



ARTICLE

# The law and ethics of ‘cultural appropriation’

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## Abstract

Cultural appropriation is often defined as the ‘taking of intellectual property, cultural expressions or artefacts, history, and ways of knowledge’. Despite this apparent link to intellectual property, legal issues are only rarely mentioned in the current debate. Thus, to start with, this paper aims to fill this gap in identifying the possible bases in existing laws that may, at least in principle, justify claims of unlawful behaviour. As far as ethical considerations are concerned, the paper then notes a deep divide between those who fully endorse the notion of cultural appropriation and those who are resolutely opposed to it. This paper aims to give fair consideration to both sides of the argument, suggesting three categories of potentially unethical conduct. On this basis, the paper finally revisits possible legal responses from a normative perspective.

**Keywords:** law and culture; ethics; intellectual property; tort law; freedom of speech; identity politics

## 1 Introduction

The term ‘cultural appropriation’ was rarely used prior to the early 2010s; yet, this has changed in recent years, with a Google search showing 2.9 million results in 2019.<sup>1</sup> This trend does not mean that the concept of cultural appropriation is uncontroversial. Rather the opposite: the debate is deeply divided between those who fully endorse it as a welcome protection of group identities and those who are resolutely opposed to it emphasising the benefits of cultural borrowing and mixing.<sup>2</sup>

To illustrate the debate, this introduction provides a representative list of recent examples. These examples are phrased in a relatively general manner; yet, this paper will then also discuss how far variations in the precise context could make a difference. The examples are:

- 1 Is it acceptable to wear a haircut that derives from another culture (e.g. ‘White people with dreadlocks’<sup>3</sup>)?
- 2 Is it acceptable to wear items of clothing that derive from another culture (e.g. sombreros at an English university freshers’ fair<sup>4</sup>)?
- 3 Is it acceptable to identify as belonging to another culture (e.g. Rachel Dolezal identifying as Black<sup>5</sup>)?

<sup>1</sup>Google search. Available at <https://trends.google.com/trends/explore?date=all&q=%22cultural%20appropriation%22> and [https://www.google.com/search?source=hp&ei=d3-rW-unHKaZgAao\\_4zADQ&q='cultural+appropriation'](https://www.google.com/search?source=hp&ei=d3-rW-unHKaZgAao_4zADQ&q='cultural+appropriation'). All Internet sources were accessed on 24 November 2019.

<sup>2</sup>See further Sections 3.1 and 4.2, below.

<sup>3</sup>‘Dear White people with dreadlocks: some things to consider’, *CNN*, 1 April 2016. Available at <https://edition.cnn.com/2016/03/31/living/white-dreadlocks-cultural-appropriation-feat/index.html>.

<sup>4</sup>‘Student union bans “racist” sombreros’, *The Guardian*, 29 September 2015. Available at <https://www.theguardian.com/world/2015/sep/29/uea-student-union-bans-racist-sombreros>.

<sup>5</sup>‘Rachel Dolezal is back, refusing to apologize for lying about being Black’, *Vanity Fair*, 28 February 2017. Available at <https://www.vanityfair.com/style/2017/02/rachel-dolezal-refuses-to-apologize>.

- 4 Is it acceptable to run a business pretending to belong to another culture (e.g. Indian restaurants run by people from other countries<sup>6</sup>)?
- 5 Is it acceptable to perform an artistic role that represents someone from another culture (e.g. a straight actor in a transgender role<sup>7</sup>)?
- 6 Is it acceptable to pursue a hobby that derives from another culture (e.g. yoga in Western countries<sup>8</sup>)?
- 7 Is it acceptable to produce works of art that take the perspective of another culture (e.g. the film *Isle of Dogs* set in Japan<sup>9</sup>)?
- 8 Is it acceptable to produce works of art that take inspiration by works of art from other cultures (e.g. merge pop art with Japanese ukiyo-e<sup>10</sup>)?
- 9 Is it acceptable to produce commercial products that are influenced by products from other cultures (e.g. Jamie Oliver's jerk rice<sup>11</sup>)?
- 10 Is it acceptable to use icons from other cultures as brand names (e.g. name and logo of the Washington Redskins<sup>12</sup>)?

It can be seen that possible cases of cultural appropriation comprise a variety of situations and phenomena: some are about changing one's looks, others about behaving in a particular way and others about creating something tangible. They also concern a variety of cultural categories, including some, such as gender and sexual orientation, where it may be a matter of debate whether those really belong to the field of 'culture'.<sup>13</sup> There are also some ambiguities in the understanding of the word 'appropriation', as will be shown later in the text (Section 3.2, below). Thus, as we will see, there are different kinds of cultural appropriation that may also elicit different responses.

This paper will discuss both the law and the ethics of cultural appropriation. It aims to give fair consideration to both supporters and critics of cultural appropriation. As legal issues are only rarely mentioned in the current debate, it is a further contribution of this paper to explain that, at least in some respects, law may play a role. Considering the legal debate can also be helpful for heuristic reasons: while it is clear that ethical considerations can be different from legal ones, the legal debate is valuable in showing that often a balance between different interests needs to be struck.

The corresponding structure of this paper is as follows. Section 2 explains the possible bases in existing laws that may justify claims of unlawful behaviour. Section 3 develops a framework for ethical considerations. Section 4 then revisits possible legal responses from a normative perspective. Section 5 concludes.

## 2 Law: existing bases for unlawfulness

Susan Scafidi's book *Who Owns Culture?*, which predates the current debate, defines cultural appropriation as the 'taking ... of intellectual property, cultural expressions or artefacts, history, and ways of

<sup>6</sup>'White people running Indian restaurant???' *The Student Room*, 5 March 2016. Available at <https://www.thestudentroom.co.uk/showthread.php?t=3932243>.

<sup>7</sup>'Is Hollywood guilty of cultural appropriation in its casting?' *Acculturated*, 27 May 2017. Available at <https://acculturated.com/hollywood-guilty-cultural-appropriation-casting/>.

<sup>8</sup>'Is my yoga cultural appropriation? What to do about it' *Huffington Post*, 2 September 2016. Available at [https://www.huffingtonpost.com/susanna-barkataki/is-my-yoga-cultural-appro\\_b\\_9191342.html](https://www.huffingtonpost.com/susanna-barkataki/is-my-yoga-cultural-appro_b_9191342.html).

<sup>9</sup>'"Isle of Dogs" is a White man's fantasy of Japan' *Vice*, 10 April 2018. Available at [https://www.vice.com/en\\_uk/article/paxqkn/isle-of-dogs-is-a-white-mans-fantasy-of-japan](https://www.vice.com/en_uk/article/paxqkn/isle-of-dogs-is-a-white-mans-fantasy-of-japan).

<sup>10</sup>*Art of the Game: Ukiyo-e Heroes* 2017, see <https://www.imdb.com/title/tt5706420/>.

<sup>11</sup>'Jamie Oliver's "jerk rice" accused of cultural appropriation' *BBC News*, 21 August 2018. Available at <https://www.bbc.co.uk/news/newsbeat-45246009>.

<sup>12</sup>'Washington Redskins/is it cultural appropriation?' *Posilicious*, 25 September 2017. Available at <http://posilicious.com/2017/09/25/washington-redskins-is-it-cultural-appropriation/>.

<sup>13</sup>Cf. Quora discussion. Available at <https://www.quora.com/Does-the-concept-of-cultural-appropriation-also-apply-to-gender>.

knowledge’ (Scafidi, 2005, p. 9).<sup>14</sup> Despite this apparent link to intellectual property, legal issues are only rarely mentioned in the current debate. Thus, this section aims to fill this gap in identifying the possible bases of existing laws – be it intellectual property or other areas of law, such as tort law. Subsequently, this paper will also discuss how far further legal topics – notably artistic freedom and freedom of speech – may stand against any extension of such laws constricting cultural appropriation (see Sections 3.3 and 4, below).

### 2.1 Copyright and specific laws protecting traditional knowledge

As copyright does not require registration, it may already cover some circumstances of cultural appropriation; yet, there are a number of limitations that make it unsuitable for some of the examples discussed here, with details also depending on the precise rules that a country provides.

As far as the object of copyright is concerned, not every aspect of a culture is protected. Common requirements are that there is a ‘work’ (i.e. not simply an idea, but an expression of an idea) that in some countries also requires a fixation in a tangible medium, as well as a degree of originality (or creativity) (e.g. Scafidi, 2005, pp. 21, 31, 42; 2001; for a comparative overview of the fixation requirement, see Carpenter and Hetcher, 2014). Showing originality of a particular cultural phenomenon can be practically difficult, as cultures have mixed and as the origins of particular traditions are often not clear (e.g. who did first create the sombrero, yoga, jerk dishes, etc.?). As copyright protection is also limited in time (details differ between countries),<sup>15</sup> protection of possible cases of cultural appropriation is more likely to be successful if it concerns a fairly recent and more specific variation of a cultural phenomenon (e.g. a particular type of dress or recipe; for the latter, see e.g. Germain, 2019).

The work requirement and, if necessary, the fixation one are clearly fulfilled in the cases that concern the creation of something tangible (see the final four examples, Section 1 above). In some of the other cases, it is possible to gain copyright protection by way of audio-video recording or photographs, such as by taking a photograph of a particular haircut or recording a form of dance, song, speech pattern, etc. (e.g. Pavis, 2018, p. 871). Moreover, most copyright laws provide ‘related rights’ (also known as ‘neighbouring rights’) that protect the rights of performers, producers of sound recordings and broadcasting organisations of copyrighted work.<sup>16</sup>

With respect to the prerequisite of there being a copyright holder, it can be a problem that the phenomena of possible cultural appropriation are typically created by groups. In principle, copyright can belong to more than one person and it has even been said that ‘copyright law has been remarkably flexible in defining “authorship”’, such as for the contributions of employees within a company (Jaszi, 2017). However, it is also clear that phenomena associated with some large groups (e.g. having a particular race, gender or sexual orientation) cannot be protected by copyright.

Thus, the issue at stake is that group members and their contributions need to be identifiable (e.g. Li, 2014, pp. 35–60; Riley, 2000). As with the requirement of ‘originality’, copyright protection is therefore more likely to be available if a specific variant of a wider cultural phenomenon is created by a subgroup of persons from the source community.<sup>17</sup> Thus, for example, there is no means to prevent Western film makers from making a film set in Japan<sup>18</sup>; yet, if they copy particular storylines from protected Japanese works, violation of copyright is conceivable.

<sup>14</sup>See also Scafidi (2005, p. 13) (‘Among the forms of property, intellectual property provides the best analogy to cultural products’; and at p. ix referring to ‘cultural products’ such as ‘cuisine, dress, music, dance, folklore, handicrafts, images, healing arts, rituals, performances, natural resources, or language’).

<sup>15</sup>Art. 7 of the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886 stipulates a minimum of fifty years.

<sup>16</sup>E.g. in the EU, see Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

<sup>17</sup>The other side of the coin is that others can use copyright to take unprotected cultural products from a source community; see Sharoni (2017, p. 416).

<sup>18</sup>See example 7 in Section 1, above.

Copyright protection means that the copyright holders have exclusive rights to reproduce, distribute and adapt their work. This would not help in some of the possible cases of cultural appropriation (e.g. where a person of ‘the wrong’ group wears a particular piece of clothing). However, many countries also extend copyright protection to ‘moral rights’, in particular the rights of attribution and integrity of a work (Inawat, 2015, p. 240 with reference to the Berne Convention). Thus, for example, a distortion of a cultural phenomenon – as alleged in some cases of cultural appropriation – is unlawful assuming the object falls under the protection of copyright.

In some countries, in particular in Africa, further extensions of copyright protection may also be relevant. For example, Ghana, Nigeria, Cameroon, Lesotho, Mali, Senegal and Uganda include ‘folklore’ as a, possibly intangible, form of copyright that derives from particular communities, even if the author is unidentified. Further details differ between countries, possibly also with some involvement of the state (e.g. a National Folklore Office in Ghana) (Inawat, 2015, pp. 238–240; Collins, 2018).

Moreover, in some countries, special laws grant a *sui generis* protection for ‘traditional knowledge’, ‘traditional cultural expressions’ and/or ‘indigenous knowledge’, such as in Thailand, the Philippines, Guatemala, Panama, Costa Rica, Venezuela, Peru and South Africa (Fisher, 2018, pp. 1537–1538; Carugno, 2018, p. 270).<sup>19</sup> Details vary, with some of these laws also going beyond issues of intellectual-property law, for example, as they address questions of human rights (see also Riley and Carpenter, 2016, p. 894). The wider trend, exemplified in these laws, can also be seen in a number of international model laws, recommendations and conventions of the UN and two of its specialised agencies (UNESCO and WIPO): the UN Declaration on the Rights of Indigenous Peoples contains some general provisions about the protection of cultural traditions and traditional knowledge<sup>20</sup>; the documents by UNESCO deal with expressions of folklore, traditional culture and intangible cultural heritage<sup>21</sup>; and WIPO is currently developing an international legal instrument on traditional knowledge and cultural expression, dealing with their control, attribution and remuneration (if exploited by others).<sup>22</sup>

Considering the impact of these new forms of protection on cultural appropriation, on the one hand, these rules may be seen as extensive, as they address the limitations of tangibility and group rights in copyright law. On the other hand, the protection of traditional or indigenous knowledge and culture means that they do not cover broader cultural groupings related to, for example, religions, nationalities and gender. As these emerging international rules are not yet globally accepted, it is also clear that they do not solve all possible cases of cross-border cultural appropriation.

## 2.2 Trademarks, geographical indications and other laws

In some of the initial scenarios, it is conceivable that the potential victims of cultural appropriation can register their interests as trademarks, patents or design rights. The use of trademarks shall be the main focus of this subsection.

Some of the frequent requirements of a trademark, such as that it needs to be distinctive and that it has visual perceptibility (Scafidi, 2005, pp. 31, 42), exclude fairly general and intangible cultural phenomena. As countries either require registration or give preference for registered trademarks (for an overview, see Aylen, 2018), it also follows that a person or group needs to make a deliberate decision to apply for trademark protection for specific goods and goods services. In return, and differently from copyright, as long as holders use the trademark, its protection does not have a time limitation.

<sup>19</sup>The most recent one is the South African law, namely the Act No. 6 of 2019: Protection, Promotion, Development and Management of Indigenous Knowledge Act, 2019.

<sup>20</sup>United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the General Assembly on 31 September 2007, Arts 11 and 31.

<sup>21</sup>Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (1982); Recommendation on the Safeguarding of Traditional Culture and Folklore (1989); Convention for the Safeguarding of Intangible Cultural Heritage (2003).

<sup>22</sup>Draft Articles on the Protection of Traditional Cultural Expressions (2011, as amended). For further discussion, see e.g. Robinson *et al.* (2017); Pager (2016).

Trademark protection may address some of the possible cases of cultural appropriation. For example, in the US, ‘source communities’ are said to ‘be able to register their names, certain phrases, symbols, designs, artwork, certain music, and characters in oral tradition’ (Sharoni, 2017, p. 426). The Navajo tribe, for example, holds eighty-six registered trademarks under the name ‘Navajo’; yet, recent judicial disputes also illustrate the limitations of such trademarks. When a manufacturer of clothes, Urban Outfitters, used the Navajo name, the tribe challenged it; Urban Outfitters then stopped producing these clothes – however, a claim for compensation against Urban Outfitters remained unsuccessful because Navajo did not hold a trademark that would cover the specific items of clothing (see Moynihan, 2018; Riley and Carpenter, 2016, p. 903).

The reverse situation has also been the subject of recent discussions, namely the protection of indigenous groups against trademarks (or patents) of companies. For example, in the US, a court cancelled the Washington Redskins trademark as disparaging to Native Americans (Phillips, 2017); in South Africa, a court rejected the application of a German company for a patent that would make use of indigenous bio-resources (Msomi, 2015); and, in New Zealand, the law explicitly forbids registration of trademarks that contain, or are derived from, a Māori sign including text or imagery, assigning this assessment to a Māori Trade Marks Advisory Committee.<sup>23</sup>

As far as cultural products refer to specific geographical locations or origins, protection can also be provided by rules on geographical indications. In particular, this is the case in countries where such protection benefits everyone who produces a product in a particular region (e.g. this is the rule in the EU<sup>24</sup>). Frequent examples are the names for certain food and drink (Champagne, Parmesan, etc.), assuming that a particular name has not become a generic one (‘French fries’, etc.).<sup>25</sup> With respect to the case of Jamie Oliver’s jerk rice (noted in Section 1, above), Jamaica already protects the term ‘Jamaica jerk’ and it aims to extend this protection to other countries<sup>26</sup>; yet, it seems unlikely that such international rules may be forthcoming.

Finally, some more general laws can be relevant, in particular for cases that involve forms of deception or defamation. In many countries, there are specific laws protecting consumers against unfair commercial practices<sup>27</sup> that may apply to cases where someone deceives the public about their true identity. For example, it is said that the respective Australian law can apply ‘if a person selling artwork and representing that it is true indigenous artwork when it is not’ (Kariyawasam, 2012, p. 540). However, other cases are unlikely to be unlawful under any law, such as ‘merely’ running an Indian restaurant (while not being Indian) or writing a book under a pseudonym (and therefore possibly associating with another group identity).<sup>28</sup>

Tort law can potentially be relevant in some cases. General statements are difficult to make, since tort law varies considerably between countries. Some forms of derogatory cultural mixing may reach the threshold of a tort of defamation (or equivalent concepts) if they undermine the reputation of individuals<sup>29</sup>; yet, this does not cover mere cases of ‘making fun’ of another culture. While it has also been suggested that, in common-law countries, the protection of intangible cultural resources may be achieved through the notion of ‘intentional infliction of emotional distress’ (Carr, 2013), here too these are likely to be rare cases, as it is

<sup>23</sup>See New Zealand Intellectual Property Office. Available at <https://www.iponz.govt.nz/about-ip/trade-marks/practice-guidelines/current/examination-of-trade-mark-applications/>; this has become relevant recently, see ‘Māori anger as Air New Zealand seeks to trademark “Kia Ora” logo’, *The Guardian*, 12 September 2019. Available at <https://www.theguardian.com/world/2019/sep/12/maori-anger-as-air-new-zealand-seeks-to-trademark-kia-ora-logo>.

<sup>24</sup>Council Regulation (EC) No. 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs. See also Dagne (2015).

<sup>25</sup>In addition, some rules distinguish between different products; see e.g. the higher protection for wines and spirits in Arts 22–24 of the TRIPS Agreement (1994).

<sup>26</sup>Jamaica seeks international legal protection for “Jamaica Jerk”, *RJR News*, 21 August 2018. Available at <http://rjrnews-online.com/local/jamaica-seeks-international-legal-protection-for-jamaica-jerk>.

<sup>27</sup>E.g. in the EU: Directive 2005/29/EC of concerning unfair business-to-consumer commercial practices in the internal market; for Australia, see the following sentences of this paragraph.

<sup>28</sup>See example 4 in Section 1, above.

<sup>29</sup>For a comparison of common-law jurisdictions, see Kenyon (2006); for legal differences between European countries, see Brüggemeier et al. (2010).

bound to be difficult to prove intention (and it would also require ‘extreme and outrageous’ conduct – a standard unlikely to be reached in ethically ambiguous cases, as discussed in the next part).

### 2.3 Preliminary conclusion

It follows that, in some of the representative examples of cultural appropriation (as listed in [Section 1](#), above), it is possible that there may be a violation of the law. Notably, this is the case for the final three examples if a cultural product is specific enough to be protected by means of copyright (possibly in example 8), geographic indications (possibly in example 9) or trademark (possibly in example 10). In the examples that concern changing one’s looks or behaving in a particular way, constructing an infringement of copyright is difficult (e.g. examples 1 or 2); in some cases, unfair competition law or tort law may be relevant in extreme circumstances (e.g. possibly in examples 2 or 4).

This incomplete legal protection is intentional because the relevant laws are based on specific rationales. For example, the classic rationale for protecting intellectual property is that it incentivises their creation and prevents free-riding (e.g. Burk, 2012); yet, such protection has its limitations (note the restrictions of time, scope, etc.) because protection that is too extensive would deter innovation and restrict the availability of ideas and goods available to the public, in particular as far as such protection would monopolise them (as often noted by critics of IP law, e.g. Boldrin and Levine, 2010). Similarly, tort law starts with need for protection – here that it aims to induce potential tortfeasors to internalise the potential damages they may inflict on others – but also acknowledges that its protection should not go too far in restricting everything that may potentially impact on someone else (e.g. because excessive precautionary actions would diminish overall utility; see generally Faure, 2009).

This section has referred to some country variations in the relevant laws. It also mentioned that, in some countries, recent law reforms have introduced protection of traditional knowledge, which can potentially be relevant for cases of cultural appropriation. Further variations can be due to the practices of private and public institutions, such as whether publishers or universities act in a way to exclude any possibility of being accused of ‘cultural appropriation’. These latter cases, which are often contentious, will be discussed in the penultimate section of this paper (Section 4.2, below), which will then also revisit the role of law from a more normative perspective.

Before doing so, the next section will address the ethics of cultural appropriation. It will show that some links to the legal debate can be made – as indeed some scholars (e.g. Merges, 2011) emphasise the ethical foundations of intellectual property (and the relationship between law and ethics/morals is of course also a general theme of legal philosophy). Yet, as will be discussed, it is also possible that certain actions are legal but potentially unethical.

## 3 Ethics: towards an evaluative framework

There is some confusion about the precise scope and accusation of cultural appropriation being ‘unethical’. The following starts with the possible view that all cases of cultural appropriation (in particular, all of the examples mentioned in [Section 1](#), above) would be seen as inappropriate. Subsequently, it discusses the view that cultural appropriation always has to be about power imbalances. Rejecting both of those positions, the final part of this section will suggest three categories of potentially unethical conduct.

### 3.1 Is cultural appropriation always inappropriate?

In social media (Twitter, etc.), some proponents of a complete rejection of all forms of cultural appropriation merely make their case with a statement such as ‘This is cultural appropriation: stop it’.<sup>30</sup> Thus, this seems to argue that there is some kind of general ethical norm according to which cultural appropriation is always inappropriate.

<sup>30</sup>E.g. <https://twitter.com/Soooraayaa/status/626127765532753920>; <https://nl.pinterest.com/pin/551761391825074048/>.

However, considering only some examples, it can be seen that ethical evaluations of cultural appropriation differ considerably. For example, even prior to the current debate about cultural appropriation, some extreme cases (e.g. ‘blackfacing’ in the US) were widely dismissed as being inappropriate; yet, other cases show that there has not been a general rejection. For example, detective fiction often uses a first-person narrative, though the author is not actually a detective (and much the same applies in other artistic fields).<sup>31</sup>

Thus, rather than simply stating it, the argument needs to be made that general ethical concepts support the new position of a complete rejection of any form of cultural appropriation. The following will mainly distinguish between ethical positions that take a consequentialist or a deontological perspective; yet, other perspectives will also be addressed in the subsequent discussion.<sup>32</sup>

From a consequentialist ethical perspective (e.g. Peterson, 2013), it may be argued that respecting the ‘ownership’ of cultural phenomena would be good for everyone: your own cultural ideas and products are protected, and it is up to you to allow others to make use of it. However, a practical problem with such a line of reasoning is that asking about consent to cultural appropriation is in many instances hardly feasible. As far as intellectual-property rights are possible (see the previous part), there are usually distinct groups who can provide such consent. Yet, in other examples, the groups in question are too large to have any reliable mechanism that would operationalise such a consent procedure (e.g. if it is about a man writing from a female perspective, would we need to survey all women of the world?).

Following a consequentialist position, it can also rather be the case that ‘appropriating’ the phenomena of another culture is beneficial for the greatest number of people.<sup>33</sup> For example, it is possible that a different perspective provides new insights into the topic under discussion, as examples from the world of literature show (Smith, 2010, p. 348, noting that authors such as Ibsen, Shaw and Joyce were better understood abroad than at home). In other instances, the advantage is the spread of good cultural phenomena<sup>34</sup>: for example, if a particular culture does something that makes everyone who enjoys this phenomenon happy – be it a particular music, food, dress, etc. – it is beneficial for other cultures that they can also benefit from it (and, as the same applies to the first culture, it can also benefit from cultural phenomena developed elsewhere).

Furthermore, a general rejection of any form of cultural appropriation would be harmful for societies, as it would make it more difficult to mix cultural phenomena. Cross-fertilisation of ideas is often emphasised as a general benefit of cultural mixing; in other words, ‘ideas need to meet and mate’ in order to cumulate, meaning that it can lead to something that is greater than the sum of its parts (Ridley, 2010, p. 6). For example, reference can be made to the popularity of fusion dishes, stories that mix cultural traditions and physical products that are only possible if you allow the mixing of different tools.<sup>35</sup>

From a deontological ethical perspective, it is also unconvincing to argue in favour of a general rejection of cultural appropriation. Taking Kant’s Categorical Imperative as standard, one of its formulations states that you are to ‘act only in accordance with that maxim through which you can at the same time will that it become a universal law’ (Kant, 1785/2003, p. 4:421). Thus, in the present case, it could be argued that humans suffer from being the victim of cultural appropriation and that they would therefore endorse a rule that would ban it completely. However, this assumed suffering

<sup>31</sup>For this discussion, see e.g. Lionel Shriver’s controversial speech at the Brisbane Writers Festival 2016. Available at <https://www.theguardian.com/commentsfree/2016/sep/13/lionel-shrivers-full-speech-i-hope-the-concept-of-cultural-appropriation-is-a-passing-fad>; ‘The painting that has reopened wounds of American racism’, *The Observer*, 2 April 2017. Available at <https://www.theguardian.com/us-news/2017/apr/02/emmett-till-painting-reopened-america-wounds-race-exploitation-dana-schutz>.

<sup>32</sup>See e.g. the contributions in Copp (2006) as well as Section 3.2, below (referring to Rawls and Locke).

<sup>33</sup>Thus, this relates consequentialism to utilitarianism; see generally Driver (2014).

<sup>34</sup>For a similar point, see ‘Three cheers for cultural appropriation’, *New York Times*, 30 August 2017. Available at <https://www.nytimes.com/2017/08/30/opinion/cultural-appropriation.html>.

<sup>35</sup>For the final point, see Ridley (2010, p. 7) (‘imagine if the man who invented the railway and the man who invented the locomotive could never meet or speak to each other’); for fusion dishes, see also Section 3.3, below.

is not self-evident. Sometimes, cultural appropriation can be felt positively, namely as recognition of another culture. Considering cultural appropriation as a cause for emotional harm is also problematic, as it uses a circular logic: one's own feelings towards a particular behaviour are often a reflection of whether this behaviour is endorsed in a particular society – in other words: if you clarify in advance that cultures are open and that cultural exchange and mixing are positive to your society,<sup>36</sup> people are more likely to accept such mixed phenomena as common good.

Another formulation of Kant's Categorical Imperative is that you should 'act in such a way that you treat humanity, whether in your own person or in any other person, always at the same time as an end, never merely as a means' (Kant, 1785/2003, p. 4:429). Some suggest that this is indeed the case here, since '[t]he telling part about cultural appropriation is the lack of consideration of the context you are taking the cultural piece from, and not asking permission for using it in that way' (Bar-Yam, 2016, p. 6; similarly, also Kennedy and Laczniaik, 2014). But, here too, this is not a matter of course: the motivation of cultural appropriation can also be an endorsement of this culture (e.g. its food, clothing, music, etc. – or even its entire identity<sup>37</sup>); thus, again, details matter, as the following subsections will discuss.

### 3.2 Is cultural appropriation only about power imbalances?

Some supporters of the concept of cultural appropriation only apply it to a situation where there is a power imbalance between the possible victim and the perpetrator. For instance, taking the view that Western culture is more powerful, it is seen as acceptable that non-Westerners wear Western clothing (ties, suits, etc.) but not that Westerners wear clothing from other cultures (e.g. see the case of the *sombreros*, mentioned in Section 1, above).<sup>38</sup> Further examples may refer to other forms of power relationships. For example, writing under a pseudonym would be unacceptable if it concerns a 'Yale-educated White male' choosing a Latino-sounding name,<sup>39</sup> but acceptable if it concerns a female author choosing a male name.<sup>40</sup> Or, for example, consider the situation in India, where moustaches are seen as a symbol for the higher castes: thus, persons from lower castes wearing moustaches would be seen as acceptable even if the higher castes do not approve of it.<sup>41</sup>

This requirement of power imbalances could also be motivated by other instances in which such imbalances are said to be relevant. Some of the literature refers to the impact of colonialism and the oppression of indigenous cultures as it relates to cultural appropriation, to efforts to return stolen property to former colonies and, specifically, to the history of the legal dispossession of Indian property in the US (Kuprecht, 2014; Scafidi, 2008; Riley and Carpenter, 2016). In addition, it seems likely that the wider context of this requirement may be influenced by Marxist (or neo-Marxist) and post-modern positions that often use the divide between the powerful (the oppressors) and the powerless (the oppressed) as one of their main analytical tools (cf. Lukianoff and Haidt, 2018, pp. 53–78).

It follows that, according to this view, it is clearly unacceptable if a powerful group further advances its privileged position by way of taking cultural phenomena from less powerful groups. By contrast, in the reverse situation, the powerful group is not seen as having a right to complain about the use of its cultural phenomena: thus, here, we have no case of 'cultural appropriation'. Yet, in this reverse situation, there can then be the problem that the powerless group feels unduly compelled to assimilate to the cultural norms of the powerful one (called 'covering' by Yoshino, 2006; e.g. note the discussion

<sup>36</sup>For a similar line of reasoning, see 'Is cultural appropriation immoral (deontology)?', 8 July 2018. Available at <https://www.youtube.com/watch?v=P72Q7Srd6k8>.

<sup>37</sup>See example 3 in Section 1, above.

<sup>38</sup>Quora discussion. Available at <https://www.quora.com/Why-is-wearing-Western-clothes-not-a-cultural-appropriation-of-the-West>.

<sup>39</sup>Cf. 'OBITUARIES: Daniel James: writer who masqueraded as a Latino', *L.A. Times*, 21 May 1988. Available at [http://articles.latimes.com/1988-05-21/news/mn-2879\\_1\\_daniel-james](http://articles.latimes.com/1988-05-21/news/mn-2879_1_daniel-james).

<sup>40</sup>Cf. <https://robert-galbraith.com/about/>.

<sup>41</sup>'India's lowest caste fights discrimination with mustache selfies', *CNN*, 6 October 2017. Available at <https://edition.cnn.com/2017/10/06/asia/india-dalit-discrimination-selfies/index.html>.



about terms such as ‘Black Anglo-Saxons’ and ‘acting White’ in the US and ‘Castle Catholic’ and ‘West Brits’ in Ireland).

Applying a requirement of power imbalances to cultural appropriation faces a number of practical problems. To start with, it requires a clear understanding about the relevant groups. For example, in the US, accusations of cultural appropriation due to persons having ‘the wrong’ haircut (e.g. dreadlocks) or wearing ‘the wrong’ clothes (e.g. wearing a Chinese dress)<sup>42</sup> are often merely based on the ethnicity of the person and thus possibly unrelated to any actual cultural belonging. Moreover, there is a lack of clarity on how power is defined: for example, can someone from Israel wear a Japanese dress<sup>43</sup> or can someone from China identify as Finnish?<sup>44</sup> And how do we deal with changes in the power relationship (e.g. considering the Hutu and Tutsi in Rwanda, White farmers in Zimbabwe, Russian-speakers in Ukraine)?

As far power imbalances are derived from historical developments, the problem also arises that questions about ‘the correct’ understanding of history become a relevant factor for current ethical rights and obligations. For example, the fierce disagreements about the question ‘who was the original owner of a particular land?’ in Israel/Palestine, Serbia/Kosovo, Greece/(North-)Macedonia, Russia/Ukraine, etc. show that ‘history’ is unlikely to provide a clear solution. It is also open to manipulation, since it may not be the actual historical experience that matters to people, but rather how it is used (or abused) by persons or groups who want to advance a particular opinion.<sup>45</sup>

In substance, it is suggested that group-based assessments of power imbalances are at odds with notions of personal responsibility and fairness. In international law, no one ‘may be punished for an offence he or she has not personally committed’.<sup>46</sup> This prohibition of collective punishment also reflects more general notions of fairness. For example, a recent newspaper report calls different rules for different groups a ‘terrible idea’, going against any sense of fairness, reciprocity and justice given that ‘the people being targeted are different than the people who historically oppressed people of colour and women’.<sup>47</sup> A speech by Barack Obama expresses a similar position, namely that one should not say that some persons ‘lack standing to speak on certain matters’ because of their group identities.<sup>48</sup> From the perspectives of theories of justice, reference can also be made to John Rawls’s insight that people reach the most just solution on their society’s basic principles if they imagine themselves behind a ‘veil of ignorance’ (i.e. not knowing which group of society they would belong to; for a discussion of the relationship between Rawls’s position and ‘identity politics’, see Chua, 2018, p. 179). And adopting the position of Locke that there is a natural right of ownership of one’s own labour<sup>49</sup> also has to lead to the conclusion that the mere belonging to a group cannot justify different treatment.

<sup>42</sup>For the first example, see Section 1, above; for the second one, see ‘Girl slammed on Twitter for culturally appropriating her prom dress says she would wear it again’, *Cosmopolitan*, 2 May 2018. Available at <https://www.cosmopolitan.com/style-beauty/fashion/a20123163/keziah-daum-prom-dress-cultural-appropriation-cheongsam-qipao/>. Another example is: ‘K-pop’s EXP Edition: the world’s most controversial “Korean” band’, *BBC News*, 6 December 2018. Available at <https://www.bbc.co.uk/news/world-asia-46381997>.

<sup>43</sup>Eurovision: Israel winner Netta accused of cultural appropriation over Japanese theme’, *Independent*, 13 May 2018. Available at <https://www.independent.co.uk/arts-entertainment/music/news/eurovision-winner-netta-israel-latest-cultural-appropriation-japan-costume-a8349296.html>.

<sup>44</sup>‘Why do millions of Chinese people want to be “spiritually Finnish”?', *The Guardian*, 5 August 2018. Available at <https://www.theguardian.com/world/shortcuts/2018/aug/05/why-do-millions-of-chinese-people-want-to-be-spiritually-finnish>.

<sup>45</sup>Cf. Ochsner and Roesel (2017) (study finding that the population of the Austrian municipalities affected by Turkish occupation 500 years ago have more hostile attitudes towards Muslim migration than other municipalities today; yet, this divergence only occurred since 2005 when the right-wing Freedom Party referred to the Turkish sieges in their political campaigns).

<sup>46</sup>Geneva Convention IV, Art. 33; similar Geneva Convention III, Art. 87.

<sup>47</sup>‘Identity politics does not continue the work of the civil rights movements’, *Areo*, 25 September 2018. Available at <https://areomagazine.com/2018/09/25/identity-politics-does-not-continue-the-work-of-the-civil-rights-movements/>.

<sup>48</sup>Available at <http://time.com/5341180/barack-obama-south-africa-speech-transcript/>.

<sup>49</sup>For an application of this reasoning to IP rights, see Merges (2011, pp. 31–67) (and at p. 108 for how it may be linked to the position of Rawls).

The final reason – and the decisive one for the purposes of this paper’s line of reasoning – is that it is linguistically impossible to make the meaning of the word ‘appropriation’ dependent on power imbalances. Considering the Latin origins of this word, it simply refers to the process of making something ‘one’s own’ (*proprius*). To draw an analogy to the word ‘theft’: we may say that we find it ethically less reprehensible when a poor person steals from a rich person, rather than vice versa; yet, it is clear that both situations refer to something called ‘theft’. Thus, in the cases discussed here, it is of course possible to say that abuse of a position of power as regards cultural phenomena is ethically wrong, but this should then be called something else (e.g. cultural ‘oppression’, ‘domination’, ‘dependency’), while it is not plausible to make power imbalances a requirement of the definition of cultural appropriation.

### 3.3 Categories of potentially unethical conduct

Starting with the aforementioned meaning of the term ‘cultural appropriation’, the following distinguishes between three forms of making another culture ‘one’s own’: (1) by denying the origins of a cultural phenomenon, (2) by treating it disrespectfully and (3) by diminishing its use in the source culture. It will, however, also be shown that often a balance between other interests needs to be struck.

First, denying the origins of a cultural phenomenon can include some situations that are unlawful, such as if there is lack of attribution in a case of intellectual-property protection or if deception can be classified as unfair commercial practice (see Sections 2.1 and 2.2, above). Other situations may be lawful, but potentially unethical: for example, some criticise the retail chain store ‘Miniso’ for using Japanese-style branding as an apparent quality signal, even though it is mainly a Chinese company.<sup>50</sup>

Implicit situations are often difficult to assess. For example, do restaurants that offer a particular type of food need to disclose the nationality of their owners, chefs, etc.? It is likely that differences in context often play a role: for instance, in many countries, it may be common that Italian food is offered in any type of restaurant (and thus there is no implicit statement that its owners or chefs are Italian); and, at least in the UK, it is also very common that Indian restaurants are actually run by people from other countries.<sup>51</sup> Other food-related topics are even more ambiguous. For example, Jamie Oliver, selling ‘jerk rice’, was accused of culturally appropriating Jamaican food while also being ‘dishonest’, as authentic Jamaican jerk is about meat, not rice. Thus, it could be suggested that these altered origins should have been clarified on the package. However, it may also be said that the meaning of words can change: for example, it is culturally accepted that today’s ‘pizzas’ can be different from the original Neapolitan ones. It is also clear that many foods and dishes are mixtures that blend various influences whereby it may be unrealistic, or even impossible, to expect that each and every potential cultural influence is fully explained.

This leads to the situations in which there is no statement about a particular cultural origin at all. Here too, it may often not be realistic to expect that each and every cultural influence is disclosed; for example, in today’s world, we may wear pieces of clothing that originate from various other places, but there is no expectation that we hang a sign around our neck that says ‘I’m from *x* culture and I wear shoes from *y* culture, trousers from *z* culture, etc.’ In other cases, there may be legitimate interests not to mention one’s group identity. For example, just because an actor plays a gay role (or indeed a straight one), does not lead to the obligation to disclose his or her sexual orientation. There can also be good reasons for authors to write anonymously, in particular where they want readers to engage with the substance of the text (as opposed to *ad-hominem* or group-related attacks<sup>52</sup>).

<sup>50</sup>‘Is Miniso a Japan-based chain store?’, *Macau Daily Times*, 26 January 2016. Available at <https://macaudailytimes.com.mo/retail-is-miniso-a-japan-based-chain-store.html>.

<sup>51</sup>Quora discussion. Available at <https://www.quora.com/Why-are-almost-all-Indian-restaurants-in-the-UK-owned-by-Bangladeshis>.

<sup>52</sup>Kwame Anthony Appiah makes a similar point: ‘Go ahead, speak for yourself – not every opinion needs to be underwritten by your race or gender or other social identity’, *New York Times*, 10 August 2018. Available at <https://www.nytimes.com/2018/08/10/opinion/sunday/speak-for-yourself.html>.

Second, some cases of cultural appropriation through disrespectful treatment also reach the threshold of being unlawful (e.g. under tort law), though those are rare examples (see Section 2, above). More generally, it is clear that, here too, the particular context often plays a decisive role. At the basic level, for example, certain signs or words may be seen as deeply offensive in one culture but not in another one (e.g. consider the swastika sign or false friends in British/American English). For some of the examples mentioned in Section 1, we also need to consider the context: for instance, is it about wearing a sombrero on a sunny day at the beach or at a party that intentionally makes fun of Mexican traditions?<sup>53</sup> And are particular names or signs that derive from indigenous cultures displayed and used in a way that is offensive or complimentary?<sup>54</sup>

In this category of potential cultural disrespect, it is particularly important to balance between this consideration with other interests such as artistic freedom and freedom of speech. There is no general ethical obligation only to write about topics related to one's own group identity or life experience (see also Section 3.1, above). For example, artists may deal with other cultures in a respectful way and make special efforts to do so.<sup>55</sup> However, artistic freedom also includes the right to mock cultural practices.<sup>56</sup> Moreover, the argument of cultural appropriation should not be used so as to exclude persons from other cultures from talking or writing about certain topics, even if it is done in a way that is sceptical about a particular cultural phenomenon (e.g. criticising FGM<sup>57</sup>); thus, here the apt response should be to argue about the substance of the topic, rather than using the concept of 'cultural appropriation' as an *ad hominem* to silence the debate.<sup>58</sup>

Furthermore, in this category, we can include cases where the relevance of power imbalances plays a role. For example, making fun about a powerful group (e.g. a governing party, a dominant religious group) is more likely to be justified where this is one of the few means of the weaker group to challenge the former's influence and criticise certain practices (e.g. use satire in the wake of scandals in the Catholic church<sup>59</sup>). It may also take the legitimate form of 'subversive appropriation' in the international sphere, such as where foreign ideas are used as a means of resistance against dominant powers (Merry, 1998, pp. 585–586).

Third, cultural appropriation can be about conduct that diminishes (or even makes disappear) the use of a cultural phenomenon in the source culture. Here too, this is straightforward as far as this phenomenon enjoys the protection of intellectual-property rights (e.g. where a particular product or sign is protected by copyright or trademark law; see Section 2, above). Other cases could also be contemplated: for example, if Jamie Oliver's jerk rice becomes more popular than authentic Jamaican dishes, is this then inappropriate?<sup>60</sup> And is this also the case where an actor plays a role of someone of another group and, in doing so, takes away the job opportunities of actors of this group?<sup>61</sup>

To start with, it needs to be considered that such cases may also promote the cultural phenomenon in question. In other words, one should not simply assume that its use 'crowds out' the opportunities

<sup>53</sup>See also 'The question of cultural appropriation', *Current Affairs*, 6 September 2017. Available at <https://www.currentaffairs.org/2017/09/the-question-of-cultural-appropriation> ('Is the originating group and its culture being celebrated, appreciated, and respected, or are they being degraded, mocked and accessorized?').

<sup>54</sup>For this example, see 'Is cultural appropriation immoral (deontology)?', 8 July 2018. Available at <https://www.youtube.com/watch?v=P72Q7Srd6k8>.

<sup>55</sup>Note the emerging practice of 'sensitivity reading'; cf. 'What the job of a sensitivity reader is really like', *Vulture*, 5 January 2018. Available at <http://www.vulture.com/2018/01/sensitivity-readers-what-the-job-is-really-like.html>.

<sup>56</sup>E.g. see 'Weird Al' Yankovic's *Amish Paradise*. Available at <https://www.youtube.com/watch?v=IOFZLb33uCg>.

<sup>57</sup>A main reference point of the debate is the chapter 'Judging other cultures: the case of genital mutilation' by Nussbaum (1999, pp. 118–129).

<sup>58</sup>See also the quote by Obama in Section 3.2, above.

<sup>59</sup>This has been a recent topic in Germany: 'Titanic vs Papst Benedikt XVI: was darf Satire?', *JE*, 11 July 2012. Available at <http://www.juraexamen.info/titanic-vs-papst-benedikt-xvi-was-darf-satire/>.

<sup>60</sup>See also BBC Africa Debate 'Can you trademark culture?', 1 October 2017. Available at <https://www.bbc.co.uk/programmes/w3cstwlp> ('misappropriation' as a form of appropriation).

<sup>61</sup>See 'The issue with able-bodied actors taking roles with disabilities', *The Student Newspaper*, 12 September 2018. Available at <http://www.studentnewspaper.org/the-issue-with-able-bodied-actors-taking-roles-with-disabilities/>.

of the source culture, but that it can also result in a ‘crowding-in’ effect. This line of reasoning can be particularly relevant where the popularity of a cultural phenomenon is fading. For example, in a programme about the Japanese woodcut art technique of ukiyo-e, it is said that a declining number of Japanese artists apply it and that, according to a Japanese commentator, it is appreciated that a Canadian craftsman and an American designer merge it with forms of pop art.<sup>62</sup>

Recognising the change of cultural phenomena is also relevant in some situations. For example, in the UK, chicken tikka masala is now seen as a ‘British national dish’, notably due to the way it has adjusted the original Indian dish to the needs of the local market.<sup>63</sup> In the US, the history of jazz music may be seen as an example of its cultural appropriation by White composers (Paul Whiteman in particular); yet, as it has evolved, it has also gained appeal to the wider public as ‘America’s classical music’.<sup>64</sup>

Finally, here too, we have to balance the interests in question. For example, the argument that actors of certain groups should not play certain roles goes against principles of artistic freedom and it may well be left to the audience to decide whether they mind watching, say, a play with a straight actor in a transgender role. With respect to the cases of economic competition (regarding dishes, music or other products), it can also be argued that it may be best to let consumers decide which product they prefer. However, this can be different where power imbalances distort the level playing field: for example, if a restaurant chain purchases the building next to an ethnic family restaurant and opens a restaurant that copies the latter’s menu, it may well be seen as unethical (or, indeed, it may constitute a violation of unfair competition law; see Section 2.2, above).

To conclude, the differentiated position developed in this section accepts only some cases of cultural appropriation. It is therefore submitted that the term ‘cultural appropriation’ is an example of a ‘concept creep’ – akin, and possibly related, to the critical finding by Haslam that negative concepts in psychology such as abuse, bullying and prejudice ‘have expanded their meanings so that they now encompass a much broader range of phenomena than before’ (Haslam, 2016, p. 1).

#### 4 Law (again): possible legal responses

The previous sections have shown that proponents of the concept of cultural appropriation suggest a fairly large number of cases, but that only some of these cases may under some circumstances be unlawful and that some further cases may be unethical. On this basis, this section addresses possible legal responses, aiming at rules that either prevent cultural appropriation to a larger degree or – if one takes a more sceptical view – prevent the overreach of cultural appropriation in the social sphere.

This topic also includes arguments against the use of law. Legal theorists frequently discuss the possible limits of law: in Europe and North America, works on law’s legitimate scope often start with Mill’s ‘harm principle’ and then discuss how far legal intervention may also be justified on other grounds (overview in Stanton-Ife, 2006; using Kantian arguments, Ripstein, 2009). It can also be seen as a typical ‘Western’ position that morality and law are treated as substitutes: thus, if there are strong moral norms, it is argued that the repressive force of law is not needed (e.g. Osiel, 2019). By contrast, non-Western legal traditions, notably religious laws, often have less hesitation to extend their reach to all areas of life (for an overview of legal traditions, see Glenn, 2014). Consequently, there cannot be any global consensus on how far legal rules should address the topic of cultural appropriation. Still, it is possible to identify the following normative considerations (based on a general ‘Western’ perspective).

<sup>62</sup>See example 8 in Section 1, above.

<sup>63</sup>As famously noted by the UK foreign secretary Robin Cook in 2001; see ‘Robin Cook’s chicken tikka masala speech’. Available at <https://www.theguardian.com/world/2001/apr/19/race.britishidentity>.

<sup>64</sup>For the conflicting positions, see e.g. ‘Black rhythm, White power’, *The Morningside Review*, 2007/08. Available at <https://morningsidereview.org/essay/black-rhythm-white-power/>.

#### 4.1 More rules preventing cultural appropriation?

The three categories of potentially unethical conduct identified in the previous section (Section 3.3, above) referred to some situations in which existing laws already cover such cases of cultural appropriation. The question raised here is therefore whether the law should go further: so as far as cultural appropriation is unethical, should more situations be treated as unlawful?

Some legal scholars advocate that intellectual-property law should broaden its scope. Susan Scafidi explicitly proposes new rules that protect cultural products of source communities, such as community-generated art forms (Scafidi, 2005, p. xi). More specifically, others also suggest extensions of particular types of intellectual property, such as granting greater copyright protection to indigenous communities (Carpenter, 2004; Merges, 2011, p. 267) and broadening the scope of performers' rights (Pavis, 2018). However, it is also accepted that intellectual-property protection should not be limitless. According to Scafidi, intellectual property should not be 'expanded to a degree that threatens to impoverish the public domain and strangle creative enterprise', as can also be seen in its temporal limitations as compared to rights to real and personal property (Scafidi, 2005, pp. xi, 17). Similarly, the prior review of the existing laws concluded that legal protection that is too extensive can have a negative effect (Section 2.3, above). Thus, any extension of intellectual-property law should only be contemplated in a modest way, such as reflecting trends to provide greater protection for traditional knowledge (Section 2.1, above), with further details dependent on the specific context of the country and culture in question (similarly Fisher, 2018).

Extending the legal protection against cultural appropriation can also be challenged for other reasons. To start with, it may cause problems of legal certainty: it is often practically difficult to establish who created a particular cultural phenomenon and how it may have become mixed with other phenomena (see Section 3.1, above); in the words of Sally Merry, 'culture as contested, historically changing, and subject to redefinition in multiple and overlapping field' (Merry, 1998, p. 602). Moreover, if one considers possible acts of cultural appropriation beyond intellectual-property law, it is bound to be even more difficult to define the boundaries of unlawful conduct.

Further objections concern the need to consider other interests, which also means that it would be difficult to develop workable general legal rules. As we have already seen for the categories of potentially unethical conduct (Section 3.3, above), it is often necessary to balance any legitimate claims of cultural appropriation with considerations such as artistic freedom and freedom of speech. Finally, cultural phenomena need space to flourish: thus, further legalisation and marketisation of culture would not be in their best interest.

#### 4.2 More rules preventing overreach of cultural appropriation?

The analysis of potentially unethical conduct in Section 3 referred to situations in which some allege cultural appropriation but there are better reasons to argue that the conduct is ethically acceptable. So should law have something to say about such misled claims made by supporters of cultural appropriation?

The main reason this could be contemplated is that unjustified but successful accusations of 'cultural appropriation' may be harmful in demanding 'pure cultures'. Thus, such a position could discourage cultural borrowing and mixing, disregarding the evidence that such forms of hybridisation have been essential to much of human progress (see Section 3.1, above). Reference can also be made to the wider debate about 'identity politics' (e.g. Appiah, 2018; Fukuyama, 2018; Lilla, 2017). Here, recent publications often criticise how the group-based identity politics of both the far-right and the far-left disregard both human commonalities and individual responsibilities. For example, it is stated that human commonalities are beneficial in their emphasis on openness, diversity and competition of ideas, while an emphasis on group identities leads to localism, exclusiveness and ideological cleansing; and that, once one 'ceases to see people as individuals, and rather sees them as symbols of a class, violence usually follows' (e.g. referring to Nazi Germany, the Soviet Union and Idi Amin's Uganda).<sup>65</sup>

<sup>65</sup>The online magazine *Quillette* focuses on these issues; see e.g. Sami J. Karam, 'Purity or universalism?', *Quillette*, 27 September 2018. Available at <https://quillette.com/2018/09/27/purity-or-universalism/>; Neema Parvini, 'Individuals and symbols', *Quillette*, 18 October 2018. Available at <https://quillette.com/2018/10/18/individuals-and-symbols/>. For criticism, see

Considering possible legal responses, some circumstances are clearly outside any specific legal rules: for example, it is entirely up to the host of a Halloween party whether to invite persons who like to dress in a way the host may or may not regard as cases of cultural appropriation. By contrast, in other circumstances, legal rules (including contracts) can be means to prevent the overreach of cultural appropriation. Some of those legal rules may be of a specific nature. For example, considering the situation of a publisher cancelling a contract 'for good cause' with an author because he/she wrote from the perspective of another culture,<sup>66</sup> contractual interpretation may lead to the rejection of such a 'good cause'. Other examples may concern the ongoing debate how universities deal with group identities (e.g. Kronman, 2019; Lukianoff and Haidt, 2018): here, for instance, as far as speakers are wrongly accused of cultural appropriation, rules that promote viewpoint diversity within universities may come into play.<sup>67</sup>

Vis-à-vis more general laws, antidiscrimination laws can potentially be relevant. These laws are usually phrased in a way that, in certain fields, discrimination based on sex, age, race, ethnicity, nationality, disability and so on is prohibited.<sup>68</sup> Thus, an example may be a job advertisement that limits the position to a certain group of persons, wrongly justifying this restriction with the risk of cultural appropriation: for instance, this has found to be the case for a restaurant from a particular culture refusing to hire people from other cultures.<sup>69</sup>

Finally, here too, free-speech law is another general area that is frequently mentioned in the debate between supporters and opponents of identity politics. For example, this issue often emerges in a situation in which defenders of group identities, including those who take a wide notion of cultural appropriation, accuse persons with a more universalist or individualist perspective of disrespect towards their group identity to which the universalists/individualists respond that free speech gives them the right to disregard the group-identity focus of the formers.<sup>70</sup> The best response is here that both sides can use freedom of speech (and other rights) to defend their position. As in the previous subsection, it is therefore suggested that we should leave the outcome of such a disagreement about culture and identity politics to the non-legal sphere.

## 5 Conclusion

The topic of 'cultural appropriation' has been frequently discussed in recent years. Yet, this is the first paper that aims to analyse it from a law and ethics perspective. It aimed to give fair consideration to both sides of the argument. Thus, on the one hand, it has rejected the view that 'there is no such thing' as cultural appropriation.<sup>71</sup> This rejection should be a matter of course, since, objectively, there are some laws that address some variants of cultural appropriation. In addition, some of the cases where ethical considerations speak against cultural appropriation should also be fairly uncontentious, such as where they involve deceit.

On the other hand, it is also suggested that some of the supporters of the concept of cultural appropriation overstate their case. For example, merely using a foreign cultural phenomenon (e.g. practising yoga) is unlikely to raise any legal and ethical concerns, and imposing a general restriction to any

e.g. 'Free thought for the closed-minded', *Slate*, 8 January 2019. Available at <https://slate.com/technology/2019/01/quillette-claire-lehmann-intellectual-dark-web.html>.

<sup>66</sup>Kenan Malik argues in a similar way: 'In defense of cultural appropriation', *New York Times*, 14 June 2017. Available at <https://www.nytimes.com/2017/06/14/opinion/in-defense-of-cultural-appropriation.html>.

<sup>67</sup>Recent examples are the 'Chicago principles' and their endorsement by the Heterodox Academy. Available at <https://heterodoxacademy.org/hxa-awards-chicago/>. For a critical discussion of the principles, see Lee (2018).

<sup>68</sup>For a comparison of some of the differences, see e.g. Suk (2007; 2012).

<sup>69</sup>Restaurant fined \$4,000 for refusing to hire a waiter because he wasn't Asian', *New Food Economy*, 22 February 2018. Available at <https://newfoodeconomy.org/ichiba-ramen-justice-department-national-origin-discrimination/>.

<sup>70</sup>Searching Google News for these terms leads to more than 20,000 hits; <http://news.google.com/search?q='identity+politics'+free+speech'>.

<sup>71</sup>E.g. Reddit discussion, Available at [https://www.reddit.com/r/unpopularopinion/comments/81gjlk/there\\_is\\_no\\_such\\_thing\\_as\\_cultural\\_appropriation/](https://www.reddit.com/r/unpopularopinion/comments/81gjlk/there_is_no_such_thing_as_cultural_appropriation/).

cultural borrowing and mixing should also be rejected. Thus, instead of a general ‘ban’, this paper suggests that potentially unethical conduct needs to (1) deny the origins of a cultural phenomenon, (2) treat it disrespectfully or (3) diminish its use in the source culture, all of which then also needs to be balanced with other interests.

Overall, this paper has avoided taking an absolutist position as regards cultural appropriation. This does not advocate relativism, but asks for a balanced approach. It is also suggested that law’s role should be limited, leaving space for the role of ethical considerations. Finally, it is clear that, while this paper has discussed cultural appropriation at a general level, in practice, the local context often plays a decisive role – and, thus, the debate is bound to continue.

## References

- Appiah KA** (2018) *The Lies That Bind: Rethinking Identity*. New York: Liveright.
- Aylen D** (2018) Worldwide: prior rights and registered intellectual property, *Mondaq*, 7 June. Available at <http://www.mondaq.com/canada/x/708556/Trademark/Prior+Rights+And+Registered+Intellectual+Property> (accessed 24 November 2019).
- Bar-Yam T** (2016) *Considering Collective Agency in Kant’s Ethics*, Working Paper 30, December. Available at <https://ssrn.com/abstract=2908704> (accessed 24 November 2019).
- Boldrin M and Levine DK** (2010) *Against Intellectual Monopoly*. Cambridge: Cambridge University Press.
- Brüggeheimer G, Colombi Ciacchi A and O’Callaghan P** (eds) (2010) *Personality Rights in European Tort Law*. Cambridge: Cambridge University Press.
- Burk DL** (2012) Law and economics of intellectual property: in search of first principles. *Annual Review of Law and Social Science* 8, 397–414.
- Carpenter MM** (2004) Intellectual property law and indigenous peoples: adapting copyright law to the needs of a global community. *Yale Human Rights and Development Journal* 7, 51–78.
- Carpenter MM and Hetcher S** (2014) Function over form: bringing the fixation requirement into the modern era. *Fordham Law Review* 82, 2221–2271.
- Carr G** (2013) Protecting intangible cultural resources: alternatives to intellectual property law. *Michigan Journal of Race and Law* 18, 363–390.
- Carugno G** (2018) How to protect traditional folk music? Some reflections upon traditional knowledge and copyright law. *International Journal for the Semiotics of Law* 31, 261–274.
- Chua A** (2018) *Political Tribes: Group Instinct and the Fate of Nations*. London: Bloomsbury.
- Collins S** (2018) Who owns Ananse? The tangled web of folklore and copyright in Ghana. *Journal of African Cultural Studies* 2018, 178–191.
- Copp D** (ed.) (2006) *The Oxford Handbook of Ethical Theory*. Oxford: Oxford University Press.
- Dagne TW** (2015) Beyond economic considerations: (re)conceptualizing geographical indications for protecting traditional agricultural products. *International Review of Intellectual Property and Competition Law* 46, 682–706.
- Driver J** (2014) The history of utilitarianism, in *Stanford Encyclopedia of Philosophy*. Available at <https://plato.stanford.edu/entries/utilitarianism-history/> (accessed 24 November 2019).
- Faure M** (ed.) (2009) *Tort Law and Economics*. Cheltenham: Edward Elgar.
- Fisher W** (2018) The puzzle of traditional knowledge. *Duke Law Journal* 67, 1511–1578.
- Fukuyama F** (2018) *Identity: The Demand for Dignity and the Politics of Resentment*. New York: Farrar, Straus and Giroux.
- Germain CM.** (2019) Don’t steal my recipe! a comparative study of French and U.S. law on the protection of culinary recipes and dishes against copying, University of Florida Levin College of Law Research Paper. Available at <https://ssrn.com/abstract=3393891> (accessed 24 November 2019).
- Glenn PH** (2014) *Legal Traditions of the World*, 5th edn. Oxford: Oxford University Press.
- Haslam N** (2016) Concept creep: psychology’s expanding concepts of harm and pathology. *Psychological Inquiry* 27, 1–17.
- Inawat RJ** (2015) Music as cultural heritage: analysis of the means of preventing the exploitation of intangible cultural heritage. *John Marshall Review of Intellectual Property Law* 14, 228–248.
- Jaszi P** (2017) Protecting traditional cultural expressions – some questions for lawmakers, *WIPO Magazine*, August. Available at [http://www.wipo.int/wipo\\_magazine/en/2017/04/article\\_0002.html](http://www.wipo.int/wipo_magazine/en/2017/04/article_0002.html) (accessed 24 November 2019).
- Kant I** (1785/2003) *Groundwork of the Metaphysic of Morals*, quoted as edited by Thomas E. Hill, and Arnulf Zweig. Oxford: Oxford University Press.
- Kariyawasam K** (2012) Protection of indigenous artistic works against unauthorised reproduction – has Australian consumer law been effective in stopping misleading and deceptive conduct in the indigenous art market? *International Review of Intellectual Property and Competition Law* 43, 532–554.
- Kennedy A-M and Laczniak GR** (2014) Indigenous intellectual property rights: ethical insights for marketers. *Australasian Marketing Journal* 22, 307–313.

- Kenyon AT** (2006) *Defamation: Comparative Law and Practice*. London: UCL Press.
- Kronman AT** (2019) *The Assault on American Excellence*. New York: Free Press.
- Kuprecht K** (2014) *Indigenous Peoples' Cultural Property Claims*. Berlin: Springer.
- Lee P** (2018) Student protests and academic freedom in an age of #BlackLivesMatter. *Ohio State Law Review* **79**, 223–278.
- Li L** (2014) *Intellectual Property Protection of Traditional Cultural Expressions*. Berlin: Springer International.
- Lilla M** (2017) *The Once and Future Liberal: After Identity Politics*. New York: Harper.
- Lukianoff G and Haidt J** (2018) *The Coddling of the American Mind: How Good Intentions and Bad Ideas Are Setting Up a Generation for Failure*. New York: Penguin.
- Merges RP** (2011) *Justifying Intellectual Property*. Cambridge, MA: Harvard University Press.
- Merry SE** (1998) Law, culture, and cultural appropriation. *Yale Journal of Law & the Humanities* **10**, 575–603.
- Moynihan K** (2018) How Navajo Nation v. Urban Outfitters illustrates the failure of intellectual property law to protect native American cultural property. *Rutgers Race & the Law Review* **19**, 51–73.
- Msoni ZN** (2015) Protecting indigenous knowledge using intellectual property rights law: the Masakhane Pelargonium case. *Africanus: Journal of Development Studies* **45**, 71–86.
- Nussbaum MC** (1999) *Sex and Social Justice*. New York: Oxford University Press.
- Ochsner C and Roesel F** (2017) *Activated History – the Case of the Turkish Sieges of Vienna*, CESifo Working Paper 6586. Available at [https://www.cesifo-group.de/DocDL/cesifo1\\_wp6586.pdf](https://www.cesifo-group.de/DocDL/cesifo1_wp6586.pdf) (accessed 24 November 2019).
- Osiel M** (2019) *The Right to Do Wrong: Morality and the Limits of Law*. Cambridge, MA: Harvard University Press.
- Pager SA** (2016) Traditional knowledge rights and wrongs. *Virginia Journal of Law & Technology* **20**, 82–200.
- Pavis M** (2018) Runway models, runway performers? Unravelling the Ashby jurisprudence under UK law. *Journal of Intellectual Property Law & Practice* **13**, 867–877.
- Peterson M** (2013) *The Dimensions of Consequentialism: Ethics, Equality and Risk*. Cambridge: Cambridge University Press.
- Phillips VF** (2017) Beyond trademark: the Washington Redskins case and the search for dignity. *Chicago-Kent Law Review* **92**, 1061–1086.
- Ridley M** (2010) *The Rational Optimist: How Prosperity Evolves*. London: HarperCollins.
- Riley AR** (2000) Recovering collectivity: group rights to intellectual property in indigenous communities. *Cardozo Arts & Entertainment Law Journal* **18**, 175–225.
- Riley AR and Carpenter KA** (2016) Owning red: a theory of Indian (cultural) appropriation. *Texas Law Review* **94**, 859–931.
- Ripstein A** (2009) *Force and Freedom: Kant's Legal and Political Philosophy*. Cambridge, MA: Harvard University Press.
- Robinson DF, Abdel-Latif A and Roffe P** (eds) (2017), *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*. Abingdon: Routledge.
- Scafidi S** (2001) Intellectual property and cultural products. *Boston University Law Review* **2001**, 793–842.
- Scafidi S** (2005) *Who Owns Culture? Appropriation and Authenticity in American Law*. New Brunswick: Rutgers University Press.
- Scafidi S** (2008) Introduction: new dimensions of cultural property. *Fordham International Law Journal* **31**, 684–689.
- Sharoni S** (2017) The mark of a culture: the efficacy and propriety of using trademark law to deter cultural appropriation. *The Federal Circuit Bar Journal* **26**, 407–446.
- Smith SA** (2010) Comparative legal scholarship as ordinary legal scholarship. *Journal of Comparative Law* **5/2**: 331–356.
- Stanton-Ife J** (2006) The limits of law. In *Stanford Encyclopedia of Philosophy*. Available at: <https://plato.stanford.edu/entries/law-limits/> (accessed 24 November 2019).
- Suk JC** (2007) Equal by comparison: unsettling assumptions of antidiscrimination law. *American Journal of Comparative Law* **55**, 295–345.
- Suk JC** (2012) From antidiscrimination to equality: stereotypes and the life cycle in the United States and Europe. *American Journal of Comparative Law* **60**, 75–98.
- Yoshino K** (2006) *Covering: The Hidden Assault on Our Civil Rights*. New York: Random House.



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