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CULTURE AND COSMOPOLITANISM IN THE GLOBAL FASHION INDUSTRY

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CULTURE AND COSMOPOLITANISM IN THE GLOBAL FASHION INDUSTRY

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Introduction

In 2018, French luxury fashion house Christian Dior featured, as part of its "cruise" collection,[1] a number of dress designs inspired by Mexican *escaramuza*. A women-only event within Mexico's otherwise all-male sport of *charrería* (Mexican-style rodeo), escaramuza features teams of women on horseback, dressed in traditional costumes inspired by the *Adelitas*—female soldiers who fought in the Mexican Revolution.[2] Escaramuza teams perform intricate and graceful choreographed equestrian maneuvers at rushing speed. It's an impressive spectacle entwining strength and femininity in a way that obviously appealed to the designers at Dior.

Dior launched its escaramuza-inspired collection at the Domaine de Chantilly, a museum near Paris dedicated to the relationship between human and horse. The lavish night-time show, billed as "Diorodeo" and held outside in a huge equestrian ring, featured an eight-woman Mexican escaramuza team flown in for the occasion. Dressed in custom Dior finery, the riders wheeled their mounts around the brightly-lit ring with a wood-planked catwalk circling its outer edge, down which models paraded while the riders performed. It began to rain during the show; the downpour, the lights piercing through the rain, the closely confined horses and people, and the motion and color all combined, according to attendees, to produce a beautiful effect. [3]

And yet right from the start there was some disquiet about the Chantilly event, with one journalist later writing that "at a time when the fashion industry is confronting its less-than-politically-correct tendencies, this slightly missed the mark…as people were clearly a little uneasy with the display…."[4] But the real trouble came months after the opening event, when Dior released its collection, along with an ad campaign featuring actor Jennifer Lawrence. The campaign provoked sharp criticism—*Teen Vogue* wrote that Dior was now "under fire"—along with much negative commentary online accusing Dior of "appropriating" Mexican culture.[5]

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[1] A "cruise" or "resort" collection is an inter-season line of clothing produced to be worn by people going on warm-weather winter vacations.

[2] *See* https://ich.unesco.org/en/RL/charreria-equestrian-tradition-in-mexico-01108; https://theculturetrip.com/north-america/mexico/articles/a-guide-to-charreria-mexicos-national-sport/

[3] *See* http://eqluxe.com/dior-holy-escaramuzas/

[4] Id.

[5] https://www.teenvogue.com/story/jennifer-lawrence-dior-ad-accused-of-cultural-appropriation

The Dior episode is not unusual for fashion firms, which regularly find themselves embroiled in controversies over alleged cultural appropriation. Indeed, the escaramuza controversy is not even the most recent such imbroglio for Dior.[6] In this Chapter, we link these controversies to the fashion industry's creative practices; in particular, the industry's practice of "referencing" and remixing existing designs, including traditional designs from cultures across the globe. The contemporary fashion industry features a global reach, rapid fashion cycles, and a creative practice based in mimicry and re-contextualization. This combination is a formula that will undoubtedly produce continued accusations of cultural appropriation, especially given the widening global influence of a viewpoint that treats cultural artifacts such as traditional designs as property, owned by an originating culture and off-limits to use by outsiders.

In what follows we take a close look at this debate. We analyze why the fashion industry has been a frequent target of appropriation claims, explore the legal and normative considerations at play, and offer a qualified defense of the fashion industry's practice of re-interpreting traditional designs. Specifically, we argue four main points:

First, the fashion industry, due to its global reach, its rapid innovation cycle, and its magpie, mashup creative practices, is particularly prone to adapting pre-existing designs in ways that provoke claims of appropriation.

Second, there is little basis in existing intellectual property law to address these charges, and substantial barriers to changing the law to do so.

Third, the normative case against many forms of cultural appropriation in the fashion industry is weaker than the often reflexively critical media and social reactions imply. As an empirical matter, many cultural practices and traditions that critics seek to protect from appropriation in fact are themselves the product of a sort of appropriation, in that they represent the melding of older, diverse traditions. This view of culture is "one of far-flung influences, brought together through contact; of innovation driven by broken traditions patched together from recovered shards."[7] The "authentic", in short, is often little more than a label we put on something that is both after-the-fact and in spite of the facts; many designs, recipes, and art forms that are promoted as originating in a particular culture have roots that extend outward to other cultures. In many cases, this network of cultural interchanges and influences undermines any particular ownership claim.

Fourth, although there are instances of appropriation that signal disrespect for source cultures and are normatively objectionable for that reason, appropriation is not disrespectful per se. Indeed, there is a strong normative argument supporting many instances of fashion appropriation. That argument is based in a set of ideas that travel together under the label "cultural cosmopolitanism," which, for now, can be shorthanded as the view that the mixing of cultural elements is more important to human flourishing than any one group's ability to seal off its culture to outsiders, that identities

[6] Dior's "Sauvage" campaign in 2019, featuring Johnny Depp and extensive Native American iconography, was pulled after an outcry deriding Dior's cultural insensitivity. Interestingly, Dior's 2023 cruise collection, first shown in June 2022 and in ads in late-fall 2022, is full of flamenco-inspired designs (flamenco is at least partially of Romani origin) set against a backdrop of Moorish architecture and décor. It wouldn't be too surprising if Dior's use of Romani and Moorish sources led to complaints, but so far there have been none.

[7] Martin Puchner, Culture: The Story of Us, From Cave Art to K-Pop, xii (W.W. Norton 2023).

are fluid, and that the use of art and design originating in another culture can be an opportunity for connection and empathy, and not merely depredation.

Cultural Appropriation in Fashion Design

Let's refer back to the Dior *escaramuza* controversy. Is it objectionable that Dior, a global fashion firm based in France, and its Italian-born creative director Maria Grazia Chiuri, used elements of Mexican *escaramuza* designs in their collection? To answer that question it is important first to understand precisely what use Dior made of escaramuza.

Dior did not design items purporting to be authentic escaramuza outfits. Rather, Dior designed apparel and accessories *inspired*, at least in part, by escaramuza. By "inspired", we mean that the outfits were not direct copies or knockoffs of typical escaramuza designs, nor did they claim to be true escaramuza wear. Dior's collection was rather a kind of fantasia that mixed escaramuza design elements with other elements of both traditional and modern European fashion design. Chiuri and her team directly spoke of the *hybridity* of their designs. For example, Stephen Jones, the milliner for the collection, described how he designed a hat that referred to escaramuza, but which re-contextualized those elements within a more modern and posh aesthetic:

> This hat was the very early prototype that I made for Maria Grazia. She liked the shape, but the straw was too rough. And she wanted something that was more Avenue Montaigne [the 8th arrondissement street that is Paris's epicenter of high-fashion showrooms], and less Zocalo in Mexico City.[8]

Dior's re-working of escaramuza-associated design was also linked to a feminist narrative—Dior promoted the escaramuza riders as a cultural archetype of strong but feminine women. One might be tempted to chalk this up to mere marketing: fashion houses love to tell a story about their collections, in part to give fashion journalists something to say beyond mere visual description. But in this case Dior's decision was a continuation of Chiuri's self-described practice of exploring feminist themes.[9] As Chiuri explained:

> Usually, the female role in rodeo culture is to be there to support their husbands and sons, but these women have decided they want to do it all themselves. But they do it in traditional dress because they don't want to give up their femininity. Women are always being made to feel they have to change who they are to fit in. This collection speaks about that. [10]

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[8] https://www.dior.com/diormag/en_gb/article/the-escaramuzas

[9] In the first year of her tenure at Dior, *Vogue France* had already noted the strong feminist themes underlying Chiuri's work:

> Under Chiuri, the catwalk has become a platform for an ongoing conversation about feminism and the arts. This season, she paid tribute to two powerful women, constructing a showspace in the style of artist and former Dior model Niki de Saint Phalle's Tarot Garden in Tuscany, and sending Breton-striped shirts stamped with the title of art historian Linda Nochlin's 1971 essay, "Why have there been no great women artists?" down the catwalk.

https://www.vogue.fr/fashion/fashion-inspiration/diaporama/maria-grazia-chiuri-dior-collection-fashion-week-feminism/46923

[10] https://www.eluniversal.com.mx/english/dior-pays-homage-mexican-escaramuzas

Chiuri also explained how the dresses' design vocabulary drew on a variety of sources:

> Among our reference ideas are the images of escaramuzas; women on the front line in rodeo.…And the collection obviously refers to these elements, but not in a didactic way. After all, Dior's archives contained riding jackets and outfits to which we have referred, but clearly interpreted them in a contemporary way, in cotton to communicate another kind of attitude. We are in Chantilly. Chantilly is famous not only for horses but also famous for its lace. This is as much a part of the French tradition of the south of France as it is of southern Italy—but also of South America.[11]

In an interview with *Women's Wear Daily*, a leading trade paper, Chiuri expanded on her last point about how common artifacts and techniques, such as embroidery, connect different cultures:

> This kind of tradition of embroidery is part of my culture, which comes from southern Italy where my father was born, but also in the south of France, as in South America....In some way, I think that all the South has the same language. When we speak about lace, when we speak about embroidery, it's such a part of different countries that it's very difficult to understand where they come from. [12]

Chiuri here is speaking the language of cultural connection; in particular, the way that embroidery is, in her view, part of a shared design language that pervades "the South." Many may disagree with Chiuri's suggestion that the particular contemporary social construct of "the South" should include southern France and Italy. But set that aside: Chiuri's principal argument—that many of the design elements associated with escaramuza clothes are common to a number of cultures and traditions—is correct. While the name and the exact combination used in escaramuza is unlikely to be found anywhere else, the constituent elements—riding jackets and boots, embroidered skirts, ruffled petticoats—are not unique to escaramuza, or even to Mexico.

Still, to some observers Dior was simply stealing traditional Mexican designs and profiting off them. Such claims, as we've already noted, are not unique to Dior. In fact, Dior isn't even the only fashion house recently accused of appropriating designs alleged to be Mexican cultural property. In 2020, the *New York Times* reported that the Mexican Minister of Culture had written a letter to Venezuelan-born designer Carolina Herrera alleging that she had appropriated traditional Mexican *Istmo de Tehuantepec* floral and *Saltiillo* serape patterns in 2020. On social media, many echoed the charge, calling the Herrera designs stealing. [13]

The Herrera brand replied respectfully (albeit also a bit pompously), stating that "[t]he emblematic fashion house recognizes the wonderful and diverse craft and textile work of Mexican artisans, its collection inspired by the culture's rich colors and artisanal techniques." That acknowledgment was not enough for *New York Times*' fashion critic, who decreed that fashion appropriation "is clearly a hangover of an old colonial mentality," and that Herrera's use of

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[11] Id.

[12] https://qz.com/quartzy/1290086/mexicos-female-rodeo-stars-inspired-diors-latest-collection/

[13] *See* Vanessa Friedman, *Homage or Theft? Carolina Herrera Called Out By Mexican Minister*, NY Times (Jun. 13, 2019), https://www.nytimes.com/2019/06/13/fashion/carolina-herrera-mexico-appropriation.html (describing social media reaction).

Mexican designs "underscores the way that traditional fashion practices are increasingly problematic and out of date."[14]

The word "stealing," though often appearing in these disputes, is almost never meant literally, at least not in the legal sense of the term. So why do people use the term to describe what's objectionable about fashion appropriation? Of course, claims of appropriation (and related claims of inauthenticity) are often found in other creative domains, including food, film, and music. But the controversies appear to occur more often in fashion, and to burn hotter. The frequency of appropriation disputes in fashion may relate to high fashion's huge budget for advertising. But it is also almost certainly linked to the industry's particular creative practices, in particular the very fast and frequent fashion cycles that characterize apparel. Fashion designers occasionally present something that is largely if not totally new. But far more common is to see older designs (sometimes much older) renewed and recombined to create something that, if not quite new, is at least fresh. This synthetic, recursive mode of creating is central to the fashion industry's success. But this creative culture, combined with the industry's global reach, does appear to lead ineluctably to accusations of cultural appropriation. And because luxury fashion houses in particular cater to a wealthy and largely white clientele, charges of appropriation gather energy from the racial and social class conflicts that underlie them.

Are these indictments of cultural appropriation in the fashion industry compelling? Responding to that question requires us to consider both the legality and the morality of the practice. We'll consider the legality question first, although, to be clear, we acknowledge that many critiques of cultural appropriation in the fashion industry are not grounded in legal claims and use the language of stealing and property loosely. That said, the question of legality is, in our view, always relevant. To the degree the term "cultural appropriation" is used to claim that design elements are owned, or, at minimum, that someone or some group has control over the use of those elements, it is generally a misreading of the law. Cultural appropriation is only very lightly regulated by intellectual property law, which does not recognize ownership of most intangible cultural artifacts or design elements.

The primary reasons for that are easy to state. First, traditional designs are often quite old—too old to be protected by copyright law or the various sorts of design protection laws. In addition, these designs are rarely associated with a particular *producer* in the way that trademark law typically understands that term, and so trademark, for the most part, does not provide protection. Other laws, such as those defining and protecting so-called "geographical indications," may provide some peripheral protections, but these are too narrow to impact most re-use of traditional designs by the global fashion industry.

In short, the vast majority of designs, dances, musical styles, culinary preparations, and other cultural materials and practices that have been associated with claims of cultural appropriation are unprotected by contemporary IP law. Below we detail the intersection of IP and cultural appropriation. In particular, we discuss the lack of fit between IP's utilitarian and rights-based justifications and property rights in traditional cultural expressions like apparel designs.

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[14] Id.

Cultural Property and Cultural Appropriation

The term "cultural property" refers to a wide range of things, only some of which are germane to the debates we address here. The 1970 UNESCO Convention on the Illicit Trafficking of Cultural Property, for example, offers an expansive definition, but one largely rooted in tangible artifacts that relate to specific cultures or traditions, such as musical instruments or sculptures. That said, the term "cultural property" is often used with regard to intangible as well as tangible works. For example, legal scholarship related to indigenous peoples often refers to "cultural property" and "cultural heritage" interchangeably, and uses cultural property as a covering term for a wide range of artistic, literary, and religious works and practices. And indeed, contemporary debates over cultural appropriation often focus on *intangible* creative works—that is, the types of works typically addressed by intellectual property law.

Utilitarian Arguments for Protection. A dominant justification for IP rights, at least in the US, is utilitarian—we grant these rights as an incentive for the creation of new works.[15] Framed in that way, it's easy to see that traditional cultural works are a poor fit with the justification for IP rights. These works have already been created, typically long ago, and so incentives to create are definitionally irrelevant. One might argue that while traditional cultural creations may be old, they are constantly updated by the relevant community, and therefore the community should enjoy some protection for that new, revised creative work. (We will return below to the very difficult question of who is comprised by the term "community" in this context.) Yet the protection afforded would only apply to the new innovations added to the old creative form, and not the traditional elements of that form. The more the new elements contribute to a work's appeal, the less traditional the underlying creation is. Protection and tradition, in short, are fundamentally in tension.[16]

There is another problem, related to the incentives problem yet independent of it: traditional works are usually far too old to be protected by the limited-term rights that are granted under copyright and design rights (design patent in the U.S.), which are the most relevant forms of legal regulation. While in principle copyright or design rights could be extended for hundreds of years, the underlying notion of time limitation is critical. The incentive to create that the law provides is meant to be balanced against the harms that result from restrictions on reproduction and use that limit competition and raise prices paid by consumers.

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[15] This is widely held to be true of US intellectual property law (Article I, Section 8, Clause 8 of the US Constitution gives Congress the power to create copyright and patent laws "to promote the progress of science and useful arts") but also of IP laws globally, as, for example, noted in the preamble to the World Trade Organization's TRIPs Accord ("*Recognizing* the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives"). For an assessment of copyright's utilitarian justification, see generally Christopher Jon Sprigman, *Copyright and Creative Incentives: What We Know (and Don't)*, 55 Houston L. Rev. 451 (2017).

[16] A tension that European policeymakers largely ignore. See European Commission, "Why Do Geographical Indications Matter to Us?", available at http://ec.europa.eu/trade/issues/sectoral/intell_property_/argu_en.htm ("GIs are key to EU and developing countries' cultural heritage, traditional methods of production and natural resources".). See also Dev S. Gangee, *Geographical Indications and Cultural Heritage*, 4 WIPO Journal 92 (2012) (noting the growth of cultural heritage justifications for GI protections).

Indefinite IP rights do exist, such as trademark (including trade dress) and trade secret. Yet these rest on a different utilitarian rationale altogether. Trade secret law protects commercially valuable information against disclosure if reasonable steps are taken to keep it secret. The classic example is the formula for Coca-Cola. In the vast majority of cultural appropriation controversies, trade secret law is not relevant because the material that is appropriated has not been kept secret and was never meant to be.

That leaves us to consider the application of trademark law. There is no insuperable barrier to adapting trademark to protect cultural creations—indeed, as we shall explain below, the related category of geographical indications provides at least a partial analogy to protections for some forms of traditional culture. However, the nature of trademark law makes it of limited use here. Unlike patents, copyrights, and trade secrets, trademarks and trade dress protections are not centrally designed or intended to spur investment in socially valuable creativity. Rather, they are justified primarily to protect consumers. Certain words, symbols and designs are protected from copying because they function for consumers as indicators of the source of products or services. In short, trademark law seeks to ensure that consumers do not become confused about the source of the good.[17]

But there are factors that limit trademark law's relevance to most instances of cultural appropriation in the fashion industry. First, protection normally requires that the words, symbols or designs be used in commerce in association with products or services, and that these marks become well known enough, or are simply distinctive enough, that they are clearly associated in the mind of the relevant public with the *source* of the good—that is, the producer—rather than the good itself. Trademark law thinks of that single source typically as a firm, but it's imaginable that the law could be re-purposed to understand the concept of "source" to refer to a particular culture, rather than a particular firm.

Yet there are two fundamental problems with this approach. First, there are already ways other than trademark law to protect legitimate consumer interests regarding the source of a traditional design or product. If consumers care whether a dress with a *Saltillo* fabric pattern originates in Mexico, that information can be provided by marking the garment with a tag stating that it's made in Mexico, or, at least, that it originates with a Mexico-based producer, and using truth-in-labeling/selling laws to regulate these indicators. (This, in essence, is the approach of the US Indian Arts and Crafts Act,[18] which bans the sales of goods that are falsely represented as being Indian-made, or sold in a way that falsely makes it seem like they are Indian-made.) And if people care that the product comes from a particular cultural group within Mexico, truth-in-labeling laws can be tailored to serve that interest. Consumer protection does not require limiting the use of *Saltillo* patterns only to Mexican producers.

Second, and more pervasively, given that the origins of many traditional names or designs are unknown to consumers, and given the frequency with which bits and pieces originating with one

[17] See, e.g., Mark McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 Virginia L. Rev. 67, 73 (2012).

[18] 25 U.S.C. § 305-305(e).

culture are incorporated into creative works produced outside the originating culture, liability under a trademark law re-fashioned to protect traditional cultural materials would likely be narrow. Consider Dior's escaramuza collection. Few consumers of these products would perceive these designs—or in fact the traditional designs worn by *adelitas* from which they draw—as coming from any single source. From the perspective of many Dior customers—who might live in Shanghai, Dubai, or London—the overall look and feel of the clothing is vaguely Mexican and equestrian, or perhaps, even more broadly, vaguely Latin American. In short, these designs lack distinctiveness for most Dior buyers—a globally dispersed group--even if the concept is stretched to embrace a nation or ethnic group (rather than a firm) as a source.[19]

Moreover, even if a traditional name or design used on a product is capable of indicating source, protection would be limited to uses that confuse consumers into believing (incorrectly) that the product originates with the source community, or that it is affiliated with or licensed or endorsed by that community. In the cases where the cultural origin of the name or design is widely known—as it would have to be to achieve distinctiveness—consumers are unlikely to believe, in many if not most instances, that products marked with names or designs famously identified with a particular culture originate with or are otherwise endorsed by that culture. (Or, perhaps more precisely, were endorsed by some official with the power to speak on behalf of the originating culture.) For example, consider the case of Kim Kardashian's (brief) use of the term "kimono" for underwear. It seems virtually impossible to believe that consumers seeing the term used on Kardashian's products would think they had any actual relationship to Japan—not least because the term was used in association with trademarks that powerfully identify the products as Kardashian's. Indeed, the Kardashian brand in some sense actually *is* the product.

Those are all doctrinal problems, but the practical difficulties are perhaps even greater. The first one is, once we've decided to establish property rights, who is the owner? Rights in traditional designs would be *collective* rights, and d efining the relevant community that would hold and exercise ownership rights is vexingly difficult. There are two interrelated and thorny problems here. One is that different groups may lay claim to the same (or very similar) traditional creations. Who invented riding boots, or short cloth jackets, or embroidery? The other is that even within a clearly delineated group with a valid claim to creation, individuals may differ on whether and how to share the creation or collaborate with others. Communities may, or may not, have rules for the use of their traditional expressions. When such rules exist, they may or may not meet widely-shared standards of representativeness or consent. But whatever the governance regime internal to a particular community, there are no agreed-upon ways for IP law to choose among different would-be users within the community.

One might imagine IP protection for traditional cultural materials that relies on temporal priority to choose among rival claimants—i.e., who did it first? But this is unlikely to work in most cases. Often it is impossible to determine which group created a particular element of traditional culture

[19] The trademark dilution cause of action is no more promising as a means of enforcing rights in traditional cultural elements. The most relevant form of dilution would be dilution by blurring, which, if trademark law were adapted to protect a particular culture, rather than a particular firm, as a source, would fit quite awkwardly, since the national or regional source of most garments is not visible from the outside. And as far as the labels go, any dilution of the could again be addressed by truth-in-labeling laws.

first. The problem deepens when the question involves in-group ownership among rival claimants: in these cases, a rule of priority is usually of no help at all. And in some cases traditional cultural practices are not actually all that traditional. Certainly escaramuza has unique Mexican embellishments. Yet much of the costume developed out of Spanish and other European influences—most centrally, the horse itself. This sort of hybrid cultural expression is common and often it is not even recognized as "appropriation"—at least until the person or firm doing the taking is identified as belonging to a dominant culture and the culture taken from is identified, in some sense, as subordinated.

Overarching all of these difficulties is a pervasive line drawing problem: how to determine which cultural materials will be protected, and which have passed into the public domain. The answer cannot be that all traditional culture belongs to the source community; such a rule would be both profoundly destructive and unadministrable. As a thought experiment, consider what would happen if the U.S. government sent a letter to the mayor of Mexico City complaining about the many jazz clubs that exist there, on the grounds that they were stealing and profiting from a cultural product that belongs to an American marginalized group. Jazz is incontrovertibly an American art form produced originally by a marginalized community. In that sense it is not dissimilar to the indigenous designs the Mexican culture minister complained about in the Herrera incident, the only notable difference being that jazz has been immeasurably more influential on global culture, and thus more heavily appropriated across the globe.

One immediate problem, from a practical point of view, is who gets to decide whether jazz in Mexico is or is not objectionable; that is, who speaks on this topic for Americans, or jazz musicians, or African-American jazz musicians. Even within source communities, often there is little agreement on what constitutes an objectionable use of culture and what does not. This is illustrated by numerous incidents in the art world, such as the controversy around Catholic painter Chris Ofili's *Holy Virgin Mary*, a portrait of the Virgin covered in elephant dung. (Ofili's painting, when first displayed in the Brooklyn Museum, led then-Mayor and Catholic Rudy Giuliani to denounce the painting as "sick" and try to cut off city support for the museum.) Is Ofili due extra latitude as a Catholic himself to test the boundaries of acceptable use of a Catholic cultural icon? Does it matter that Giuliani is Catholic?[20] These difficult internal questions of who gets to use what cultural material, how and when, are fundamentally unpoliceable by our legal system.

A second problem is defining what counts as a given cultural product for this purpose. There is no official arbiter of musical styles, for instance. Do jazz hybrids count as jazz? When, in 1970, Miles Davis recorded *Bitches Brew* with electric guitars and multiple drummers, irritating purists and essentially creating jazz fusion, was that working within the genre or creating something new? Would our hypothetical American jazz policeman care about the appropriation, in Mexico, of jazz fusion, or just "traditional" jazz?

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[20] From the perspective of one important institution in the Catholic community, the Catholic Church itself, Ofili may have *less* latitude, as a Catholic, to demean the Virgin. That is the message conveyed by the Vatican's 2006 statement recommending Madonna's excommunication in response to the singer's staging of a mock-crucifixion as part of her concert in Rome. In that episode, Cardinal Ersilio Tonino, speaking with the approval of Pope Benedict, characterized Madonna's performance as "a blasphemous challenge to the faith and a profanation of the Cross. She should be excommunicated. To crucify herself … in the city of popes and martyrs is an act of open hostility."

Still a third problem is what happens if an American jazz musician is invited to invest in a jazz club in Mexico. Is the connection with an American member of the jazz "source community" sufficient to immunize the Mexican club against charges of cultural appropriation? Or consider again the Carolina Herrera example. What if Herrera, for instance, had hired as part of their design team a single individual from among the local indigenous people associated with the traditional serape designs they modified? What if they simply hired someone who is from the same ethnic group as the source community but who lives in New York City (where Herrera's fashion house is based)? What if the head designer was herself Mexican? What if the prime minister or monarch of a nation that contains the source community gave his or her imprimatur to the cultural borrowing? Would any of these facts matter for purposes of claims of appropriation?

As these hypotheticals and examples show, it is often very difficult to know who should be in a position to authorize any given act of "appropriation." This is just one of a multitude of thorny practical problems that must be addressed as part of an argument justifying legal protections for traditional cultural materials, at least if one wants to move beyond casual social media shaming or tsk-tsking by fashion journalists. Unless the property right is untransferable and unlicenseable, someone has to have the capacity to authorize.

Rights-Based Arguments for Protection. There are, in addition to the incentives-based rationales for IP, two well-established rights-based justifications. The first grows out of the theory of property famously set out in John Locke's *Two Treatises of Government*. Locke identified the individual's contribution of labor as the mechanism by which objects are reduced to property, and focused on the harm—in terms of fairness rather than wealth maximization—when another deprives the owner of the fruits of that labor. A person owns her own labor, and that person adds that labor whenever she appropriates a thing from the commons. If another takes the object the first person has appropriated, that person also takes the labor that the first person has added. That taking of labor is a harm.

Some commentators have questioned whether the Lockean framework readily carries over to the realm of intangible creative expression. There is a critical difference between the two. Reading a book and accessing its intellectual content is *non-rivalrous*; any number of people can do it without "exhausting" or degrading the work. Consuming the work is not the same as taking the book itself (the physical item), which only one person can possess. This has led some philosophers to argue against Lockean justifications for IP rights.[21]

But there is a deeper problem here, one which goes to the heart of what it means to "labor" within the Lockean framework. For most traditional cultural expressions, current members of the in-group have not labored to create them—they are laboring to *reproduce* or to *perform or display* them. That sort of labor is present in any act of copying, and it cannot be the sort of labor that gives rise to ownership within the Lockean framework, else every copyist would also be an owner. To justify collective rights within the Lockean framework, one must sustain an argument that the labor of someone in the group (usually an unknown person or persons, and usually much earlier

[21] *See, e.g.*, Seana Valentine Shiffrin, Lockean Arguments for Private Intellectual Property, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138 (Stephen R. Munzer ed., 2001).

in time) justifies labor-based rights for the rest of the group, therebt making copies made by a group member different than those made by someone outside the group. No such argument has been made, to our knowledge, from within the Lockean framework. But if such an argument *were* made, it would run directly into the problem of determining who belongs to the group and how decisions must be made about use of the property right, if we were to establish one.

Of course, to the extent that individuals are currently creating works that, while recognizably falling within the boundaries of a form of traditional cultural expression, add new creativity to that form, then, as we have already noted, current IP law will grant rights in that new creative portion only.

A second rights-based justification for copyright protection is found in the idea that because original expression reflects and embodies an author's personality, respect for creators' autonomy requires the recognition of property rights in creative works. This justification grows out of theories set out by Hegel, Kant, and, much more recently, Margaret Radin.[22]

Personality theory is based in the autonomy interests associated with property. The theory posits that property provides an especially powerful mechanism for self-definition, for personal expression, and for society's recognition of the dignity of an individual. Personality theory is appealing in part because it aligns with modern understandings of the importance of property: in a consumer society we are (in part) what we own. And given popular adherence to a Romantic conception of authorship in the West, where most major fashion houses are based, the fashion industry is apt to find a particularly strong link between an individual creator's personality and his or her creative expression.

The question, again, is whether the justification extends to a *community's* claim of ownership over traditional designs. Personality theory at its root is about affording *individuals* the capacity for self-realization through the ownership of property. Adapting this argument to provide a justification for community ownership of traditional culture requires more. First, that the ability of a community to express itself is implicated in human flourishing. This basic communitarian argument is, we believe, fairly straightforwardly sustained. And of course if a community is *barred* from using traditional cultural expressions—a policy that at various times has been imposed by majorities on marginalized groups across the globe—that seems very likely to harm the community's ability to sustain its identity.

The more difficult part is specifying when and how a community's ability to sustain itself is likely to be harmed when traditional culture is used by individuals *outside* the community. It is possible that the source community could lose some, or all, of its capacity to identify itself to others as a community if outsiders are free to make use of their traditional arts or designs. On the other hand, it may be that use by outsiders (especially if that use is coupled with some form of attribution to the source community) increases public recognition of the that community and the cultural materials associated with it. The outcomes will almost inevitably differ case by case, and the effects of any particular case likely will be difficult to understand in advance.

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[22] Margaret J. Radin, Property and Personhood, 34 Stanford Law Review 957 (1982).

Moreover, even if harm to the source community seems likely, that community's group interest is not the only interest at stake. The appropriator has an interest in his or her individual creative freedom that cannot be dismissed solely on the grounds that he or she used "someone else's" source materials unless there is a compelling reason to believe that the community's interest should always override the individual's (and that the source material at issue is, in fact, someone else's). This is especially true in cases of cultural appropriation, such as in the Dior and Herrera examples, that involve creative re-contextualization as opposed to mere copying. Each of us has an interest in being able to use the culture that we're exposed to, whether it originates from the national or local community to which we happen to belong, or elsewhere. Cultural artifacts and forms—whether *Istmo de Tehuantepec* floral designs, or American jazz—impress themselves upon the consciousness of an ever-wider diversity of people as they travel. This isn't a process we can control. Nor do people choose what bits and pieces of culture they connect with. And that's why a Japanese musician living in Osaka who loves jazz has an interest in "appropriating" the form and creating new jazz that is difficult to distinguish from the interest of an American musician living in New York.

In short, if one wants to seriously propose a method of protection for traditional creations, it is very hard to fit that protection into well-accepted IP concepts, whether approached from a utilitarian or rights-based perspective. As a matter of IP theory and doctrine, traditional culture is a very poor fit—deliberately. And as a matter of practicality and politics, the obstacles are daunting. All that said, there are some more peripheral forms of IP that may provide some measure of protection to some types of traditional cultural expression.

Perhaps the most potentially useful is the geographical indication, or GI. Akin to a collective trademark, these designate a given geographic location as the sole source of the good. Well-known examples include Bordeaux, Barolo, and Roquefort. The notion, roughly, is that only certain places can "authentically" produce certain products, which are made singular by some combination of the natural and physical characteristics of a region (*terroir*) plus local knowledge. Use of the name with products from another location, this line of reasoning goes, is misleading to consumers.

There are many conceptual and practical problems with the protection of GIs. But doctrinally, they are recognized in many national legal systems, including that of the U.S., and also under international law, such as in the WTO Trade-Related Intellectual Property agreement. GIs are not limited to agricultural products. There are various textiles and clothing products currently protected via GIs, and so there is no reason that the Mexican styles at stake in the Dior and Herrera cases could not, in theory, be given a GI designation.

However, all GIs do is bar the use of certain descriptive words or place-names. They do not bar the mimicking of style, taste, or appearance. In other words, wine called Chablis, but not made in Chablis, runs afoul of the GI rule. But nothing stops a winemaker in Australia from making a wine that tastes just like Chablis—they just can't call it Chablis. Similarly, nothing would stop a designer such as Carolina Herrera from making a dress in the style, or spirit, of the Mexican traditional

patterns, as long as the GI-designated name for those patterns was not employed. In short, GIs would not address the underlying phenomenon of appropriation that critics are concerned with.[23]

In short, the law governing IP is of very limited use with regard to nearly all claims of cultural appropriation. None of this is to gainsay the fact that traditional designs or practices sometimes are copied and used by outsiders in ways that are troubling. But given the deep structure and articulated categories of IP law, the protections available under any justifiable IP regime are very limited. The vast majority of extant cultural appropriation claims are simply not addressable without a wholesale shift in our understanding of what IP law is supposed to be about. There is currently no meaningful legal path forward to the "problem" of cultural appropriation.

Moral Objections to Cultural Appropriation

Of course, even if cultural appropriation is legal, that doesn't mean that it's right. The very label "cultural appropriation" suggests a moral transgression, as opposed to a more positive term, like "cultural interchange" or "cultural borrowing." The strong negative charge of the label suggests that the practice presents a clear case for moral condemnation. Yet, at least with respect to the practice overall, as opposed to specific examples, the case for moral condemnation is often unclear and only rarely as straightforward as some of the critics of appropriation make it out to be.

In part this is because, as we noted above, creations or designs claimed to have originated in a particular tradition often are in fact the product of *multiple* traditions. It is often said, for example, that bucatini amatriciana is one of the four traditional pastas of Rome. And it is. But the dish isn't really *from* Rome. It originated in the village of Grisciano, approximately 150 kilometers northeast. The shepherds in this hilly rural area took to mixing their pasta with cured pork jowl (guanciale) and the local pecorino cheese. They called this simple dish *griscia*. Griscia transformed as it spread to the nearby village of Amatrice, where it was remixed by adding tomato sauce. Rechristened as "amatriciana," the dish eventually migrated to Rome. Rome is where the recipe was *popularized*, not where it was invented. It is also where the dish became associated with the hollow bucatini pasta; in Amatrice it was more typically made with spaghetti.

The hybridity of the dish, of course, runs deeper. It is impossible at this point to reconstruct the origin and early spread of pasta, but it is clear that different types of pasta have long existed not

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[23] As was mentioned earlier, in the US, in addition to GI protection for things like Napa Valley wine, the Indian Arts and Crafts Act protects against claims of Indian manufacture by non-Indians. As the Department of Interior states, the law

> is a truth-in-advertising law that prohibits misrepresentation in the marketing of Indian arts and crafts products within the United States. It is illegal to offer or display for sale, or sell any art or craft product in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the United States.

While useful and important, the statute does not stop the copying of Indian designs—just the misrepresentation of the identity of the designer as coming from the Indian source community. Obviously, a general statute modeled on the Indian Arts and Crafts Act would, like geographical indications, not touch most instances of alleged cultural appropriation.

only in Italy but also in the Mediterranean as a whole and in China (and elsewhere).[24] The tomato, of course, was unknown in Italy before 1548, when it was introduced from the New World, and wasn't widely adopted in Italian cuisine until the early 18th century. So in a dish which is considered the quintessence of Roman cuisine, we see origins that lie both outside of Rome and outside of Italy, or indeed, Europe. There are many similar examples in which foods, styles, or designs from varied places or peoples are combined to create something now considered authentic to a single place or people. This complexity not only calls into question the authenticity of a particular design or feature as a conceptual matter; it complicates any putative ownership claim as well.

Returning to Dior and escaramuza, neither Mexican culture in general nor escaramuza in particular are hermetic—like many traditions that are said to belong to a particular nation or people, escaramuza has long and tangled roots and combines elements that can, in many cases, be found elsewhere as well. The designs associated with escaramuza are themselves a blend of traditional European equestrian designs and practices and indigenous Mesoamerican ones. Indeed, the central, signature feature of escaramuza—the horse—is a European import.

And the point runs in the other direction as well: traditions associated with a particular place travel with the people from that place—or, as is the case with Mexico and the U.S., as national borders move but people (and often their cultural practices) remain. California, where the Dior ad campaign was shot, was widely criticized online as a location choice for a Mexican-inspired collection. Yet California was part of Mexico until the mid-nineteenth century. Mexico the nation cannot claim the *only* moral interest in the designs associated with escaramuza—at minimum, Mexicans and Mexican-Americans in the U.S. also have an interest in the development of these cultural practices. But the interest runs beyond Mexicans, wherever they may live. As a particular cultural practice spreads, it often impresses itself on members of out-groups who have not encountered it before. Those out-group members might develop an affinity for it; they may even adopt it as a core aspect of their identity. This is inevitable in any world in which people move around or communicate across borders, and those who are exposed to a culture have an interest in being free to respond to it that cannot just be waved away by invoking the word "appropriation."

The upshot is that as cultural practices travel, they interact, are received, adopted, and transformed. This sort of transmission of cultural content is precisely what Maria Grazia Chiuri, Dior's creative director, intended. Chiuri stated that she admired the way in which the escaramuza reconcile tradition and modernity, femininity and strength. The escaramuza designs, if you take Chiuri at her word, are not just meant to be pretty. They are part of a narrative in which she invokes *cultural values* in the form of particular visual elements. Chiuri incorporates those already hybrid visual elements into new designs that mix Mexican and European traditions to make a case that the sort of muscular femininity that escaramuza embodies is in fact a disposition shared by women across cultures.

A common response is that Mexicans should be empowered to control the use of escaramuza and its traditional attire because they are part of a subordinated culture and people. Dior

[24] For a deeply learned account of pasta's murky origins, see Silvano Serventi & Francoise Sabban, Pasta: The Story of a Universal Food (Columbia Univ. Press 2002).

represents the wealthy, powerful North; Mexico the poor, colonized South. (Recall Chiuri's perhaps unintentional attempt to assimilate Southern Europe to the "South".) This argument is important, but it raises a host of issues. One of them is that the hierarchy is not always clear. We see this in a recent cultural appropriation spat that doesn't involve fashion, but rather the motion picture industry.[25] In 2023, Netflix premiered a docudrama series, titled "African Queens," which focuses on female African rulers. One of the queens was Cleopatra, portrayed in the series by a Black actress from the U.K., Adele James. "We don't often get to see or hear stories about Black queens, and that was really important for me, as well as for my daughter, and just for my community to be able to know those stories because there are tons of them," Jada Pinkett Smith, who produced "African Queens," said in a Netflix-sponsored article about the show.[26]

The most famous Hollywood actress to play Cleopatra was, of course, Elizabeth Taylor, who starred in the movie of that name in 1963. It's almost unimaginable that an actress who looks like Elizabeth Taylor would be chosen to play the part today. But now the choice of a Black woman to portray Cleopatra in "Africa Queens" has sparked a lot of pushback from Egyptians, who note that Cleopatra wasn't a Black African, but rather the last of a dynasty that originated in Macedonian Greece. Even the Egyptian government complained. "Statues of Queen Cleopatra confirm that she had Hellenistic (Greek) features, distinguished by light skin, a drawn-out nose and thin lips," Egypt's government said on Twitter in 2023.[27]

Whether Roman statues, which are often executed in a standard Hellenistic portrait style that idealizes more than portrays, actually confirm anything about Cleopatra's appearance is an open question. But it's noteworthy that the Black Americans behind "African Queens" want to see Cleopatra as African, while many Egyptians prefer to see her as specifically *Egyptian*, and, more generally, prefer to see Egypt not as simply African, but as a racial mélange with long-standing and continuing ties to Europe and the Middle East. Whose vision ought to prevail?

There is another problem, one which has to do with what it means for a culture to be "subordinated." One of the ways in cultures may be subordinated is when perspectives and practices from that culture are ignored in debates within dominant cultures. Referring again to Dior, we might question whether that is happening, or, rather, the reverse. One way of seeing Chiuri's use of escaramuza designs is as a bid to make the cultural views and practices associated with escaramuza known and salient to a wider world. Simply deriding what Chiuri has done as "appropriation" misses how use of designs from subordinated cultures, at least if done with reasonable acknowledgment of the source (as Chiuri and Dior have generally done) can both introduce and honor a source culture for a new, and wider, audience. And in doing so, the "appropriation" both creates something new and can, as in this case, transmit some of the values of the source culture. Of course, firms like Dior make money in the process, which is a source of much of the objection we catalog.

[25] See https://www.nytimes.com/2023/05/10/world/middleeast/cleopatra-netflix-race-egypt.html.

[26] https://www.netflix.com/tudum/articles/african-queens-release-date-cast-news.

[27] https://twitter.com/TourismandAntiq/status/1652744796509814784.

These processes are not static, and precisely what happens to culture when it travels is case-specific. Often, as a cultural practice takes root in a new place, it changes; no cultural practice remains pure when transmitted. Interaction among cultures has never produced purity. This re-working of transmitted culture is ubiquitous and, we believe, is a significant driver of cultural innovation.[28]

None of this means that some instances of appropriation aren't objectionable. When Gucci put turbans on white models, as it did in Milan Fashion Week in 2018, or when Marc Jacobs featured white models wearing multi-colored dreadlocks, as he did at New York Fashion Week in 2016, people might reasonably react by asking whether a white designer is disparaging minority cultures or at least treating them with disrespect. But those who label as "cultural appropriation" every use by a rich-world actor of a cultural artifact from another community are taking the argument too far. This view that cultural appropriation involves power disparities—that it is not cultural mixing in itself that is wrong, but rather only the instances in which actors from the rich world use source material from the Global South—is understandably attractive to some. But it is often overly simplistic in its analysis of the evolution of culture and, as we have suggested, difficult to apply with any consistency in practice.

Why do cultural appropriation debates capture so much attention today?

Finally, we turn to an underlying question which we think vital: What is driving the seeming growth in concern over cultural appropriation, whether in the fashion industry or elsewhere? In the fashion world, as we argued earlier, such charges are easy to level because it is a global industry in which the dominant creative approach of fashion designers is to mix and match ideas from different eras and places. But the forces pushing cultural appropriation claims into the conversation are more complex and pervasive than that. At bottom, we think that the expanding boundaries of the behavior labeled with that term reflect a recent and curious convergence of right and left ideas about culture. The most media-saturated objections to cultural appropriation come almost entirely from the left. These claims are typically rooted in a dynamic of the powerful versus the powerless. At the same time, a troubling parallel critique of cultural mixing has emerged on the political right. As populist and nationalist movements have taken hold in many states, we see concerns with cultural property and cultural purity taking root that are, at a very broad level of generality, akin to the left-wing concerns that formerly have driven the debate.

The increased salience of right-wing objections to cultural hybridity is grounded in (often racist) concerns over cultural and demographic transformation and "pollution." They have not been connected to left-wing objections to cultural appropriation. But while the underlying claims and rationales on the left and right are very different, the shared belief system is clear: only certain people have the right to engage with certain cultural practices. Cultural purity is good; cultural mixing, dilution and exchange are suspect.

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[28] For a fascinating inquiry extolling the virtues of hybrid styles see Gustavo Arrellano, Taco USA: How Mexican Food Conquered America (Scribner 2013)

The view that particular peoples should be able to control the development of their cultures, and that the freedom of outsiders to adopt, interpret or dilute that culture should be restricted, is at the core of this ascendent trans-partisan ideology of cultural purity. The left-wing variant focuses on the right of minority cultures or marginalized communities to control the development of their own cultures and ensure that "outsiders" do not misuse, profit from, or even simply employ, their cultural expressions. The right-wing variant inverts this focus: it is the majority culture's right to self-definition that is under threat from invasion and involuntary cultural hybridity.

Consider a recent opinion survey of the British public:

> [M]ore than half of British people feel hostile not just to refugees, but to ethnic minorities—many of them British people themselves—already living here. This can be put down to various perceived economic and social threats—a quarter think immigrants take away jobs, and a third that they remove more from society than they contribute. But more sinister is its generality. *More than half of the British people surveyed felt that people from ethnic minorities threatened their "culture".*[29]

Examples of the concern on the right with cultural purity are unfortunately not limited to the U.K. Illiberalism is on the rise and fear of foreigners and their cultural practices and traditions growing in many places. In Hungary, for example, Viktor Orban has solidified his rule by vilifying foreign cultures. His regime has hung posters throughout the country that read "If you come to Hungary, you must respect Hungarian culture!" And of course the real goal is less fostering respect for Hungarian culture than keeping foreigners and their cultures out in the first place. The goal is not respect, but cultural purity. In this vein, right-wing Italian Prime Minister Giorgia Meloni, in her autobiography, "I am Giorgia", published in 2021, "compared mass immigration to Italy to the forced transfers of populations in the old Soviet Union, aimed at diluting local customs and religions. 'The right wants to preserve these same deep-rooted identities that the left wants to cancel,' she wrote, warning of the dangers of 'ethnic substitution' and the dilution of Europe's Christian culture."[30]

Of course, one need not go to Europe to see this tendency. Donald Trump's political strategy was built on fomenting racial and cultural anxiety among white voters, and much of his strategy for stoking white racial and cultural grievance focused on migrants and their cultural influence. The argument often focuses quite explicitly on the threat of cultural invasion: as the co-founder of Latinos for Trump famously declared during the 2016 election, there will be "taco trucks on every corner" if Mexican immigration is not stanched. English-only laws, common throughout the nation, instantiate this same idea: foreign cultural practices are dangerous and their importation must be resisted.

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[29] Afua Hirsch, "Brexit is entrenching some dangerous myths about 'British' culture," The Guardian (May 25, 2017), https://www.theguardian.com/commentisfree/2017/may/25/brexit-myths-british-culture-history-ethnic-minorities.

[30] Angelo Amante, "Italian First! Meloni's Nationalists Defend Cultural Identity at Risk of Irking EU," Reuters, April 12, 2023

These efforts on the right are, of course, very different than those on the left. We are not equating them. Yet the commonalities are striking. In the left-wing version of this argument, minority cultures are the victims. In the right-wing version, minority cultures are the perpetrators. But in each version, the crime is the same.

The antithesis of this view, and a normatively much more attractive vision, is so-called cultural cosmopolitanism, which, as Salman Rushdie has put it, celebrates "hybridity, impurity, intermingling, the transformation that comes of new and unexpected combinations of human beings, cultures, ideas, politics, movies, songs." Cultural cosmopolitanism "rejoices in mongrelization and fears the absolutism of the Pure. Melange, hotchpotch, a bit of this and a bit of that is *how newness enters the world*."[31]

Persuasive defenses of cosmopolitanism have already been mounted by Rushdie, Anthony Appiah,[32] Jeremy Waldron,[33] and others. We have little to add to their broad claim that cultural mixing is, generally, a force for good in the world. But it is important to underscore that from the perspective of intellectual property theory, and the underlying goals animating the protection of intellectual property, efforts to hive off of cultures and prevent mixing (and remixing) of cultural expressions are disfavored. IP law exists not only to stop copying; it is also intended to preserve the public domain and foster creative work. Creativity often, if not always, rests on prior expressions, genres, and conventions. The ability to rework and pay homage to past creations is integral to the development and evolution of culture, broadly understood as human creation. It is perhaps Martin Puchner who has best capsualized this point:

> In our debates over originality and integrity, appropriation and mixture, we sometimes forget that culture is not a possession, but something we hand down so that others may use it in their own way; culture is a vast recycling project in which small fragments from the past are retrieved to generate new and surprising ways of meaning-making.[34]

Of course, what Puchner says here is, at least to a lawyer, somewhat overstated. We do recognize property rights over some bits and pieces of our shared culture. That's the point of copyrights and patents—although it is important to remember that these expire and so apply only to relatively recent elements of culture. We also grant trademark rights to certain commercial signs and symbols, and trademark rights can last (at least theoretically) forever. This is why it's important that trademark law develop robust rules to allow people to make expressive uses of culturally significant source indicators. But Puchner's general point stands. Culture is not, at its core, about property rights, whether held by individuals or particular communities or nations. It is a resource common to us all, as humans.

To be sure, we recognize that there are uses of cultural materials that are in poor taste, or which profit off of cultural practices in ways that ought to be morally condemned even if they cannot be legally barred. But we think that neither categorical condemnation of appropriation, nor legal

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[31] Salman Rushdie, *In Good Faith* (Penguin 1990).

[32] Kwame Anthony Appiah, Cosmopolitanism: Ethics in a World of Strangers (W.W. Norton 2007).

[33] Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 Mich. J. L. Reform 751 (1992).

[34] Puchner, supra n. 7, at xxiii.

prohibition, is warranted or workable. Even control through social norms (via social condemnation and shaming) is an enterprise that should be undertaken with caution, as difficult issues of definition, line-drawing, and expressive freedom attend virtually all conduct that some might be tempted to condemn as "cultural appropriation."

It is important also to stress that we do not believe that, like Goldilocks' third serving of porridge, existing IP law is "just right" in its balance struck between property rights and access by others. Indeed, we are critics of many aspects of existing intellectual property doctrine, and have long argued that IP is overused and overbroad.[35] We also have, along with many scholars, demonstrated that IP protection is not in fact necessary for creative fields to thrive.[36] For much the same reasons, we are skeptical of assertions that seek to expand these rights into new domains today, whether grounded in a politics of majority rule or minority rights.

At bottom, we share Salman Rushdie's belief that the mixing of cultures is "how newness enters the world." That capacity for creating newness, perhaps the most precious possesion of humankind, should not be surrendered lightly to claims that some bit of our human cultural patrimony is being appropriated rather than shared.

[35] See e.g. Raustiala and Sprigman, The Knockoff Economy: How Imitiation Spurs Innovation (Oxford 2012).

[36] Id; Raustiala and Sprigman, The Piracy Paradox, 92 Virginia Law Review 1687 (2006).