Cultural Appropriation of Indigenous Designs in Fashion: Can this be Prevented by Canadian IP Law?

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From trademarking your logo to potentially patenting your items (a newer – yet narrowly used – method of protecting your unique fashion designs), there are various ways that start-ups and young companies in Canada can protect their intellectual property (IP) prior to diving into the competitive realm of fashion. Unfortunately, the Canadian fashion industry has also seen an increase in the number of large retailers who have found it *appropriate* to take designs originating from Indigenous communities and integrate them into their newest seasonal line.

From fast fashion to high fashion retailers, the fashion industry has been culturally appropriating the designs of Indigenous Peoples for years. Defining cultural heritage is a difficult and ongoing process. Though the United Nations Educational, Scientific and Cultural Organization (UNESCO) has defined cultural heritage as "the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity," cultural heritage continues to be conceptually developed to reflect and encompass a more dynamic and holistic perspective. Regardless of many companies' knowledge of and awareness of the significance of Indigenous cultural heritage, there continues to exist a sense of ignorance regarding the impact cultural appropriation can have on a community.

In some cases, the Canadian IP rules and legislation, specifically in regards to trademarks, have benefitted and protected Indigenous Peoples from cultural appropriation. For example, the Cowichan First Nation has registered the trademark "Genuine Cowichan Approved" in order to help consumers distinguish between the authentic Coast Salish hand-knit sweaters and mass-manufactured counterfeits such as those found at Hudson's Bay and Artizia. With this said, though trademark registration can prevent counterfeits from using this "Genuine Cowichan Approved" label, trademarks cannot actually prevent the exploitative and appropriative use of Indigenous ideas, knowledge, and culture. Unfortunately, there still exists a lack of integration between Canadian IP law and the ownership of Indigenous designs in the fashion industry.

Take, for example, the case of United Kingdom-based fashion label, KTZ, and their 2015 men's collection, which included multiple garments based on traditional Inuit designs. Specifically, Salome Awa was in shock after seeing her great-grandfather's sacred garment directly copied. Unfortunately, this isn't just a problem occurring with international retailers.

The North American brand Free People recently went under fire for launching a Festival Shop. Several of the items from this line – although marketed to the young millennials attending various music festivals – ended up being blatant cultural appropriation of Indigenous Peoples. The reality is, it is not just the monetary value of the vast distribution of object and design that is the problem. In fact, it is more about how the images' meanings are negatively affected by such portrayal.

With this said, the protection of Indigenous cultural heritage against cultural appropriation through the use of Canadian IP law is difficult to actually implement, primarily due to the fundamental differences regarding the origins of Canadian IP law and Indigenous ethics. However, this is not to say that future reform in our IP laws *could not* assist this problem. Scholars argue the issue lies in the fact that the main goal of IP is to promote and protect innovation by awarding the inventor economic rights.[1]

First, the traditional knowledge of Indigenous Peoples does not normally meet the criteria of novelty and originality required by IP protection. Since traditional knowledge is generally handed down from generation to generation, it makes it difficult for this information to meet these novelty and originality requirements. Second, the fact that Indigenous ethics do not attach exclusive economic rights to cultural heritage makes it difficult to apply any IP protection.

Although designs in the fashion industry are the *primary* means for infringement, it is not the *only* way that Indigenous Peoples have lost their culture to society's commodification. Take, for example, Toronto's yearly Leslieville art exhibition and its cancellation due the cultural appropriation of various artists' work. Although cancelling the exhibition may have temporarily solved a very narrow amount of cultural appropriation, this is not a long-term action plan. How, if at all, can our legal system better protect various Indigenous IP rights.

As stated by Rosemary Coombe, it is clear that work still needs to be done in Canada, even with various international remedies currently in place:

> "New ways of recognizing and remedying such injury are being formulated internationally. Indigenous peoples' advocacy has been central in this process, and the legitimacy of their participation in the international arenas in which these negotiations take place has achieved a high level of respectful recognition. Nonetheless, considerable work needs to be done to convince the general public that new forms of protection are necessary if Canadian governments are to be compelled to adopt the principles and objectives formulated internationally and effectively incorporate these into laws that will provide tangible benefit to First Nations."[2]

The reality is, current IP laws will not be able to solve the issue of misappropriation or infringement for Indigenous Peoples. Rather, existing IP laws should be supplemented by *sui generis* legislation in order to address the needs of various Indigenous groups and their heritage. New concepts of ownership and control over cultural heritage must be implemented in Canadian law in order to deal with the tension and difficulties in protecting Indigenous traditional knowledge and cultural identity. Although the Federal Government has promised to legislate this issue through various international instruments, it is also essential to implement change at a grassroots level. Take, for example, Vancouver's first Indigenous fashion week to celebrate *cultural appreciation.* With initiatives as such taken at a grassroots level, there is greater opportunity to engage in discourse surrounding the issues of cultural appropriation. Ultimately, if you like Indigenous aesthetic, buy it from those who create it and live it.

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[1] Mohsen Ahmed, Nicole Aylwin and Rosemary Coombe, "Indigenous Cultural Heritage Rights in International Human Rights Law", C. Bell and R. Paterson, eds., Protection of First Nations' Cultural Heritage: Laws, Policy and Reform (University of British Columbia Press) 311-342.

[2] Rosemary Coombe, "First Nations' Intangible Cultural Heritage Concerns: Prospects for Protection of Traditional Knowledge and Traditional Cultural Expressions in International Law", C. Bell & R. Paterson, eds., Protection of First Nations' Cultural Heritage: Laws, Policy and Reform (University of British Columbia Press) 247-277.

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