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Cultural Appropriation and the Role of the Law: Is the Current System of Intellectual Property Law the Best Solution for Issues of Cultural Appropriation?

I. INTRODUCTION

In the United States and globally, cultural appropriation has become an increasingly polarizing issue in recent years. The argument between appropriation and appreciation continues and has challenged society to try to find solutions in the legal field.¹ However, this struggle is not new. There is a long-standing history of the destruction of cultural identity.² Continued globalization and increased interconnectedness spurred by capitalism place minority and Indigenous cultures in the defensive position of trying to protect their cultural identity, heritage, and memories from destruction through misuse or appropriation.³ Existing intellectual property theories have been utilized to assist cultures in defending against their culture's destruction, misuse, and abuse. However, a deeper analysis of culture and cultural heritage in the law reveals that the legal system is ill-equipped to address cultural appropriation claims.

The most difficult aspects of adjudicating cultural appropriation claims are defining the protected parties, defining culture, finding legitimate representatives to stand in these claims, and finding workable dispute resolution methods. The United States, Mexico, and New Zealand have and continue to, attempt to address cultural appropriation claims within their legal systems. This note will: (1) examine the role of intellectual property law in the United States as a mechanism where a cultural appropriation may be argued; (2) examine the legal responses to cultural appropriation of Mexico, New Zealand, and the United States; and (3) discuss potential solutions within and outside of the legal system for addressing cultural appropriation.

A. The Issue with Definitions

Simply defined, culture is “a set of shared ideas, customs, traditions, beliefs, and practices shared by a group of people.”⁴ Culture is based on intangible and tangible things that defy quantification, an issue for the law. A widely recognized group that has a distinct culture are Indigenous people.⁵ Globalization, ease of travel, and even social media have allowed people to reconnect with their cultures and for others to experience other

cultures. This has had positive and negative effects; cultural appropriation is one of those negative effects.

In the United States, people who wish to retain their cultural identities distinct from the dominant culture face an uphill battle. These communities “attempt to maintain their distinctiveness, despite pressures to assimilate, they are undoubtedly influenced by and are subject to the legal system produced by the majority culture.”⁶ Minority cultures must define the differences between the dominant culture and themselves, which is another roadblock.^{7, 8} Research suggests that the traditional acculturation strategies⁹ are very restrictive, meaning that assimilation or preservation are the only two models.¹⁰ Instead, a more diverse model recognizing integration, assimilation, separation, and marginalization can provide greater insight into the immigrant experience.¹¹ Thus providing better insight into draft laws tackling cultural appropriation claims.¹² The United States’ dominant American culture has difficulty with such ambiguity, as does the law.¹³ To best understand the implications of cultural appropriation on cultural and personal rights, it is necessary to define the relevant terms. According to Madhavi Sunder, cultural appropriation describes the phenomenon of cultural traveling in the opposite direction: ‘the taking – from a culture that is not one’s own – of intellectual property, cultural expressions or artifacts, history and ways of knowledge.’¹⁴ Sunder identifies two major concerns with cultural appropriation. First, cultural appropriation will lead to misrepresentation, distortion, and damage resulting from the distortion of culture.¹⁵ The second concern Sunder highlights is that “outsiders will exploit the cultural resources of a people, with the people losing the economic benefit of their cultural production (this claim is akin to one of unjust enrichment, or of ‘cultural economic theft’).^{16, 17} Domestically and abroad, the artists and artisans fear that the assimilation of their culture into the dominant American culture will erase, not just replace, their identities and memories.

Courts have grappled with defining art. Courts have articulated that it is not their place to decide the limitations of art.¹⁸ Some courts have decided that it is the purview of Congress to determine the definition of ‘art.’¹⁹ Others have had to decide what constitutes art. This paper will utilize part of the definitions surveyed by the 9th Circuit in *In re Leonardo*.²⁰ In that case, a debtor attempted to claim that his 1957 MGA car was a work of art and therefore exempt from a money judgment under California statutes. One of the definitions the court looks to in an attempt to find a workable definition of art is a work meant to stir human emotion and is exemplified in cultural heritage.^{21, 22} Although the court ultimately adopted the 9th Circuit’s intellectual property law definition of art the court chose to turn to the *Corpus Juris Secundum*, a legal encyclopedia, in an attempt to clarify what qualifies as art. This struggle to understand which pieces and works are art begins to shed light on the battle between the law and societal definitions.

This paper will use the term cultural heritage to attempt to define the intangible and tangible aspects of culture, identity, traditional knowledge, and memories. Tangible manifestations of culture will refer to UNESCO’s definition of cultural heritage.²³ Incorporating aspects of Mexico and New Zealand’s statues, cultural heritage here will also refer to intangible memories, ideas, histories, and cultural expressions, including artisanal works, stories, myths, experiences, and dress commonly shared among people distinct from others stemming from a

common ethnic or geographical heritage that can provide economic benefit through the preservation of the culture.

The law requires precision and definitions. Clear definitions of art, cultural appropriation, cultural heritage, and culture are needed to ascribe remedies, violations, and elements or factors to statutes, regulations, and case law. That is the fatal flaw. Defining culture for legal purposes is difficult and has resulted in impractical legal solutions. However, it is necessary to ‘flounder in semantics’²⁴ and first to understand the difficulty in defining culture.

The most logical legal outcome is that culture's physical and immaterial aspects will be moved into the intellectual property regimes where individual ownership will alienate, penalize, and delegitimize the collectivistic views of property minority cultures often hold. However, this outcome would further suppress indigenous and minority cultures because collectivistic and the evolutionary nature of cultural heritage is ignored to accommodate Eurocentric ideas of property. As such, for communities that have been systematically alienated from access to the legal system, the most crucial question is, what remedies are there for communities facing appropriation that does not destroy another aspect of their cultural heritage?

II. ROLE OF INTELLECTUAL PROPERTY IN CULTURAL APPROPRIATION CLAIMS

Generally, the United States addresses issues of cultural appropriation within the framework of intellectual property law. Intellectual property rights create a monopoly over “any product of the human intellect,”²⁵ allowing the owner to protect their creation from unauthorized use with a (1) patent, (2) copyright, (3) trademark, or (4) trade secret.²⁶ Premised on traditional property law concepts, the United States regime of intellectual property focuses on the idea that a singular person or entity is the only one that may obtain a benefit from a statutorily protected tangible item or intangible idea.²⁷ Furthermore, there are legal consequences for those who attempt to obtain a benefit from using the intellectual property of another without first obtaining permission.²⁸ A violation of intellectual property rights may occur from misappropriation, infringement, conscious wrongdoing, negligence, or innocent wrongdoing that results in a direct benefit that is measurable²⁹ or harm that is sustained by the holder from the use or misuse of the intellectual property.³⁰



Mexico and New Zealand have a convergence of individualistic property and collectivistic ideals of property co-exist due to pre-existing indigenous cultures. Mexico and New Zealand have employed other legal and statutory methods to protect intangible and shared cultural heritage. A brief review of the various statutes in the United States³¹, Mexico's General Law for the Protection of the Cultural Heritage of Indigenous and Afro-Mexican Populations and Communities³², and New Zealand's Toi Iho, Trade Marks Act of 2002³³, and

non-legal solutions will explore if these methods are adequate to address cultural appropriation claims.

III. INTERNATIONAL SURVEY OF STATUTES

A. Mexico Law

Mexico's population comprises approximately 130,000,000³⁴ people and recognizes fifty-six indigenous languages.³⁵ Each indigenous group has a separate identity, language, and culture. While Mexico recognizes the indigenous groups and their contribution to Mexico's greater culture, there is a deep history of discrimination against indigenous people.³⁶ Appropriation of Indigenous dress and artisanal works form the basis of many of Mexico's cultural appropriation claims. This problem has become so pervasive for Indigenous Mexicans that the state government enacted the General Law for the Protection of Cultural Heritage of Indigenous and Afro-Mexican Populations and Communities.³⁷

i. General Law for the Protection of the Cultural Heritage of Indigenous and Afro-Mexican Populations and Communities

The first article of the statute sets forth the legislative intent: "to recognize and guarantee the protection of safeguarding and developing cultural heritage and collective intellectual property of the indigenous and Afro-Mexican communities and people."^{38, 39} Article 2 then sets forth the purpose of the statute. (1) The statute recognizes the intangible nature and importance of traditional knowledge and cultural expressions as well as a collective right to intellectual heritage; (3) the right to self-determination and autonomy of the communities to determine how to preserve, protect, control, and develop their cultural heritage and tradition; (5) establishes a new System for the Protection of the Cultural Heritage as the mechanism for interinstitutional coordination that will work with the communities; (6) establishes sanctions for "misappropriation"^{40, 41}, Article 6 then defines appropriation as, "use, exploitation, commercialization or reproduction of the cultural heritage, knowledge and traditional cultural expressions... [without] free, informed, or prior consent... or when their cultural heritage is violated; ... [or] any act that threatens or affects the integrity of the cultural heritage of the indigenous and Afro-Mexican peoples and communities is prohibited."⁴² Other features of this statute that are not common to other intellectual property statutes are the definition of cultural heritage⁴³, the recognition and definition of Afro-Mexicans⁴⁴, a recognition and protection in the statute of biculturality⁴⁵, pluricultural⁴⁶ and interculturality^{47, 48}, an entire chapter is devoted to collective rights over cultural heritage⁴⁹, a committee that consists of secretaries and ministers of both foreign and interior departments⁵⁰, and the new mechanism for dispute resolution.⁵¹ Recognizing the importance of cultural heritage and the blight of appropriation demonstrates the impact of appropriation claims on an individual and community level.⁵² This legislation is new; as of this note, there are no current challenges under this statute.

The U.S. may find some clues in the language of Mexico's legislation for addressing appropriation claims. First, a definition for cultural appropriation to help recognize cultural appropriation as a normative and legal wrong. Article 1 lays out the harm and importance of appropriation. The United States could adopt a similar

normative rule through case law or legislation that would allow further legal scholarship to develop practical solutions for addressing appropriation claims. Second, the broad definition of culture and the groups that deserve special protections can serve as another basis for legal scholarship and developing remedies.⁵³ Third, the statute's mandate that the government work with Indigenous representatives and communities poses a question of practicality and workability, which is undoubtedly one of the statute's most difficult but valuable sections that should be closely studied. Most importantly, the statute provides workable guidelines for dispute resolution mechanisms that the U.S. may study as a guide. The statute designates several methods of resolution: mediation, a complaint, or denunciation.⁵⁴ The INDAUTOR, the National Institute of Copyright, will process violation claims and mediate between the alleged infringer and the claimant.⁵⁵ Strict fines or even prison terms may be imposed for violations under the statute.⁵⁶ The real consequences of the statute will have a deterrent effect.⁵⁷ However, the true nature of the deterrence and potential applicability will not be known until test cases and decisions are made.⁵⁸

B. New Zealand Law

The Māori people also sought legal protections under New Zealand's Intellectual Property systems. Māori people find protection for their tangible cultural heritage in the Treaty of Waitangi⁵⁹ and in succeeding intellectual property laws, like the Trade Marks Act of 2002.⁶⁰ The Treaty of Waitangi has two versions, an English and Māori version, that are considered official. However, important differences between the two translations highlight an issue of protecting cultural heritage.⁶¹ The English version protects only tangible items with historical and cultural significance.⁶² The Māori version protects "tino rangatiratanga" (full authority or chieftainship) overall "taonga" (treasures which to Māori include both the tangible and intangible, material and non-material).⁶³ One definition protects the tangible only, and the other protects both tangible and intangible aspects of cultural heritage. It is important to note that the Treaty protecting the Māori cultural heritage has only been adopted through reference, legislation, or any other formal act.⁶⁴

In her analysis of the proposed changes to the Trade Marks Act and the existing system for protection against appropriation in New Zealand, Buchanan repeats the same frustrations with addressing appropriation claims in the legal system. The struggle between cultural and intellectual property rights because of the requirement of defining culture⁶⁵, the battle to prevent misuse and exploitation, and the need to compensate the Māori for using their cultural expressions and traditional knowledge.^{66, 67}

Māori culture has two prominent examples of appropriation, despite the language of the Treaty, the Ka Mate haka, and the koru pattern. The Ka Mate haka is a war dance authored by warrior chief Te Rauparaha of the Ngāti Toa tribe in 1821.⁶⁸ It has been adopted by the All Blacks New Zealand rugby team, American high school athletic teams, for car ads, and by non-Māori for other commercial use.⁶⁹ Despite requests and outcry against the use by the Māori, attempts to trademark the dance were futile and led to a settlement.⁷⁰ The Koru pattern is a traditional design in carvings, jewelry, tattoos, and other artwork that non-Māori people have also adopted for commercial uses.⁷¹

i. Toi Iho Māori Made Mark, Technical Guidance, and the Trade Marks Act of 2002

New Zealand has attempted both legislative and non-legislative attempts to stem appropriation. In 2002, the Toi Iho Māori Made Mark, funded by the New Zealand Arts Council, served as an authentication mark but was soon abandoned in 2009.⁷² The Ministry of Economic Development published a guide for protecting cultural and artistic expressions.⁷³ The Trade Marks Act of 2002 attempted to address Māori concerns with registering trademarks that contain a Māori sign, including imagery and text.⁷⁴ This new version of the law contains a reference for the ‘offensiveness’ standard, lower than ‘appropriateness’ and one that does not include ‘the “cultural origins of designs and designers [as]...part of the assessment process.”⁷⁵ The Advisory Committee that resulted from the 2002 Act, however, has since published more technical assistance documents like guidance on the use of the koru pattern, the standard of “offensiveness,” and that the cultural origins of designers are not factors for the assessment process for obtaining a mark.⁷⁶

The existing frameworks in New Zealand present the same problems as those found in Mexico. Administering appropriation claims is complex. Providing the agencies tasked with workable guidelines to administer the laws is equally difficult. New Zealand’s experiences demonstrate that it is critical to include indigenous voices and leadership in creating any solution. The U.S. may implement this lesson in subsequent efforts to address appropriation.⁷⁷ However, it does not solve the issue of finding representatives, as was the issue in the Mexican statute.

C. United States

Legislators have produced several statutes that protect cultural heritage. Intellectual property covers trademarks, copyrights, and patents. The Lanham Act is the legislation that governs the use and misuse of trademarks. The Arts and Crafts Act of 1990 protects the works of recognized Native American tribes in the United States.

Intellectual property is the central umbrella under which a potential cultural appropriation claim may be decided, and cultural heritage may find protection. “Intellectual property embodies unique work reflecting someone’s creativity and is all around us, manifested through miracle drugs, computer games, films, and cars. Innovators use the three main areas of intellectual property law to protect their ideas: “ Trademarks, Patents, and Copyrights.”⁷⁸ According to the 2017 Trade Policy Agenda, U.S. intellectual property rights are among the top priorities.⁷⁹ The continued development and enforcement of intellectual property rights (IPR) is highlighted as having the important purpose of fostering continued scientific, artistic, and entrepreneurial innovation.⁸⁰ The framework provides concrete incentives and economic benefits. However, framework does not accommodate cultural heritage’s need for



compensation for the intangible and tangibles of culture that are in constant flux.

i. The Intellectual Property Umbrella: Patents, Copyright, and Trademarks

The benefits of a patent are clear. Protection from misuse of cultural heritage, the ability to legally enforce one's rights, the ability to seek compensation for harm sustained from the inappropriate use, and the ability to recuperate lost benefits the violating party received for the misuse of the holder's patent. However, this requires that there be a singular holder of a patent. The use of a patent would also require a singular party to be responsible for the registration and upkeep of a patent. This is likely the most difficult hurdle because the basis of culture is that it is shared and does not have a singular owner.

A patent protects technical inventions, particularly pharmaceuticals, mechanical processes, and mechanical designs. Patents protect inventions and processes from being copied, used, or sold without the inventor's consent.⁸¹ Patents may be less applicable for cultural appropriation claims. As cultural heritage is defined here, mechanical processes and technical inventions would not fall under the purview of patents.

Trademarks protect a word, phrase, design, or combination that identifies goods or services that differentiate them from other goods or services and helps identify the source of the good or service.⁸² Registering a trademark allows the holder to restrict the use of the trademarked good or service without permission. It prevents others from using a trademark similar to the registered one with a related good or service.⁸³ Design patents may be particularly useful against cultural appropriation. A design patent may be issued for new, original, and ornamental designs that are used in or applied to a manufactured item and allows the owner to prevent others from making, using, or selling the registered design.⁸⁴

Copyrights may be sought for artistic, literary, or intellectually created works, like novels, music, movies, software code, photographs, and original paintings in a tangible medium⁸⁵ may be protected with a copyright.⁸⁶ A copyright holder has exclusive rights to reproduce, distribute, and perform or display the work and may prevent others from copying or exploiting the creation without the holder's⁸⁷

ii. The Lanham Act

The Lanham Act was enacted in 1946, establishing the national trademark registration system. A trademark⁸⁸ can be "any word, name, symbol, or device, or any combination" that a person intends to use in commerce to identify and distinguish their goods, including a unique product, from others in commerce and to indicate the source of the goods.⁸⁹ A trademark protects the holder from infringement, where the unauthorized use of the trademark can cause consumer confusion, or dilution when unauthorized use causes the mark's reputation to be questioned by the public.^{90, 91}

The Lanham Act requires that a mark must be (1) used in commerce and (2) be distinctive.⁹² To qualify for the commerce requirement, there must be bona fide intent to use it in commerce, to be used in the marketplace for economic benefit. Courts have explained that a bona fide use does not require significant sales; use of the mark in test markets or infrequent sales because it is in a large or expensive item can satisfy this

requirement under a “less traditional” use of the mark.⁹³ A trademark may be registered before it is used in commerce, but the applicant must establish they have a good faith intention to use it in commerce at a future date⁹⁴, but if the holder does not use the mark for three consecutive years, the mark is considered abandoned.⁹⁵

The distinctive requirement shows that the mark can be recognized as belonging to a specific producer. The 9th Circuit articulated the importance of the distinctive requirement by identifying two goals of this requirement. “First, it quickly and easily assures a potential customer that this item--the item with the mark--is made by the same producer as other similarly marked products.”⁹⁶ Second, it provides the producer with certainty that an “imitating competitor”⁹⁷ will not “reap the financial, reputation-related rewards associated with a desirable product.”⁹⁸ In determining the likelihood of confusion, courts will use the eight-factor Sleekcraft test: (1) strength of the mark(s); (2) relatedness of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels; (6) degree of consumer care; (7) defendant's intent; (8) likelihood of expansion.⁹⁹ For cultural appropriation claims, trademarks may be highly useful. However, the Lanham Act reinforces the common law and registration rights rule of “first-in-time, first-in-right.”¹⁰⁰ Once a mark has been registered for five years, it can be deemed “uncontestable.”¹⁰¹ The underlying principle is that the free flow of commerce is the goal. This does not consider the importance of reputation, cultural significance, or cultural heritage.¹⁰²

III. The Indian Arts and Crafts Act of 1990

The United States has, however, recognized the importance of cultural heritage for Native Americans.¹⁰³ The Indian Arts and Crafts Act of 1990 is a “truth-in-advertising law that prohibits misrepresentation in the marketing of Indian art and craft products within the United States.”¹⁰⁴ The Indian Arts and Crafts Act, along with the accompanying regulation, makes it illegal to offer, display for sale, or sell any art or craft product 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.”¹⁰⁵

The legislative history of this Act demonstrates how harmful cultural appropriation can be for the minority culture. Congress cited in its House Report that in 1985, imitations siphoned 10 to 20 percent of the market because the imitations purported to be genuine Native American crafts, amounting to \$40 to \$80 million.¹⁰⁶ The Commerce Department found that the Zuni, Navajo, and Hopi people, whose original jewelry was being sent to the Philippines and Mexico to be reproduced, were the most affected.¹⁰⁷ However, the main goal of the Act is to address false advertising; there is little mention of the cultural impact counterfeit goods have on Native American people.¹⁰⁸

D. Are Any of the U.S. Approaches Useful for Asserting a Cultural Appropriation Claim?

Under the existing systems in the United States, there is no useful legal theory for asserting a cultural appropriation claim. Each of the systems: trademark, copyright, patents,¹⁰⁹ and the Indian American Arts and Crafts Act, is not able to fully appreciate the breadth of legal and social issues that a cultural appropriation claim

encompasses.

Under copyright protections, original works are protected. Because copyright seeks to promote innovation¹¹⁰, asserting a cultural appropriation claim under copyright will be more difficult. Copyright does not protect ideas, concepts, systems, or methods of doing something, only the expression of ideas in writing or drawings (tangible items).^{111, 112}

Within the trademark system, anyone with access to time to educate themselves on the trademark registration process and the ability to fulfill the requirements or those with the economic power to contract those with the knowledge and ability to file trademarks can obtain rights over cultural heritage. Practical issues with asserting a cultural appropriation claim under these legal theories arise because of the problem with defining culture and cultural appropriation. Kim Kardashian's attempt to trademark "kimono" for a shapewear brand exemplifies how the system fails to protect cultural heritage from dilution and confusion of a culturally significant dress and mass-produced American shapewear.¹¹³

Frida Kahlo's trademark demonstrates the ineffectiveness of cultural appropriation claims in the legal system. Kahlo was a feminist, anti-capitalist, queer, disabled, gender-fluid, and revolutionary. Still, the misuse of her life, art, and image has stripped her of cultural significance and made her into a neutral, able-bodied, feminized white woman who is easily commodified and sold.¹¹⁴ Frida Kahlo's name and image have transcended popularity and artistic significance in Mexico and reached the global stage. This issue encompasses problems of economic benefit and has greater cultural implications because the artist now holds cultural significance.¹¹⁵

After the rise of Frida Kahlo's popularity, Mexico declared her works part of the national cultural heritage and prohibited their export.¹¹⁶ For Kahlo's living family and Frida Kahlo Corporation (FKC), the dispute over Frida's trademark rights¹¹⁷ is the right to shape her legacy and the erasure or recognition of Mexicans whose lives and experiences informed Kahlo's works. Kahlo's family transferred existing US trademark registrations to FKC, who then registered Frida's name, signature, initials, and slogans in the U.S.¹¹⁸ The family and FKC's dispute regarding the scope of the rights granted had a significant effect. Mattel had developed a Frida Kahlo doll and received an injunction from the Superior Court of Justice in Mexico to halt the doll's sales in Mexico.¹¹⁹ FKC filed a lawsuit against a Mexican corporation, Vera Licensing, for various trademark infringement claims under the Lanham Act.^{120, 121} FKC was also sued by two artists who had received takedown demands for items they sold on online platforms.¹²² Ultimately, the decade-long litigation was fruitless because the action was dismissed.¹²³ The court specified that because a forum selection clause in the mark's assignment to FKC stated that any disputes regarding the agreement must be brought in Mexico City to determine which party owns the marks.¹²⁴

The Navajo Nation has also sued Urban Outfitters for trademark infringement and violations of the Indian Arts and Crafts Act when items bearing on Urban Outfitters' online shop were advertised as "NAVAJO."¹²⁵ After a "Cease and Desist" letter in 2011 the Navajo Nation filed the lawsuit against Urban Outfitters¹²⁶, which, like Frida Kahlo's trademark litigation, began a long line of litigation that resulted in some

reparative action on Urban Outfitters' part and a settlement that ignores the cultural harm that was caused.^{127, 128}

The Indian Arts & Crafts Act of 1990 cannot address cultural appropriation claims. Since the Act amended, the Indian Arts and Crafts Act of 1935, it has been a case study for how current legal regimes are inadequate for cultural appropriation claims.^{129, 130} The Act and any legal regime like it will likely result in more harm than good.

The Act is problematic from the start. The Act's definition of who is an "Indian"¹³¹ requires a narrow definition that ignores a history of violence and racism from identifying as an "Indian." This definition is too narrow because only those enrolled in a federally or state-recognized tribe qualify, and it ignores Indian law scholars, Native American artisans, and the desires of Native Americans generally.¹³² Although the goal of the Act can be seen as cultural survival¹³³, as seen in litigation based on the Act, there is very little that the Act does for cultural appropriation. But, as with any legislation or legal framework that may be created to address cultural appropriation, the real driver is economics.¹³⁴



The idea that the law should protect cultural identities, as seen in the Act does not translate into the practice of law. Minutely defining culture and designating an inside and outside group that the law will protect will have the opposite effect of protecting cultural minorities, ensuring cultural survival, and promoting self-determination.¹³⁵ The chilling effect this Act had on Indian Art could happen if such a specialized law were promulgated for cultural appropriation.

IV. WILL A LEGAL SOLUTION BE ENOUGH?

The brief international survey and deeper analysis of existing U.S. laws suggest that the law cannot provide a satisfactory solution for the persistent issue of cultural appropriation. Instead of forcing complex and unworkable claims into the traditional legal system, other options in alternative dispute resolution, a critical race analysis of existing laws, and further research may provide a more straightforward pathway.

A. Elegance v. Practicality

In his article, *Mexico Testing Limits of Using Law to Bar Cultural Appropriation*, Kyle Jahner also surveys various U.S. and international approaches to cultural appropriation. Ultimately, he concludes that there is "No Elegant Solution" to protect the intellectual property rights of minority cultures.¹³⁶ Laws like the one in Mexico are difficult to administer, and New Zealand's approach is also insufficient.¹³⁷ However, it is clear that laws with the best intentions will struggle to address the complexity of culture. It is then clear that a solution must be found in the increasingly globalized marketplace, with practicality as the only requirement.

B. An Argument for Alternative Dispute Resolution And Community Resolutions

i. Mediation and Community-Based Resolutions

Mediation is the best and most familiar solution for appropriation claims. In the spirit of practicality, mediation is a familiar and established dispute resolution process.¹³⁸ While this solution does not address potential power and sophistication disparities, the potential for working in creative solutions outside the scope of ordinary litigation makes this the best current solution.

Parties may also seek community-based solutions such as consultation with and contracting minority culture representatives to honor and use the cultural heritage appropriately while compensating a legitimate representative.¹³⁹

ii. Promotion of Native American Scholarship in Intellectual Property Law

The United States laws surveyed cannot accommodate Indigenous ideas of property. New Zealand law also struggles with the administration of a collective and individual concept of property. While Mexico's fate has yet to be seen, each system would benefit from a critical analysis from an Indigenous perspective. This proposal, like the remaining proposals, will not immediately yield solutions. However, supporting scholarship in intellectual property and the intersection of culture and the law from Indigenous cultures can begin to clarify some of the obstacles highlighted.

iii. Critical Analysis of Existing Laws

CRT, or critical race theory, is "a strain of legal scholarship that challenges how race and racial power are constructed and represented in legal culture and, more generally, in society."^{140, 141} CRT embraces concretizing the abstract and neutral with material, aesthetic, emotional, and spiritual experiences of color.¹⁴² CRT embraces storytelling as a way to challenge the law and jurisprudence.¹⁴³ This rich body of scholarship embraces ambiguity and pushes the intersection of the law and social issues. This approach to analyzing the failures of the existing systems can bring diverse perspectives and new solutions.

V. CONCLUSION

The current legal solutions are not sufficient to address cultural appropriation claims. The current legal regime based on existing intellectual property law needs to be revised for the current societal and social needs in the United States and many other nation-states. Each country surveyed presented similar issues in administering cultural appropriation claims within the existing intellectual property law frameworks and trademark protections. The law struggles with defining the protected parties, defining culture, finding legitimate cultural representatives to stand in these claims, and finding workable dispute resolution methods. Even the proposed solutions may still determine that the law is not the best tool for cultural appropriation claims. However, it is imperative to explore alternative dispute resolution methods and support diverse legal scholarship in this area until a better solution can be found.

Citations

¹ Google, *cultural appropriation* (April 1, 2023), <https://bit.ly/3UrzcJH>(a Google search on the term ‘cultural appropriation’ returns approximately 48,500,000 results with the following related questions: “What is the meaning of cultural appropriation,” “What is an example of cultural appropriations,” “What is the difference between cultural appropriation and appreciation”, and “how to avoid cultural appropriation in art”).

² Patty Gerstenblith, *Art, Cultural Heritage, and the Law*, 713 (2019) (stating that Niccolò Machiavelli advocated for the destruction of conquered cities to destroy the cultural memory and identity of the conquered people, so the community was destroyed and therefore the possibility of revolution was quelled).

³ See generally *infra* note 116 (Indigenous and minority cultures may engage in cultural survival tactics to protect their cultural heritage from appropriation and destruction).

⁴See Michael Holt, Diversity, Equity, Inclusion, and Accessibility (DEIA) Resources, LSU Libraries (Dec. 9, 2022), <https://guides.lib.lsu.edu/c.php?g=1052777&p=7644484>(explaining that this definition extends to recognize that the experiences and actions of the group changes their culture in both subtle and significant ways).

⁵ *Id.*(this paper will use “Indigenous” when referring generally to first peoples, aboriginal peoples, native peoples who are decedents from the original inhabitants of a particular geographic area and have been settled, occupied, or colonized).

⁶ See Jean S. Phinney et. al, *Ethnic Identity, Immigration, and Well-Being: An Interactional Perspective*, 57 *Journal of Social Issues* (2001), <http://cretscmhd.psych.ucla.edu/events/PhinneyPaper.pdf>; *infra* note 1, at 1108.

⁷ See *id.* at 493.

⁸ See Holt, *supra* note 4 (recalling the changing nature of culture makes this even more difficult when attempting to ascribe legal principles).

⁹ See *id.* at 494 (refers to the preservation of one’s cultural heritage and adaptation to the host society).

¹⁰ *Id.*

¹¹ See Phiney,*infra* note 1, at 1108.

¹² *United Nations Permanent Forum on Indigenous Issues*, Factsheet(April 6, 2023), https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf (stating that the United Nations is careful to stipulate that “Considering the diversity of indigenous peoples, an official definition of ‘indigenous’ has not been adopted by any UN-system body. Instead, the system has developed a modern understanding of the term based on” several characteristics including self-identification, historical continuity with pre-colonial societies, a strong link to territories and surrounding natural resources, and a resolve to maintain and reproduce their ancestral environments and systems as distinct people and communities).

¹³ See *Bonnichsen v. United States*, 357 F.3d 962, 979 (9th Cir. 2004)(holding that the Secretary of the Interior’s assertion that, under the Chevron doctrine, his definition of the term “Native American” must be followed is incorrect because the Native American Graves Protection and Reparation Act’s language is clear, plain, and unambiguous).

¹⁴ Madhavi Sunder, *ARTICLE: Intellectual Property and Identity Politics: Playing with Fire*, *The Journal of Gender, Race & Justice*, 67 (2000) 73.

¹⁵ *Id.* at 73.

¹⁶ *Id.*

¹⁷ *Id.*(stating that another term, often used in tandem with cultural appropriation, is cultural imperialism. "Cultural Imperialism" refers to the threat of assimilation or the loss of cultural distinctiveness; in an international framework, the fear is that the globalization of U.S. popular consumer culture will replace local cultures entirely.The fears of cultural imperialism are a current reality. Both of these terms demonstrate a genuine and legitimate fear of cultural minorities that their cultural identities will not be assimilated but rather erased).

¹⁸ See *Mazer v. Stein*, 347 U.S. 201 (1945).

¹⁹ *Id.*

²⁰ See Holt, *supra* note 4.

²¹ See *id.* at 203 (stating that as generally used, it has been said that the term is difficult to define; but the definitions of artists and lexicographers are any human work made with the specific purpose of stirring human emotion; something displaying artistic merit; anything in the formation or into the accomplishment of which art in any sense has entered; specifically, a production of any one of the fine arts, a skillful production of the beautiful invisible form, the handiwork of an artist, or something more than [***3] the mere labor of an artisan; and the term has been said to include all works belonging fairly to the so-called fine arts, painting, drawing, and sculpture . . . (6A C.J.S. § 57 at p. 291 (Emphasis added)).

²² Cultural heritage is defined in this paper to also include tangible and intangible expressions of culture.

²³ See UNESCO Institute for Statistics, Cultural Heritage (last visited April 1, 2023), <https://uis.unesco.org/en/glossary-term/cultural-heritage> (stating that “Cultural heritage includes artefacts, monuments, a group of buildings and sites, museums that have a diversity of values including symbolic, historic, artistic, aesthetic, ethnological or anthropological, scientific, and social significance. It includes tangible heritage (movable, immobile, and underwater), intangible cultural heritage (ICH) embedded into cultural, and natural heritage artefacts, sites, or monuments. The definition excludes ICH related to other cultural domains such as festivals, celebration, etc. It covers industrial heritage and cave paintings).

²⁴ See *In re Leonardo*, 102 B.R. 202 (Bankr. E.D. Cal. 1989).

²⁵ Cornell Law School, Intellectual Property (last visited April 15, 2023), https://www.law.cornell.edu/wex/intellectual_property.

²⁶ *Id.*

²⁷ Lexis, Restat Draft (last visited April 16, 2023), <https://plus.lexis.com/api/permalink/ddf93520-05d6-4233-82e1-99206df02a24/?context=1530671>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ See *infra* note 36.

³¹ A brief overview of the Lanham Act, intellectual property in the United States, and the U.S., the Arts and Crafts Act of 1990 and an analysis of whether they are adequate to address claims cultural appropriation.

³² *Infra*, note 36.

³³ *Infra*, note 60.

³⁴ The World Factbook, Explore All Countries – Mexico (April 11, 2023), <https://www.cia.gov/the-world-factbook/countries/mexico/#people-and-society>.

³⁵ Jonathan Fox, *Mexico’s Indigenous Population*, Cultural Survival (March 26, 2010), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/mexicos-indigenous-population>.

³⁶ Minority Rights Group International, Mexico Indigenous Peoples (last visited April 2, 2023), <https://minorityrights.org/minorities/indigenous-peoples-4/> (Indigenous Mexicans often face discrimination because of their distinct style of dress, which consequently is the subject of many cultural appropriation claims abroad, and their socioeconomic status).

³⁷ Ley Federal de Protección del Patrimonio Cultural de los Pueblos y Comunidades Indígenas y Afromexicanas, Diario Oficial de la Federación (Jan. 17, 2022), <https://www.diputados.gob.mx/LeyesBiblio/pdf/LFPPCPCIA.pdf>.

³⁸ *Id.* at 1.

³⁹ See also ECIJA, Regulations On The Cultural Heritage Of Indigenous And Afro-Mexican Populations And Communities: Considerations For Companies (July 7, 2022), <https://ecija.com/en/sala-de-prensa/mexico-regulations-on-the-cultural-heritage-of-indigenous-and-afro-mexican-populations-and-communities/> (outlining important provisions of the statute in English for companies doing business in Mexico).

⁴⁰ A direct translation would read as “undue appropriation” but contextually also means cultural appropriation.

⁴¹ *Id.*

⁴² *Id.* at 4.

⁴³ *Id.* at 3.

⁴⁴ *Id.* (this is significant because of a historic erasure of Afro-Mexicans).

⁴⁵ Biodiversidad Mexicana, *Patrimonio Biocultural* (last updated August 7, 2021), <https://www.biodiversidad.gob.mx/diversidad/patrimonio-biocultural> (this is defined as the “local ecological knowledge and practices, biological wealth (ecosystems, species, and genetic diversity), the formation landscape features and cultural landscapes, as well as the heritage, memory and living practices of managed or built environments.”).

⁴⁶ Centro Mexicano de Derecho Ambiental, *El Estado pluricultural en México* (last visited April 14, 2023), https://www.cemda.org.mx/wp-content/uploads/2019/06/CEM_folleto_estado_pluricultural1.pdf (“In a pluricultural state, the right to difference is guaranteed, through which indigenous people and comparable communities can maintain control over their cultural elements (exercise of autonomy (and where the State itself develops public policies that foster the flourishing of all identities under conditions of equality from their territories.”).

⁴⁷ Roberto Campos Navarro and RyLee Curtis, *Lessons from Latin America: Interculturality in Health*, ACCELERATE (Dec. 12, 2022), [https://accelerate.uofuhealth.utah.edu/equity/lessons-from-latin-america-interculturality-in-health#:~:text=Interculturality%20%22refers%20to%20the%20existence,through%20dialogue%20and%20mutual%20respect.%20\(“The%20existence%20and%20equitable%20interaction%20of%20diverse%20cultures%20and%20the%20possibility%20of%20generating%20shared%20cultural%20expressions%20through%20dialogue%20and%20mutual%20respect.”\)](https://accelerate.uofuhealth.utah.edu/equity/lessons-from-latin-america-interculturality-in-health#:~:text=Interculturality%20%22refers%20to%20the%20existence,through%20dialogue%20and%20mutual%20respect.%20(“The%20existence%20and%20equitable%20interaction%20of%20diverse%20cultures%20and%20the%20possibility%20of%20generating%20shared%20cultural%20expressions%20through%20dialogue%20and%20mutual%20respect.”))

⁴⁸ *Id.* at 4.

⁴⁹ See *El Estado pluricultural en México*; *supra* note 46.

⁵⁰ See *id.*

⁵¹ *Id.*

⁵² *Supra* note 28 (asserting that some cultural expressions may be exempt from a public domain rule; however if such an exception for cultural heritage is implied or explicit in this statute it demonstrates the profound impact appropriation can have on a community that it is exempt from legal norms).

⁵³ See Buchanan, *infra* note 69 (defining Indigenous people to include comparable communities would circumvent some of the issues and some of the chilling effects the Indian Arts and Crafts Act produced).

⁵⁴ See *supra* note 27 (noting that the statute delineates a process by which a violation of an agreement by an Indigenous Party and one under which a person violates the statute through appropriation).

⁵⁵ See *supra* note 27 at 14-19.

⁵⁶ *Id.* at 18.

⁵⁷ See *id.* (noting that the statute allows for a fine of 500 to 50,000 of the offending party’s currency per violation; criminal penalties range from two to ten years and a fine of 500 to 15,000 of the offending party’s currency per violation, and when a violation affected cultural ethnocide because the damage generated seriously impairs or endangers the integrity and continuity of cultural heritage penalties may be doubled).

⁵⁸ This statute may suffer the same unintended consequences that are discussed in analysis of the Indian Arts and Crafts Act of 1990.

⁵⁹ See *infra* note 60 (explaining how the treaty signed in 1840 established British rule over New Zealand and carved out protections for the property rights and citizenship privileges of the Māori).

⁶⁰ Kelly Buchanan, *New Zealand: Māori Culture and Intellectual Property Law*, THE LAW LIBRARY OF CONGRESS (Dec. 2010), <https://tile.loc.gov/storage-services/service/l1/llglrd/2018298829/2018298829.pdf>.

⁶¹ See *id.* at 1.

⁶² See *id.* (showing that this version protects lands, estates, forests, fisheries, and other property that we collectively or individually possessed for as long as the Māori wish to retain ownership).

⁶³ *Id.* at 2.

⁶⁴ *Id.*

⁶⁵ See *id.* at 3 (defining traditional cultural expressions as, “artwork, symbols, song, and dance that ‘reflect and identify a community’s history, cultural and social identities, and values,’ [that] can result in economic benefits to indigenous people; however, ‘they are also and perhaps more importantly, instrumental to the preservation and

continuation of indigenous cultures.”).

⁶⁶ *See id.*

⁶⁷ *See id.* at 4 (suggesting incorporation of collective ownership, historical and contemporary cultural works, and multi-generational coverage span to recognize indigenous ideas of property rights into the existing systems).

⁶⁸ *See id.* at 6.

⁶⁹ *Id.*

⁷⁰ *See id.* at 7 (noting that the trademark request for the lyrics of the Ka Mate haka were rejected and in 2009 the New Zealand government and the Ngāti Toa tribe were seeking a settlement, with the Ngāti Toa pushing for a solution that would prevent misappropriation and inappropriate use or performance and a recognition of the significance of the dance and song to the Ngāti Toa).

⁷¹ *See id.*

⁷² *See id.* at 8 (stating that the goal of the mark was to increase sales of Māori art with the certification inspiring certainty in authenticity, but without a measurable increase since the start of the program it was abandoned).

⁷³ *Id.* at 9 (the 2007 publication attempted to give clarity and guidance on the benefits of utilizing intellectual property rights).

⁷⁴ *Id.* at 10.

⁷⁵ *Id.* at 11.

⁷⁶ *See id.* (without a consideration of the cultural origin of the designer, it seems as though this is a gap that would have to be directly addressed through the review process for the mark. One that leaves the door open for the very appropriation the Act sought to end).

⁷⁷ *See infra* note 104 (this is a complex lesson as the U.S. learned with the Indian American Arts and Crafts act of 1990).

⁷⁸ U.S. Dep’t of ST., Div. for Trade and Policy Negot., *Intellectual Property Enforcement* (last visited Mar. 15, 2023), <https://www.state.gov/intellectual-property-enforcement/>.

⁷⁹ *Id.*

⁸⁰ *Id.* (the incentives for such systems are clear; first, economic benefits for the creator; second, continued reinvestment into innovation; third, sharing the knowledge with others; finally, enforcement of IPR and implementation of the systems domestically and abroad).

⁸¹ *See supra* note 23.

⁸² United States Patent and Trademark Office, *Trademark, patent, or copyright* (February 6, 2023), <https://www.uspto.gov/trademarks/basics/trademark-patent-copyright>.

⁸³ *Id.*

⁸⁴ Legal Information Institute, *Patent* (last visited April 15, 2023), <https://www.law.cornell.edu/wex/patent>.

⁸⁵ *See supra* note 23 (the United States Patent and Trademark Office defines tangible mediums as paper, canvas, film, or digital formats).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Survivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 631-32 (9th Cir. 2005) (trademarks are further categorized as arbitrary, fanciful, suggestive, descriptive, and generic. Arbitrary and fanciful marks are awarded the highest degree of protection); *Id.* at 631 (arbitrary marks are common words that have no connection to the product, while fanciful marks are coined phrases that have no commonly known connection with the product); *Id.* at 632.

⁸⁹ 15 U.S.C. § 1127.

⁹⁰ Legal Information Institute, *Lanham Act* (last visited March 31, 2023), https://www.law.cornell.edu/wex/lanham_act.

⁹¹ *See also Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc.*, 457 F.3d 1062, 1067 (9th Cir. 2006).

⁹² *Id.*

⁹³ *Gerlach, Inc. v. Gerlach Maschinenbau GmbH*, 592 F. Supp. 3d 634, 644 (N.D. Ohio 2022).

⁹⁴ 15 U.S.C. § 1051.

⁹⁵ 15 U.S.C. § 1127; *see also* *Gerlach, Inc.* 457 F. Supp. 3d at 644.

⁹⁶ *Au-Tomotive Gold, Inc.*, 457 F.3d at 1067.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 937.

¹⁰⁰ *Lodestar Anstalt v. Bacardi & Co.*, 31 F.4th 1228, 1236 (9th Cir. 2022).

¹⁰¹ *Id.*

¹⁰² A fuller analysis will be done in Section D.

¹⁰³ Although this is a minimal and problematic step in recognizing the devastating effects of American imperialism in North America, Native Americans have been able to carve out some deserved recognition in U.S. laws. The Arts and Crafts Act is one such example.

¹⁰⁴ U.S. Dep't of the Interior, *Indian Arts and Crafts Board*, The Indian Arts and Crafts Act of 1990 (last visited Mar. 19, 2023), [https://www.doi.gov/iacb/act#:~:text=The%20Indian%20Arts%20and%20Crafts%20Act%20\(Act\)%20of%201990%20\(,products%20within%20the%20United%20States](https://www.doi.gov/iacb/act#:~:text=The%20Indian%20Arts%20and%20Crafts%20Act%20(Act)%20of%201990%20(,products%20within%20the%20United%20States).

¹⁰⁵ *Id.*; *see also* 25 C.F.R. Protection of Indian Arts and Crafts Products (last visited Mar. 19, 2023), <https://www.govinfo.gov/content/pkg/CFR-2015-title25-vol2/pdf/CFR-2015-title25-vol2-part309.pdf>.

¹⁰⁶ H.R. REP. No. 101-400(I) at 4 (1990), https://www.doi.gov/sites/doi.gov/files/uploads/iaca_1990_leg_history.pdf.

¹⁰⁷ H.R. REP. No. 101-400(I) at 5.

¹⁰⁸ More criticisms have been voiced regarding the Act, such as the problematic definition of “Indian” the Act utilizes, the lack of discussion of the impact counterfeit goods have had on the cultural survival of Native Americans, and the practicality of the law. This will be subsequently discussed.

¹⁰⁹ As previously discussed, patents are outside the scope of possible protection for cultural heritage, as defined in this paper.

¹¹⁰ *See infra* note 58 at 641.

¹¹¹ U.S. Copyright Office, *What Does Copyright Protect?* (last visited April 10, 2023), <https://www.copyright.gov/help/faq/faq-protect.html#:~:text=Copyright%2C%20a%20form%20of%20intellectual,%2C%20computer%20software%2C%20and%20architecture>.

¹¹² However, when recognizing cultural expressions under the umbrella of cultural heritage copyrights can assist in protecting the cultural memories encompassed in cultural heritage and may be more a nimbler solution as culture changes.

¹¹³ Dariush Adli, *TM Law Obstacles To Challenging Cultural Appropriation*, ALDI IP Law (September 9, 2019), <https://www.adlilaw.com/wp-content/uploads/2019/09/ADLI-IP-Law-TM-Law-Obstacles-To-Challenging-Cultural-Appropriation.pdf>.

¹¹⁴ Lario Alabrran, *Comment: Owning Frida Kahlo*, 35 *Emory Int'l Rev.* 627, 635 (2021).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 635.

¹¹⁷ *Id.* at 636.

¹¹⁸ *Id.* at 637.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* (ultimately, this claim was dismissed when both parties filed a stipulation of dismissal and the court granted the motion, signaling a settlement).

¹²² *Id.* at 639 (both cases were also settled, though Plaintiffs claimed that their products did not infringe on FKC's trademark because the use of the name was not source descriptive rather descriptive of the subject matter, a historical figure. The second Plaintiff made similar claims but alleged that her paintings were created years before FKC was formed and obtained the trademark).

¹²³ *Frida Kahlo Corp. v. Pinedo*, Civil Action No. 18-21826-Civ, 2021 U.S. Dist. LEXIS 172909 (S.D. Fla. Sep. 10, 2021) (defendant's motion to dismiss was granted with the court holding (1) that before infringement claims may be settled the ownership of the marks must be determined through interpretation of the assignment of the marks and (2) the exercise of personal jurisdiction over the Defendant here violated the Due Process Clause).

¹²⁴ *Id.* at 5.

¹²⁵ *Navajo Nation v. Urban Outfitters, Inc.*, 918 F. Supp. 2d 1245, 1249-50 (D.N.M. 2013).

¹²⁶ *Id.* at 1248-52.

¹²⁷ A long line of subsequent history details motions and summary judgments argued, granted, and dismissed by both parties from 2013 to 2016.

¹²⁸ See *Navajo Nation v. Urban Outfitters, Inc.*, No. 12cv0195 BB/LAM, 2016 U.S. Dist. LEXIS 137417 (D.N.M. Sep. 19, 2016) (court setting a preliminary settlement conference for the Plaintiff is the last reported subsequent history of the litigation).

¹²⁹ See William J. Hapiuk Jr., *Of Kitsch and Kachinas: A Critical Analysis of the Indian Arts and Crafts Act of 1990*, 53 Stan. L. Rev. 1009 (2001).

¹³⁰ See also *supra* note 50.

¹³¹ This section of the paper will refer to Native Americans as "Indians" when discussing the language of the Indian Arts and Crafts Act as that is the language used in the statute and regulation.

¹³² *Id.* at 1012, n. 16, 1014, 1022.

¹³³ *Id.* at 1014.

¹³⁴ *Id.* at 1015 (Hapiuk addresses this struggle head on in his note. The worthy cause of cultural survival does not drive cultural protections in the law. Economic factors do like job loss, loss profits. Even for collectivistic cultures, like Native American cultures and other minority cultures, if there is no financial incentive to create, then the culture may be in danger of extinction); *Id.* at 1021 ("Without profit incentive, young American Indians will be deterred from becoming artisans, so those legitimate producers... will not be replaced by others. The fear is that native arts and crafts traditions will die out, leading to the disappearance... of 'an irreplaceable part of American culture and a valuable national resource: native American arts and crafts.'").

¹³⁵ The result will be another failed case study of a nonworkable social issue being forced into a traditional system that historically rejects its existence.

¹³⁶ Kyle Jahner, *Mexico Testing Limits of Using Law to Bar Cultural Appropriation*, Bloomberg Law (April 11, 2022).

¹³⁷ Although the validity given to both versions of the Trademarks Act demonstrates great deference to the Māori people, that law too is not able to address the intangible, nonlegal elements of cultural appropriation.

¹³⁸ It is likely that many of the claims were settled, like *Navajo v. Urban Outfitters* and *FKC v. Pineda*, were settled using mediation sessions.

¹³⁹ See *supra* note 48 at 13-14 (community-based solutions are not elegant but are highly practical. This method would address concerns like those the Māori raised with wanting to guard their cultural heritage through prior consultation and compensation for the use of their culture, particularly when used for profit).

¹⁴⁰ See *supra* note 101 at 630.

¹⁴¹ *Id.* at 630 (CRT examines the language of mainstream legal and social analysis and argues that a preference for neutral, disengaged, unraced, and unsexed voices in the legal field reinforces a status quo of white and male).

¹⁴² *Id.*

¹⁴³ *Id.*