CULTURAL APPROPRIATION AND ITS RELATIONS WITH INTELLECTUAL PROPERTY LAW: IN THE REALM OF THE TRADEMARK LAWS, DISNEY AND MORE

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ABSTRACT

Within moments of the release of the music video of "How You Like That", by K-POP girl-group BLACKPINK, people spotted a sculpture of Lord Ganesh (a popular Hindu God) hidden under the throne upon which Lisa, a member of BLACKPINK, was sitting. In Hindu culture, it is considered sacrilegious to sit at a height that is higher than where you have placed the sculpture of any God. Stan Twitter was taken up by a storm when news broke out. While certain fans of the group continued to support them, people quickly pointed out appropriation of culture that was taking place in the video. As the age of technology dawned upon generations both old and young, culture became easily accessible to share and export. Along with it, tagged along appropriation of the same. Whether it be Disney trademarking a common phrase spoken by Swahili people, or Isabel Marant "copying" the designs off of Mexican brands, appropriation of culture exists in every nook and cranny of our society. WIPO, World Intellectual Property Office, states that expressions of traditional culture raise important questions of law, ethics, and policy in the field of intellectual property law. Cultural appropriation is often defined as "taking of intellectual property, cultural expressions and artifacts, history and ways of knowledge". And, as rightfully put forth by M. Siems in his paper, despite a glaring link to IP law, legal issues in relation to the topic at hand are rarely spoken of during debates revolving around the appropriation of a culture. The article uses popular cases and examples of cultural appropriation and relates it to the infringement of intellectual property. It aims to educate its readers the fine line between ethical usage of culture and the appropriation of it, and how the time has come to be educated on sensitive issues such as this.

Keywords: Law, Intellectual Property, Culture, Appropriation, Ethics.

INTRODUCTION

Indigenous people and native cultures around the world cherish traditional cultures for their unique and individual inventiveness, as well as its cultural, historical, spiritual, and economic worth.

The World Intellectual Property Organization (WIPO) has made it a priority to define the appropriate role of intellectual property (IP) in the protection, preservation, and promotion of traditional cultural expressions (TCEs), which is the subject of a number of normative and capacity-building programmes[1].

Rarely used prior to the early 2010s, the scene has changed for the term "cultural appropriation", as recent google searches have skyrocketed past the point of 2.9 million searches[2][3]. However, it does not necessarily mean that the term is uncontroversial. This debate of the appropriation of culture is deeply divided into two separated sides: 1. Those who welcome it with open arms and see it as a way of protecting the cultures and identities of certain groups, and; 2. Those who are thoroughly opposed to it, and see it as an insult to the group whose culture is being appropriated[4].

Some of the possible questions that may arise during the debate of cultural appropriation may be as follows:

Can someone wear a particular hair-do that is a significant representation of another culture? (Corn-rows on a white person)

Can someone wear clothing or prints that are derived from another culture?

Can someone run and manage businesses that pretend to be from another culture (For example, Indian Restaurants being owned and manage by people from other countries)

As can be seen, probable forms of cultural appropriation include a wide range of events and phenomena: some involve changing one's appearance, others include behaving in a specific manner, and yet others involve creating something physical. They also cover a wide range of cultural categories,

[1] Molly Torsen, *INTELLECTUAL PROPERTY AND THE SAFEGUARDING OF TRADITIONAL CULTURES: Legal Issues and Practical Options for Museums, Libraries and Archives*, wipo.intl, https://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo_pub_1023.pdf (last visited on October 5th 2021).
[2] Mathias Siems, *The Law and Ethics of 'Cultural Appropriation'*, 15 International Journal of Law in Context 408, 408-423 (2019).
[3] Also refer to https://trends.google.com/trends/explore?date=all&q=%22cultural%20appropriation%22
[4] Siems, *supra* note 2.

including those that may be debatable, such as gender and sexual orientation, whether or not they truly belong in the category of "culture"[5].

CHAPTER 1 – THE CHEMISTRY BETWEEN CULTURE, ITS APPROPRIATION AND IP LAWS

An umbrella-term in nature, "culture" encompasses all that are norms of social behaviour, found in society, as well as knowledge, beliefs, arts, laws, customs, traditions, and so on.

Intellectual property (IP), as part of intellectual capital, is closely linked to a firm 's core capability in a knowledge - based economy[6] [7]. One such competitive edge, if not properly managed and protected, is subject to copying and imitation, and may lose the majority of its market value [8] [9]. Intellectual property protection is thus not only required, but also a must-have from the standpoint of organizational learning. Preservation of Intellectual Property is often defined as a set of policies and regulation that govern how to avoid unlawful appropriation of intellectual property for a significant duration of time[10]. IP protection, on the other hand, can be seen of as a collection of information and knowledge practises in the framework of an information research[11]. These activities entail gathering, interpreting, and applying a large amount of data at multiple levels, including individual, group, and organisational. They might be self-initiated or forced upon you[12].

[5] *Supra* note 1.
[6] Javier Carillo, *Managing knowledge-based value systems*, 1(4) Journal of Knowledge Management 280, 280-286 (1997).
[7] Azmi Halasa et. al., *Intellectual Capital as a Core Competency for Competitive Advantage: A Case Study*, 16(4) Journal of Digital Information Management 192, 192-202 (2018).
[8] Amanda Budde-Sung, *The invisible meets the intangible: Culture's impact on intellectual property protection*, 117(2) Journal of business ethics 345, 345-359 (2013).
[9] Derek Bosworth, et. al., *Intellectual property abuses: how should multinationals respond?*, 37(5) Long Range Planning 459, 459-475 (2004).
[10] Bryan Husted, *The impact of national culture on software piracy*, 26(3) J. Business Ethics, 197-211. (2000).
[11] *Supra* note 13.
[12] *Id*, at page 468.

Studies have proved to us that framework of intellectual property laws, such as "property rights" and the "Lockean theory", can be traced all the way back to Western cultural heritage and customs[13] [14] [15]. These unique "logic and reasoning", "mindsets", and "understandings" may have to adapt in some way when they leave their native environment and go to new territories[16]. Furthermore, multiple researchers have discovered that data is culture-specific, and that persons raised in various cultures may have dramatically different perspectives on information[17].

From our above-mentioned discussion, it can be stated that we may now be able to answer a commonly asked question: Can culture die? Patnaik, in her online article wonders, does it not seem plausible? With the whitewashing of several Disney heroes (look at Hercules for example)[18], the rapid disappearance of many regional Indian languages, and the loss of culture of several groups of Indigenous people, it does not seem like a far-away nightmare[19]. Patnaik clarifies why it so happens- the appropriation of culture.

Cultural appropriation is, simply put, the misuse of one culture by another, often done so without giving due compensation towards the community from where you "take" the culture, often resulting in the "perpetration of negative stereotype"[20]. Such a terminology, however, received a lot of backlashes from critics around the globe, Patnaik explains. They've argued that a majority of the instances that are often being termed as "cultural appropriation" are only instances where cultural exchanges take place or are often acts of "cultural borrowing"[21].

[13] Richard A. Spinello, *Intellectual property rights*, 25(1) LHT 12, 12-22 (2007).
[14] Adam Mossoff, *Why Intellectual Property Rights? A Lockean Justification*, Library of law and liberty, https://www.lawliberty.org/liberty-forum/why-intellectualproperty-rights-a-lockean-justification/ (last visited on 8th October 2021).
[15] Michael Reber, *A Study of Cultural Influence on the Valuation of Patents*, Doctoral Dissertation, The University of Gloucestershire (2016).
[16] Marco Santoro, *Putting Bourdieu in the global field. Introduction to the Symposium*, 2(2) Sociologica 1 ,1-32 (2008.)
[17] Ji-Hyun Kim, *Information and culture: Cultural differences in the perception and recall of information*, 35(3) LISR 241, 241-250 (2013).
[18] In proper Greek mythology, Hercules was a demi-god, born out of an act of rape by the God Zeus. In the Disney "adaptation", he's a child of both Hera and Zeus, making him a God, not a demi-god. Hercules, in the film (apart from all their inaccuracies) has been depicted like the perfect "hero" that the white suburban population of America would love - from his raging abs, his perfectly-brushed blond hair and those sky-blue eyes. In reality, he would've been olive-toned, with darker hair and eyes - if we are to look into ethnicity as an aspect.
[19] Prarthana Patnaik, *When IP Law and Cultural Appropriation Meet At a Crossroad*, spicyip.com, https://spicyip.com/2019/01/when-ip-law-and-cultural-appropriation-meet-at-a-crossroad.html (last visited 9th October 2021).
[20] *Id*, at para 1.
[21] *Id*.

Hence, the author of this paper agrees with Patnaik, it is important that we learn to distinguish between actual cases of cultural appropriation that demand legal scrutiny and public attention, and spurious charges used to pull off PR stunts.

In her article titled "Cultural Property versus Intellectual Property: The Cultural Appropriation Debate", Kim gainer quotes a study[22]:

"*As scholars have noted, indigenous expressions, symbols, and ideas often constitute collective, intergenerational, religious, and spiritual properties which, by their nature, exclude them from protection under prevailing intellectual property laws. For indigenous peoples, then, there is little protection against the appropriation of intangible cultural "goods,' even if the appropriation is experienced by tribes as distortion, theft, offense, or misrepresentation, each with an attendant set of legal, social, and ethical issues.*"

For example, among appropriated resources in the instance of the Music Theatre Bristol performance[23] were the roles, which were not played by performers from the same community as the characters were intended to come from. Critics of the show felt that these characters belonged to persons of colour (POC), no matter how historically inaccurate their notion of theatrical casting was. Cuthbert writes, the concept of ownership as interpreted within a postcolonial discourse, in which "culture assets of colonised people" is perceived as having been appropriated by colonising powers, is implied in the theory of cultural exploitation[24].

This leads us to an important question: Does there lie an important link between IP laws and the exploitation and appropriation of culture?

The best way to protect aspects of the culture of a community from misappropriation would be to protect them under the umbrella of "Traditional Cultural Expressions" or, TCEs, only when they fall under the ambit of the term. The Intergovernmental Committee on Intellectual Property and Genetic

[22] Angela R. et. al., *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94(5) Texas L.R. 859, 859-931 (2016).
[23] Adam Hetrick, *Theatre Cancels Aida amid Concerns over Cultural Appropriation*, playbill.com (October 6, 2016), http://www.playbill.com/article/theatre-cancels-aida-amidconcerns-over-cultural-appropriation (last visited 10th October 2021).
[24] Denise Cuthbert, *Beg, Borrow or Steal: The Politics of Cultural Appropriations*, 1(2) Postcolonial Studies 257, 257-262 (1998).

Resources, Traditional Knowledge and Folklore of the WIPO has defined TCEs[25] as "*tangible and intangible forms in which traditional knowledge and cultures are expressed, communicated or manifested.*"

The committee also provided us with two methods for the protection of TCEs[26]:

"Positive protection": This type of protection refers to where both intellectual properties and non-intellectual properties approach boards to ensure that parties do not get a chance to gain illegitimate access towards cultural expressions and build businesses that take advantage of and use such cultural expressions for financial gain.

"Defensive protection": These mention a set of techniques or strategies that will ensure that third parties won't be able to claim illegitimate or unfounded intellectual property rights over such expressions.

The issue with IP remedies to such issues is that so many nations' Intellectual property laws don't really acknowledge comparable circumstances. When we look at the legal position in India, for example, even though the constitution of our motherland safeguards our cultural heritage[27], we see that our IP law structure is inadequate to safeguard TCEs[28].

The following chapters will deal with such cultural appropriations and clashes with IP Law.

CHAPTER 2 – ONE SERVING OF HAKUNA MATATA FOR DISNEY

As the dawn of a new age of technology arises, new and different technologies are created every day. This allows us to be more perceptive of all the different kinds of cultures that exist all over the globe. This demonstrates that the world has become a 'Global Village,' and we must guarantee that no group's culture is misappropriated[29].

[25] *THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS: DRAFT ARTICLES*, wipo.intl, https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_39/wipo_grtkf_ic_39_5.pdf (December 20,2018) (last visited on 9th Oct 2021).
[26] *Id*, at page 6.
[27] INDIA CONST. art. 51A(f)20.
[28] Sreyoshi Guha, *People Tree v. Dior: IP Infringement, Cultural Appropriation or Both?*, spicyip.com, https://spicyip.com/2018/02/people-tree-v-dior-ip-infringement-cultural-appropriation-or-both.html (last visited 9th October 2021).
[29] Vikash Dhaka, *"Hakuna Matata": can Disney trademark it*, blog.ipleaders, https://blog.ipleaders.in/hakuna-matata-can-disney-trademark-it/ (last visited on 10th October 2021)

However, while it still remains an infuriating PR stunt, it's still hakuna matata for the Walt Disney Company overs its trademark of the Swahilian phrase.

A Brief History

The Walt Disney Company, more commonly known as Disney, is a media and entertainment conglomerate based in the United States. In the US entertainment industry, Disney is a well-known name[30]. Disney owns a number of film studios, including 20th Century Fox, Marvel Studios, and Pixar Animation Studios. Aside from film studios, Disney owns a number of television networks, including Disney Channel, Freeform, and ESPN, among others. Disney+, Hotstar, Hulu, and other internet streaming platforms are among the company's offerings. Disney is, without a doubt, at the pinnacle of the media and entertainment sector[31].

Disney used the Swahili phrase "hakuna matata" in their blockbuster animation "The Lion King", which was one of the highest-grossing movies ever made that year[32]. The movie was a remake of an animated feature film produced by Disney "Lion King", which became available for the public to watch and enjoy in the year 1994[33]. The terminology "hakuna matata" was also used in an extremely popular song from the original 1994 soundtrack of the film. In the year 2003, Disney filed for the trademark of that catchphrase, and the US Trademark and Patent Office awarded them such a trademark[34]. Disney limited the scope of such a trademark to products like T-Shirts, other pieces of clothing, headgear, and other items[35].

The phrase "hakuna matata" translates to "no worries". It is a Swahili term that is spoken throughout Africa. With the viewpoint that language is a crucial part of a culture and capitalising it is immoral[36], many people were against the Walt Disney Company monopolising on common phrase of "hakuna

[30] *Id*, para 1.
[31] *Id*, para 2.
[32] Kyle Jahner, *No (Legal) Worries for Disney in 'Hakuna Matata' Trademark Row*, bloomerglaw.com, https://news.bloomberglaw.com/ip-law/no-legal-worries-for-disney-in-hakuna-matata-trademark-row (last visited on 10th October 2021).
[33] *Id.*
[34] Jahner, *supra* note 32.
[35] *Id*, at para 3.
[36] Cuthbert, *supra* note 24.

matata". A Zimbabwean activist, Shelton Mpala, sued Disney over its trademark registration on the phrase is a popular example[37].

The Hakuna Matata trademark "has never and will not hinder anybody from using the phrase," according to a Disney spokesperson. As per the Bloomberg Law Records, Disney has not filed a lawsuit against the use of Hakuna Matata. Various businesses, including a wedding planner and a supplement firm, have registered Hakuna Matata trademarks without Disney's permission in other areas[38]. "*Indeed, for many years, trademarks have been registered for popular words and phrases such as 'Yahoo!', 'Vaya con Dios (Go with God),' 'Merry Christmas' and 'Seasons Greetings' without impeding the use of these phrases and words in any cultural way*," Disney said in its statement[39].

"*Trademark law is pretty clear in terms of how marks can be used, and whether Disney owns a particular phrase*." Joshua S. Reisberg of Axinn Veltrop & Harkrider LLP, an attorney for intellectual property mentioned[40]. "*Whether it's good and worth the outcry, it is for Disney to consider.*"

Arguments have arisen from both the sides; it can be noted.

Ann Bartow, a professor at University of New Hampshire, who teaches Intellectual Property Laws, explains that she could understand why the issue of cultural appropriation may come up during such a sensitive case[41]. Courts occasionally grant trademarks far too much weight, reflecting "a rather poor impression of consumers and how quickly they might be confused," she said. "*When it goes wrong, companies start shutting down people using it other ways. And that's where I see the point alleging cultural appropriation. The background is that the U.S. is a big bully on IP generally. It's not Disney's fault, but it benefits from it*"[42].

An IP Laws practitioner, Bryan Wheelock, stands on the opposing side. "*A fundamental misunderstanding of trademark law*," is what he commented about the backlash against the trademark[43]. He said that Disney's selection of "Hakuna Matata" showed a facet of African culture that most American audiences would be unfamiliar with. He also mentioned various other similar cases. Hundreds of

[37] Kimiko de Freytas-Tamura, Hakuna Matata™? Can Disney Actually Trademark That?, nytimes.com, https://www.nytimes.com/2018/12/20/world/africa/hakuna-matata-disney-trademark.html (last visited 9th October 2021)
[38] Jahner, *supra* note 32.
[39] *Id.*
[40] *Id*, at para 5.
[41] *Id*, at para 13.
[42] *Id.*
[43] *Id*, at para 16.

trademarks are based on other languages or sayings, he added, along with about a handful for "*sans souci*" (French for "without worry") and over 400 for the Swahili word "*safari*"[44]. Mr. Wheelock is of the opinion that we, as a society, are all progressive when we share parts of ourselves with each other. He admitted that obtaining a trademark is not by nature sharing, but stressed that "it's part of the language, and we all accept we may pull words out of the language for restricted purposes" in trademark law[45].

CHAPTER 3 – #KIMOHNO AND HOW WE CAN USE TRADEMARK LAW TO CURB SUCH INSTANCES

KIM'S 'MONO

Kimberly Noel Kardashian-West (popularly known as Kim Kardashian-West) rose to fame with her family's reality TV Show "Keeping Up With The Kardashians", but that it not the only reason she is famous today. Kim is a proud business woman of various businesses, and the most well-known as KKW Beauty (that sells beauty products, perfume, and so on) and Skims (selling mainly shapewear in various skin tones)[46].

However, dubious as her rise to fame may be, her sex tape was not the last scandal she faced in the public eye[47]. In the month of June of 2019, she was in hot water for her new, improved brand of shapewear - KIMONO[48]. The brand website explains that Kimono is "*a new, solution focused approach to shape enhancing underwear*" and "*fuelled by her (Kim's) passion to create truly considered and highly technical solutions for everybody*"[49]. She faced a lot of public back-lash for naming her brand of shapewear after a traditional Japanese garment, especially on Twitter, where people started to trend "#KimOhNo"[50].

[44] *Id*, at para 17.
[45] *Id*, at para 18.
[46] Himanshu Mohan, *Cultural Appropriation and Trademark Law*, mondaq.com, https://www.mondaq.com/india/trademark/836418/cultural-appropriation-and-trademark-law (last visited 11th October 2021).
[47] Oli Coleman, *The Kim Kardashian sex tape: An oral history*, pagesix.com, https://pagesix.com/2017/03/27/the-kim-kardashian-sex-tape-an-oral-history/ (last visited 11th October 2021).
[48] Carol Goyal, *Weekend Blog: Kim Kardashian and the #KimOhNo*, campaignindia.in, https://www.campaignindia.in/article/weekend-blog-kim-kardashian-and-the-kimohno/452920 (last visited 11th October 2021).
[49] *Id*.
[50] Mohan, *supra* note 49.

The brand's name is undoubtedly a creative (many might say purposefully imaginative) play on words with Kardashian's first name, but the reality that the business is titled after the Japanese Traditional clothing, the renowned 'Kimono' has sparked outrage online. People expressed their disappointment and condemnation with the fact that the so-called shapewear Kardashian shared in photo promos appears to look nothing like an actual 'kimono' in the first place. Following the release of her brand, Kardashian was met with public outrage, both in America and Japan, and primarily on social media platforms, labelling it as "cultural appropriation"[51], and rightfully so.

Several well-known people spoke out against it, including Kyoto Mayor Daisaku Skamokawa, who expressed his worry in a statement to Kim Kardashian. He goes on and on about how important the kimono is to Japanese culture[52]. More than a million individuals joined an online petition to change the brand name, emphasising the brand's blatant disrespect of Japanese culture. The brand name was later renamed to "Skims," and that is how we know it today. She lost millions of dollars due to a minor adjustment in the brand's name. Tons of stories were written about the branding scandal, that negatively impacted Kardashian-West's both reputation and brand[53].

CULTURAL APPROPRIATION VS. TRADEMARK LAWS

Attempts to appropriate cultural emblems through trademark registration have been made on various occasions. Despite the key claims to GI-tagging, India had to fight a long battle against some American firms in the 1990s to protect the label 'Basmati' rice[54]. The goal of trademark law is to prevent customer confusion regarding the source of the goods or service recognised by the trademark, as well as to safeguard the trademark owner's goodwill in the mark. A trademark must be unique enough to execute its two-fold identification and differentiating duties in order to be enforceable[55].

When it comes to trying to curb cultural appropriation, there are 2 different kinds of trademarks that might come in handy[56]:

[51] *Id*, at para 8.
[52] *Id*, at para 8.
[53] *Id*.
[54] *The Role of Trademark in Cultural Appropriation*, kashishipr.com, https://www.kashishipr.com/blog/the-role-of-trademark-in-cultural-appropriation/ (last visited on 11th October 2021).
[55] *Id*, at para 13.
[56] *Id*, at para 16.

A Certificate Mark: This is used to certify or guarantee the existence of specific traits, qualities, or aspects of the items or services it specifies. They're usually associated with a specific product kind, a particular place, or a certain craftsmanship source.

A Collective Mark: This is a term used by individuals and groups or organisation to indicate membership in the group or organisation, as well as the items or services offered by the organisation. The group owns a collective mark, which its members are free to make use of.

Collective marks, in contrast to certification marks, have the benefit of not having to operate as a certification or assurance of a standard or quality, but might conceivably act as trademarks. Certification marks, on the other hand, cannot be registered as trademarks but it may be easier to achieve since they do not demand confirmation of secondary meaning when used as a geographical indicator or cultural symbol and so on[57].

CONCLUSION AND RECOMMENDATIONS

Many large firms and businesses have started to employ the cultural words of numerous languages as their brand names. Companies often choose anything truly unique and unforgettable, but this can lead to a slew of problems. Prime examples of such issues will be Disney's trademark of "Hakuna Matata" and Kardashian-West's attempt at getting away with calling her brand after a traditional Japanese garment.

There exist no proper rules and regulations barring such firms and businesses from appropriating cultural heritage. Individuals may, nevertheless, use trademark law to fight cultural appropriation. Within trademarks, there are several types of marks, such as certification marks and collective marks. These marks can be used as a deterrent against cultural appropriation. Under the concept of "prior use," even some people can defend their cultures.

In conclusion, while trademark rules are not flawless, they do give significant instruments for communities that are impacted to oppose and regulate cultural appropriators from utilizing their prized traits. The best approach to properly utilizing these resources is for the communities to recognize the tools available and adopt a methodological approach that attempts to use these assets efficiently.

[57] *Id*, at para 17.

The author feels confident that their research has successfully concluded, and has been able to answer all the important research questions posed during the formulation of such research work. The author is also confident that they have been able to achieve all the research objectives that they had set out to do so while they were researching on the topic at hand.

RECOMMENDATIONS

The most important lesson for companies, brands, celebrities and so on, to take away from such instances is to understand that while selecting the name for their new business venture that might be a derivative from another culture, it is essential to note that the process should involve more than just checking its availability and ensuring that the trademarking of such a name is allowed under the country's intellectual property laws.

Cultural sensitivity and the market's likely response to whether the term would be judged insulting or improper, and so bad for business, must be examined. Furthermore, if any culturally themed product is released, it should be a joint endeavor that gives fair credit and recompense to the culture while not demeaning it in any way.

If brands and companies still wish to use cultural expressions in their products, they may

1. Understand and be respectful of the culture and the expression which they wish to utilize on their products
2. Transform their product as per the particular cultural expression respectfully
3. Acknowledge the culture of origin and give the culture its due credit and compensation
4. By submitting applications for approval and forming creative collaborations, engage with the owners of traditional cultural manifestations.