



Why is everybody talking about cultural misappropriation?



As discussed by Laura Collada, Managing Partner, Dumont www.dumont.mx

Cultural appropriation also called cultural misappropriation is a concept that it is not well defined and that when defined, pretty much depends on the source, of which elements and political position they are referring to phrase such a concept.

It is an issue that has critics and defenders and many blurry lines, and depending on the author, it will be related to white supremacy, western world, xenophobia and such. We often hear great arguments defending one position or the other and more frequently, arguments without any knowledge or understanding of what is essential to highlight. It is an issue that needs context, as well as relevancy to current culture. It is a sensitive issue which depends on the eye of the beholder.

Who owns culture?

In modern free society, it is supposed that cultural exchange enriches our society. It is a vital part of the culture and its grounds on the cultural appreciation. However, there is a very fine line between cultural appropriation and cultural appreciation; they are entirely different concepts.

There are so many things that we “borrow” from different cultures: Food, for example. In the western world we like Asian food or Mexican food and many times it is not the real thing, it is inspired in a particular cuisine; however, I genuinely believe that cuisine exemplifies cultural exchange at its best. Being a Mexican, most of the time, I do not like the inspirations or the look-alike. However, a part of my heart appreciates that it is likable; thus, people try to imitate it or are being inspired by it. Regardless of that, in my country, it would never be considered as original. The same happens with music (and its performers: Katy Perry, Miley Cyrus, etc.) as well with hair styles and hairdressers (dreadlocks, braids, mohawks, etc.), fashion, etc.

There is a very fine line between the critics speaking about cultural misappropriation and defenders talking about cultural appreciation.

Every single year around Fashion week, important fashion shows, award season, and lately prom season, we hear about this

topic. The qipao dress, the Chinese bag, the white singer winning R&B awards, Katy Perry, Carolina Herrera using Mexican imagery, Coachella and native American symbols, UK chefs cooking authentic Asian food and the list goes on and on. Not forgetting, Halloween and the insensitive costumes!

So, what is it? Is it cultural appropriation or just paying homage? As mentioned before, the tricky thing to establish is that if it is hurtful and offensive to ethnic minorities, it should not be done. Nevertheless, expressed like this, it seems only to be a moral issue, and it is not. Usually, expressions of culture are protected by intellectual property.

To define cultural appropriation, it means the use of one culture and its defining elements, by another culture. Oxford Reference defines it as: **“A term used to describe the taking over of creative or artistic forms, themes, or practices by one cultural group from another. It is in general used to describe Western appropriations of non-Western or non-white forms and carries connotations of exploitation and dominance.”**

As mentioned before, there is not a universally accepted definition for the term, but it always relates to the use of art, imagery, symbology, artifacts of cultural expressions with significance to a minority or dominated group by someone who does not belong to that group.

It is important to highlight, as a foundation for making laws related to this topic, that appreciation of culture requires understanding and respect; appropriation lacks those things. There must be certain engagement with the culture to appreciate it. Borrowing is not inherently wrong, and cultures must not be reduced to stereotypes.

Some authors consider that trends are not trends; they are someone’s culture. Trends usually cherry-pick things from a minority culture and make them socially acceptable when the dominant culture adopts it and finds it fashionable, cool, innovative, inspirational, etc. Usually, this cherry-picking will be profitable for the trendsetter. Moreover, other authors speak about assimilation, which in these cases is not suitable. Assimilations most often are a means of survival.

So, where do we stand?

It is difficult to say. Context, geography, and current culture are important when defining what to protect and how to protect it. A free modern society promotes cultural development and the enrichment of culture; however, in a society like this, many voices accompany it: freedom of speech, indigenous rights, western supremacy, and so on. Global modern world culture is being created every single day, people share their culture, and sometimes they give it up (because of political, economic, etc. reasons) but it transforms every day, regardless of the reason. Perspective is valid.

So legally speaking, what should be done?

It is not a trivial topic, and there are many angles, many perspectives, there is no way to please everyone. WIPO has been working on the issue and recognises the protection as sui generis. In 2008, The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore commissioned two gap analyses on the protection of traditional cultural expressions/expressions of folklore and traditional knowledge. In 2017, the WIPO General Assembly requested the Secretariat to “update the 2008 gap analyses on the existing protection regimes related to Traditional Knowledge and Traditional Cultural Expression. It is various works advising policymakers. WIPO suggests treating traditional cultural expressions as



So, it must be a goal to enhance international instruments to protect these cultural expressions. At a national level, many countries are doing an excellent job, but in the meantime, we must appeal to educate people on what cultural appropriation is. It is not a trivial issue.

intellectual property, where holders would have the possibility to control access and use of these rights by third parties, as well as using intellectual property principles and values to prevent unauthorised or inappropriate uses by third parties (namely misuse and misappropriation). It is a sui generis protection adapted to respond to the features and needs of these rights.

Protection would consist of:

Positive protection that will enable the granting of rights that empower communities/nations to promote and control their uses by third parties and benefit from their commercial exploitation as well as defensive protection in order to stop people outside the community/nation from acquiring intellectual property rights over these rights.

WIPO has also analysed and suggested which are the key questions with the view of developing an IP strategy regarding the protection of traditional knowledge and traditional cultural expressions. As an advisor to policymakers, the lawmakers should decide if it should be protected as a sui generis intellectual property right, and if so, define the objectives and the legal means of their protection. This should be done by identifying the traditional cultural expressions and the holder’s interest, assessing legal systems of protection and considering as an option - sui generis, as well as assessing the implementation. Also, governments should identify the interested parties surveying the cultural expressions of the country as well as the indigenous and local communities that hold, practice, and maintain such rights. It should also assess the expectations of using them as a vehicle for economic development.

Also, we must highlight that between a sui generis IP system and a traditional IP system, there are most certainly gaps. Obviously, without any harmonisation, there are at an international level, obligations, provisions, and possibilities to protect these rights. The gaps refer to an unmet economic, cultural, and social need. Moreover, there is a conceptual divide. A traditional IP system would have certain shortcomings; conceptions such as ownership, fixation, originality, exclusive rights are entirely different when referring to traditional expressions. Cultural expressions were created primarily for spiritual, religious, tribal purposes which defer quite much to the objectives of traditional IP. There could indeed be other non-IP mechanisms such as laws about cultural wealth, dignity, human rights, heritage preservation, etc.

We must understand that cherry-picking cultural elements from marginalised groups without knowing or caring what the significance is of such elements, might hurt and affect that group. History shows that people share their culture, and sometimes they are forced to give it up, it can be disempowering, dehumanising. It is essential to take responsibility for your actions that can cause harm to other people.

For example, I am Mexican, and I have never understood why 5 de Mayo is celebrated in the United States. It is celebrated by drinking a lot, eating guacamole, wearing huge sombreros and fake mustaches. It is not Mexican Independence Day (September 16), and that is a huge misconception, and most Americans do not know what that holiday commemorates. The date is observed to commemorate the Mexican Army’s victory over the French Empire at the Battle of Puebla, on May 5, 1862. The victory of the smaller Mexican force against a larger French force was a boost to morale for the Mexicans. A year after the battle, a more significant French force defeated the army and Mexico City soon fell to the invaders. What is the reason to celebrate? It is said that at the beginning of the last century some Mexican consulates in the USA used to celebrate and from there it picked up as something to commemorate. Usually, it stereotypes Mexicans and its traditions; it should not be like that; this is my personal opinion. Same happens with ninja or geisha costumes or traditional tribal wear, such as penachos of indigenous tribes, or some headdresses or tribal Polynesian tattoos. Appropriation does not go both ways.

We have to understand that what is trivial for one person, might be very important for someone else; each perspective is valid. We should never invalidate, and we should be cautious with creative licenses. Sharing or borrowing is acceptable if we understand the significance and value of those cultural expressions and use them properly. We should not create resent and blurry, fine lines should be balanced.

So next time, appreciate cultural expressions: you do not have to own it, to do it.

Bibliography:

- <https://www.theatlantic.com/entertainment/archive/2014/05/cultural-appropriation-in-fashion-stop-talking-about-it/370826/>
- <https://aestheticdistance.com/blog/cultural-appropriation>
- <https://www.bustle.com/p/7-things-you-might-not-realize-are-cultural-appropriation-that-are-60679>
- <https://www.lawliberty.org/2019/02/26/cultural-appropriation/>
- <https://www.wipo.int/tk/en/folklore/>
- <https://www.wipo.int/tk/en/igc/issues.html>

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