEs. Some jurisdictions like Kenya, have attempted to define derivative works concerning traditional knowledge but these definitions often circle back to the ambiguous term “derived” which can lead to confusion.<sup>13</sup>

These incidents highlight the troubling trend of large companies capitalizing on their unique cultural heritage in the name of inspiration and fitting them into derivative works. Incorporating

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Innovation, April 2019. [https://www.wipo.int/wipo\\_magazine/en/2019/04/article\\_0002.html](https://www.wipo.int/wipo_magazine/en/2019/04/article_0002.html)

<sup>12</sup> Supra note 11

<sup>13</sup> *The Protection of Traditional Knowledge and Cultural Expressions Act*, 2016. Kenya Gazette Supplement No. 154, September 7, 2016.



these designs into their products not only trivializes the cultural meaning but also perpetuates a long history of marginalization and disrespect for Indigenous communities. The lack of legal frameworks to protect traditional cultural expressions leaves these communities vulnerable to exploitation. This paper now attempts to analyze the legal frameworks to have a clear idea of how effective the existing laws are in protecting the TCEs.

## V. LEGAL FRAMEWORKS IN OTHER JURISDICTIONS

It is essential to create a robust framework for protecting the traditional cultural expression and it is paramount to have a clear definition and to come up with an effective implementation strategy for the necessary protections. If the legislation introduces further ambiguity or unnecessary protections, it could ultimately do more harm than good – compromising both freedom of expression and the safeguarding of TCEs. The UNESCO model provisions<sup>14</sup> and the Swakopmund protocol<sup>15</sup> came up with the recommendation of establishing a competent authority for authorizing the commercial use of traditional cultural expressions. This approach aims to provide a clear and streamlined process for individual entities seeking to utilize TCEs for commercial gain while preserving the rights and interests of the communities. However, the Kenya legislative makers introduced the Traditional Cultural Expressions Act,<sup>16</sup> which was heavily criticized for its overly broad definitions and an exorbitant amount of penalties. For example, the Kenyan Act restricts the use of words, signs, names, and symbols that are considered cultural expression or their derivatives. This proviso is more or less similar to sec 19 of the Swakopmund protocol which raises concerns as there exists a significant overlapping and similarities in cultural expressions among various communities within Kenya. The offenses outlined in section 37 for distorting cultural expressions are not only vague but also carry high fines of \$ 10,000 and a potential five-year prison sentence.<sup>17</sup> Additionally, the act imposes even stricter penalties for misleading, confusing, or falsely indicating the cultural expression with fines reaching \$ 20,000 and ten-year imprisonment or both.<sup>18</sup> This potentially hinders creativity and expression as fashion brands may become more cautious about engaging with cultural expressions.

Unlike Kenya where the legislative attempts were heavily criticized for their overly broad and

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<sup>14</sup> UNESCO & WIPO, *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions*, 1985. <https://www.wipo.int/export/sites/www/tk/en/docs/1982-folklore-model-provisions.pdf>

<sup>15</sup> Swakopmund Protocol on the Protection of Traditional Knowledge and Expression of Folklore, 2010. [https://www.wipo.int/tk/en/databases/tklaws/articles/article\\_0044.html](https://www.wipo.int/tk/en/databases/tklaws/articles/article_0044.html)

<sup>16</sup> *Supra* Note 13

<sup>17</sup> The Protection of Traditional Knowledge and Cultural Expressions Act, 2016 § 37 (1)

<sup>18</sup> The Protection of Traditional Knowledge and Cultural Expressions Act, 2016 § 37 (5)

restrictive nature. The South African Protection, Promotion, Development, and Management of Indigenous Knowledge Systems bill<sup>19</sup> takes a more nuanced approach by providing a strict level of protection for certain traditional expressions that warrant the highest safeguarding. One of the key strengths of the bill is its inclusion of a registration system for Indigenous knowledge and expression. This public registry serves two important purposes, i) To help identify the respective communities that had rights over specific TCEs. ii) It helps in the transparent record of declarations made by the various communities across the country. Moreover, the bill's provisions for the establishment of the national Indigenous knowledge systems office with a comprehensive list of functions and powers is a significant step towards creating an effective Sui Generis system. By aligning with the international best practices, the bill lays the groundwork for a more effective and sustainable sui generis system for the safeguarding of traditional cultural expression in South Africa.

Panama stands out as one of the few legislations to implement the sui generis legal framework specifically designed to protect the TCEs and associated knowledge.<sup>20</sup> The proliferation of cheap mola imitations significantly undermined the value of authentic molas which require two to four weeks to create using traditional know-how skills. This seriously threatened and economically challenged the Kuna community. Consequently, the rich heritage of the Kuna community is at risk. Similar issues have been reported by women from Ngobe-Bugle and Embera communities who also face challenges due to the misappropriation of their traditional cultural expressions.



<sup>19</sup> Promotion, Protection, Development and Management of Indigenous Knowledge Act., Government Gazette Act No 6 of 2019.

[https://www.gov.za/sites/default/files/gcis\\_document/201908/42647198act6of2019protectpromodevelopmanagemen\\_tindigenousknowlegeact.pdf](https://www.gov.za/sites/default/files/gcis_document/201908/42647198act6of2019protectpromodevelopmanagemen_tindigenousknowlegeact.pdf)

<sup>20</sup> WIPO, "Panama: Empowering Indigenous Women through a Better Protection and Marketing of Handicrafts." WIPO Magazine., Issue 6/ 2005. [https://www.wipo.int/wipo\\_magazine/en/2005/06/article\\_0005.html](https://www.wipo.int/wipo_magazine/en/2005/06/article_0005.html)

#### Pic 4: Kuna Community and Their Mola Works

During a seminar event, the Panamanian government formally presented the authenticity labels to the members of the Kuna people. These labels, the first of their kind issued under law are intended to be affixed to molas distinctiveness textile panels crafted by Kuna women to ensure their authenticity and protect them from imitation. This initiative needs to be appreciated even though the authenticity labels cannot eliminate the sale of imitations but offer practical solutions at the grassroots level to ensure more effective recognition and protection of cultural assets.

## VI. FLAWS IN INDIAN IP LAWS IN PRESERVING TCES

The Indian intellectual property laws miserably failed to address this issue or even recognize the concept of traditional cultural expressions. The legislation has no sign of the idea except the mere mention of the rights of the minorities to preserve and protect.<sup>21</sup> The Designs Act which is specifically created to protect the designs, figures, shapes, and character of products is not sufficient enough to meet the needs and claims of indigenous people for protecting their rights.<sup>22</sup> To claim protection under the Designs Act, the product must be “Original” in nature but the term original is not defined either in national legislation or in international conventions. The criteria of novelty or originality is determined by the difference that exists between two works. The minimal novelty or minimal originality will result in extending the rights to the fashion designers potentially leading to the exploitation and misappropriation of designs. The act further exempts the protection of designs which is functional as the works of art. The process of application, the cost of acquisition of rights, and the enforcement of the acquired rights further complicate things for the indigenous people as it is far-reaching in their understanding.

The unfavorable characteristics of copyright laws regarding protecting the Indigenous people are pointed out by Anurag Dwivedi and Monika Saroha,<sup>23</sup> who argued for the requirement for an identifiable author, ownership, fixation, and exclusivity for a limited period.<sup>24</sup> They recommend that the protection of copyright laws may be extended to folklore by taking a liberal and purposeful stance when interpreting these rules.

The core challenge in implementing the aforementioned recommendation lies in identifying and defining the Indigenous communities who are entitled to equity benefit sharing. Determining the beneficiaries of traditional cultural expressions is complex due to the inherent vagueness

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<sup>21</sup> P.V. Vasala G. Kutty., “National experience with the protection of expressions of folklore- traditional cultural expressions: India, Indonesia, and the Philippines.” WIPO publication no 912 (E), 2002

<sup>22</sup> Ibid

<sup>23</sup> Anurag Dwivedi and Monika Saroha, “Copyright Laws as A Means of Extending Protection to Expressions to Folklore” Journal of Intellectual Property Rights, Vol 10, July 2005, Pp 308 - 314

<sup>24</sup> Ibid

and ambiguity surrounding the cases. Although the World Intellectual Property Organization has been working for years to develop a practical definition for indigenous communities, success has been limited. In 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous People (DRIP).<sup>25</sup> However, DRIP does not provide a clear definition of an indigenous person. The concept of “indigenous” may differ depending on the context, particularly about traditional knowledge, where the term can carry multiple meanings.<sup>26</sup> Given the lack of an agreed-upon definition, we can begin by considering the plain language meaning of the term. The concise Oxford dictionary defines “Indigenous” as “originating or naturally occurring in a particular place; native”.<sup>27</sup> Historically, this term has been used to describe the native people that European explorers encountered in America, India, Africa, and other regions.

In this discourse on traditional knowledge, the term traditional and indigenous people generally refer to non-European populations. However, the precise scope of who may be considered Indigenous is not clearly outlined in the WIPO materials or in the literature on the protection of Indigenous peoples and their cultural heritage. It is not evident that this term is limited to those referred to in Western dialogue as “aboriginal” or first nations in countries like Canada, New Zealand, and Latin America ethnic or tribal groups.

Despite the absence of a universally accepted definition of the Indigenous or traditional peoples, one common element across various definitions is the recognition of a people with deep, historical, and ancestral ties to traditional lands as central to their indigeneity. While this provides a useful starting point, the fact remains that there is no global consensus on the definition of Indigenous peoples. National laws must be developed in consultation with the Indigenous people and with the appropriate authority. Importantly, the indigenous people own their knowledge in perpetuity and their rights over this knowledge revert to them once the expiry of agreed terms. Therefore, TCE laws should not be contingent upon any formalities. One potential recommendation the paper proposes is the concept introduced by Cultural Intellectual Property Rights. The concept is known as 3C’s rule which stands for consent, credit, and compensation.<sup>28</sup> This framework emphasizes the importance of recognizing the rights of artisans as the guardians of traditional cultural expressions and advocates for a benefit-sharing business model that ensures legal protections against misappropriation.

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<sup>25</sup> United Nations, Declaration on the Rights of Indigenous Peoples (2007)

<sup>26</sup> Thornberry, Patrick. *Indigenous Peoples and Human Rights*. Manchester University Press, 2002.

<sup>27</sup> CONCISE OXFORD DICTIONARY (10th ed. 1999).

<sup>28</sup> Cultural IP rights Initiative, “*The 3Cs: Cultural Consent, Credit, And Compensation.*”, 2017. <https://www.culturalintellectualproperty.com/the-3cs>

## VII. SECURING HERITAGE: REFORMS TO STRENGTHEN INDIGENOUS RIGHTS IN INDIA

Regarding India, it lacks a *Sui Generis* legal framework and tries to fit the issue into already existing IP laws. The reliance has drawn criticism due to the inherent conflicts between the nature of traditional cultural expressions and the principles underlying conventional IP laws. Unlike the Bio Diversity Act of 2002, which includes provisions for prior informed consent regarding the issue of biological resources the concept of benefit-sharing is not present in the Indian legislation. The absence of a dedicated legal framework in India not only leaves TCEs vulnerable to misappropriation but also fails to provide Indigenous communities with the necessary tools to assert their rights over their cultural heritage. The paper strongly demands an established *Sui Generis* system that provides a clear definition of traditional cultural expression and related concepts. The bill should have separate provisions incorporating prior informed consent and equitable benefit sharing when TCE is used commercially. India should adopt the system of maintaining a public registry for communities to formally declare and record their TCEs like South Africa. Further India should engage itself in international forums like WIPO's IGC to contribute and learn the experience of other countries with *Sui Generis* laws and to ensure cross-border protection.

India, a country rich in diverse cultural heritage, community-based documentation, and mapping of traditional cultural expressions is crucial for preserving the identity and legacy of indigenous groups in India. The goal of the project is to carefully locate and catalog TCEs in these communities so that their cultural treasures are acknowledged and safeguarded. Elders, cultural guardians, and members of the local community all actively participate in the process; their in-depth familiarity with and ties to these customs are crucial. Through the use of participatory mapping techniques, it is possible to determine the precise geographical and cultural roots of TCEs, leading to a thorough comprehension of their relevance.

TCE should have permanent protection under the law, which means that their ownership rights do not change over time. Because TCEs are cultural artifacts that are passed down through generations and have lasting cultural importance, this metric is essential. To supervise the preservation and administration of TCEs and support the establishment of community councils or cultural boards among indigenous communities. Respected community members with extensive knowledge of the community's cultural legacy such as elders and cultural custodians, should make up these bodies.

The preamble for the legislation should acknowledge the need to safeguard TCEs against

misappropriation, misuse, and exploitation while ensuring that the communities who are the custodians of these expressions are the primary beneficiaries of their use. A national registry run by the Ministry of Culture would be established as a part of a registration system to further reinforce the recognition and protection of TCEs, which would give them official legal legitimacy and safeguard against the appropriation and would also promote and support Indigenous groups. Furthermore, clear prior informed consent procedures are required, guaranteeing free and equitable discussions with Indigenous groups before the use of their traditional knowledge by third parties. Penalties including fines and imprisonment would follow any unlawful use of TCEs that have been registered. In addition, a specific framework for mediation and arbitration would be established to address the disagreements around the usage and benefit sharing of TCEs between the communities and outside stakeholders.

## **VIII. CONCLUSION**

Considering the holistic approach, the role of fashion brands is undeniable as they reinvent and revive the cultural artifacts that are either overlooked or deemed lost. For instance, the attire kaftan was once a discarded Middle Eastern traditional attire which now gave its comeback by associating itself with comfort and high fashion through dominant fashion brands such as Gucci and Zara. By doing these the brands play a significant role in preserving cultural heritage and increasing demand for authentic products. However, this dynamic needs to be carefully navigated. Even though the intention was to celebrate and preserve culture, the potential room for exploitation remains a significant concern.

From the above discussions, the paper strongly advocates for the need for a sui generis system. It is also very clear that the universally accepted model for safeguarding these cultural assets has yet to emerge at both international and national levels. There is a long way to reach a multifaceted approach to protecting the rights of Indigenous communities.

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