

Remediating Cultural Appropriation

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Accusations of cultural appropriation—using cultural symbols from a culture that is not one’s own without consent, understanding, or respect—have sparked fervent social, ethical, and political debates. While the issue does not seem to be a legal one at first blush, there’s a growing area of legal scholarship on the topic. This Article builds on this scholarship by making two contributions. First, it introduces a taxonomy of cultural appropriation based on two factors—the cultural symbol’s level of diffusion and the commercial nature of the use. This classification results in four types of cultural appropriations with varying degrees of harm and prospects for legal intervention. Notably, legal remedy in three of these forms is unworkable since it would risk significant disruptions to free speech protections or raise legal standing issues. Second, the Article advances a theory of “cultural passing off,” offering the framework for a cause of action against commercial use of a distinct symbol that falsely implies affiliation with an identifiable community. It draws on the under-theorized tort of passing off to outline the elements of collective goodwill, commercial appropriation of distinct cultural symbols, and deprivation of material advantage as the claim’s core elements. This framework addresses harmful cultural appropriation while preserving the beneficial dynamics of cultural diffusion.

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INTRODUCTION

The Jeep corporation used “Jeep Cherokee” as one of its most iconic trademarks for decades without the consent of the Cherokee Nation.¹ If the Cherokee Nation decided to use the term “Jeep” to sell products, vehicles, or otherwise, it would more than likely face legal claims of trademark infringement based on confusion and dilution, among others. This and other disputes about cultural appropriation have been in the public’s mind for several decades.

However, discussions of the concept inevitably raise disputes about what differentiates cultural appropriation from appreciation. Is there a problem with Kim Kardashian registering “kimono” as a trademark?² Is it considered cultural appropriation for Justin Timberlake to attend celebrity events with braids?³ Should fans don Native American headdresses to support their team?⁴ Is it okay for the luxury fashion house Gucci to show non-Sikh

1. Jenny Gross, *Chief of Cherokee Nation Asks Jeep to Stop Using Tribe’s Name*, N.Y. TIMES (Feb. 25, 2021), <https://www.nytimes.com/2021/02/25/business/jeep-grand-cherokee.html?auth=login-google1tap&login=google1tap>. For a detailed analysis of the Jeep Cherokee case, see *infra* Section I.A.

2. Kimono Intimates, Inc., which is associated with Kim Kardashian, submitted several trademark applications in connection with the term “kimono.” See U.S. Trademark Application Serial No. 87/886,640 (filed Apr. 20, 2018); U.S. Trademark Application Serial No. 87/886,644 (filed Apr. 20, 2018); U.S. Trademark Application Serial No. 87/886,657 (filed Apr. 20, 2018); U.S. Trademark Application Serial No. 87/886,659 (filed Apr. 20, 2018); U.S. Trademark Application Serial No. 88/331,282 (filed Mar. 8, 2019); U.S. Trademark Application Serial No. 88/380,839 (filed Apr. 11, 2019); U.S. Trademark Application Serial No. 88/468,425 (filed June 11, 2019); U.S. Trademark Application Serial No. 88/479,867 (filed June 19, 2019) [hereinafter Kimono Trademark Applications]. The applications were for standard and stylized marks of the word “kimono.” Kimono Trademark Applications. The applicant has expressly abandoned the applications. Kimono Trademark Applications. However, the trademark created a significant public backlash, including communication from Japanese government officials stating they would send officials to the U.S. Patent and Trademark Office to discuss the matter. See Amy Woodyatt et al., *Japan to Send Trademark Officials to US over Kim Kardashian West ‘Kimono’ Row*, CNN (July 2, 2019), <https://www.cnn.com/style/article/kim-kardashian-rename-kimono-intl-scli/index.html> [<https://perma.cc/T8Z2-PE3H>].

3. *Dos and Don’ts: Black Hairstyles on White Celebrities*, BLACK ENT. TELEVISION (BET), <https://www.bet.com/photo-gallery/p3y4sh/dos-and-don-ts-black-hairstyles-on-white-celebrities/2i30c7> [<https://perma.cc/7DTD-KLBB>]; see also Ellie Krupnick, *Justin Timberlake Regrets Those Cornrows (PHOTOS)*, HUFFPOST, https://www.huffpost.com/entry/justin-timberlake-hair_n_877735 (Dec. 6, 2017).

4. Manasi Pathak, *Native American Tribe Praises Washington Football Team’s Ban on Headdresses, Face Paint*, REUTERS (Aug. 6, 2021), <https://www.reuters.com/lifestyle/sports/native-american-tribe-praises-washington-football-teams-ban-headdresses-face-2021-08-06> [<https://perma.cc/8BJQ-S2VR>].

models wearing turbans on catwalks?⁵ Should Urban Outfitters be allowed to sell products using the name Navajo?⁶

These instances demonstrate that not all forms of cultural borrowing are equally problematic. In fact, scholars of cosmopolitanism argue that cultural borrowing is a necessary component of a vibrant society.⁷ This underscores the need for a nuanced approach to discussions of cultural appropriation. Therefore, distinguishing between the different types of cultural borrowing offers nuance to discussions of cultural appropriation and supports a legal remedy in a subset of cases. This Article introduces a quadrant of cultural appropriation based on two essential features—the level of diffusion of the cultural signifier and the commercial nature of its use by the borrower.

On the first feature, the Article outlines a spectrum between diffused and distinct cultural elements. A cultural element is more diffused if shared by several source communities and distinctive if associated with only one. On the second feature, the spectrum of commercial use ranges from non-commercial use, which includes personal, expressive, or political use, to highly commercial use on the other extreme. While a mixture of purposes can exist, the primary or predominant purpose should be the deciding factor.⁸ The Article offers a quadrant containing a combination of these features: diffused non-commercial use, distinct non-commercial use, diffused commercial use, and distinct commercial use. It then proposes a new theory of “cultural passing off,” a legal claim for which the commercial use of a distinct cultural signifier misrepresents affiliation with an identifiable source community.⁹ It suggests extra-legal solutions, such as

5. *Gucci Accused of Culturally Appropriating Sikh Turban*, AL JAZEERA (Feb. 23, 2018), <https://www.aljazeera.com/features/2018/2/23/gucci-accused-of-culturally-appropriating-sikh-turban> [https://perma.cc/RBD8-8USR].

6. Nicky Woolf, *Urban Outfitters Settles with Navajo Nation After Illegally Using Tribe’s Name*, GUARDIAN (Nov. 18, 2016), <https://www.theguardian.com/us-news/2016/nov/18/urban-outfitters-navajo-nation-settlement> [https://perma.cc/T3MW-P7BB].

7. For a detailed discussion of the cosmopolitan perspective on cultural diffusion, see *infra* Section I.B.

8. The “predominant purpose” in contract law, among other areas of law, has been used to decide the nature of hybrid contracts that involve goods and services. *See generally*, Daniel P. O’Gorman, *Contract Law’s Predominant Purpose Test and the Law-Fact Distinction*, 45 FLA. ST. U. L. REV. 443 (2018) (examining whether a contract’s predominant purpose is a question of law for the judge or fact for the jury). A similar analysis would help with the theory developed in this Article.

9. The “awkward middle ground” describes a position where one attempts to “strik[e] a balance between the interests of indigenous groups and the requirements of liberal democracy.” MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 8–9 (2003). The awkward middle ground”

public pressure, voluntary guidelines, and Corporate Social Responsibility (CSR), as more fitting solutions for harms created by appropriations within the first three quadrants.

The Article draws on the under-theorized tort of passing off to outline the new cultural passing-off theory. It updates the three classical elements of this tort—goodwill, misappropriation, and damage¹⁰—with elements that work in the context of cultural appropriation. The three updated elements of the cultural passing-off theory are (1) collective goodwill, (2) commercial use of a distinct symbol, and (3) the deprivation of material advantage suffered by the source community. The new claim can address a subset of harms resulting from cultural appropriation while avoiding erosion of existing protections offered for freedom of speech or disrupting legal standing rules.

The framework offered in this Article is more of a thought experiment to explore the potential of the under-theorized area of passing off for a potential solution to the contentious topic of cultural appropriation.¹¹ A cause of action to be enacted by Congress or applied by courts will likely take time and involve continuous calibration. What this Article offers is the outlines of a potential cause of action that can, at least in the short term, provide insight into one solution to the questions raised earlier. For example, one impact of the cultural passing-off claim could be in bridging the gap between existing protections for Native American cultural signifiers under the Indian Arts and Crafts Act and trademark law.¹²

This Article proceeds in four parts. Part I outlines the harms and benefits of cultural appropriation and the limitations of current law. Part II offers a taxonomy of cultural appropriation based on the cultural symbol's level of diffusion and the degree of commerciality of the use. This Section is

has been described as “a notoriously exposed, dangerous, and ungrateful position.” *Id.* at 9 (quoting Isaiah Berlin).

10. Ben Evans, *Passing Off Law: A Guide*, HARPER JAMES, <https://harperjames.co.uk/article/passing-off> [https://perma.cc/V8AL-YBHF] (Oct. 13, 2023).

11. See generally Sari Shroni, *The Mark of a Culture: The Efficacy and Propriety of Using Trademark Law to Deter Cultural Appropriation*, 63 FED. CIR. B. J. 407, 408 (2017) (discussing the under-theorized nature of trademark law as a potential solution for cultural appropriation and exploring its feasibility).

12. See Indian Arts and Crafts Act (IACA) of 1990, Pub. L. No. 101–644, §§101–602, 104 Stat. 4662 (codified as amended at 18 U.S.C. §§ 1158–1159; 20 U.S.C. § 4414, § 4417, §4421, §4424, § 4425, § 4451; 25 U.S.C. § 162(a), § 305, § 305(d), § 305(e), § 450, § 450(b), § 450(c), § 450(f), § 450(h), § 450(j), § 450(k), § 483(a), § 1461, § 1484, § 2206; 42 U.S.C. § 2545). For a detailed discussion of the Act and the limitations of existing intellectual property laws, see *infra* Section I.C.

followed by examples of cultural borrowing for each of the four categories. Part III discusses the doctrine of passing off, extended passing off, and the cultural passing-off theory. Part IV applies this theory in two case studies—Jeep’s use of the Cherokee name and Gucci’s use of the Sikh turban—revealing the framework’s strengths and weaknesses.¹³

I. CULTURAL APPROPRIATION AND APPRECIATION

The term ‘cultural appropriation’ is a subject of intense debate, often sparking polarizing views. What one perceives as cultural appropriation, another may view as cultural appreciation.¹⁴ The Oxford English Dictionary defines cultural appropriation as “[t]he unacknowledged or inappropriate adoption of the practices, customs, or aesthetics of one social or ethnic group by members of another (typically dominant) community or society.”¹⁵ This definition underscores the power imbalance present in most incidents of cultural appropriation while still acknowledging that cultural appropriation can be conducted by a member of a less dominant community against another, more dominant community.¹⁶ However, these later types of incidents do not carry the historically problematic baggage that most other cultural appropriation incidents involve, and the majority of cultural appropriation claims that gain public notoriety fit the former scenario.¹⁷

The root word “appropriate” comes from the Latin *ad propriare*, which means “to make one’s own.”¹⁸ This Latin version does not necessarily have the negative connotation that the term has been associated with in the context of cultural appropriation.¹⁹ The Merriam-Webster dictionary defines

13. Gross, *supra* note 1; AL JAZEERA, *supra* note 5.

14. See Ben Hohenstatt, *Can Appropriation Be Appropriate?*, JUNEAU EMPIRE (Oct. 14, 2019), <https://www.juneauempire.com/news/can-appropriation-be-appropriate> [https://perma.cc/67BX-RVGV].

15. *Cultural Appropriation*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/cultural-appropriation_n?tab=meaning_and_use [https://perma.cc/X98D-YWFM].

16. See Dave Fossum, *The Frictions of IP and the Schism in Turkey’s Collective Management of Music Copyright*, 36 J. POPULAR MUSIC STUD. 52, 55 n.15 (2024).

17. Nitanga Safi, *Cultural Appropriation Negatively Impacts Communities*, IOWA ST. DAILY (Nov. 22, 2020), <https://iowastatedaily.com/231043/news/cultural-appropriation-negatively-impacts-communities> [https://perma.cc/6SFA-X4SG].

18. Ligaya Mishan, *What Does Cultural Appropriation Really Mean?*, N.Y. TIMES STYLE MAG. (Sept. 30, 2022), <https://www.nytimes.com/2022/09/30/t-magazine/cultural-appropriation.html>.

19. See *id.*

“appropriate” as the act of “tak[ing] or mak[ing] use of [something] without authority or right.”²⁰ This, combined with the adjective “cultural,” implies that someone is using cultural content without the authority or right to do so. The “[lack of] authority or right” phrasing highlights the essential insider-outsider dynamic core to the term as it is currently understood.²¹

While the use of a cultural symbol, a signifier of group identity, by an outsider is the foundational element of cultural appropriation, not all use by outsiders results in cultural appropriation. As discussed in a later section, culture has always been and will continue to be in a constant state of diffusion.²² Many respectful and collaborative uses of cultural symbols create cultural understanding rather than harm.²³ It is crucial to determine the negative version of cultural borrowing so as not to paint with too broad a brush.

The various forums in which cultural appropriation is being discussed have produced multiple definitions of such harmful appropriation, but most definitions share key common elements.²⁴ Cultural appropriation involves a *power imbalance* between the user and the source community.²⁵ There is

20. *Appropriate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/appropriate> [https://perma.cc/AH5A-HJ47].

21. See Angela Gracia B. Cruz et al., *Between Cultural Appreciation and Cultural Appropriation: Self-Authorizing the Consumption of Cultural Difference*, 50 J. CONSUMER RSCH. 962, 977 (2024) (“If the cultural appropriation discourse assumes a clear boundary between cultural outsiders and cultural insiders”).

22. For a detailed discussion of cosmopolitanism, see discussion *infra* Section I.B.

23. *Cultural Appropriation vs. Appreciation*, YWCA SPOKANE (Sept. 28, 2023), https://ywcaspokane.org/2023-racial-justice-challenge-cultural-appropriation-vs-appreciation/?utm_source=perplexity [https://perma.cc/T4LD-AHRJ] (highlighting the difference between cultural appreciation and appropriation).

24. One of the most prominent forums for discussions about traditional cultural expression issues is the World Intellectual Property Organization’s (WIPO) Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge, and Traditional Cultural Expressions. See, e.g., World Intell. Prop. Org. [WIPO], *Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, WIPO/GRTKF/IC/40/INF/7, at 43 (Apr. 10, 2019), https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_40/wipo_grtkf_ic_40_inf_7.pdf [https://perma.cc/37Q8-7XEW] [hereinafter *Glossary*]. Various resources on these issues are available at the Committee’s website. See *Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, WIPO, <https://www.wipo.int/en/web/traditional-knowledge> [https://perma.cc/6MK4-8L6D].

25. See Jonas R. Kunst et al., *Delineating the Boundaries Between Genuine Cultural Change and Cultural Appropriation in Majority-Group Acculturation*, 98 INT’L J. INTERCULTURAL RELS. art. no. 101911, at 2–3 (2024). Here, “source community” is a term used to efficiently refer to the community associated with the cultural symbol being referenced. See *Source Communities*, DECOLONIAL DICTIONARY, <https://decolonialdictionary.wordpress.com/>

also an element of *misunderstanding or misusing* the symbol, which could harm members of the source community.²⁶ The use could also harm members of the public who do not belong to the source community but still see it as inappropriate, unethical, or perhaps, in some instances, illegal. These elements make up the essential ingredients of negative cultural appropriation.

Discussions of cultural appropriation gain depth and relevance when we consider the specific communities whose culture is being appropriated. However, clearly delineating a cultural group and definitively stating membership rules is challenging. Native American tribes recognized under federal or state law provide the most straightforward case study of the challenging questions about cultural appropriation and how they could be addressed. Native American tribes have a unique standing under U.S. law, including a nation-to-nation relationship with the U.S. government.²⁷ As such, the discussion of a legal claim for cultural appropriation finds the strongest case within a Native American tribe. However, the need for such a claim also highlights its importance for other minority communities, though the presumptions and suggestions that apply in Native American communities may be unworkable in the context of other source communities.

Diplomats, scholars, and legal practitioners have recently explored legal protections for traditional cultural expressions, a term broadly used to describe expressive works, artifacts, and other cultural elements from source communities around the world.²⁸ This literature uses “indigenous peoples” and “local communities” to describe source communities.²⁹ “Indigenous peoples” refer to native communities who reside with colonial settlers, such as the native populations in the U.S., Canada, Australia, New Zealand, and South Africa.³⁰ By contrast, “local communities” usually

2021/03/23/source-communities [<https://perma.cc/G3C3-LGDQ>]. It’s important to note that this term doesn’t imply that the community willingly offered the symbol or that it’s a willing participant in a cultural exchange.

26. See Kunst, *supra* note 25, at 3.

27. See Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22951, 22951–52 (May 4, 1994).

28. For a detailed engagement with the various leading scholars on this topic, see *infra* Sections I.B–C.

29. See, e.g., Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 866 (2016) (using “indigenous peoples” in a synonymous way to source community, referencing the group of people attempting to protect against appropriation of their culture).

30. See, e.g., *Glossary*, *supra* note 24, at 23.

refers to once colonized communities that, after their liberation from the colonizing power, remain outside of the mainstream communities in those countries; examples include formerly colonized communities in Latin America, Africa, and Asia.³¹ The broadest use of the term “indigenous communities” includes those who maintain their traditional ways of life in Western jurisdictions, including Europe. An example is the Sámi people of Northern Norway, Sweden, Finland, and parts of Russia—the only officially recognized indigenous people by the European Union.³² It is worth noting, however, that these two terms are frequently used interchangeably in the various forums where traditional cultural expressions are discussed.³³

A. The Harms of Cultural Appropriation

Most claims of cultural borrowing involve contentious discussions about whether the act is appropriation or appreciation.³⁴ However, when used in the negative, the term cultural appropriation is universally associated with some form of harm, at least to some members of the source community and the public.³⁵ Even where wrongfulness is recognized, there is usually little consensus on what type of harm the act inflicts.

A very commonly cited harm of cultural appropriation is offense.³⁶ This harm is most frequently associated with the inappropriate use of sacred cultural symbols. However, it can also include use that fails to acknowledge the historical oppression of the source community or respect the traditions

31. See, e.g., *id.* at 22–23.

32. See Thomas R. Hilder, *Repatriation, Revival and Transmission: The Politics of a Sámi Musical Heritage*, 21 ETHNOMUSICOLOGY F. (SPECIAL ISSUE) 161, 162 (2012). Other communities claim Indigenous identity even if they have not received official recognition from the European Union. T. Mattila, *Trademark Protection of Traditional Cultural Expressions of Sámi People in Finland*, 2 NORDISKT IMMATERIELLT RÄTTSSKYDD 219 (2021).

33. See *Glossary*, *supra* note 24, at 22–23 (providing a collective definition for “indigenous and local communities” and thus demonstrating its interchangeability).

34. Compare generally Katherine Sawczyn, Note, *Imitation Is Not Flattery When You Don’t Get Credit: Protecting Intellectual Property in the Age of Fast Fashion, Social Media, and “Culture Vultures,”* 64 HOWARD L.J. 491 (2021) (arguing that, in the fashion industry, cultural appropriation without credit or compensation exacerbates societal imbalance and inequity), with Hohenstatt, *supra* note 14 (arguing that appropriation can be appropriate with understanding and permission from the source community).

35. See Kunst, *supra* note 25, at 3.

36. See, e.g., Kwame Anthony Appiah, *Cultural Borrowing Is Great; The Problem Is Disrespect*, WALL ST. J. (Aug. 30, 2018), <https://www.wsj.com/articles/cultural-borrowing-is-great-the-problem-is-disrespect-1535639194>.

associated with that cultural symbol.³⁷ Examples include the use of Native American mascots in sports, which has the effect of stereotyping tribes, or wearing revered headdresses in demeaning ways. In 2005, the American Psychological Association passed a resolution calling for the “immediate retirement of all American Indian mascots, symbols, images and personalities” because of social science research showing the negative impacts of the imagery on all students.³⁸

Harm extends beyond offense. In their influential book *Borrowed Power*, Bruce Ziff and Pratima Rao offer four types of non-mutually exclusive harms that can arise from cultural appropriation: (1) degradation of the appropriated culture, (2) harm to the cultural artifact being appropriated, (3)

37. See, e.g., James O. Young, *Profound Offense and Cultural Appropriation*, 63 J. AESTHETICS & ART CRITICISM 135, 138 (2005).

38. *APA Resolution Recommending the Immediate Retirement of American Indian Mascots, Symbols, Images, and Personalities by Schools, Colleges, Universities, Athletic Teams, and Organizations*, AM. PSYCH. ASS'N, <https://www.apa.org/pi/oema/resources/indian-mascots> [https://perma.cc/NZ7C-D5XV] (July 2021). For a popular example of offense being felt by a relatively dominant group, the public outrage against the Last Supper scene at the opening ceremony of the 2024 Paris Olympics is fitting. The Last Supper is an iconic painting of the Eucharist celebration that Christians cite as the start of Christianity itself. See Camilla Klein, *The Significance of the Last Supper in Christianity: Explained*, CHRISTIAN EDUCATORS ACAD. (July 10, 2025), <https://christianeducatorsacademy.com/the-significance-of-the-last-supper-in-christianity-explained> [https://perma.cc/GJX9-NE9D]. Christians in many parts of the world were outraged by a scene they believed was mocking Leonardo da Vinci's famous painting, *The Last Supper* (c. 1495). See Angela Giuffrida, *Paris Olympics Organisers Apologize to Christians for Unintentional Last Supper Parody*, GUARDIAN (July 28, 2024), <https://www.theguardian.com/sport/article/2024/jul/28/paris-olympics-organisers-apologise-to-christians-for-last-supper-parody> [https://perma.cc/DA3Y-YEM4]. The global outrage included death threats and solicited comments from the Pope, political leaders, and influential figures. See Thomas Adamson, *7 Charged with Cyberbullying After Paris Olympics Artistic Director's Opening Ceremony Backlash*, AP NEWS (Oct. 25, 2024), <https://apnews.com/article/olympics-thomas-jolly-cyberbullying-24c1871664f4d9adc240643ebb20272c> [https://perma.cc/49Y8-NYDZ]. Responding to the outrage, ceremony organizers explained that the scene was not mocking the Last Supper but instead depicted Jan Harmensz van Bijlert's “The Feast of the Gods” (c. 1630), which represents Greek mythology, including Thetis, Peleus, and Dionysus. See Jon Henley, *Olympic 'Last Supper' Scene was in Fact Based on Painting of Greek Gods, Say Art Experts*, GUARDIAN (July 29, 2024), <https://www.theguardian.com/sport/article/2024/jul/29/olympic-last-supper-scene-based-painting-greek-gods-art-experts> [https://perma.cc/S5UG-SRS6]; see also Giuffrida, *supra*. These incidents show how potent the offense felt by communities may be, even where the act is misunderstood or not intended to offend. See Giuffrida, *supra*; see also Katie Kelaidis, *Claims that Olympic Opening Ceremony 'Mocked Christianity' Ignore the Long-Standing Connection Between Jesus and Dionysus*, CONVERSATION, <https://theconversation.com/claims-that-olympic-opening-ceremony-mocked-christianity-ignore-the-long-standing-connection-between-jesus-and-dionysus-236271> [https://perma.cc/6EGM-AZXV] (Aug. 28, 2024).

failure to recognize sovereign claims, and (4) deprivation of material advantage.³⁹ The first harm of cultural degradation is described as the “corrosive effects on the integrity of an exploited culture because appropriative conduct can erroneously depict the heritage from which it is drawn.”⁴⁰ This harm is tied to the assumption that “cultural property is a basic element of a people’s identity” and that appropriation of cultural elements erodes the cultural cohesion indispensable for political power and the ultimate success of the source community.⁴¹ The harm of cultural degradation is tied to the very survival of the source community as a distinct cultural unit.

The second harm is that cultural symbols and practices may be lost if not properly stewarded.⁴² This concern is based on the understanding that “cultural representations are best understood in their original setting” and that, therefore, using them outside of this setting can create a misunderstanding of the value or context of such artifacts.⁴³ This harm is closely tied to physical and cultural signifiers.⁴⁴ However, since intangible signifiers are usually found with such artifacts, the harm can be expected to extend to the intangible cultural element.⁴⁵ While observers and scholars have reported these harms, the concerns should balance the opposing harm of limiting the use of cultural artifacts or symbols to the originating culture.⁴⁶ Such a limitation can have the effect of keeping the culture or the symbol stagnant.⁴⁷

39. Bruce Ziff & Pratima V. Rao, *Introduction to Cultural Appropriation: A Framework for Analysis*, in BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION 1, 9–16 (Bruce Ziff & Pratima V. Rao eds., 1997).

40. *Id.* at 9.

41. *Id.* (quoting RICHARD HANDLER, THE POLITICS OF CULTURE 67 (Brett Williams ed., 1991)).

42. *See id.* at 12.

43. *Id.* at 12–13.

44. *See id.* at 13.

45. *Id.*

46. *See, e.g.*, Adam Schrader, *Indigenous Groups Respond After US Museums Cover Native Displays*, ARTNET (Feb. 2, 2024), <https://news.artnet.com/art-world/indigenous-groups-respond-display-native-artifacts-museums-2426071> [<https://perma.cc/5BA6-UMBT>] (reporting that regulations requiring consent to display Native American artifacts had raised concerns that the rule would stifle research and extend to contemporary Native American art displays).

47. *See* Kwame Anthony Appiah, *The Case for Contamination*, N.Y. TIMES (Jan. 15, 2006), <https://www.nytimes.com/2006/01/01/magazine/the-case-for-contamination.html?auth=login-google1tap&login=google1tap>.

The third harm is the failure to recognize sovereign claims.⁴⁸ Certain Native communities are recognized as sovereign nations with their own legal systems.⁴⁹ Their laws sometimes regulate the use of cultural elements and, in many instances, conflict with laws adopted by the governments of the countries in which they reside.⁵⁰ For instance, it is common among some Indigenous communities to restrict access to information or rituals only for elders or tribal healers.⁵¹ Given the power imbalance between native tribes and the government with which they engage, this conflict in rules is usually resolved in favor of those set by the government.⁵² Instances of cultural appropriation add to the erosion of sovereign claims by violating customary rules of source communities with impunity.

The fourth harm highlighted by Ziff and Rao is the deprivation of material advantage, bringing focus to the economic angle.⁵³ This harm recognizes that when someone commercially appropriates a cultural element, they may deny the source community the opportunity to benefit from its commercial use.⁵⁴ Mirroring the long history of dispossession of land and other resources, commercial uses of cultural symbols benefit the foreign user and deprive the source community of the income they could receive from their cultural symbols.⁵⁵

This harm is similar to that recognized by intellectual property laws—free-riding resulting in lost market opportunity.⁵⁶ Thus, it is the least foreign

48. Ziff & Rao, *supra* note 39, at 15.

49. *Do Tribes Have to Follow Federal Laws*, CIRCLING EAGLE LAW (Mar. 31, 2023), [https://www.circlingeaglelaw.com/blog/2023/march/do-tribes-have-to-follow-federal-laws-\[https://perma.cc/FE7H-ARR7\]](https://www.circlingeaglelaw.com/blog/2023/march/do-tribes-have-to-follow-federal-laws-[https://perma.cc/FE7H-ARR7]).

50. Ziff & Rao, *supra* note 39, at 15.

51. See Heather Dadashi, *The Need for Enhanced and Meaningful Confidentiality in Tribal Cultural Resource Protection*, LEGALPLANET (Nov. 26, 2021), <https://legalplanet.org/2021/11/26/the-need-for-enhanced-and-meaningful-confidentiality-in-tribal-cultural-resource-protection/#:~:text=Contemporary%20tribal%20religious%2C%20cultural%2C%20and,ands%20re%2Daccess%20their%20culture> [https://perma.cc/9N6Z-VR99]. Local Contexts, an Indigenous community-led global data governance and licensing initiative founded by professors Jane Anderson and Kim Christen, offers an impressive variety of traditional knowledge and biocultural labels representing the various restrictions that may be available among Indigenous communities. See *TK Labels*, LOC. CONTEXTS, <https://localcontexts.org/labels/traditional-knowledge-labels> [https://perma.cc/65GD-4YS5].

52. See, e.g., Jada Boggs, *Protecting Indigenous Artists Against Infringement and Appropriation*, COPYRIGHT ALL. (Nov. 17, 2022), <https://copyrightalliance.org/protecting-indigenous-artists-infringement-appropriation> [https://perma.cc/7ZLW-6QFS].

53. See Ziff & Rao, *supra* note 39, at 14.

54. See *id.*

55. See *id.*

56. *Id.* at 14–15.

to current laws, especially considering the ever-expanding protection offered to creative expression under copyright law, source signifiers under trademark law, inventions under patent law, and commercially advantageous information under trade secrets.⁵⁷ However, this economic harm does not apply to all cultural expressions. In particular, sacred and secret cultural symbols are typically not used for commercial gain by the source community, and thus, the harm is primarily non-economic.⁵⁸

This Article focuses on the economic harms identified by Ziff and Rao—the deprivation of material advantage.⁵⁹ Emphasis on this harm does not dismiss the potency of other harms discussed earlier. However, it is necessary to create a feasible theory of legal liability for a subset of cultural appropriation, given the restrictions imposed by freedom of speech protection, among other competing rights.⁶⁰ To the extent that existing legal frameworks can address some of these harms, including, for example, civil rights or rights protected by treaties, those legal avenues should be explored fully, and the theory of liability outlined in this Article is not exclusive of other legal options. Additionally, extra-legal solutions such as corporate social responsibility, consumer choice, and public pressure have proved valuable tools, sometimes offering more fitting solutions to some of the harms caused by cultural appropriation.⁶¹

57. *See id.* at 14.

58. *See, e.g.*, *The Use of Symbols in Native American Art*, FAUST GALLERY (May 8, 2019), <https://www.faustgallery.com/the-use-of-symbols-in-native-american-art/#:~:text=Symbols%20are%20tools%20not%20just,spirit%20of%20the%20natural%20world> [https://perma.cc/NR5V-V8F4] (highlighting how cultural symbols are used among Native American tribes, many of which are non-economic).

59. Ziff & Rao, *supra* note 39, at 14.

60. For a detailed discussion of the competing interests referenced here, see *infra* Section I.C.

61. Gabrielle Brill, *Cancel Culture: Inciting Corporate Social Accountability*, U. RICH. L. REV.: WEB F. (Jan. 25, 2021), <https://lawreview.richmond.edu/2021/01/25/cancel-culture-inciting-corporate-social-accountability/#:~:text=When%20Cancel%20Culture%20Achieves%20Change,was%20based%20on%20Nancy%20Green> [https://perma.cc/S6LY-9UR5]. Some institutions have consulted indigenous communities or used processes that respect customary rules, even without legal obligation. Such initiatives avoid the expensive, antagonistic, and lengthy legal processes of enforcing legal rights. For instance, various institutions voluntarily use the traditional knowledge and biocultural labels created by Local Contexts in collaboration with indigenous communities. *See Labels*, LOCAL CONTEXTS, <https://localcontexts.org/labels/about-the-labels> [https://perma.cc/D3RW-JXAG].

B. Cosmopolitanism and Cultural Diffusion

The discussion of the harms of cultural appropriation raises the question of whether cultural borrowing (or appropriation) can ever be beneficial. Scholars who study the evolution of culture point to the concept of cosmopolitanism as the core value we should embrace. Cosmopolitanism, a term derived from the Greek *cosmopolitan*, was used by Stoic philosophers of the time who opposed the traditional city-based identity and instead wanted to claim the entire *cosmos* (the world) as their *polis* (city-state).⁶²

Martin Puchner's extensive research into culture highlights the central role cultural exchanges played in the development of human civilizations.⁶³ These cultural exchanges started as early as cave paintings 37,000 years ago and have increased to the present day.⁶⁴ The latest social transformations, including in digital media, have accelerated cultural exchange, including the commodification of culture.⁶⁵

The best-selling author Sir Ahmed Salman Rushdie draws on his Indian and British identities to champion freedom of expression even when it inevitably offends certain social groups.⁶⁶ He forcefully argues that no group has a right to be free from offense and that the freedom of expression is a universal value.⁶⁷ Similarly, Anthony Appiah, a lawyer and philosopher of Ghanaian and British descent, draws on his multicultural background to advocate for a cosmopolitan view of the world where universal moral

62. Gillian Brock, *Cosmopolitanism*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/cosmopolitanism-philosophy> [https://perma.cc/4FQA-WKFX].

63. See generally MARTIN PUCHNER, CULTURE: THE STORY OF US, FROM CAVE ART TO K-POP xiii–xxiv (W.W. Norton & Co., 2023) (offering an impressive selection of examples that build a narrative about human cultural evolution).

64. See *id.* at xiv.

65. See *id.* at xxiii.

66. See SALMAN RUSHDIE, *In Good Faith*, in IMAGINARY HOMELANDS: ESSAYS AND CRITICISM 1981-1991 393–94, 404 (Granta Books, 1991). Rushdie's essay addresses the public and scholarly reaction in response to his famously controversial fictional work, *The Satanic Verses* (1988). See generally *id.* at 393–414 (discussing his intention in writing *The Satanic Verses*, the controversy that it caused, and his personal reaction to the public response). His book has been highly controversial, resulting in protests in many corners of the world, especially among Muslims, the issuing of a fatwa for his assassination declared by the Iranian Government, and a stabbing attack on Aug. 12, 2022, during a lecture at the Chautauqua Institution in Chautauqua, New York. See Myriam Renaud, *Why Salman Rushdie's 'The Satanic Verses' Remains So Controversial Decades After Its Publication*, CONVERSATION, <https://theconversation.com/why-salman-rushdies-the-satanic-verses-remains-so-controversial-decades-after-its-publication-102321> [https://perma.cc/85Z7-UV8L] (Aug. 12, 2022).

67. See RUSHDIE, *supra* note 66, at 396–397.

values are balanced with respect for cultural diversity.⁶⁸ Appiah argues that cosmopolitanism should be the leading perspective when dealing with cultural evolution rather than forced homogeneity.⁶⁹ He argues that attempts to seek authentic culture or to create ownership are unworthy goals bound to fail because culture has always been and will continue to be in a constant state of diffusion.⁷⁰

Scholar Jeremy Waldron has also critiqued cultural preservation projects in liberal democracies for prioritizing the protection of minority cultures.⁷¹ He argues that laws designed to preserve culture tend to take paternalistic perspectives and may result in rigid rules that restrict individual rights and reinforce cultural division.⁷² In contrast, he suggests a cosmopolitan approach that prioritizes individual choice to create cultural fluidity.⁷³

The cosmopolitan view is embraced in this Article. Increased understanding between cultures is desperately needed as the pace of globalization heats up, making cultural transformation and diffusion unavoidable. Otherwise, the absence of such an understanding can be expected to lead to more tension and conflict. Embracing the cosmopolitan worldview, however, should not necessarily exclude attempts at introducing narrowly tailored claims over cultural symbols. While the cosmopolitanism scholarship makes an excellent case for cultural diffusion, it does not need to reject specific legal interests over cultural elements. The robust intellectual property law framework that creates ownership interests over expression, commercial symbols, and inventions is tolerated under the cosmopolitan worldview. Appiah does address the global pressure to recognize ownership interests in cultural heritage.⁷⁴ He challenges the claim of cultural authenticity upon which the cultural preservation movement

68. See generally KWAME ANTHONY APPIAH, COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS (W.W. Norton & Co. 2006) (developing a theory of cosmopolitanism based on his cultural background and historical stories).

69. See Appiah, *supra* note 47 (noting the inevitability of cultural change and transformation and advocating for individual freedom to navigate their identities amidst global influences).

70. See *id.*

71. Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J. L. REFORM 751, 786–88 (1992).

72. See *id.* at 752–54, 758–59, 786–88.

73. See *id.* at 792.

74. See Appiah, *supra* note 36.

relies.⁷⁵ Nevertheless, even in this pointed criticism, ownership of cultural artifacts via intellectual property does not seem to be objectionable.⁷⁶

In response to the cosmopolitanism literature, some scholars have called for a balance against an extreme cosmopolitan perspective by introducing competing interests, such as respect for cultural diversity and distinct identity. For instance, while appreciating the values of cosmopolitanism, David Harvey argues that idolizing global citizenship may overlook deep-rooted inequalities and power dynamics that may result in an unequal exchange of cultural elements.⁷⁷ Harvey's work emphasizes what he calls the "geography of freedom," which adds spatial relations to the individual freedoms advocated for in liberal democracies.⁷⁸ Stated otherwise, while the individual's freedom for self-identification should be embraced, there should also be space for group identification, especially when such a group shares common identities from the same geographic space.⁷⁹ Even Appiah, who advocates for the prioritization of the cosmopolitan view, acknowledges that the offense felt by communities in reaction to disrespectful and exploitative uses of their symbols may, at times, be justified.⁸⁰

Susan Scafidi, a leading legal scholar, strongly advocates a balance between the cosmopolitan view and those seeking to preserve or protect cultures.⁸¹ Like those championing cosmopolitanism, Scafidi also admits essential values of cultural exchanges for human flourishing.⁸² However, her work argues for the need for a *sui generis* type of legal right and the expansion of existing legal tools to achieve a mid-point between safeguarding cultural heritage and encouraging creative expression.⁸³ Scafidi goes even further, suggesting that trademark law be extended to deal

75. *See id.*

76. *See id.*

77. DAVID HARVEY, COSMOPOLITANISM AND THE GEOGRAPHIES OF FREEDOM (2009).

78. *Id.* at 196.

79. This group identification forms part of the taxonomy of cultural appropriation offered in Section I.B.

80. *See* Appiah, *supra* note 36 (exploring questions of appropriation and authenticity concerning Yoga). This essay is adapted from Kwame Anthony Appiah's book. *See* KWAME ANTHONY APPIAH, THE LIES THAT BIND: RETHINKING IDENTITY (Liveright Publ'g Corp. 2018).

81. SUSAN SCAFIDI, WHO OWNS CULTURE? APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW xii (2005).

82. *See id.* at 21–22.

83. *See id.* at 150–51.

with the appropriation of some cultural symbols—even if some aspects of the law are not met.⁸⁴

This Article argues that cosmopolitanism must be prioritized as a baseline worldview in this quickly globalizing world. However, accepting the cosmopolitan view should not necessarily mean rejecting any and all group claims over cultural identifiers. Corporations are entities holding a form of group identity.⁸⁵ As such, the trademark rights that protect corporate identity can also be extended to protect other types of group identities.⁸⁶ The cultural passing-off theory outlined in this Article is one way to extend existing law to fit a subset of the harms identified earlier—the deprivation of material advantage.

C. Limitations Under Current Law

Despite the various instances of cultural appropriation and the public backlash that follows, the U.S. legal system has not responded.⁸⁷ This is in stark contrast to some national jurisdictions and deliberations at the international level.⁸⁸ In the U.S., there is no judicially recognized theory of

84. See *id.* at 152.

85. YUVAL NOAH HARARI, *SAPIENS: A BRIEF HISTORY OF HUMANKIND* 30 (John Purcell trans., Harper Collins 2014).

86. See generally Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 LAW & CONTEMP. PROBS. 97 (2007) (examining how traditional communities can adapt existing intellectual property frameworks, particularly geographical indications, to protect group cultural identity and economic interests).

87. Riley, *supra* note 29, at 859 (“It is difficult for legal decision makers and scholars alike to understand why Indian tribes should be able to regulate the use of Indian names, symbols, and expressions.”); see J. Janewa OseiTutu, *Emerging Scholars Series: A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law*, 15 MARQ. INTELL. PROP. L. REV. 147, 164–69 (2011).

88. Numerous countries have enacted what are called “sui generis” legislations to address cultural appropriation. A curated database hosted by the World Intellectual Property Organization (WIPO) lists 118 legislations on the topic of “Traditional Cultural Expressions,” which are technical phrases used at the international forum. *Traditional Knowledge, Traditional Cultural Expressions & Genetic Resources Laws*, WIPO, <https://www.wipo.int/en/web/traditional-knowledge/databases/tklaws/index> [<https://perma.cc/X2S3-C5VB>]. For instance, Mexico introduced a new law designed to address cultural appropriation issues. See Ley Federal de Protección del Patrimonio Cultural de los Pueblos y Comunidades Indígenas y Afromexicanas, Diario Oficial de la Federación [DOF] 17-01-2022 (Mex.), which penalizes unauthorized uses of cultural symbols from Indigenous and Afro-Mexican communities through fines and prison time. Beyond national laws, international deliberations have been taking place at the WIPO since the early 2000s. See *Intergovernmental Committee (IGC)*, WIPO, <https://www.wipo.int/en/web/igc> [<https://perma.cc/Q8VG-DAH8>], for several reports on the

liability for cultural appropriation.⁸⁹ These disputes are frequently resolved, if at all, in the court of public opinion.

One of the most relevant areas of current law with regard to cultural appropriation is intellectual property law, because the subject matter revolves around ownership interest in intangible symbols and expressions.⁹⁰ The two most relevant areas of intellectual property law are copyright and trademark laws.⁹¹ However, the rules within these legal frameworks are not a good fit for cultural appropriation claims.⁹²

work of the WIPO, Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge, and Traditional Cultural. The Committee has been discussing issues around traditional cultural expression, traditional knowledge, and genetic resources. On May 24, 2024, the WIPO approved a treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge, which is expected to become a binding international treaty soon. This outcome has encouraged advocates working on traditional cultural expression issues that a similar outcome may be feasible for the sister-topic. *WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge*, WIPO, <https://www.wipo.int/treaties/en/ip/gratk> [https://perma.cc/562Q-T9KB]; see also Nirmalya Syam & Carlos M. Correa, *Understanding the New WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge*, SOUTH CENTRE, (July 3 2024), https://www.southcentre.int/wp-content/uploads/2024/07/PB131_Understanding-the-New-WIPO-Treaty-on-Intellectual-Property-Genetic-Resources-and-Associated-Traditional-Knowledge_EN.pdf [https://perma.cc/4W3U-T6BH]; see also Peter K. Yu, *WIPO Negotiations on Intellectual Property, Genetic Resources and Associated Traditional Knowledge*, 57 AKRON L. REV. 277, 283–298 (2024).

89. Riddhi Setty, *OMG Girlz Case Sidesteps Cultural Appropriation's Day in Court*, BLOOMBERG L. (May 9, 2023), <https://news.bloomberglaw.com/us-law-week/omg-girlz-case-sidesteps-cultural-appropriations-day-in-court> (stating that this was the first time a claim of cultural appropriation was made in a U.S. court and that the claim was barred because it was not relevant for the trade dress claim that was core to the claimant's case); see also Nosson Sternbach, *Protecting Ravenstail: Cultural Appropriation and the Outer Limits of Copyright Law*, 40 CARDOZO ARTS & ENT. L. J. 891, 894–97 (2023) (discussing how the lawsuit against Neiman Marcus ended in a pre-trial settlement). See generally Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 CARDOZO ARTS & ENT. L. J. 37, 48 (2009) (discussing the concept of traditional knowledge and the rights that ought to come along with it and exploring avenues that justify their protection).

90. See Jane Anderson, *Indigenous/Traditional Knowledge & Intellectual Property*, DUKE U. SCH. L. (2010), https://web.law.duke.edu/cspd/pdf/ip_indigenous-traditionalknowledge.pdf [https://perma.cc/9BX2-2ZSG] (discussing the exclusion of indigenous culture from the intellectual property framework).

91. See, e.g., ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* (1998).

92. See Justin Hughes, *Traditional Knowledge, Cultural Expression, and the Siren's Call of Property*, 49 SAN DIEGO L. REV. 1215, 1238–46 (2012) (exploring various theories of intellectual property law to examine if they can apply to cultural expression and concluding that they are not a good fit).

Intellectual property law in the U.S. is designed to reward individual creative labor.⁹³ The form that intellectual property law has taken in the U.S. almost exclusively emphasizes economic interests over all others.⁹⁴ This perspective conflicts with communal interests over intangible property and non-economic interests that claimants focus on in cultural appropriation.⁹⁵

More specifically, various policies and rules within the copyright framework exclude cultural appropriation claims.⁹⁶ For instance, there is a mismatch between copyright law's policy of encouraging creativity and stewardship worldviews prominent among Indigenous communities.⁹⁷ Additionally, copyright law is designed with a single author in mind.⁹⁸ This individualistic perspective directly conflicts with group interest in cultural expression.⁹⁹ Furthermore, the three core requirements of copyrightability—authorship, fixation in a tangible medium of expression, and the idea-

93. See Jane C. Ginsburg, *Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 1002–05 (1990).

94. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1031 (2005) (stating that the primary purpose of U.S. intellectual property law is to incentivize creative and inventive endeavors with the ultimate goal of economic progress). This standard theory of intellectual property law has been challenged recently. See JESSICA SILBEY, *AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE* 5, 9, 10 (2022).

95. See Rebecca A. Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L. J. 299, 300, 310 (2002); Sally Engle Merry, *New Direction: Law, Culture, and Cultural Appropriation*, 10 YALE J. L. & HUMANS. 575, 585–86 (1998); Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 J. GENDER, RACE & JUST. 69, 73 (2000).

96. Riley, *supra* note 29, at 892; Tsosie, *supra* note 95, at 334–38; James D. Nason, *Traditional Property and Modern Laws: The Need for Native American Community Intellectual Property Rights Legislation*, 12 STAN. L. & POL'Y REV. 255, 259 (2001); *see also* BOATEMA BOATENG, *THE COPYRIGHT THING DOESN'T WORK HERE: ADINKRA AND KENTE CLOTH AND INTELLECTUAL PROPERTY IN GHANA* 165–67 (2011).

97. Munzer & Raustiala, *supra* note 89, at 59–68.

98. Joint authorship rules were introduced into U.S. copyright law relatively later in the lifecycle of the legal framework. See Benjamin Kaplan, *An Unhurried View of Copyright: Proposals and Prospects*, 66 COLUM. L. REV. 831, 850 (1966); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 40 DUKE L. J. 455, 455–56 (1991); Laura Biron & Elena Cooper, *Authorship, Aesthetics and the Artworld: Reforming Copyright's Joint Authorship Doctrine*, 35 LAW & PHIL. 55, 56 (2016); *see also* Aman K. Gebru, *Communal Authorship*, 58 U. RICH. L. REV. 337, 347 (2024) (arguing that one of the reasons for the mismatch between copyright law and communal expression, such as folklore, is the former's emphasis on the romanticized version of the individual author).

99. SCAFIDI, *supra* note 81, at 20–21 (exploring how the individualistic perspective of intellectual property ownership creates conflict with co-ownership).

expression distinction—pose a challenge to protecting communal cultural expression, which tends to be “non-original” and, at times, not fixed in a tangible medium.¹⁰⁰ Copyright law concepts such as fair use empower cultural appropriation by legalizing outsiders’ unauthorized use of cultural expression.¹⁰¹

Trademark laws are also ill-fitted for cultural appropriation claims.¹⁰² Trademark protection in the U.S. depends on two core elements: the existence of a distinctive mark and its use in commerce.¹⁰³ The “use in commerce” element requires that the mark be associated with goods sold or services offered in interstate commerce.¹⁰⁴ The distinctiveness of a mark is required as an essential element of claiming ownership over a trademark.¹⁰⁵ Trademark law also requires competitiveness between the claimant and defendant.¹⁰⁶

The combination of these features excludes the most common types of cultural appropriation claims. Since the symbols at the heart of a cultural appropriation claim are shared by a social group rather than an individual or a firm, the symbol’s distinctiveness is called into question.¹⁰⁷ The use in commerce requirement is usually not met, at least in the current iteration of the doctrine.¹⁰⁸ While some members of the source community could be using a cultural symbol in commerce, the absence of a centralized structure, such as a legally recognized firm, makes it challenging to prove that the

100. Trevor G. Reed, *Fair Use as Cultural Appropriation*, 109 CALIF. L. REV. 1373, 1392–93 (2021).

101. *Id.* at 1402–21 (discussing how the fair use doctrine is a gatekeeping mechanism enabling appropriations of cultural expression).

102. See Kal Raustiala & Christopher Jon Sprigman, *Cultural Appropriation and the Global Fashion Industry*, PUB. L. & LEGAL THEORY RSCH. PAPER NO. 23-23, 2 (2023); J. Janewa Osei-Tutu, *Protecting Culturally Identifiable Fashion: What Role for GIs?*, 14 FIU L. REV. 571, 579 (2021); Sharoni, *supra* note 11 at 408–09.

103. See *In re Trade-Mark Cases*, 100 U.S. 82, 94–95 (1879) (stating that trademark law is about using the mark in commerce and not mere adoption). While there are state-based trademark laws, they play a relatively minor role compared with the considerable and active federal trademark landscape. Federal trademark law is justified based on the commerce clause of the U.S. Constitution. *See id.*

104. J. THOMAS McCARTHY, *McCarthy on Trademarks and Unfair Competition* § 19:10 (Thomson Reuters, 5th Ed. 2025); 15 U.S.C. § 1127 (2006); *see also* Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1887 (2007).

105. *See Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 10 (2d Cir. 1976).

106. McKenna, *supra* note 104, at 1888–89.

107. See Raustiala & Sprigman, *supra* note 102, at 7; *see also* Osei-Tutu, *supra* note 102, at 581–82.

108. *See* Sharoni, *supra* note 11, at 424.

symbol has been used in commerce.¹⁰⁹ Furthermore, source communities may not have the resources to compete with those who use their symbols, especially if the user is a major corporation.¹¹⁰

Recent developments restricting the scope of trademark law may invite the appropriation of cultural symbols.¹¹¹ Case law on the interplay between trademark law and constitutional law allows the registration of disparaging, immoral, or scandalous marks.¹¹² Although this development does not directly address cultural appropriation, it shows the significant challenge a claim of cultural appropriation based on disparagement or immorality would face.¹¹³ Notably, in *Matal v. Tam*, the Supreme Court held that the disparagement clause of the Lanham Act—which allowed the trademark office to refuse the registration of disparaging marks—violated the First Amendment.¹¹⁴ The decisions in *Matal* resulted in the abandonment of the appeal process in *Pro-Football, Inc. v. Blackhorse*, since the latter case relied on the disparagement clause.¹¹⁵ *Pro-Football* involved a group of Native Americans who applied for the cancellation of the “Redskins” mark owned by the Washington Football Team under Lanham Act 2(A), the same section found to be unconstitutional in *Matal*.¹¹⁶

109. See *id.* at 423–24; SCAFIDI, *supra* note 81, at 20–21.

110. See Osei-Tutu *supra* note 102, at 580–82.

111. See generally Vicki Huang, *Trademarks, Race and Slur-Appropriation: An Interdisciplinary and Empirical Study*, 2021 U. ILL. L. REV. 1605 (discussing the background of racial slurs, their incorporation into trademark applications, and the normative implications of those racial trademarks).

112. See, e.g., *Matal v. Tam*, 582 U.S. 218, 219 (2017) (finding the Lanham Act, 15 U.S.C. §1052(a) prohibition of the registration of disparaging trademarks is unconstitutional); *Iancu v. Brunetti*, 588 U.S. 388, 388 (2019) (invalidating the Lanham Act’s prohibition on the registration of “immoral” or “scandalous” marks for violating the Free Speech Clause of the First Amendment); *Vidal v. Elster*, 602 U.S. 286, 286 (2024) (holding that the Lanham Act’s “names clause,” prohibiting the registration of a trademark containing a living person’s name without their consent, does not violate the First Amendment).

113. See Lisa P. Ramsey, *Free Speech Challenges to Trademark Law After Matal v. Tam*, 56 HOUS. L. REV. 401, 429–432 (2018). See generally Christine Haight Farley & Lisa P. Ramsey, *Raising the Threshold for Trademark Infringement to Protect Free Expression*, 72 AM. U. L. REV. 1225, 1228–31 (2023) (discussing how the Supreme Court has raised protections for freedom of expression within the realm of trademark applications).

114. *Matal*, 582 U.S. at 219 (considering a trademark examiner rejecting the registration of the mark “The Slants” for being disparaging when used in connection with the plaintiffs, Asian American band members).

115. See *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439, 455 (E.D. Va. 2015); see also BERTON BEEBE, TRADEMARK LAW: AN OPEN-ACCESS CASEBOOK 259 (12th ed. 2025), <https://www.tmcasebook.org/wp-content/uploads/2025/06/BeebeTMLaw-v12-digital-edition.pdf> [<https://perma.cc/A7MM-6VV2>].

116. See BEEBE, *supra* note 115, at 259.

The First Amendment protection of Freedom of Speech also impacts attempts to use the law to address cultural appropriation. While most non-economic harms of cultural appropriation may involve protected expression, some restrictions against commercial uses of cultural symbols may be allowed. Recently, the U.S. Supreme Court has allowed the rejection of trademark applications, even if such a rejection may restrict one's ability to express oneself.¹¹⁷ In *Vidal v. Elster*, the Court agreed with the U.S. Patent and Trademark Office's rejection of a trademark application for the mark "Trump Too Small" under the "names clause" of the Lanham Act.¹¹⁸ In its ruling, the Court stated that trademark laws inherently involve content-based distinctions.¹¹⁹ However, some of these restrictions are narrowly tailored to meet the long-standing purpose of protecting unauthorized uses of the names of others.¹²⁰

The Court has a long line of cases accepting restrictions on the Freedom of Speech in favor of intellectual property rights. For instance, the Court upheld the U.S. Olympic Committee's exclusive use of the term "Olympic,"¹²¹ allowed the extension of copyright terms because it targeted the legitimate goal of encouraging creativity,¹²² and permitted the restoration of a copyright over foreign works that fell into the public domain.¹²³ The Court also prioritized a publisher's exclusive right over an unpublished memoir over another's First Amendment rights,¹²⁴ allowed for trademark law to restrict First Amendment rights despite the claimant's alleged parody of a trademark,¹²⁵ and restricted speech that diminished a trademark's unique value, even in the absence of confusion.¹²⁶

The third, and perhaps the most relevant legal framework, is the Federal Indian Arts and Crafts Act.¹²⁷ The Act carries civil and criminal penalties

117. *Vidal*, 602 U.S. at 289.

118. *Id.*

119. *Id.*

120. *Id.*

121. S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 527–28 (1987).

122. *Eldred v. Ashcroft*, 537 U.S. 186, 205–08 (2003).

123. *Golan v. Holder*, 565 U.S. 302, 303–305 (2012).

124. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 540–41 (1985).

125. *Jack Daniel's Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 145 (2023).

126. *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 418–19 (2003).

127. Indian Arts and Crafts Act (IACA) of 1990, Pub. L. No. 101–644, §§101–602, 104 Stat. 4662 (codified as amended at 18 U.S.C. §§ 1158–1159; 20 U.S.C. §§ 4414, 4417, 4421, 4424, 4425, 4451; 25 U.S.C. §§ 162(a), 305, 305(d), 305(e), 450, 450(b), 450(c), 450(f), 450(h), 450(j), 450(k), 483(a), 1461, 1484, 2206; 42 U.S.C. § 2545).

for misrepresenting products as “Indian-Made” when they are not.¹²⁸ The Act is intended to protect Native artisans and community members from counterfeit arts and crafts.¹²⁹ While the Act was meant to address rampant appropriation of Native American cultural symbols and expression, it has suffered from several shortcomings.¹³⁰ Criticisms of the Act include its lack of appreciation for the history and complexity of tribal arts and crafts, ineffective legal enforcement, narrow definition of the term “Indian,” and use of nominal authenticity as a baseline.¹³¹ While these criticisms are well-supported, the Act has been cited in a few cases, although not always leading to the outcome desired by claimants and proponents.¹³²

Before proceeding to litigation around cultural appropriation, it is worth mentioning the Native American Graves Protection and Repatriation Act (NAGPRA).¹³³ NAGPRA was passed in 1990 with the goal of establishing a respectful way for federal agencies and museums to return Native American “human remains, funerary objects, sacred objects, and objects of cultural patrimony” to the relevant Native American community.¹³⁴ While NAGPRA might become quite relevant to cultural appropriation defined broadly, it is designed with physical items in mind. Since this Article focuses on “intangible” cultural expression, NAGPRA is not discussed beyond this Section.¹³⁵

128. *Id.* at § 105 (the act that triggers liability is selling “any good . . . [I]n a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe”).

129. *The Indian Arts and Crafts Act of 1990*, U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/iacb/act> [<https://perma.cc/23A5-3J56>].

130. 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, 1011–14 (2001); Jennie D. Woltz, *The Economics of Cultural Misrepresentation: How Should the Indian Arts and Crafts Act of 1990 Be Marketed?*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 443, 447–48 (2006).

131. See Hapiuk, *supra* note 130; see also Woltz, *supra* note 130.

132. See Hapiuk, *supra* note 130; Woltz *supra* note 130.

133. Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 25 U.S.C. §§ 3001-3013, 104 Stat. 3048 (1990).

134. *Id.* § 3001(3).

135. For a detailed analysis of the issues that arise out of NAGPRA, see generally, Pemina Yellow Bird, *NAGPRA at Twenty: A Report Card*, 44 ARIZ. ST. L.J. 921 (Summer 2012) (describing ongoing compliance failures and enforcement challenges twenty years after NAGPRA’s passage); B. Stephen Jones, *Strengthening NAGPRA*, 41 CARDOZO ARTS & ENT. L.J. 883 (2023) (arguing that NAGPRA’s protection should be expanded through right of publicity and moral rights concepts to protect Indigenous intangible cultural patrimony from commercial appropriation).

D. Cultural Appropriation Litigation

While current law does not include a judicially recognized claim against cultural appropriation, there seems to be a slow development of at least entertaining claims of property-like interests over cultural symbols.¹³⁶ At least three recent cases have involved claimants stating cultural appropriation as a core part of their legal disputes.¹³⁷ Except for the first case, the claims submitted do not list cultural appropriation as an independent theory of liability within their brief but make such claims in association with their cases.¹³⁸

The first case is *MGA Entertainment Inc. v. Harris*.¹³⁹ The party claiming cultural appropriation is a former girl band named OMG Girlz, which has three young African American singers as its members.¹⁴⁰ They accused MGA Entertainment of engaging in cultural appropriation when it created and sold dolls closely resembling the band members during their performances.¹⁴¹ The lead claims were trademark, trade dress, and right of publicity infringement over the resemblances of a unique outfit and colorful hairstyles.¹⁴²

This case seems to be the first instance where cultural appropriation is listed as a cause of action in a brief submitted to a U.S. court in a reported case.¹⁴³ However, the claim of cultural appropriation was entered later.¹⁴⁴ The judge dismissed the cultural appropriation claim because it was immaterial to the claim of trade dress infringement, the core theory of legal liability upon which the band relied.¹⁴⁵ Given this dismissal at an early stage of the trial, the *MGA Entertainment* case has not created any concrete rule

136. See generally Angela R. Riley, *The Ascension of Indigenous Cultural Property Law*, 121 MICH. L. REV. 75 (2022) (discussing a growing global pressure to recognize Indigenous people's right to their cultural property).

137. *MGA Ent., Inc. v. Harris*, No. CV 20-11548, 2021 WL 4732923 (C.D. Cal. Aug. 27, 2021); Complaint, *Sealaska Heritage Inst. Inc. v. Neiman Marcus Grp. LTD, LLC*, 2020 WL 6817129; *Navajo Nation v. Urb. Outfitters, Inc.*, 212 F. Supp. 3d 1098, 1100–01 (D.N.M. 2016).

138. Complaint, *Sealaska Heritage Inst.*, 2020 WL 6817129; *Navajo Nation*, 212 F. Supp. 3d at 1105–06.

139. *MGA Ent., Inc.*, 2021 WL 4732923.

140. Setty, *supra* note 89.

141. *MGA Ent., Inc.*, 2021 WL 4732923, at *2.

142. *Id.*

143. Setty, *supra* note 89.

144. *MGA Ent., Inc. v. Harris*, Case No. 2:20-cv-11548-J VS, 2022 WL 4596697 (C.D. Cal. July 29, 2022).

145. *Id.* at 14.

on the claim of cultural appropriation. The band ended up winning \$71 million in damages based on the primary causes of action.¹⁴⁶

In another lawsuit, *Sealaska Heritage Institute Inc. v. Neiman Marcus Group LTD, LLC et al.*, the claim of cultural appropriation, while not being listed as a stand-alone claim, played a key role in the plaintiff's case.¹⁴⁷ A celebrated Native Alaskan weaver, Clarisa Rizal, created an award-winning design titled "Discovering the Angles of an Electrified Heart" using native weaving techniques.¹⁴⁸ Her heirs later copyrighted the design, and a license was granted to the plaintiff, the Sealaska Heritage Institute.¹⁴⁹ The Institute sued Neiman Marcus, a Dallas-based luxury retailer, over the alleged use of the design on the latter's "Ravenstail Knitted Coat," which was on sale for about \$2,500.¹⁵⁰ Various observers sent text and picture messages of the luxury coat to Rizal's heirs, claiming it appropriated the Native Alaskan design.¹⁵¹

Despite the plaintiff's attorneys claiming cultural appropriation in their public statements, they did not lead with such a claim in their briefs.¹⁵² This is an understandable decision, given that cultural appropriation is not a recognized legal claim.¹⁵³ Instead, they relied on copyright infringement, false designation of origin, and violation of the Federal Indian Arts and Crafts Act.¹⁵⁴ In March 2021, the two parties settled the dispute under confidential terms.¹⁵⁵

146. Nancy Dillon, *T.I., Tiny Win Whopping \$71 Million Award at OMG Girlz Trial*, ROLLING STONE (Sept. 23, 2024), <https://www.rollingstone.com/music/music-news/ti-tiny-win-omg-girlz-mga-infringement-lawsuit-jury-verdict-1235109498> [https://perma.cc/XD2R-VVBW].

147. See First Amended Complaint, *Sealaska Heritage Inst. Inc. v. Neiman Marcus Grp. LTD, LLC*, No. 1:20-CV-00002, 2020 WL 6817129 (D. Alaska 2020) (attorneys for the plaintiff publicly repeated claims of cultural appropriation as a core part of their claim).

148. Elizabeth Jenkins, *Lawsuit over Cultural Appropriation of Native Designs Proceeds, Despite Neiman Marcus Bankruptcy*, ALASKA PUB. MEDIA (July 1, 2020), <https://alaskapublic.org/2020/07/01/lawsuit-over-cultural-appropriation-of-native-designs-proceeds-despite-neiman-marcus-bankruptcy> [https://perma.cc/L39J-L9KS].

149. DISCOVERING THE ANGLES OF AN ELECTRIFIED HEART, U.S. Copyright Registration No. VAu001380817.

150. Jenkins, *supra* note 148.

151. *Id.*

152. *Sealaska Heritage Inst. Inc.*, 2020 WL 6817129.

153. Lauren M. Ingram, *Cultural Misappropriation: What Should the United States Do?* 111 TRADEMARK REP. 859, 866 (2021).

154. *Sealaska Heritage Inst. Inc.*, 2020 WL 6817129 at ¶¶ 56–97.

155. Associated Press, *Alaska Native Group and Neiman Marcus Settle Lawsuit over Robe with Copyrighted 'Ravenstail' Design*, ANCHORAGE DAILY NEWS (Mar. 5, 2021),

The third case involves a dispute between the Navajo Nation and Urban Outfitters.¹⁵⁶ The dispute arose because Urban Outfitters publicized a Navajo-themed line of products, including “Navajo hipster panties” and a “Navajo print flask.”¹⁵⁷ The Navajo Nation alleged that Urban Outfitters committed trademark infringement and violated the Indian Arts and Crafts Act.¹⁵⁸ Since the Nation had registered the name “Navajo” on the federal trademark register, it had standing to bring the infringement claim.¹⁵⁹ However, the case was settled out of court based on undisclosed terms.¹⁶⁰ Shortly afterward, Urban Outfitters announced it would partner with the Navajo Nation on future products.¹⁶¹ These cases represent missed opportunities to develop case law on cultural appropriation claims.¹⁶² However, as the topic of cultural appropriation becomes more popular, courts may see additional disputes with similar claims, offering additional opportunities for detailed examination of the issues.

II. CATEGORIZING CULTURAL APPROPRIATION

As discussed earlier, cultural appropriation can produce multiple different harms, but not all acts of appropriation produce the same harms

<https://www.adn.com/arts/2021/03/05/alaska-native-group-and-neiman-marcus-settle-lawsuit-over-robe-with-copyrighted-ravenstail-design> [https://perma.cc/KRN2-YLMZ].

156. *Navajo Nation v. Urb. Outfitters, Inc.*, 212 F. Supp. 3d 1098, 1100–01 (D.N.M. 2016).

157. For an in-depth analysis of the case, see *Woolf, supra* note 6, which describes the public backlash towards Urban Outfitters and *Owning Red: A Theory of Indian (Cultural) Appropriation, supra* note 29, at 903–04, which details how intellectual property law affected this issue. *See also* Brigitte Vézina, *Curbing Cultural Appropriation in the Fashion Industry*, CTR. FOR INT'L GOVERNANCE INNOVATION (Apr. 2019), <https://www.cigionline.org/static/documents/documents/paper%20no.213.pdf> [https://perma.cc/487B-FPB6]. Urban Outfitters has been involved in other instances of cultural appropriation involving the Kaffiyeh, a headwear most commonly associated with Palestinians, and other products depicting the Hindu god, Ganesh. *See* Ellie Violet Bramley, *The Keffiyeh: Symbol of Palestinian Struggle Falls Victim to Fashion*, GUARDIAN (Aug. 9, 2019), <https://www.theguardian.com/fashion/2019/aug/09/the-keffiyeh-symbol-of-palestinian-struggle-falls-victim-to-fashion> [https://perma.cc/3CUA-5B5Q].

158. *See Navajo Nation Sues Urban Outfitters for Trademark Infringement*, GUARDIAN (Mar. 1, 2012), <https://www.theguardian.com/world/2012/mar/01/navajo-nation-sues-urban-outfitters> [https://perma.cc/87G4-HARV].

159. *See Navajo Nation*, 212 F. Supp. 3d at 1100–01.

160. *Woolf, supra* note 6.

161. *Id.*

162. *See Setty, supra* note 89 (stating that introduction of testimony alleging cultural appropriation was barred from the record); *see also* Sternbach, *supra* note 89, at 897 (discussing how the lawsuit brought against Neiman Marcus ended in a pre-trial settlement).

with the same weight—some may even be negligible. This Section outlines categories of cultural appropriation based on factors that may influence the type and severity of harm inflicted.¹⁶³ While the high-level categorization below does not capture the full complexity of cultural appropriation, it does provide a foundation on which the search for a legal remedy could be based.

While there are several points of contention in the cultural appropriation discussion, two factors seem to dominate. The first is the cultural symbol's level of *diffusion*. The second is the *commerciality* of the use. These factors are also reflected in the challenges of applying current law to cultural appropriation. The following two Sections will examine these two factors.

A. Level of Diffusion

The diffusion element refers to two aspects: the symbol and the source community. In this Article, *diffusion* means the degree to which the symbol that is the subject of cultural appropriation is associated with other source communities. The level of diffusion is the extent to which a cultural symbol is associated with one or a few communities versus being shared by several discrete communities. Diffusion is a spectrum rather than a binary: On the one hand, a cultural symbol associated with one community is not diffused at all; however, the more communities a cultural signifier is associated with, the more diffused it becomes. The opposite point on this spectrum is a *distinct* symbol—one that is associated with a single, identifiable source community.

The distinction between *distinct* and *diffused* is complicated and requires a case-by-case analysis. For instance, the name of a source community may be an easy case of a distinct symbol if the name is used for one or a limited number of communities. However, many cultural symbols offer vague connections lacking a clear understanding of which community they may be tied to; the use of such a symbol may be diffused. Most instances would fall within these two extremes, thus requiring contextual analysis.

A cultural symbol is distinct if associated with a social group having a unified and distinct identity. Defining identity at the group level is complicated.¹⁶⁴ However, scholars have developed tools to analyze group

163. For a different type of categorization of cultural products, compare SCAFIDI, *supra* note 81, at 38–51, which categorizes the transformation of cultural property into organic versus cultivated and private versus public.

164. See, e.g., Rogers Brubaker & Frederick Cooper, *Beyond “Identity,”* 29 THEORY & SOC’Y 1, 1–4 (2000) (rejecting simplistic formulations of group identity and instead outlining

identities.¹⁶⁵ Shared history, language, religion, experience, and practices are core sources of group identity.¹⁶⁶ The importance of each of these sources of identity differs from one group to another. However, group identity is core to social theory, politics, and law.¹⁶⁷

Geographic location is one core feature that functions as an imperfect but important proxy for group identity.¹⁶⁸ The availability of physical space to practice essential group activities and rituals is indispensable for a group's identity.¹⁶⁹ Locating one's group in physical space offers a meaningful source of identity formation and cultural expression.¹⁷⁰ The primary border for legal, political, and social groupings—the nation—is mainly created and enforced spatially.¹⁷¹ Therefore, the existence of a physical location to which a group is connected helps in analyzing whether its symbols are diffused or distinct and whether an interest in a symbol is justified.¹⁷²

There are a few reasons for emphasizing distinct symbols for the framework and excluding diffused symbols.¹⁷³ First, the more diffused a cultural mark is, the less likely it is to inflict the types of harms that would justify a legal claim against cultural appropriators.¹⁷⁴ It is hard to imagine that using a widely diffused symbol could result in the deprivation of material advantage. Even beyond this utilitarian harm, using a cultural symbol associated with multiple cultures is less likely to harm any one of those cultures by degrading its integrity, depleting its cultural goods, or offending its members.

how diversity and fluidity are welcomed as groups set boundaries and create collective identities).

165. See PIERRE BOURDIEU, *DISTINCTION: SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE* 13 (Richard Nice trans., Harv. Univ. Press 1984) (discussing the creation of distinctive social groups through socialization, education, and social practices); BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (rev. ed. 2006) (outlining how social coherence and distinctiveness are gained through language, culture, and history). For additional sources on scholarship discussing group identity, see also *infra* note 308.

166. See BOURDIEU, *supra* note 165, at 394–95; ANDERSON, *supra* note 165, at 1–7.

167. See ANDERSON, *supra* note 165, at 1–7.

168. EDWARD W. SOJA, *POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY* 17–25 (Verso 1989).

169. DOREEN MASSEY, *SPACE, PLACE, AND GENDER* 154–162 (1994).

170. Edward T. Hall, *Proxemics*, in *THE ANTHROPOLOGY OF SPACE AND PLACE: LOCATING CULTURE* 51, 51–59 (Denise Lawrence-Zúñiga & Setha M. Low eds., 2003).

171. ANTHONY D. SMITH, *NATIONAL IDENTITY* 74–82 (1991).

172. HARVEY, *supra* note 77, at 7–14 (taking a critical view of mainstream cosmopolitan worldview and advocating for consideration of geographic location as part of group identity).

173. See *infra* Section III.B.

174. See *supra* Section I.A.

Second, even where harm may arise from using a diffused symbol, the various legal frameworks that create a theory of liability involve limitations that make a claim against the use of diffused symbols challenging. From a practical standpoint, bringing legal claims over cultural symbols associated with numerous disconnected communities would be difficult, especially if they do not share a unifying history, identity, or worldview. Cultural appropriation, which falls outside the legal system, either because the harms are negligible or because of practical obstacles to a legal claim, can be (and often is) addressed through extra-legal means such as public shaming or corporate social responsibility.

For instance, consider the examples of celebrities like Kylie Jenner, Madonna, Justine Timberlake, Christina Aguilera, Kristen Stewart, Lena Dunham, and Melanie Griffith wearing their hair in cornrows.¹⁷⁵ Cornrows are presently most directly associated with Black people in the Americas and Africa.¹⁷⁶ However, the earliest documented evidence of the cornrow hairstyle comes from varied locations, including Mali, Niger, Algeria, and even the Vikings in Northern Europe.¹⁷⁷ This exercise highlights the pernicious issues of tracing the origins of a diffused cultural symbol.

175. Andrea Arterberry, *Does Anyone Own the Cornrow?*, N.Y. TIMES (Nov. 3, 2015), <https://www.nytimes.com/2015/11/05/fashion/does-anyone-own-the-cornrow.html>; *see also* *Dos and Don'ts: Black Hairstyles on White Celebrities*, *supra* note 3; Lauren Cochrane, *Kylie Jenner's Cornrows and the Racial Politics of Hair*, GUARDIAN (July 13, 2015), <https://www.theguardian.com/fashion/shortcuts/2015/jul/13/kylie-jenner-cornrows-racial-politics-hair> [<https://perma.cc/WE4K-KSZ9>]. One celebrity who responded to and wrote about the selfie is Amandla Stenberg, an actress in *The Hunger Games*: “When u appropriate black features and culture but fail to use ur position of power to help black Americans by directing attention towards ur wigs instead of police brutality or racism #whitegirlsdoitbetter.” Cochrane, *supra* note 175. Stenberg has been active about cultural appropriation, especially concerning cornrows. *See* Hype Hair Magazine, *Amandla Stenberg: Don't Cash Crop on My Cornrows*, YOUTUBE (Apr. 15, 2015), https://www.youtube.com/watch?v=O1KJRRSB_XA [<https://perma.cc/F9CL-QNG2>].

176. Ashley Turner & Dymond Green, *The Black Hair Care Industry Generates Billions — but the US Is Missing Out on the Market*, CNBC, <https://www.cnbc.com/2018/08/17/black-hair-care-wigs-weaves-extensions-salons.html> [<https://perma.cc/Q2N5-KW3W>] (Aug. 17, 2018).

177. The Tassili cave paintings, ancient African cave paintings on the border of Mali, Niger, and South-East Algeria, show people with cornrows. *See* ENCYCLOPEDIA OF AFRICAN HISTORY AND CULTURE: ANCIENT AFRICA 37 (Willie F. Page & R. Hunt Davis eds., 2001). Braids and cornrows were also a key part of the Horn of Africa hairstyle. For instance, these hairstyles, locally called shuruba or albaso, are present in the portraits of Emperor Yohannes IV and Tewodros II. *See* Kiya Ali, *Returning to Roots: Braids Make a Comeback*, ETHIOPIAN BUS. REV., Apr. 16–May 15, 2019, <https://ethiopianbusinessreview.net/returning-to-roots> [<https://perma.cc/9RXZ-5KED>]. There have been social media debates over the historically accurate hairstyles of Vikings following the popularity of motion pictures depicting Vikings. Although there are debates about where cornrows or box braids originated, there is evidence

As discussed earlier, culture is constantly in a state of diffusion and transformation.¹⁷⁸ Given the historical process of diffusion between communities, it is inevitable that some cultural symbols are inherited from common ancestors or borrowed from neighboring communities. The result is a symbol associated with multiple communities rather than any particular group, a feature that would make proving ownership arduous.

The “level of diffusion” point reveals that any claim of interest in a cultural signifier must take the current snapshot in time as its perspective. In other words, this Article’s legal framework must consider the current understanding of the connection between the source community and the cultural signifier.

Using the current snapshot in time as a perspective begs the question, why is the current point in time selected? Since misrepresentation relates to the perception of consumers currently engaged in commerce, taking such a perspective is warranted. Furthermore, the area of law closest to the cultural appropriation discussion—intellectual property and trademark law—solves a similar challenge by taking a similar perspective. As such, the need to select the current snapshot in time as the relevant perspective is not alien to the U.S. legal system.

Moreover, such a perspective addresses a key challenge in the distinctiveness analysis. Cultural symbols may have been distinct in the past and may become diffused because of various reasons, including globalization, trade, colonization, or displacement. If one attempts to trace the history of a diffused cultural symbol, there may have been a point in time when the symbol was distinct. However, such an exercise would make a legal framework unworkable, given the contested claims of past ownership, challenges of collecting historical evidence, and disagreement about the relevant time for such analysis. It is acknowledged that the current snapshot perspective may have the unintended consequence of neglecting historical oppression, which may have caused the diffused nature of cultural symbols. However, accounting for and tracing the historical origin of symbols is simply infeasible.

that braids were part of the Viking culture. *See* Rebecca H. McCormick, *Did the Vikings Invent Braids?*, HIST. UNBOXED, <https://www.historyunboxed.com/did-the-vikings-invent-braids> [<https://perma.cc/B8CK-PJKP>]. For a heated debate regarding hairstyles and appropriation, see *Dr. Phil: Appropriation Nation: Has It Gone Too Far?* (CBS television broadcast Sept. 30, 2022).

178. For a detailed discussion of the cosmopolitan worldview, see *supra* Section I.B.

B. Degree of Commerciality

The second factor of cultural appropriation is the degree of *commerciality*. Trademark law has developed the theory of “use in commerce.”¹⁷⁹ The term “use in commerce” is defined under the Lanham Act as “a bona fide use . . . in the ordinary course of trade.”¹⁸⁰ In the context of goods, this is further defined as the placement of the mark “in any manner on the goods or their containers or the displays associated therewith or . . . on documents associated with the goods.”¹⁸¹ For services, use in commerce means the “display[] in the sale or advertising of services.”¹⁸² Stated otherwise, the use of a cultural symbol as a trademark or service mark—when it is used on commercial goods, on the container or display for commercial goods, or used to display or advertise services—amounts to commercial use.

The case law and literature on “use in commerce” help explain the types of uses that should also be addressed here, albeit with the necessary adjustments for the context of cultural appropriation. Commercial use in this Article is generally defined as use that relates to the advertisement, promotion, or sale of goods or services. The definitions offered by other areas of law may be relevant in outlining the outer limits of commerciality in this context. That said, an outright adoption of such definitions may not be warranted, given the differing contexts in which these terms are used.

Non-commercial uses, such as those that are primarily personal, expressive, or political, should not trigger a legal claim given the challenges of regulating them via legal remedy.¹⁸³ As explained in the following Section, the reduced harm and the need to respect long-standing rights and privileges provided to citizens are two core reasons to exclude non-commercial uses from the legal framework outlined in this Article.

As with diffusion, commerciality exists in a spectrum. Consider boxer Mike Tyson’s iconic face tattoo as an example. Ordinarily, someone’s face tattoo would not be seen as commercial use, but rather personal or

179. 15 U.S.C. §§ 1114(1)(a), 1125(a)(1).

180. *Id.* § 1127.

181. *Id.*

182. *Id.*

183. Similar exclusions under trademark law reveal justifications for excluding personal, expressive, and political uses in the context of cultural appropriation. *See Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989) (stating that the Lanham Act’s trademark regulations should apply to artistic expression only when “the public interest in avoiding consumer confusion outweighs the public interest in free expression”); *see also* 15 U.S.C. § 1125(c)(3)(C) (excluding “non-commercial use of a mark” from trademark dilution liability).

expressive. However, Tyson's face tattoo is one of the most famous tattoos in the entertainment industry. Its iconic status was confirmed when Stu, a character in the film *Hangover: Part II*, which features Mike Tyson, woke up from a night of drunken stupor with a replica.¹⁸⁴ Tyson's tattoo artist, S. Victor Whitmill, even brought a copyright infringement action against Warner Bros.¹⁸⁵ This exercise of categorizing cultural appropriation reveals how the concept rejects strict borders. Instead, the focus should be on the primary or predominant purpose of the use.¹⁸⁶ Here, Tyson's face tattoo is primarily an artistic expression and not a commercial product.

Notwithstanding this challenge of delineating the border between commercial and non-commercial, some uses are clear and make an easier reference. For example, the use of a Native American name like Cherokee for a product would be an easy case of commercial use, whereas wearing a traditional dress for a friend's wedding would be a non-commercial use. Even here, though the use by the purchaser of the product is non-commercial, the company making the cultural dress may be engaged in commercial use of the cultural symbol. This shows the need for context-specific analysis.

The focus on commercial cultural appropriation and exclusion of non-commercial uses from the framework outlined in this Article is indispensable. First, most non-commercial use of cultural symbols enjoys robust protection under the First Amendment.¹⁸⁷ As explained earlier, the First Amendment protection for freedom of expression leaves little room to limit personal, expressive, and political expression.¹⁸⁸ Therefore, cabining

184. THE HANGOVER: PART II (Warner Bros. Pictures 2011).

185. 'Hangover 2' Tattoo Lawsuit over Mike Tyson-Style Ink Is Settled, L.A. TIMES (June 22, 2011), <https://www.latimes.com/archives/blogs/ministry-of-gossip/story/2011-06-22/hangover-2-tattoo-lawsuit-over-mike-tyson-style-ink-is-settled>. An intriguing backstory to the tattoo is that Tyson, who initially wanted to get hearts and other symbols, was convinced otherwise by Whitmill who, a couple of days later, told Tyson that he had a "tribal warrior symbol" fitting for Tyson's persona. See The Howard Stern Show, *Mike Tyson on Going Broke, Retiring from Boxing, and the Lesson He Learned from Joe Frazier*, SIRIUSXM (Apr. 19, 2013), <https://www.youtube.com/watch?v=biqUosmB-DQ&t=1s> [https://perma.cc/JM3P-6FRN]. Traditional Māori symbols from New Zealand inspired the tattoo artist. For an in-depth discussion of the intellectual property law issues regarding Mike Tyson's face tattoo, see Marie Hadley, 49 *Mike Tyson Tattoo*, in A HISTORY OF INTELLECTUAL PROPERTY IN 50 OBJECTS 400, 400–07 (Claudy Op den Kamp & Dan Hunter eds., 2019). See also Charlotte Everett, *TATTED TYSON What Does Mike Tyson's Face Tattoo Mean?*, U.S. SUN, <https://www.thesun.com/sport/7764246/mike-tysons-face-tattoo> [https://perma.cc/WH83-TR9Q] (Mar. 7, 2024).

186. See *supra* note 8 and accompanying text.

187. See U.S. CONST. amend. I.

188. See *supra* Section I.C.

the claim of cultural passing off to commercial acts ensures that these fundamental rights and freedoms are not disturbed. The First Amendment already recognizes limitations on the freedom of expression that are based on the commercial interests and property rights of others.¹⁸⁹

Second, similar to the point of diffusion, non-commercial use is less likely to create economic harm via deprivation of material advantage. Given the economies of scale, most commercial uses can be expected to involve large-scale reproduction of cultural symbols, and this considerable commercial use would create proportional harm in the form of lost economic opportunity for members of the source community. To the extent that non-commercial uses are limited in scale (for example, a single personal use of a symbol), their ability to cause the other types of harm discussed earlier may also be limited.¹⁹⁰

Third, as with attempts to control the use of diffused symbols, legal restriction of non-commercial uses creates practical issues that would render enforcement virtually impossible. Permitting passing-off claims based on personal use of cultural symbols would require investigation to determine if personal use is taking place or if the user is a member of or associated with the source community. Such an investigation would not only be practically complex, as personal uses of a symbol are potentially difficult to identify, but it would almost certainly be invasive. These challenges exist in the commercial context but to a much lesser degree.

The two key features discussed earlier—the level of *diffusion* of the cultural symbol and the level of *commerciality* of the appropriation give us the following quadrant.

Table 1. Cultural Appropriation Quadrant

Q1 Diffused, Non-commercial	Q2 Distinct, Non-commercial
Q3 Diffused, Commercial	Q4 Distinct, Commercial

189. *Vidal v. Elster*, 602 U.S. 286, 287–88 (2024); *see supra* text accompanying notes 118–26.

190. *See supra* Section I.B.

C. Examples of Cultural Appropriation

This categorization of cultural appropriation is abstract; thus, examples may help clarify the four quadrants. These examples illustrate the different forms cultural appropriation can take and explain why only a subset of cultural appropriation justifies legal intervention. These examples will be followed by a discussion, within each subsection, of whether legal intervention is warranted.

1. Diffused, Non-Commercial Use

The best example for category Q1, diffused non-commercial use, is the use of culturally unique hairstyles. Hairstyles are important in conversations about race and inclusivity. Within this context, cornrows and other forms of braids have gotten significant attention.¹⁹¹ For instance, there have been several reports of BIPOC students being kicked out of school for cornrows, braids, or dreadlocks.¹⁹² These incidents have followed BIPOC individuals into the corporate world as well.¹⁹³ In the face of such prejudice, the use of these hairstyles by non-BIPOC individuals triggers emotional debates about cultural appropriation. As mentioned earlier, Black hairstyles have come up in cultural appropriation debates several times.¹⁹⁴ Justin Timberlake had cornrows when he was in the boy band NSYNC, a style he later described

191. See, e.g., LAUREN MICHELE JACKSON, WHITE NEGROES: WHEN CORNROWS WERE IN VOGUE . . . AND OTHER THOUGHTS ON CULTURAL APPROPRIATION (2019).

192. BIPOC is short for Black, Indigenous, and People of Color. See Chevaz Clarke, *BIPOC: What Does It Mean, and Where Does It Come from?*, CBS NEWS (July 2, 2020), <https://www.cbsnews.com/news/bipoc-meaning-where-does-it-come-from-2020-04-02> [https://perma.cc/VXZ3-JWJM]; see, e.g., Alisha Ebrahimji, *Texas High School Policy Banning Braided or Twisted Hair Has Stopped a Teen from Attending School, His Mom Says*, CNN, <https://www.cnn.com/2022/04/28/us/texas-high-school-east-bernard-braided-hair-ban/index.html> [https://perma.cc/FB9U-W5E9] (Apr. 29, 2022) (describing how a seventeen-year-old high school student was prevented from registering for school because he wore dreadlocks); Christine Hauser & Patrick McGee, *Black Student's Suspension Over Hairstyle Didn't Violate Law, Texas Judge Rules*, N.Y. TIMES (Feb. 22, 2024), <https://www.nytimes.com/2024/02/22/us/darryl-george-locs-hair-trial-texas.html> (describing how an eighteen-year-old high-school student was suspended for wearing locs).

193. Regina E. Spellers, *Cornrows in Corporate America: Black Female Hair/Body Politics and Socialization Experiences in Dominant Culture Workplace Organizations* 161–64 (Dec. 2000) (Ph.D. dissertation, Arizona State University) (ProQuest).

194. For a discussion of various celebrities accused of culturally appropriating Black hairstyles, see *supra* note 175 and accompanying text.

as regrettable.¹⁹⁵ Similarly, Justin Bieber was accused of cultural appropriation when he was seen with dreadlocks.¹⁹⁶

These hairstyles are examples of diffused cultural symbols because they are present in multiple communities worldwide, making it challenging for a specific community to claim exclusive association with a hairstyle.¹⁹⁷ For instance, several African cultures have used cornrows or braids for generations, a practice enslaved people brought to the Americas.¹⁹⁸ These hairstyles are currently most directly associated with the African American community.¹⁹⁹ Dreadlocks, most notably associated with Jamaica's Rastafarian movement, are now prominent in many other corners of the world.²⁰⁰

The use of a hairstyle, in most cases, is also non-commercial. Usually, such uses are purely personal; depending on how intentional one is with their hairstyle selection, it would be expressive. While celebrities' use of a style blurs the line between commercial and non-commercial, Timberlake's and Bieber's adoption of those hairstyles is not primarily associated with selling products.²⁰¹ The distinction is even more apparent when used by

195. *Dos and Don'ts: Black Hairstyles on White Celebrities*, *supra* note 3.

196. Faith Karimi, *Justin Bieber Is Accused of Cultural Appropriation over His Hair Again.*, CNN (Apr. 27, 2021), <https://www.cnn.com/2021/04/27/entertainment/justin-bieber-dreadlocks-trnd/index.html> [<https://perma.cc/742X-ABUB>].

197. See, e.g., Kenneth Byrd, *Where Did Dreadlocks Originate? The True History of Dreadlocks*, CURL CENTRIC, <https://www.curlcentric.com/where-did-dreadlocks-originate> [<https://perma.cc/FL7L-EGFD>] (Apr. 1, 2022) (noting that dreadlocks have ties to Egyptian, Celtic, African, Israeli, Polish, and Aztek cultures); Seline Shenoy, *Did Vikings Have Dreadlocks: What Did Viking Dreadlocks Look like and Why Were They Special?*, SCANDIFICATION, <https://scandification.com/viking-dreadlocks-did-vikings-have-dreadlocks> [<https://perma.cc/LR42-5DKK>] (describing the history of dreadlocks in Scandinavia, as well as noting its presence in many Mediterranean, Eastern, and African cultures).

198. Aimee Simeon, *The Beautiful, Black History of Cornrows*, BYRDIE, <https://www.brydie.com/history-of-cornrows-5193458> [<https://perma.cc/L3NC-HGBF>]. (Apr. 28, 2022).

199. *Id.*

200. *Dread History: The African Diaspora, Ethiopianism, and Rastafari*, SMITHSONIAN INSTITUTION, <https://smithsonianeducation.org/migrations/rasta/rasessay.html> [<https://perma.cc/8B56-SWV8>] ("Perhaps the most familiar feature of Rastafari culture is the growing and wearing of dreadlocks, uncombed and uncut hair which is allowed to knot and mat into distinctive locks. Rastafari regard the locks as both a sign of their African identity and a religious vow of their separation from the wider society they regard as Babylon."). For a detailed exploration of the origins of dreadlocks, see Barry Chevannes, *The Origins of Dreadlocks*, in THE JAMAICA READER: HISTORY, CULTURE, POLITICS 253, 253–58 (Diana Paton & Matthew J. Smith eds., 2021).

201. *Dos and Don'ts: Black Hairstyles on White Celebrities*, *supra* note 3; Karimi, *supra* note 196.

ordinary individuals, as most adopt these hairstyles without commercial incentives. Thus, the diffused cultural symbol of cornrows, and perhaps most hairstyles, is also predominantly non-commercial.

This first category, diffused and non-commercial use, does not justify legal intervention because the harms to the source culture are the most limited, and the constitutional interest is at its strongest. The harms are limited because of how diffused the cultural signifier is, and the constitutional protection is most potent because of the absence of other justifiable limitations on such protections.

2. Distinct, Non-Commercial Use

The dispute over the use of the Kente cloth associated with the Ashanti tribe of Ghana offers a good context for the second category—distinct non-commercial use. The elaborate and colorful Kente designs have become a popular accessory worn by people of African descent at various celebratory events.²⁰² Graduating students wear Kente stoles to celebrate their achievements as they walk the stage.²⁰³

In June 2020, a picture circulated of members of Congress wearing Kente shawls.²⁰⁴ The Kente cloth was offered by the members of the Congressional Black Caucus when the Democratic Party proposed police reform legislation after the killing of George Floyd.²⁰⁵ As described by Karen Bass, chairwoman of the Caucus, their use of the Kente cloth represented respect for the African heritage of African Americans.²⁰⁶ However, the picture highlighting then House Speaker Nancy Pelosi and other members of Congress wearing the Kente stole sparked accusations of cultural appropriation.²⁰⁷ While a strong protest from the Ghanaian

202. See Joseph K. Adjaye, *The Discourse of Kente Cloth: From Haute Couture to Mass Culture*, in LANGUAGE, RHYTHM, & SOUND: BLACK POPULAR CULTURES INTO THE TWENTY-FIRST CENTURY 23, 23–39 (Joseph K. Adjaye & Adrienne R. Andrews eds., 1997).

203. *Id.*

204. *Why Were US Democrats Wearing Ghana's Kente Cloth?*, BBC (June 9, 2020), <https://www.bbc.com/news/world-africa-52978780> [<https://perma.cc/9NMJ-UAKZ>].

205. *Id.*

206. *Id.* (“The significance of the kente cloth is our African heritage and for those of you without that heritage who are acting in solidarity . . . [t]hat is the significance of the kente cloth - our origins and respecting our past.”).

207. *Id.*

community has not been widely reported, at least some individuals expressed disapproval, with one writer stating, “We are not your props.”²⁰⁸

This case exemplifies the complexities surrounding the issue of “ownership,” even when the use arguably meets the *distinctiveness* requirement. More to the point, Chairwoman Bass’s explanation about the purpose behind the group’s use of Kente stoles as displaying solidarity demonstrates that it was non-commercial—in this instance, it was used for a political purpose.

Non-commercial use of a distinct symbol may impose some harm and is usually controversial. However, such use is still constitutionally protected. In fact, controversial speech is in the greatest need of protection if that protection is to have meaning.²⁰⁹ As such, legal protection for a non-commercial appropriation of a distinct symbol is unworkable without disrupting this indispensable right.

3. Diffused, Commercial Use

The third category is the commercial use of diffused cultural symbols. An example of this category is Aunt Jemima, the popular ambassador for breakfast products.²¹⁰ The Aunt Jemima image has been part of American

208. *Id.* Further complicating the claim of “ownership,” the individual quoted as protesting the use of the Kente stole is a famous Kenyan writer. *Id.* This raises the question of who has the authority to claim “ownership” of the Kente as a cultural symbol and whose perspective matters in deciding the wrongfulness of cultural appropriation. Is the right level of identity an African, national, or tribal one? These questions are challenging to answer, and that struggle is inherent in any conversation about cultural appropriation. There does not seem to be a generally applicable authoritative answer, but one must look to each context for a workable solution. The discussion in Section II.A about distinct identities outlines some of the factors that can be used to provide a context-specific solution.

209. This phrasing is usually associated with Justice Anthony Kennedy’s concurrence in *Texas v. Johnson*, 491 U.S. 397, 420–21 (1989) (Kennedy, J., concurring), and Justice Oliver Wendell Holmes Jr.’s dissenting opinion in *U.S. v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting) (“[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other[,] it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country.”).

210. M. M. MANRING, *SLAVE IN A BOX: THE STRANGE CAREER OF AUNT JEMIMA* 18–19 (Edward L. Ayers ed., 1998) (discussing the “mammy” image of the Old South with emphasis on how Aunt Jemima has endured as an iconic image of American culture). There have been mixed reactions regarding the use and later cancellation of the Aunt Jemima brand. While some see the symbol as a racist relic of the Old South, others, including descendants of real people who depicted the Aunt Jemima character, would prefer the continued use of the Aunt Jemima

culture for over 130 years, and it is one of the most successful commercial symbols of its generation.²¹¹

One of the co-founders of the predecessor company to R.T. Davis Milling Company, owners of the Aunt Jemima brand in the late 19th century, heard the song “Old Aunt Jemima” in a minstrel performance by the famous Billy Cursons.²¹² The song was about an enslaved black woman whose primary desire was to serve her white family.²¹³ The company decided to use Aunt Jemima’s name to sell its products, following a trend of using “mammy” images on various products of the time.²¹⁴ These images helped corporations sell products based on racial stereotypes and caricatures.²¹⁵

The Aunt Jemima example meets the requirements of commercial use of a diffused symbol. The most memorable part of the product is the Aunt Jemima image and name on the packaging of breakfast products.²¹⁶ Real individuals who depicted the Aunt Jemima character are credited for saving the company from the brink of bankruptcy during its initial stages.²¹⁷ These reports show the commercial nature of the Aunt Jemima symbol.

symbol. *See, e.g.*, ABC News, *The Woman Behind ‘Aunt Jemima’*, YOUTUBE (Aug. 11, 2020), https://www.youtube.com/watch?v=efXD_7eTKUw [<https://perma.cc/GKH5-D8VE>].

211. MANRING, *supra* note 210, at 18–19, 74–75, 77; Tiffany Hsu, *Aunt Jemima Brand to Change Name and Image Over ‘Racial Stereotype’*, N.Y. TIMES (Feb. 10, 2021), <https://www.nytimes.com/2020/06/17/business/media/aunt-jemima-racial-stereotype.html> [<https://perma.cc/68Z7-LXTR>]. The Aunt Jemima symbol was labeled as “one of America’s most enduring living trademarks.” *See* Sam Roberts, *Overlooked No More: Nancy Green, the ‘Real Aunt Jemima’*, N.Y. TIMES (Aug. 28, 2020), <https://www.nytimes.com/2020/07/17/obituaries/nancy-green-aunt-jemima-overlooked.html> [<https://perma.cc/355D-FRHG>].

212. MANRING, *supra* note 210, at 60–63, 72, 74, 75, 77.

213. *Id.* at 18–20, 60–63. The meaning of Aunt Jemima is a contested one, with some commentators grouping her with the traditional symbol of a “stereotyped silly, happy slave totally devoted to the service of her white family,” while others have worked to disprove that symbolism. *See id.* at 19.

214. *See* KIMBERLY WALLACE-SANDERS, *MAMMY: A CENTURY OF RACE, GENDER, AND SOUTHERN MEMORY* 13–32 (2008); *see also* MARILYN KERN-FOXWORTHY, *AUNT JEMIMA, UNCLE BEN, AND RASTUS: BLACKS IN ADVERTISING, YESTERDAY, TODAY, AND TOMORROW* 61–114 (Greenwood Publ’g Group, Inc. 1994).

215. KERN-FOXWORTHY, *supra* note 214, at 72–77; *see also* Hsu, *supra* note 211. *See generally* MICKI MCELYEA, *CLINGING TO MAMMY: THE FAITHFUL SLAVE IN TWENTIETH-CENTURY AMERICA* (2007) (discussing how mammy images such as Aunt Jemima and other caricatures of faithful slaves who are happy to cook and care for whites, has been a strong hold on our imagination).

216. *See* Hsu, *supra* note 211.

217. MANRING, *supra* note 210, at 72–77.

The diffused nature of the Aunt Jemima mark is, admittedly, more challenging. On the one hand, the Aunt Jemima image is part of a common trend in pre- and post-civil-war era marketing.²¹⁸ The symbol does not necessarily depict any specific black community, but rather depicts a racial stereotype, a fiction, of enslaved black women. Given the widespread use of enslaved people in the American South during this era,²¹⁹ it would be challenging to tie the use of the symbol to any particular black community.

On the other hand, one may argue that despite being a racial caricature, the symbol refers to enslaved black women in the American South. There is some basis to argue that this group is more or less distinct and therefore the symbol is on the distinct side of the spectrum.

To drive this point home, the Aunt Jemima character had real individuals who embodied the character.²²⁰ Nancy Green, herself a formerly enslaved black woman, was working as a nanny for a family in Chicago when she was recruited to play the role.²²¹ She had already developed a local reputation as a good cook and may even have created her pancake recipe.²²² She became the first ambassador for the Aunt Jemima brand and traveled throughout the country promoting the product, sometimes making pancakes at festivals.²²³ After Green passed away in 1923, the company hired at least one more person as a replacement ambassador.²²⁴

218. WALLACE-SANDERS, *supra* note 214; KERN-FOXWORTHY, *supra* note 214; Hsu, *supra* note 211.

219. WALLACE-SANDERS, *supra* note 214.

220. Roberts, *supra* note 211.

221. *Id.*

222. There are disputes about whether the famous Aunt Jemima pancake recipe was developed independently by the company or if it was Nancy Green's popular recipe. See, e.g., Katherine Nagasawa, *The Fight to Preserve the Legacy of Nancy Green, The Chicago Woman Who Played the Original 'Aunt Jemima'*, WEBZ CHI. (June 19, 2020), <https://www.wbez.org/2020/06/19/the-fight-to-preserve-the-legacy-of-nancy-green-the-chicago-woman-who-played-the-original-aunt-jemima> [<https://perma.cc/C32Q-GZTL>]; see also "Aunt Jemima", of *Pancake Fame, Dead*, SUNDAY MORNING STAR (Sept. 9, 1923), <https://cdn.wbez.org/image/d9ad9bf07003c4613c6ebf8322947504> [<https://perma.cc/6CET-P6TW>]. One Nancy Green's obituary states "Chicagoans recall the history of an interesting figure. She was the original 'Aunt Jemima' of the pancake fame, and because of her native ability to make 'flapjack to the queen's taste' was selected by a milling company to travel the country as demonstrator and introduce their wheat cake brand wherever she went." See *Aged Woman Killed When Autos Crash*, CHI. DEF. (1923), <https://s3.amazonaws.com/wbez-assets/curiouscity/World's+Fair+Legacies+/Nancy+Green+Obituary.jpg> [<https://perma.cc/6GX7-SVTW>].

223. Roberts, *supra* note 220.

224. *Id.* Vera Harris stated in an interview with ABC News that her great aunt, Lillian Richard (1891–1956), was a spokesperson for Quaker Oats, playing the Aunt Jemima character

However, these individuals were not the symbols themselves, but spokespersons for the symbol. The complexity of black identity and the challenge of finding a cohesive and unitary social group make these symbols diffused.²²⁵ This is especially the case when one considers the importance of geographic space in forming a unified social group.²²⁶ If Aunt Jemima is a reference to enslaved black women of the American South, which group can be said to be associated with the symbol at this time? And if such a community is found, would they self-describe Aunt Jemima as a symbol to be associated with them? It is challenging to address these questions, and perhaps the absence of an authority to provide answers is in itself evidence of the diffusion nature of Aunt Jemima as a commercial symbol.

Turning to the commercial aspect of the symbol, commercial speech still involves constitutional concerns, albeit to a limited extent. Moreover, the use of a diffused symbol, as stated earlier, at best causes limited harm in the form of deprivation of material advantage. Imagine who can claim to own the commercial image of Aunt Jemima if it is not the company that first created it. This does not mean that other types of harm are not present; it is

for decades. *See* Jon Schlosberg & Deborah Roberts, *The Untold Story of the Real ‘Aunt Jemima’ and the Fight to Preserve Her Legacy*, ABC NEWS (Aug. 12, 2020), <https://abcnews.go.com/US/untold-story-real-aunt-jemima-fight-preserve-legacy/story?id=72293603> [<https://perma.cc/KH87-QHNH>]; *see also* Tiana Wilson, *The Legacy of Lillian Richard Williams: Aunt Jemima’s Icon*, TEX. STATE HIST. ASS’N (Dec. 19, 2024), <https://www.tshaonline.org/handbook/entries/williams-lillian-richard> [<https://perma.cc/JDD6-PPXN>]; Gwen Aviles, *Relatives of Aunt Jemima Actresses Express Concern History Will Be Erased with Rebranding*, NBC NEWS (June 22, 2020), <https://www.nbcnews.com/pop-culture/pop-culture-news/relatives-aunt-jemima-actresses-express-concern-history-will-be-erased-n1231769> [<https://perma.cc/M99L-GASV>].

225. EUGENE ROBINSON, *DISINTEGRATION: THE SPLINTERING OF BLACK AMERICA* 4, 8–10 (Random House, Inc. 2010) (arguing against what the author says is an outdated monolithic view of Black America and instead identifies various groups, including mainstream middle class, abandoned, transcendent elite, and emergent immigrant groups). *See generally* JOHN L. JACKSON JR., *HARLEMWORLD: DOING RACE AND CLASS IN CONTEMPORARY BLACK AMERICA* (2001) (relying on fieldwork and interviews to challenge a unified African American identity, instead arguing that contemporary black identity is diverse in various forms of identity including personal experiences, economic status, and social network).

226. For a discussion of the role geographic location plays in the diffusing-distinct spectrum, *see supra* Section II.A. Various scholars have argued that the shared experiences of slavery, discrimination, and systemic racism have created a cohesive social unit of African Americans. *See, e.g.*, PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 25 (Routledge, 2d ed. 2000). *See generally* W. E. B. DU BOIS, *THE SOULS OF BLACK FOLK* 205–10 (Henry Louis Gates, Jr. ed., Oxford Univ. Press 2007) (claiming the existence of a collective feeling of double-consciousness within the black community that is rooted in slavery and discrimination).

just that the economic harm of denying economic advantage to a distinct social group is challenging to prove. Therefore, commercial use of a diffused cultural symbol still does not justify legal intervention.

4. Distinct, Commercial Use

The fourth and final category deals with the commercial use of distinct cultural symbols—the only use that should trigger a cultural passing-off claim. The *Navajo Nation v. Urban Outfitters* case mentioned earlier is one of the most fitting examples.²²⁷

Urban Outfitter's use of the word "Navajo" is in the "distinct symbol" camp because the company uses the official name of a recognized Native American tribe.²²⁸ The use of the official name of the source community is one of the strongest examples of the use of a distinct symbol. There are many other examples where names of specific Native American tribes, communities, or individuals are used to sell products and services, including "Jeep Cherokee, Pontiac cars, Shawmut Bank, Mohawk Paper Company, Crazy Horse Malt Liquor, and Sioux Industries."²²⁹

These examples also show the commercial nature of such uses. Urban Outfitters' use of the name "Navajo" is clearly commercial because it is incorporated into the name of products offered for sale to the public.²³⁰ This use also demonstrates the commercial value associated with the Navajo name, at least to a subset of the consuming public. The many other examples of Native American product names listed above have comparable commerciality but have not been the subject of litigation.²³¹

Here, legal intervention is justified, given the increased level of harm and the limited constitutional protections available to commercial speech. The deprivation of material advantage is seen in the placement of the Navajo name in the marketplace, a name used in commerce by the Navajo Nation and one that has received federal trademark registration.²³² The

227. See *supra* Section I.D.

228. See *Navajo Nation v. Urb. Outfitters*, 212 F. Supp. 3d 1098, 1100 (D.N.M. 2016).

229. Janet McGowan, *What's in a Name? Can Native Americans Control Outsiders' Use of Their Tribal Names?*, CULTURAL SURVIVAL (Mar. 19, 2010), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/whats-name-can-native-americans-control-outsiders-use> [<https://perma.cc/2BZT-N56T>] (providing a non-exhaustive list of examples where Native American names are used in relation to the commercialization of goods and services).

230. See *Navajo Nation*, 212 F. Supp. 3d at 1100.

231. See McGowan, *supra* note 229.

232. *Navajo Nation*, 212 F. Supp. 3d at 1100.

constitutional protection Urban Outfitters gets is also limited, given the commercial nature of the use and the fact that the use is most probably an infringement of a federally registered trademark.²³³

For an additional example justifying legal intervention in the fourth quadrant, recall the *Sealaska Heritage Institute v. Neiman Marcus* dispute mentioned earlier.²³⁴ The copying of an award-winning copyrighted design by Neiman Marcus in a luxury Ravenstail coat would deprive the designer, her heirs, and other community members of a potential market for that design.²³⁵ This fits the harm emphasized in this Article—deprivation of material advantage. The unique copyrighted design by Neiman Marcus is a core part of the coat’s \$2,500 value,²³⁶ a value that could have been realized by the original designer, her heirs, or assignees.

The purpose of the fourth quadrant is to outline when a legal claim against cultural appropriation is justified without disrupting existing fundamental protections. It does not mean that all acts of cultural appropriation within this quadrant give rise to successful claims. As explained below, additional substantive and procedural steps must be fulfilled for legal liability.²³⁷

To summarize, diffused and non-commercial use justifies no restriction because the harms are the most limited, while the constitutional interest is at its strongest. Non-commercial use of a distinct symbol may impose some harm but is constitutionally protected; in fact, controversial speech is often in the greatest need of protection. Diffused and commercial speech has fairly limited (but still present) constitutional concerns but has remote cultural harm that does not justify legal intervention. Commercial use of a distinct symbol is the only scenario where legal intervention should be triggered since this scenario balances the need to address potential economic harm—the deprivation of material advantage—while respecting existing fundamental rights. The following Section develops a theory of cultural passing off detailing the specific elements claimants should fulfill to succeed in their claim. This theory builds on the old tort of passing off.

233. *Id.* at 1106.

234. First Amended Complaint, *Sealaska Heritage Inst. Inc. v. Neiman Marcus Grp. Ltd.*, LLC, No. 1:20-CV-00002 (D. Alaska 2020), 2020 WL 6817129.

235. *Id.* ¶¶ 84–89.

236. Jenkins, *supra* note 148.

237. *See infra* Section III.B.

III. CULTURAL APPROPRIATION AS PASSING OFF

A. *Passing Off*

The legal theory closest to the type of harm emphasized in the article—deprivation of material advantage—is passing off. The analysis offered in the previous and this Section provides a framework within which cultural passing-off theory can be understood. In addition to the traditional passing-off doctrine, its modern iteration in the U.S.—trademark infringement—is examined at the end of this Section.²³⁸

The tort of passing off was developed within the English legal system, which later found its way into the common law of states in the U.S.²³⁹ This tort gave birth to the more sophisticated theories of trademark infringement and unfair competition.²⁴⁰ This Section’s exploration begins with the origins of the common law passing-off cause of action upon which the cultural passing-off theory will then be built.

Passing off involves a three-step analysis aptly described as the trinity test. The claimant must prove that it has (1) goodwill that has been subject to (2) misrepresentation by the defendant, and which has resulted in (3) damage to its goodwill.²⁴¹ The following Sections will outline the details of these three elements.

238. For detailed discussions about the history of trademark law, see generally Edward S. Rogers, *Some Historical Matter Concerning Trade-Marks*, 9 MICH. L. REV. 29 (1910); FRANK I. SCHECHTER, *THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADE-MARKS* (Faculty of Law of Colum. Univ. eds., 1925); Sidney A. Diamond, *The Historical Development of Trademarks*, 65 TRADEMARK REP. 265 (1975); Benjamin G. Paster, *Trademarks—Their Early History*, 59 TRADEMARK REP. 551 (1969). See also generally *In re Trade-Mark Cases*, 100 U.S. 82 (1879) (analyzing the constitutionality of Congress’ earliest attempts at legislating within the realm of trademark law).

239. McKenna, *supra* note 104, at 1849–1861; see also *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 246–48 (1918) (Holmes, J., dissenting) (providing a brief discussion of the passing-off doctrine); *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 428 (2003) (noting the English common law as the source of the U.S. trademark infringement cause of action).

240. McCARTHY, *supra* note 104, § 5.2 (discussing the origins of trademark law as being from the older torts of fraud and deceit).

241. See *Reckitt & Colman Prods. Ltd. v. Borden Inc.* [1990] RPC 341 (HL) 342 (known as the “Jif lemon” case); see also CHRISTOPHER WADLOW, *WADLOW ON THE LAW OF PASSING-OFF* 1–21 (6th ed., 2021); *Int’l News Serv.*, 248 U.S. at 246–49 (Holmes, J., dissenting).

1. Goodwill

Goodwill is at the core of a passing-off claim.²⁴² It has been the subject of significant scholarly examination, especially in Europe.²⁴³ As Catherine Ng examined, goodwill in the context of passing off could have one of two meanings: substantive or structural.²⁴⁴ Substantive goodwill refers to the business's reputation that would give consumers some sort of value.²⁴⁵ In contrast, structural goodwill refers to "the public recognition of the provenance of the goods not only in the sense of their trade origin, but also in the broader sense of their selection by the trader for sale or endorsed association."²⁴⁶

Although the two types of goodwill are admittedly intertwined, Ng proposes emphasizing structural goodwill over substantive goodwill to introduce internal coherence in the law of passing off, rationalize the trademark regime, and avoid conflicts with other areas of intellectual property protection.²⁴⁷ This Article accepts Ng's proposal and uses the term goodwill to mean structural goodwill, i.e., the public's perception of the source or affiliation of goods.

Furthermore, the concept of goodwill can be dissected based on the type of claimant involved. Passing off usually involved a single trader as a claimant.²⁴⁸ However, relatively recently, courts have entertained what has come to be labeled as "extended passing off."²⁴⁹ The extended passing-off doctrine allows traders who are loosely connected members of a group to

242. *See, e.g.*, Starbucks (HK) Ltd. v. British Sky Broad. Grp. PLC [2015] UKSC 31, [67] (appeal taken from Eng.) (where the U.K. Supreme Court stated that passing off protects goodwill as opposed to reputation).

243. Jonathan Griffiths, "*Property in What?*" – *Goodwill, Unregistered Marks and the Law of Passing Off*, [2025] INTELL. PROP. Q. (forthcoming).

244. CATHERINE W. NG, *GOODWILL IN PASSING OFF: A COMMON LAW PERSPECTIVE* 1–15 (2021).

245. *Id.* at 3–4; *see also* Inland Revenue Comm'rs v. Muller & Co's Margarine Ltd. [1901] AC 217 (HL) 224 (appeal taken from Eng.) (defining goodwill as the "attractive forces which brings in custom").

246. NG, *supra* note 244, at 5.

247. *Id.* at 2–3.

248. Earlier cases on passing off required "exclusivity of reputation" in order for the plaintiff to successfully bring a passing-off action. The understanding was that if the plaintiff does not exclusively own a reputation associated with the mark used by the defendant, how can such a plaintiff prove that the defendant misrepresented their mark, which resulted in damaging their reputation? For discussion of this point, see W. M. C. Gummow, *Carrying on Passing Off*, 7 SYDNEY L. REV. 224, 232 (1974).

249. *See* J. Bollinger v. Costa Brava Wine Co. (No. 1) [1960] Ch 262 at 264 (Eng.); J. Bollinger v. Costa Brava Wine Co. (No. 2) [1961] 1 WLR 277 (Ch) at 280 (Eng.).

claim damages to their collective goodwill against a trader who does not meet the requirements of membership in the group.²⁵⁰

The leading case on extended passing off is *FAGE v. Chobani*, a 2014 case from an appellate court in the United Kingdom involving the descriptor “Greek yoghurt.”²⁵¹ The claimant, a group of yogurt importers, started producing their popular thick and creamy textured yogurt in Greece in the late 1920s.²⁵² They started importing Greek yogurt into the U.K. market in 1983, and before the start of the litigation in 2012, their market share had grown to 95% of all Greek yogurt in the country by sale value.²⁵³ A market survey showed that all Greek yogurt, including that sold by the claimant’s competitors in the U.K., was made in Greece.²⁵⁴ This thick and creamy texture comes from a modernized version of a traditional Greek method of straining cow’s milk using cloth bags.²⁵⁵ The claimant argued that a product labeled “Greek yoghurt” in the U.K. must be made in Greece, using the traditional Greek process, and must not have sweeteners or other additives.²⁵⁶

Defendant Chobani, a U.S. company importing yogurt into the U.K., described its product as “Greek yoghurt.”²⁵⁷ Despite being thick and creamy like the claimant’s yogurt, Chobani’s product was made in the U.S.²⁵⁸ Thus, the leading theory of liability put forth by the claimant was that the defendant engaged in passing off when it described its product as “Greek yoghurt” while not being produced in Greece.²⁵⁹ The defendant, on its part, argued that it used the phrase “Greek yoghurt” not to indicate the product’s origin but to describe that it was a strained yogurt in the generic sense.²⁶⁰ The court, finding for the claimant, held that “Greek yoghurt,” as used in the U.K. market, describes yogurt from Greece and does not simply mean strained yogurt.²⁶¹

250. See Katharine Saunders, *Choccosuisee - The New ‘Extended Extended’ Passing Off*, 32 VICTORIA U. WELLINGTON L. REV. 351, 352 (2001).

251. FAGE UK Ltd. v. Chobani UK Ltd. [2014] EWCA (Civ) 5 [1].

252. *Id.* [13].

253. *Id.* [2], [13].

254. See *id.* [14]–[15].

255. *Id.* [11]–[12].

256. *Id.* [19].

257. *Id.* [3].

258. *Id.*

259. *Id.* [1], [21].

260. *Id.* [22], [32], [34].

261. See *id.* [111] (agreeing with the lower court’s grant of an injunction against the defendant).

The *FAGE* case builds on an earlier case where the “Spanish champagne” descriptor was in dispute.²⁶² In *J. Bollinger v. Costa Brava Wine Co.*, twelve companies that produced wine in France’s Champagne district for import into the U.K. market brought a lawsuit against the defendant, which imported their product from Spain, for describing the latter’s product as “Spanish Champagne.”²⁶³ The court held that, in the U.K. market, the term “champagne” describes wine from the Champagne district of France, and therefore, it was dishonest for the defendant to describe its product as Spanish Champagne.²⁶⁴

These cases on the extended passing-off doctrine support the cultural passing-off theory developed in this Article in several ways. First, they expand our understanding of claimants in these types of cases. While the typical trademark infringement case usually involves a single legally recognized entity, extended passing-off cases resemble class action lawsuits in that claimants just need to show they meet certain membership requirements for the claimant group. The class comprises distinct entities joined by a loose definition of shared products or symbols such as exporters of “Greek Yogurt” or “Champagne.” Using the extended passing-off doctrine, independent legal entities that produce the same type of product or use the same type of process can bring an action as a class.

Second, these cases show how the mark or identifier itself may not be clearly delineated in all instances, but only within the context in which the defendant uses it. For instance, “Greek yoghurt” may mean different things in the U.S. and U.K. markets. Nevertheless, the term’s meaning within the U.K. market will be the relevant definition for litigation in that jurisdiction. The fact that the term has other, more generic meanings in other jurisdictions does not impact the analysis for extended passing off.

Lastly, the cases support the rule that the relevant time of analysis is the time the defendant begins their act of passing off.²⁶⁵ Terms like Greek yogurt, Champagne, and Swiss chocolate might have meant different things at different historical points.²⁶⁶ However, the judges in these cases took the

262. *J. Bollinger v. Costa Brava Wine Co.* (No. 2) [1961] 1 WLR 277 (Ch) at 277.

263. *Id.*

264. *Id.* at 278.

265. WADLOW, *supra* note 241, 5-309 (citing *Cadbury Schweppes Pty. Ltd. v. Pub Squash Co. Pty. Ltd.* [1981] 1 WLR 193 (PC) (appeal taken from NSW); *Starbucks (HK) Ltd. v. British Sky Broad. Grp. PLC* [2015] UKSC 31).

266. See *Chocosuisse Union des Fabricants Suisses de Chocolat v. Cadbury Ltd.* [1999] RPC 826 (AC) at 832 (*The Chocosuisse Case*); *FAGE UK Ltd. v. Chobani UK Ltd.* [2014] EWCA (Civ) 5 [18]; *J. Bollinger*, 1 WLR at 283-86.

meaning the terms had for the consumer at the time of litigation as the relevant point of analysis.²⁶⁷ As outlined in the next Section, the cultural passing-off theory also adopts this approach of taking the current snapshot time—the time the defendant's act begins—as the relevant point in time.

2. Misrepresentation

Misrepresentation is another key element of the “classical trinity” of passing off.²⁶⁸ The leading definition of misrepresentation is an act by the defendant that misleads or deceives a substantial portion of consumers.²⁶⁹ Misrepresentation is sometimes replaced by terms such as “confusion” or “deception.”²⁷⁰ While expressly false representations are clearly misrepresentations, they are not the basis of most litigation.²⁷¹ Thus, the case law entertains implied false representations that lead consumers into believing that the defendant's products are those of the plaintiffs.²⁷²

Notably, the defendant need not act fraudulently or intentionally in order for misrepresentation to take place.²⁷³ The plaintiff does not have to prove malicious intent on the defendant's part; it is just that the defendant's use of

267. See *The Chocosuisse Case*, RPC 826 (AC) at 829; *FAGE*, EWCA (Civ) 5 [73]; *J. Bollinger*, 1 WLR 277 at 286.

268. WADLOW, *supra* note 241, 1-21; *see also* *Reckitt & Colman Prods. Ltd. v. Borden Inc.* [1990] RPC 341 (HL) at 406; *see also* *A.G. Spalding & Bros. v. A.W. Gamage Ltd.* [1915] 32 RPC 273 (HL).

269. WADLOW, *supra* note 241, at 1-22.

270. *Id.*

271. *See, e.g., Spalding*, 32 RPC 273.

272. *Id.* The relevant opinion of Lord Parker from *Spalding* reads as follows:

“[T]he basis of passing off action being a false representation by the defendant, it must be proved in each case as a fact that the false representation was made. It may, of course, have been made in express words, but cases of express misrepresentation of this sort are rare. The more common case is where the representation is implied in the use or imitation of a mark, trade name, or get-up with which the goods of another are associated in the public's minds. In such cases, the point to be decided is whether, having regard to all the circumstances of the case, the use by the defendant in connection with the goods of the mark, name, or get-up in question impliedly represents such goods to be the goods of the plaintiff, or the goods of the plaintiff of a particular class of quality, or, as it is sometimes put, whether the defendant's use of such mark, name or get-up is calculated to deceive.”

Id.

273. WADLOW, *supra* note 241, at 5-91.

the mark results in a misrepresentation.²⁷⁴ However, if the plaintiff can show fraudulent intent, there is usually a presumption of damage.²⁷⁵ The legal stance here is that if the defendant intentionally attempts to mislead consumers, courts should take that level of intent as evidence of the likelihood of misrepresentation and damage.²⁷⁶

Misrepresentation in passing off includes the use of the plaintiff's name, mark, or other identifier relevant to consumer perception. This is because the relevant audience of the misrepresentation is usually the consumers of the plaintiff's products, although there is often an overlap between the plaintiff's and the defendant's consumer bases.²⁷⁷ U.S. case law has expanded this aspect of the passing-off law doctrine, as discussed below.²⁷⁸ Under the Lanham Act, the falsehood may be related to "affiliation, connection, or association" between the plaintiff and the defendant.²⁷⁹

3. Damage

The last element of the classical passing-off cause of action is damage. The plaintiff must prove that the defendant's misrepresentation has damaged their goodwill or is likely to damage it.²⁸⁰ There are variations of harm recognized under a passing-off claim. The first and most common is the diversion of trade.²⁸¹ Diversion of trade results from the plaintiff's

274. *Id.*

275. *See, e.g.*, Harrods Ltd. v. R. Harrod Ltd. [1924] 41 RPC 74 at 84.

276. *See Soc'y of Motor Mfrs. & Traders v. Motor Mfrs.' & Traders' Ins. Co.* [1925] 42 RPC 307.

277. *See Erven Warnink B.V. v. J. Townend & Sons (Hull) Ltd.* [1979] AC 731 (HL) at 741; *see WADLOW, supra* note 241, at 5-181.

278. *See supra* Section II.B.

279. Lanham Act, 15 U.S.C. § 1125(a)(1)(A); *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 783, 764 n.1 (1992); *NG, supra* note 244, at 13, 80. The full text of the Lanham Act sub-article reads as follows:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person. . .

280. *Reckitt & Colman Prods. Ltd. v. Borden Inc.* [1990] RPC 341 (HL) at 376.

281. *See Reddaway v. Banham* [1896] AC 199 (HL) at 209.

consumers purchasing the defendant's product, believing it to belong to the plaintiff.²⁸²

Another type of damage in a passing-off action is the dilution of goodwill.²⁸³ Dilution of goodwill exists if the plaintiff's consumers buy the defendant's product, find it disappointing, and associate the disappointment with the plaintiff.²⁸⁴ This damage is related to that present in dilution claims under U.S. trademark law, although significant differences exist.²⁸⁵ Other damages include harm to reputation, harm to goodwill, and loss of exclusivity.²⁸⁶

A unique feature of the damages element under passing off is that actual damages are not required—threatened damage is sufficient.²⁸⁷ For instance, the *British Telecomm. v. One in a Million* court found that the defendant's ownership of virgin.org amounted to passing off even if the claimant did not produce evidence of actual damage.²⁸⁸ It is part of settled law that “likelihood of damage” is accepted as the required standard in passing-off claims.²⁸⁹ Another unique aspect of the passing-off cause of action is that the parties do not have to compete with each other for liability to exist.²⁹⁰ No competitive harm is required as long as the plaintiff's current and potential customers are misled by the defendant's actions.²⁹¹ Furthermore, even if the defendant has not made any sales, the plaintiff could still get nominal damages if successful on the other elements of passing off.²⁹²

282. See *id.* at 208–09.

283. See *A.G. Spalding & Bros. v. A.W. Gamage Ltd.* [1915] 32 RPC 273 (HL).

284. Saunders, *supra* note 250, at 355.

285. See Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813 (1927). While the concept of dilution existed earlier, this Article is credited for giving birth to the theory of trademark dilution under U.S. law. See also David S. Welkowitz, *Reexamining Trademark Dilution*, 44 VAND. L. REV. 531, 533 (1991).

286. See Rembert Meyer-Rochow, *Passing Off—Past, Present and Future*, 84 TRADEMARK REP. 38, 49–52 (1994).

287. *British Telecomm. PLC. v. One in a Million Ltd.* [1999] 1 WLR 903.

288. *Id.* (finding threatened passing off had occurred where the defendant registered plaintiff's mark as domain name “virgin.org”).

289. Gummow, *supra* note 248, at 227 (stating that the likelihood of damage is sufficient for passing-off claims).

290. *Id.* at 226–27.

291. *See id.* at 227.

292. *Id.* at 231.

4. Trademark Law and Passing Off

U.S. trademark law has its origins in the much older tort of passing off, which, according to leading scholars, dates back to medieval times, when liability was recognized for misuse of marks.²⁹³ The doctrine of passing off and earlier versions of trademark law were established in the U.S. legal system by the mid-1800s.²⁹⁴ As the offspring of the passing-off doctrine, trademark law was also primarily concerned with the harm of trade diversion.²⁹⁵

Goodwill has continued to play a key role in U.S. trademark jurisprudence.²⁹⁶ One instance in which the value of goodwill can be observed is in the insistence that a transfer of the goodwill must accompany a transfer of a trademark.²⁹⁷ Scholars have explored the persistence of goodwill despite the various changes in U.S. trademark law.²⁹⁸ This emphasis on protecting goodwill and on stopping dishonest diversion of trade further highlights the continued connection between passing-off and trademark law.²⁹⁹

More importantly, trademark law has an ever more expansive scope than the typical passing-off doctrine.³⁰⁰ For instance, the Lanham Act § 43 (a) (1) (A) expands confusion-based liability to include confusion “as to affiliation, connection, or association.”³⁰¹ This scope is more expansive than the narrower scope of addressing confusion as to the source in the traditional passing-off doctrine. The recognition of dilution-based causes of action has

293. McKenna, *supra* note 104, at 1849–50.

294. *See id.* at 1859 & n.82; *see also* Zvi S. Rosen, *Federal Trademark Law: From Its Beginnings*, 11 LANDSLIDE 34 (2019).

295. McKenna, *supra* note 104, at 1858; *see also* Coats v. Holbrook, Nelson & Co., 2 Sand. Ch. 586, 597 (N.Y. Ch. 1845).

296. JORGE L. CONTRERAS, *INTELLECTUAL PROPERTY LICENSING AND TRANSACTIONS: THEORY AND PRACTICE* 37–40 (discussing *Sugar Busters LLC v. Brennan*, 177 F.3d 258 (5th Cir. 1999)).

297. Lanham Act, 15 U.S.C. § 1060(a)(1).

298. *See, e.g.*, Irene Calboli, *Trademark Assignment “With Goodwill”: A Concept Whose Time Has Gone*, 57 FLA. L. REV. 771 (2005).

299. McKenna, *supra* note 104, at 1858–61, 1863 n.104.

300. NG, *supra* note 244, at 66–144 (discussing the scope and application of the passing-off doctrine).

301. Lanham Act, 15 U.S.C. § 1125(a)(1)(A); *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 783, 764 n.1 (1992); NG, *supra* note 244, at 13, 80. For the full text of the Lanham Act sub-article, see *supra* note 279.

expanded the scope of claims over commercial symbols.³⁰² Beyond the expansion of the key source of liability, trademark law has also expanded to recognize collective trademarks and certification marks, which are an increasingly active area of trademark protection.³⁰³ Furthermore, the core feature of trademark law, i.e., the use of the mark in commerce, is understood more expansively, and includes marks used by charities or non-profit organizations that do not necessarily “sell” their product or service in the strict commercial sense.³⁰⁴ These expansions will enable the acceptance of a similar extension of the passing-off doctrine—cultural passing off—within the limits outlined below.³⁰⁵

B. Cultural Passing Off

This Section outlines the elements of a new theory of cultural passing off. It builds on the doctrines of passing off, “extended passing off,” and trademark law. The theory is triggered within the fourth quadrant of cultural appropriation discussed in earlier Sections—commercial use of a distinct symbol.³⁰⁶

A claimant relying on the cultural passing-off theory must show the following three elements: (1) the existence of a collective goodwill, (2) the commercial use of a distinctive cultural symbol (as per the fourth quadrant outlined earlier), and (3) deprivation of material advantage as discussed in earlier Sections.³⁰⁷

1. Collective Goodwill

The first step in defining the concept of collective goodwill is providing a process by which the collective or the group can be identified. As

302. Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (1996); Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat. 1730 (codified as amended in scattered sections of 15 U.S.C., including § 1125(c)).

303. Lanham Act, 15 U.S.C. § 1127 (defining certification marks and collective marks).

304. *See, e.g.*, Planetary Motion, Inc. v. Techsplosion, Inc., 261 F.3d 1188, 1195, 1119 n.19 (11th Cir. 2001); McCARTHY, *supra* note 104, § 9:5.

305. *See infra* Section III.B.

306. *See supra* Sections II.A–B.

307. *See supra* Part II for the categorization of cultural appropriation, specifically the last subsection on distinct, commercial use. *See supra* Section I.A for a discussion on the various harms of cultural appropriation including the harm emphasized in this Article—deprivation of material advantage.

discussed earlier, literature from adjacent areas of research, such as sociology, anthropology, and political science, may be helpful in defining what makes a cultural unit for the purposes of having collective goodwill.³⁰⁸ As such, more work is needed to bridge research in these adjacent research areas and the theory of cultural passing off.

Despite this challenge, the U.S. legal system identifies various groups for legal, political, social, or economic purposes.³⁰⁹ These groupings may be based on laws, treaties, or agreements with the U.S. government, and they usually lead to rights, protections, and benefits under the law.³¹⁰

Generally, communities may be grouped for various purposes. It could be for tax purposes, as when the IRS requires disclosure of religious status,³¹¹ or when the Department of Veterans Affairs decides on veteran status to confer specific benefits.³¹² Refugee or asylee status is also determined based on recognized groups that face persecution based on their nationality, race, religion, membership in a political or social group, or political opinion.³¹³

308. For a detailed discussion of scholarship on group identity, see *supra* text accompanying note 164. For examples of additional relevant research, see CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES (1973) (examining cultural groups as being defined by their interpretive practices of shared meaning and symbols); ETHNIC GROUPS AND BOUNDARIES: THE SOCIAL ORGANIZATION OF CULTURE DIFFERENCE (Fredrik Barth ed., 1969) (introducing the concept of ethnicity as a social construct); ROGERS BRUBAKER, ETHNICITY WITHOUT GROUPS (2004) (discussing ethnicity, not as a static concept but a dynamic and situational process of developing a perspective of the world); ANTHONY D. SMITH, THE ETHNIC ORIGINS OF NATIONS (1987) (offering a historical and cultural viewpoint on the development ethnic groups); ANDERSON, *supra* note 165 (arguing how cultural groups are “imagined” entities).

309. See, e.g., Milton M. Gordon, *Assimilation in America: Theory and Reality*, 90 DAEDALUS 263 (1961); Elliott R. Barkan et al., *Race, Religion, and Nationality in American Society: A Model of Ethnicity—From Contact to Assimilation*, 14 J. AM. ETHNIC HIST. 38 (1995).

310. See, e.g., LEADERSHIP CONF. ON CIV. AND HUM. RTS., SIXTY YEARS AFTER THE CIVIL RIGHTS ACT OF 1964: ONGOING THREATS AND THE WORK AHEAD (2024), <https://civilrights.org/wp-content/uploads/2024/07/Civil-Rights-Act-60th-Anniversary.pdf> [<https://perma.cc/6DXR-B556>].

311. E.g., *Found. of Hum. Understanding v. United States*, 88 Fed. Cl. 203, 220 (2009), *aff'd*, 614 F.3d 1383 (Fed. Cir. 2010) (describing the 14 criteria used by the IRS to define a “church” for tax exemption purposes).

312. 38 U.S.C. § 101(2) (defining a veteran as a “person who served in the active military, naval, air, or space service” who has since been released or discharged but was not dishonorably discharged).

313. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (defining a refugee as a person who is “outside any country of [their] nationality,” and who cannot or will not return to or seek that country’s protection due to “persecution on account of race, religion, nationality, membership in a particular social group, or political opinion”).

Compared with definitions, there are more relevant exercises of grouping communities that use ethnic or cultural heritage as a filter. For instance, various agencies, including the U.S. Census Bureau, collect demographic data by grouping individuals as White, Black or African American, Asian, Native Hawaiian or Other Pacific Island, American Indian or Alaska Native, Hispanic or Latino.³¹⁴ These groupings are usually used for policy planning, resource allocation, and civil rights enforcement.³¹⁵ Experience shows that grouping communities based on the policy's intended purpose leads to more effective categorization.³¹⁶

Since this Article hopes to create a workable theory around collective goodwill, relying on the nature of goodwill itself will help define the types of groups that could create it. In this sense, the "extended passing off" concept discussed earlier is relevant.³¹⁷ For instance, when a U.K. court decided that a group of importers of "Greek yoghurt" could stop others from using the phrase in association with yogurt produced outside of Greece, it recognized a group that met specific requirements.³¹⁸ These features from the extended passing-off doctrine are likewise helpful here.

A claimant in an extended passing-off case must qualify the group to which they belong and prove that the group has shared characteristics. These include consistency in quality or standard used, geographical origin, recognition by the public, membership in a recognized association, use of common symbols, or evidence of legal protection.³¹⁹ These features also recognize collective marks and certification marks under U.S. trademark law.³²⁰ Thus, using similar elements to support the concept of collective goodwill will not be alien to the American legal system.

314. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58782, 58789 (Oct. 30, 1997). The new standards separately classify ethnicity (indicating if the respondent is of Hispanic or Latino origin) from race (indicating if the respondent is White, Black or African American, Asian, American Indian or Alaska Native, or Native Hawaiian or Other Pacific Islander).

315. *Id.* at 58782.

316. *See id.*

317. *See supra* Section III.A.1.

318. FAGE UK Ltd. v. Chobani UK Ltd. [2014] EWCA (Civ) 5.

319. *See* Erven Warnink B.V. v. J. Townend & Sons (Hull) Ltd. [1979] AC 731; J. Bollinger v. Costa Brava Wine Co. [1960] Ch 262; *The Chocosuisse Case*, RPC 826 (AC).

320. *Collective Marks Under the Law*, JUSTIA, <https://www.justia.com/intellectual-property/trademarks/categories-of-marks/collective-marks> [https://perma.cc/RDZ5-B9NM]; *Certification Marks Under the Law*, JUSTIA, <https://www.justia.com/intellectual-property/trademarks/categories-of-marks/certification-marks> [https://perma.cc/LZ65-8VGQ].

The relevant factors in grouping claimants that have collective goodwill should include self-identification, the cultural cohesiveness of the group, geographical location, legal recognition of the community as a cultural group, shared ethnicity, and the group's use of common language and symbols. Instead of one of these features being a primary factor, the grouping should rely on examination based on a combination of several factors. Furthermore, depending on the context, some of these factors are easier to apply than others. For instance, membership in a legally recognized community is more straightforward to apply in the context of Native American tribes than in most other cultural groups in the U.S. In contrast, using geographic location to identify African American groups will be impossible.

The next step is examining what types of goodwill the group is associated with in the public's minds. The extended passing-off doctrine is also helpful here. Building on the Greek yogurt case discussed earlier, market research can identify Greek yogurt's reputation and include a specific market value for such a label.³²¹ Similarly, the public may have specific expectations of characteristics for products associated with particular cultural groups because of social, ideological, historical, or geographic reasons.³²²

Cultural symbols preserved and used by a community have commercial value.³²³ In some respects, these values parallel the value of commercial symbols used by corporations that are recognized by laws such as trademark rights.³²⁴ Scholars have noted that "Indigenous beliefs, names, symbols, and practices clearly are worth money in the American marketplace."³²⁵ For example, Native American imagery in commercial products and packaging

321. See *supra* Section III.A.1.

322. See, e.g., FAGE UK Ltd. v. Chobani UK Ltd. [2014] EWCA (Civ) 5.

323. See, e.g., McGowan, *supra* note 229; WIPO's *Wend Wendland on Proactively Using Trademarks to Protect the Rights of Indigenous Peoples*, INT'L. TRADEMARK ASS'N (Nov. 10, 2021), <https://www.inta.org/perspectives/interviews/interview-wipos-wend-wendland-on-proactively-using-trademarks-to-protect-the-rights-of-indigenous-peoples-and-local-communities> [<https://perma.cc/5N5Q-FL5E>]; Ali Sell, *American Brand Names and Indigenous Cultures: Changing the Narrative*, ZINZIN (Nov. 4, 2022), <https://www.zinzin.com/observations/2022/american-brand-names-indigenous-cultures-changing-the-narrative> [<https://perma.cc/2T57-LTTP>].

324. See Lanham Act, 15 U.S.C. § 1127; see, e.g., Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159 (1995) (recognizing that trademark rights protect the commercial value of symbols representing the products with which they are associated); McCARTHY, *supra* note 104. The trademark protection under the Lanham Act focuses on the source indicating the function of marks used in commerce, which protects the symbol's commercial value as a distinct mark.

325. McGowan, *supra* note 229.

is so ubiquitous that the National Museum of the American Indian has an exhibition with close to 350 artifacts used in association with commercial products.³²⁶

For instance, when Urban Outfitters used the term “Navajo” in association with its products, it hoped to conjure images of certain types of prints associated with the Navajo Nation in consumers’ minds.³²⁷ A similar attempt at capturing value seems to be taking place in the corporate use of racial stereotypes, such as Aunt Jemima, Uncle Ben, and Mrs. Butterworth’s.³²⁸ There may be disagreements about the content being signaled, at least at the edges. However, collective symbols can carry commercial value and are sometimes as effective as trademarks or other brand-related symbols owned by corporations.³²⁹

For cultural passing-off, the symbol at the heart of collective goodwill does not need to have independent commercial value. The association with the source community is sufficient. This is because of the broad scope of the misrepresentation element in the original passing-off doctrine and its formulation here. If the symbol brings up, in the public’s mind, a source community that fits the elements discussed earlier, then the collective goodwill element is met.

2. Commercial Misappropriation of Distinct Cultural Symbol

The second element of the cultural passing-off theory builds on the misappropriation element from the tort of passing off. Given the broad scope under the original doctrine, a general definition of misappropriation can offer a workable legal framework. Within the cultural passing-off theory, misappropriation means the commercial use of a distinct cultural symbol in the absence of consent, affiliation, or connection with the source

326. *Exhibition: Americans*, SMITHSONIAN NAT’L MUSEUM OF THE AM. INDIAN, <https://americanindian.si.edu/americans/#gallery> [<https://perma.cc/VS4U-PBJV>]. For a detailed discussion of the ubiquity of Native American imagery in commercial products, see Katharine Schwab, *The Fraught History of America’s Most Pervasive Brand*, FAST COMPANY (Jan. 22, 2018), <https://www.fastcompany.com/90157503/the-fraught-history-of-americas-most-pervasive-brand> [<https://perma.cc/E95Z-C6SB>].

327. For discussions on Urban Outfitters’ use of the Navajo name, see *supra* Section II.C.4.

328. Maria Cramer, *After Aunt Jemima, Reviews Underway for Uncle Ben, Mrs. Butterworth and Cream of Wheat*, N.Y. TIMES (Feb. 10, 2021), <https://www.nytimes.com/2020/06/17/business/aunt-jemima-mrs-butterworth-uncle-ben.html>. It is disputed if the racial stereotypes are referenced in Mrs. Butterworth’s case. For a detailed discussion of the diffused and commercial use of Aunt Jemima, see *supra* Section II.C.3.

329. COOMBE, *supra* note 91, at 4–6; see BROWN, *supra* note 9, at 69–81.

community.³³⁰ This definition requires further explanation of what is meant by consent and what level of distinctiveness is required to address the lack of affiliation or connection.

The requirement of consent brings up a few important questions: whose consent is required? A tribal leader? A single member? And what happens if there is disagreement between members? These questions are almost impossible to answer in the abstract, and they require the context of the particular community in question. Since this Article only outlines the framework of a legal cause of action, its suggestions also remain at a general level. From this perspective, the most workable path forward is to recognize the source communities' internal working mechanisms.³³¹ Since the cause of action outlined in this Article requires there to be a distinctive community, such an internal system is expected to exist.

Returning to the absence of affiliation and connection between the user and the source community, the latter must have a certain level of distinctiveness to ensure the feasibility of the cause of action. As discussed earlier, "diffusion" points to the number of communities with which the symbol may be associated and the distinctiveness of the source community. If the symbol is associated with a single community, it falls on the most distinct point on the spectrum. In contrast, if various discrete and independent communities share it, it is a diffused symbol. Most symbols fall somewhere in between these two extremes.

Determining whether the symbol is distinct enough to give rise to a claim of cultural passing off would have to be done on a case-by-case basis.³³² The distinctiveness of the source community, on the other hand, would be based on non-exhaustive and non-cumulative factors such as self-identification, legal recognition, existence of a set geographic location, ethnicity, and language.³³³ Understandably, defining the boundaries of communal

330. For a discussion of the commercial value of cultural symbols, see *supra* text accompanying note 324. McGowan, *supra* note 229; INT'L. TRADEMARK ASS'N, *supra* note 323.

331. *See, e.g.*, 2 N.C.C. § 101 (2025). Various Native American communities have detailed rules and procedures about how the community is to be represented in relationships with external entities. The largest Native American tribe, the Navajo Nation, has detailed governance rules with checks and balances similar to the U.S. Constitution. Comparatively, it may be more challenging to figure out the internal structure of other source communities for the purposes of getting consent or to establish standing.

332. See *infra* Sections IV.A–B for two instances where the cultural passing-off theory is applied. The examples offer two distinct cases, one relatively more straightforward and the other more challenging, where the application of the theory is examined.

333. *See, e.g.*, ROGERS BRUBAKER, ETHNICITY WITHOUT GROUPS (2006). One of the prominent debates about group identity is the potential difference in the interests and

identities is a daunting task. It is certainly beyond the scope of this Article. Luckily, many leading scholars have proposed workable solutions, and it is possible to allocate legal rights to communities if a certain level of clarity is introduced in the legal framework.³³⁴

This analysis of misappropriation must consider the collective goodwill the source community has in the public's minds and the damage the appropriation may inflict on such goodwill. In other words, a substantial portion of the public must associate the symbol in question with the source community for the symbol to meet the *distinctness* element.

Similarly, the definition of commercial use also falls on a spectrum. Commercial use is defined as use that relates to the advertisement, promotion, or sale of goods or services.³³⁵ While simple, this definition is a good starting point from which areas of contention could be addressed through courts or Congress to achieve a workable and fair system continuously. Here, a line drawing exercise is needed to ensure the border between commercial and non-commercial is clarified over time. However, the challenge of delimiting this border is eased because these questions have been addressed in adjacent areas, such as trademark law and free speech.³³⁶ Given these experiences, uses that are primarily personal, expressive, and political should clearly be grouped on the non-commercial side.

Merging these two definitions together offers the type of misappropriation at issue here—the use of a distinct cultural symbol in association with the advertisement, promotion, and sale of goods or services. As explained in Part II, these types of appropriations would fall within the fourth quadrant in the taxonomy of cultural appropriations.³³⁷ As such, instances that meet both requirements may resemble trademark infringement (particularly infringements in the certification and collective marks space) or the torts of passing off or extended passing off.³³⁸

expectations between homeland community members and the diaspora. For an in-depth discussion of these issues, see Stuart Hall, *Cultural Identity and Diaspora*, in IDENTITY: COMMUNITY, CULTURE, DIFFERENCE 222 (Jonathan Rutherford ed., 1990).

334. For an in-depth discussion of ways to identify distinct communities while maintaining the fundamental framework of liberal democracy, see generally WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1996) (discussing the cultural diversity of modern countries, the history of minority rights, and posing a new approach to the subject). See also S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2d ed. 2023).

335. See *supra* Section II.B.

336. See *supra* text accompanying notes 103–06; *supra* Section II.B.

337. See *supra* Part II.

338. For a discussion on the extended passing-off doctrine, see *supra* Section III.A.

Courts applying the cultural passing-off theory should consider the extensive case law and resulting tools, rules, and limitations in the original tort of passing-off. This includes the types of remedies, including injunctions and damages, that are customary under passing-off theory, and which should be available here as well.³³⁹ As a helpful example, it is a common feature that the defendant in a passing-off claim need not act fraudulently.³⁴⁰ Drawing on the established trademark law theory of “anonymous source,” the passing-off framework sets the requirements so that the public does not need to know the source by name, just that there is an entity associated with the signifier.³⁴¹ Additionally, there is no need to find competition between the claimant and the defendant.³⁴² These and other limitations, which may be borrowed from adjacent theories of liability, enable a more stable theory for the unique context of cultural passing off. In cultural passing-off theory, there is likewise no need to show fraudulent intent by the defendant, that the public knows of the specific source community associated with the symbol, or that there is a direct competition between the source community and the user.

3. Deprivation of Economic Advantage

The third and last element of the cultural passing-off theory is the deprivation of economic advantage.³⁴³ As stated earlier, this harm is recognized by Bruce Ziff and Pratima V. Rao’s seminal work.³⁴⁴ In this sense, the harm recognized here is one where a distinct cultural symbol is used in the commercial context in a way that denies the source community the opportunity to benefit from such a symbol.³⁴⁵

339. See *What Is Passing Off? Definitions, Defenses & Remedies Available*, BERKELEY LEGAL (Apr. 5, 2024), <https://berkeleylp.com/insights/what-is-passing-off> [https://perma.cc/9APT-WLCM].

340. See WADLOW, *supra* note 241, at 5–87.

341. See *id.* at 8–35.

342. See *id.* at 5–179.

343. For a discussion of the commercial value of cultural symbols, see McGowan, *supra* note 229. See also INT’L. TRADEMARK ASS’N, *supra* note 323; *Exhibition: Americans*, *supra* note 326.

344. See *supra* Section I.A.

345. This emphasis on economic harm is not meant to reduce the impact of other types of harm resulting from cultural appropriation. The emphasis is based on the goal of proposing a feasible legal framework while suggesting the use of quasi-legal solutions for other types of harm. For a detailed discussion of the various harms created by cultural appropriation, see *supra* Section I.A.

One analogue to this harm is the loss of licensing revenue present in intellectual property law.³⁴⁶ In considering if a certain unauthorized use of a copyright work is “fair use,” the fourth factor of the fair use analysis considers “the effect of the use upon the potential market for or value of the copyrighted work.”³⁴⁷ Admittedly, the application of “market effects” in general or, more specifically, lost licensing revenue has been controversial.³⁴⁸ The main criticism of this analysis is its circular nature—finding harm wherever the owner could have charged the defendant’s use—an interpretation which risks changing fair use’s balancing exercise into a strict liability regime.³⁴⁹ However, as many scholars have noted, this circular analysis could be addressed by balancing it with beneficial or market-expanding uses and by requiring a stronger showing of the feasibility of the potential market.³⁵⁰ Similar adjustments and fine-tuning will be needed for this element of the cultural passing-off framework as well.

Returning to the harm examined in this Article, the frequently utilized concept of “free riding” on the intellectual value created by others fits here.³⁵¹ The standard justification for most intellectual property rights is that

346. See 17 U.S.C. § 107.

347. *Id.* § 107(4).

348. For scholarship on judicial reliance on the “market effects” element in general and specifically on the harm of lost licensing revenue, see Suneal Bedi & Mike Schuster, *Measuring Fair Use’s Market Effect*, 6 WIS. L. REV. 1467, 1479–1482 (2022).

349. See Mark A. Lemley, *Should a Licensing Market Require Licensing?*, 70 L. & CONTEMP. PROBS. 185, 190 (2007).

350. See, e.g., Jane C. Ginsburg, *Fair Use Factor Four Revisited: Valuing the “Value of the Copyrighted Work”*, 67 J. COPYRIGHT SOC’Y 19 (2020) (arguing that courts should consider both market and non-market harms when evaluating the fourth fair use factor); Jeanne C. Fromer, *Market Effects Bearing on Fair Use*, 90 WASH. L. REV. 615, 640 (2015) (arguing that courts should consider market benefits and potential harms when assessing fair use). See generally David Fagundes, *Market Harm, Market Help, and Fair Use*, 17 STAN. TECH. L. REV. 359, 378–85 (2014) (arguing that fair use should consider overall market effects, including recognition, affirmation, reincarnation, and innovation).

351. For detailed discussions on the justification for intellectual property law, see generally WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 37–45 (2003) (presenting economic model of copyright and its limitations); ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* (2011) (emphasizing the balance between individual intellectual property claims and third-party or societal interests); RONALD A. CASS & KEITH N. HYLTON, *LAWS OF CREATION: PROPERTY RIGHTS IN THE WORLD OF IDEAS* 38–47 (2013) (noting that intellectual property protection leads to reduced access to information but also incentivizes innovation). For detailed discussions more specifically on the free-riding aspect of such theory, see generally Lemley, *supra* note 94, at 1032–47; Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 166–170 (1992) (warning that culture depends on free riding and intellectual property should

legal intervention is needed to address the benefit one gets from exploiting the public good created by another, because without legal intervention, there will be a tragedy of over-exploitation and under-production.³⁵² The difference is that the free riding taking place here is over the collective goodwill of a symbol associated with a distinct source community. This free riding on the collective goodwill developed by the source community is, at least in part, enabled by the non-exclusionary worldview that some source communities abide by, compared with the exclusionary practices in the corporate world.³⁵³ Similar incursions into other non-exclusionary or open knowledge systems have already been noted, most recently in the context of the open innovation ethos of the Internet age.³⁵⁴

This harm fits within the theory of damages under the passing off and extended passing-off theories. The tort of passing-off theory generally recognizes at least two types of damages: diversion of trade and dilution of goodwill.³⁵⁵ Diversion of trade resembles the deprivation of material advantage in the core concern it attempts to address—a misrepresentation leading the claimant's potential consumers to purchase products from the defendant.³⁵⁶ The dilution of goodwill, i.e., the ability of a symbol to signal a source to the public, is also closely tied to the harm of depriving the claimant of using the symbol to sell products or services.³⁵⁷

avoid overbroad entitlements); Brett Frischmann & Mark P. McKenna, *Comparative Analysis of Innovation Failures and Institutions in Context*, 57 Hous. L. Rev. 313, 332–34 (2019) (critiquing the free-rider allegory as too narrow to justify intellectual property rights).

352. See Garrett Hardin, *The Tragedy of the Commons: The Population Problem Has No Technical Solution; It Requires a Fundamental Extension in Morality*, 162 SCIENCE 1243, 1244–45 (1968); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989). This “free riding” theory of intellectual property law has been challenged by strong scholarly critique. See, e.g., Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1610–14 (1982). See generally Lemley, *supra* note 94 (arguing that the free riding argument in intellectual property is fundamentally misguided).

353. Richard A. Posner, *Exclusionary Practices and the Antitrust Laws*, 41 U. CHI. L. REV. 506, 507 (1974).

354. See, e.g., Philip Mirowski, *The Evolution of Platform Science*, 90 SOC. RSCH: AN INT'L Q. 725, 730–36 (2023) (discussing the concept of “platform capitalism” where corporations use the open community ethos to benefit from aggregated data produced by others).

355. For a detailed discussion of the various actionable misrepresentations, see WADLOW, *supra* note 241.

356. *Id.*

357. *Id.* It should be noted that dilution of goodwill is also closely associated with the “cultural degradation” harm identified in Bruce Ziff and Pratima Rao’s seminar book, *Borrowed Power*. See Ziff & Rao, *supra* note 39, at 14. For a discussion of these harms, see *supra* Section I.A.

Beyond the torts of passing off and extended passing off, current U.S. law may also be friendly to the damage emphasized in this Article. As stated earlier, the Lanham Act goes beyond aspects of the passing-off doctrine in its original scope.³⁵⁸ The expansive language in § 1125(a)(1)(A) extends confusion-based trademark infringement to include confusion as to “affiliation, connection, or association,” which, arguably, is supportive of the cultural passing-off theory.³⁵⁹ This expansive understanding, when read in combination with, for instance, the finding that the term “Navajo” is not generic in its use in products such as “Navajo panties” or “Navajo print flask,” supports the extension of the Lanham Act to include a cultural passing off-theory.³⁶⁰

IV. APPLYING CULTURAL PASSING OFF

Now that the theory of cultural passing off has been outlined, its application to a real dispute will help make it more concrete. If they are to be helpful, examples should allow the application of each element of the cultural passing-off theory—collective goodwill, commercial use of a distinctive cultural signifier, and the deprivation of material advantage. Furthermore, the examples are selected as contexts where current laws, including trademark law, would not offer remedy.³⁶¹

Two examples are analyzed in this Section: one relatively more straightforward case and one more challenging. The Cherokee name by the Jeep Corporation is used as a relatively straightforward case, whereas Gucci’s use of a turban during its fashion shows is used as a more complicated one.³⁶²

358. *Supra* Section III.A.4.

359. 15 U.S.C. § 1125(a)(1)(A); *see also supra* note 183 and accompanying text.

360. *See Navajo Nation v. Urban Outfitters, Inc.*, 212 F. Supp. 3d 1098, 1104 (D.N.M. 2016).

361. *See supra* Section I.C.

362. *See supra* Section I.A. for the “Jeep Cherokee” discussion and *supra* Section I.B. for a discussion on Gucci’s use of turbans.

A. The “Jeep Cherokee” Dispute

This Section applies the passing-off theory to the use of the name “Cherokee” in association with the Jeep Brand.³⁶³ Jeep started selling cars under “Cherokee” and “Cherokee Chief” in 1975.³⁶⁴ The Cherokee line of vehicles is one of “one of Jeep’s most legendary nameplates.”³⁶⁵ The company said the name was “carefully chosen and nurtured over the years to honor and celebrate Native American people for their nobility, prowess, and pride.”³⁶⁶

The company did not consult the Cherokee Nation when it chose the names.³⁶⁷ Chief Hoskin of the Cherokee Nation has expressed disapproval of the name “Jeep Cherokee.”³⁶⁸ Like many other instances where Native American names are used in association with products, the company must have expected the name to be free for anyone to use without authorization.³⁶⁹ The company temporarily changed the name to Jeep Liberty; however, its new name did not catch on as much as the original, so it was switched back to Cherokee.³⁷⁰ After many years of public pressure, the company appears to be retiring the nameplate.³⁷¹

A claim of cultural passing off would be available in the Jeep Cherokee case, depending on the specific pieces of evidence supporting each claim. First, there is collective goodwill in the “Cherokee” name. As outlined

363. Taylor Telford, *Cherokee Nation to Jeep: Stop Using the Tribe’s Name*, WASH. POST (Feb. 22, 2021), <https://www.washingtonpost.com/business/2021/02/22/cherokee-nation-new-jeep-name/>.

364. See *History: 1970–1979*, JEEP, <https://www.jeep.com/history/1970s.html> [https://perma.cc/FW93-UNHE] (listing Jeep models released between 1970 and 1979 and stating that the Jeep Cherokee (SJ) and Jeep Cherokee Chief (SJ) were first produced in 1975).

365. Brian Silvestro, *Jeep Kills Cherokee, Breaks Nearly 50-Year Production Run*, RD. & TRACK (Mar. 23, 2023), <https://www.roadandtrack.com/news/a43400838/jeep-cherokee-dead> [https://perma.cc/3LLP-9JCB].

366. Wilson Wong & Phil Helsel, *Jeep Open to Dropping Cherokee Name, CEO Says*, NBC NEWS (Mar. 4, 2021), <https://www.nbcnews.com/news/us-news/jeep-open-dropping-cherokee-name-ceo-says-n1259641> [https://perma.cc/CTF5-FT7E].

367. Angela R. Riley et al., Opinion, *The Jeep Cherokee Is Not a Tribute to Indians. Change the Name*, WASH. POST (Mar. 7, 2021), <https://www.washingtonpost.com/opinions/2021/03/07/jeep-cherokee-name-change-native-americans/>.

368. See Gross, *supra* note 1.

369. See McGowan, *supra* note 229.

370. See Tara Hurlin, *The Jeep Cherokee Is Discontinued Again, Here’s Why*, HEMMINGS (Apr. 3, 2023), <https://www.hemmings.com/stories/car-culture/jeep-cherokee-discontinued> [https://perma.cc/EP8T-UPSV] (explaining that the Jeep Cherokee was renamed to the Jeep Liberty in 2001 but was changed back in 2013 when the “Liberty failed to carry on the Cherokee’s success . . .”).

371. Silvestro, *supra* note 365.

earlier, the “collective goodwill” element requires the group to have the following characteristics: self-identification, cultural cohesiveness, geographical location, legal recognition of the community as a cultural group, shared ethnicity, and the group’s use of common language and symbols.³⁷²

The Cherokee Nation has a sovereign tribal government with a constitution established in 1839 and a membership of over 450,000 tribal citizens.³⁷³ While citizens reside worldwide, a considerable portion of the population resides within the borders of the tribe’s reservation in northeastern Oklahoma.³⁷⁴ As one of the largest tribes in the country, it is reasonable to presume that a considerable portion of the public knows the Cherokee name.³⁷⁵ The tribal government employs thousands of individuals to provide various services similar to those provided by the U.S. government.³⁷⁶ The Cherokee Nation has set rules about membership and utilizes shared symbols throughout its various social, political, and legal initiatives.³⁷⁷ Therefore, the Nation meets the definition of a cohesive community that can hold collective goodwill over shared symbols.

Turning to the second element of the cultural passing-off theory, there must be misrepresentation, i.e., an unauthorized commercial use of a distinctive cultural symbol.³⁷⁸ As stated earlier, there is no evidence that consent was sought before Jeep started using the name.³⁷⁹

The use of the Cherokee name easily meets the *distinctiveness* requirement since the word is the officially recognized name of a Native

372. *See supra* Section I.B.1.

373. For detailed information about the history and governance of the Cherokee Nation, see *Osiyo!*, CHEROKEE NATION, <https://www.cherokee.org> [<https://perma.cc/UAJ9-272G>].

374. *Id.* (estimating that over 141,000 citizens reside within the northeastern Oklahoma reservation).

375. *From the Carolinas to Oklahoma: The History of the Cherokee Nation*, NATIVE HOPE (Feb. 27, 2022), <https://blog.nativehope.org/the-history-of-the-cherokee-nation#:~:text=The%20Cherokee%20are%20one%20of,in%20the%20Native%20American%20community> [<https://perma.cc/68EX-34B2>] (“The Cherokee are one of the largest and most well-known Native American tribes in history.”).

376. *See, e.g.*, *All Services*, CHEROKEE NATION, <https://www.cherokee.org/all-services> [<https://perma.cc/FDW6-WF7R>].

377. *Frequently Asked Questions*, CHEROKEE NATION, <https://www.cherokee.org/our-government> [<https://perma.cc/DD6B-QDCD>] (displaying the various branches of the Cherokee Nation governance structure using the term “Cherokee” as a symbol of the tribal nation).

378. *See supra* Section III.B.2.

379. *See supra* note 367.

American tribe.³⁸⁰ Similarly to the point of collective goodwill stated above, the name of a source community, such as Navajo or Cherokee, offers the most straightforward example of distinctive symbols. While various symbols may be shared by source communities,³⁸¹ the primary example of a symbol that holds the community's goodwill is its name. The more we move away from core cultural signifiers, the less clear the cases will get.

The use is primarily *commercial* since the Cherokee name is directly associated with the advertisement, promotion, and sale of a product, in this case, one of Jeep's best-selling cars.³⁸² It is fair to assume that a considerable portion of the public knows the name of one of the largest Native American tribes in the U.S. Furthermore, the cultural passing-off theory does not require that the public know the specific community associated with the Cherokee name, just that such a community exists. Additionally, there is no need to show direct competition between Jeep and the Nation or evidence of fraudulent intent on Jeep's part. These elements are not part of the original tort of passing off, extended passing off, and trademark infringement.³⁸³ The combination of the commercial nature of the use and the distinctiveness of the cultural signifier in question creates an element of misrepresentation.

The third element, *deprivation of material advantage*, requires that the use of the symbol has the effect of denying the source community the opportunity to benefit from the use of the symbol.³⁸⁴ Under the theory of "lost licensing revenue," the Cherokee Nation has a strong claim. The criticisms outlined earlier against this theory can be addressed here with the limiting features suggested by scholars or adopted by courts in the intellectual property law context.³⁸⁵

Using the Cherokee name in association with a product without the consent of the Cherokee Nation can be expected to deprive the Nation of its

380. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 Fed. Reg. 7554, 7555 (Jan. 29, 2021) (listing Cherokee Nation as an officially recognized Native American tribe).

381. See *Common Symbols in Native American Art and Jewelry*, PALMS TRADING CO. (Nov. 30, 2023), <https://www.palmstrading.com/common-symbols-in-native-american-art-and-jewelry/#:~:text=Native%20American%20cultures%20are%20rich,%2C%20culture%2C%20and%20daily%20life> [https://perma.cc/Z9XR-NAUN].

382. See Cobus F. Potgieter, *The 10 Top Selling Jeep Models Ever Made*, CARBUZZ (Oct. 2, 2024), <https://carbuzz.com/the-10-top-selling-jeep-model-ever-made> [https://perma.cc/QMC2-S7S5].

383. For a detailed discussion of these elements, see *supra* Section I.A.1–3.

384. See *supra* Section I.A for a discussion of deprivation of material advantage.

385. See *supra* Section I.B.3.

ability to use the name in commerce. While this point requires further evidence to show how aggressively Jeep has enforced its trademark right, there have been cases where source communities were asked to stop using their own symbols by others who developed trademark rights over them.³⁸⁶

Given the increasing expansion in trademark law—both in confusion and dilution-based causes of action—it is not a stretch to imagine that Jeep could enforce its trademark right over the Cherokee name.³⁸⁷ It is certainly easy to imagine that the Jeep corporation would quickly send a cease-and-desist letter to the Cherokee Nation if the latter started offering vehicles in the marketplace. Given expansive protection under the dilution theory of trademark law, Jeep would also have strong claims if the Cherokee Nation used its name in relation to a wide variety of products that may not be confusing to consumers.³⁸⁸

However, one challenging aspect of this analysis is that the average American consumer may be so used to cultural appropriation that they do not expect any affiliation between Jeep's use of the Cherokee name and the Cherokee Nation. That is to say, the presumption of affiliation or

386. See, e.g., Nick Kindelsperger, *Hawaiian Activists Call for Boycott of Aloha Poke*, CHI. TRIB. (May 31, 2019), <https://www.chicagotribune.com/2018/07/30/hawaiian-activists-call-for-boycott-of-aloha-poke> (discussing an incident where a Chicago-based business sent cease and desist letters to businesses in Hawaii who were using the term “Aloha Poke” in relation to a similar business); Riley, *supra* note 367 (discussing disputes where companies use intellectual property laws to own cultural symbols or expressions which then restricts the right of the source communities to use them); COOMBE, *supra* note 91, at 68–73 (examining instances where corporate monopolies over cultural symbols are supported by enforcement of intellectual property rights). For instances of biopiracy where the company accused of biopiracy is attempting to stop the source community's use of its own genetic resource, see Gillian N. Rattray, *The Enola Bean Patent Controversy: Biopiracy, Novelty and Fish-And-Chips*, 1 DUKE L. & TECH. REV. 1, 1–8 (2002); LAURENCE R. HELFER, INTELLECTUAL PROPERTY RIGHTS IN PLANT VARIETIES: AN OVERVIEW WITH OPTIONS FOR NATIONAL GOVERNMENTS 10–11 (FAO Legal Papers Online No. 31, 2002).

387. See McKenna, *supra* note 104, at 1846; Stacey L. Dogan & Mark A. Lemley, *Grounding Trademark Law through Trademark Use*, 92 IOWA L. REV. 1669, 1672–79 (2007); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1722–24 (1999); Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 517–18 (2008).

388. See Federal Trademark Dilution Act of 1995, Pub. L. No. 104–98, 109 Stat. 985 (1996). The theory of trademark dilution was first outlined in the seminal work by Frank Schechter. See generally Schechter, *supra* note 285 (outlining the theory of trademark dilution). The theory has since evolved into a broader cause of action. See J. Thomas McCarthy, *Proving a Trademark Has Been Diluted: Theories or Facts?*, 41 HOUS. L. REV. 713, 715–17 (2004). See generally Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 687–701 (2004) (discussing how trademark law addresses dilution and the challenges of ambiguity in determining what constitutes actionable infringement).

connection may not exist in the minds of a public that is so used to cultural appropriation. If that is the case, then consumers may be aware of or expect Jeep's use to be without consent. Here, there could be a strong normative role that trademark law could play in encouraging respect for source communities by righting historical wrongs.³⁸⁹

As a way to justify the new cause of action outlined here, it is helpful to show that trademark law may not be a feasible route. The Cherokee Nation does not have a registered trademark for the name "Cherokee." This is entirely understandable since trademark registration was not a common practice among Native American communities when the Cherokee name was first used in the 1970s.³⁹⁰ Furthermore, there is little evidence to suggest that the Cherokee Nation has been using the term "Cherokee" in a way that easily meets the requirements of trademark law for acquiring trademark rights. The use of commerce elements requires continuous and intentional use of the symbol in commerce.³⁹¹

Given the challenges of meeting the standard for many Native Communities, it would have been challenging for the Cherokee Nation to bring a successful trademark infringement action.³⁹² There may be other

389. There is a robust scholarly debate about whether trademark law should passively follow consumer perception or actively shape or lead it. *See generally*, e.g., Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413 (2010) (arguing that trademark law has expanded beyond source confusion to regulate perceived affiliations); Robert G. Bone, *Taking the Confusion Out of "Likelihood of Confusion": Toward a More Sensible Approach to Trademark Infringement*, 106 NW. U. L. REV. 1307 (2015) (highlighting critiques that the likelihood-of-confusion test has expanded beyond source confusion to cover sponsorship and affiliation); William McGeeveran & Mark P. McKenna, *Confusion Isn't Everything*, 89 NOTRE DAME L. REV. 253 (2013) (noting the trend of expanding actionable confusion beyond its original scope). For discussions on the normative role that trademark may or should play, *see generally* McKenna, *supra* note 104 (noting that traditional trademark law focused on preventing trade diversion, not consumer confusion); Mathias Strasser, *The Rational Basis of Trademark Protection Revisited: Putting the Dilution Doctrine into Context*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 375, 416 (2011) (arguing the Federal Trademark Dilution Act aligns with traditional trademark rationales through a functional approach); Litman, *supra* note 387 (analyzing U.S. trade symbol law and the balance between consumer confusion and commercial interests); and Beebe, *supra* note 388.

390. *See* Richard A. Guest, *Intellectual Property Rights and Native American Tribes*, 20 AM. INDIAN L. REV. 111, 114–15 (1995); *see, e.g.*, Brian Zark, *Use of Native American Tribal Names as Marks*, 3 AM. INDIAN L.J. 537, 545–46 (2015) (explaining that few tribes have registered insignias or names despite PTO efforts to protect them).

391. *See* Lucent Info. Mgmt., Inc. v. Lucent Techs., Inc., 186 F.3d 311, 319 (3d Cir. 1999) (Ackerman, J., dissenting) (quoting *La Societe Anonyme des Parfums le Galion v. Jean Patou, Inc.*, 495 F.2d 1265, 1272 (2d Cir. 1974)).

392. *See* Central Mfg., Inc. v. Brett, 492 F.3d 876, 882 (7th Cir. 2007) (rejecting a trademark infringement claim due to a lack of evidence establishing continuous use); Christian

grounds on which a trademark infringement claim may fail. For instance, if the above assumption about the American public being used to cultural appropriation holds true, it may be challenging to prove the likelihood of confusion element of trademark infringement.

Here, it is worth noting that, although rare, the trademark system has entertained the possibility that use of a Native American tribal name potentially creates consumer confusion under certain circumstances. The Trademark Trial and Appeal Board (TTAB) held that a trademark application for the term “LAKOTA” was properly rejected by the examiner under the Lanham Act § 2(a) as a false designation of origin.³⁹³ The Board held that “a false suggestion of a connection may be found when one’s right to control the use of its identity is violated, even if the name claimed to be appropriated was never commercially exploited as a trademark.”³⁹⁴ However, the decision is limited in that the opinion was given as a rejection of a trademark application by an individual without the necessary association with the source community, rather than an application for the term by the Native American tribe itself. Still, the decision offers a glimpse into what the cultural passing off theory could look like within the context of Native American tribes.

As has been the case many times, Native American tribes would not be able to use existing laws, including intellectual property laws, to protect against cultural appropriation.³⁹⁵ Aside from the preceding point, the Jeep Cherokee analysis demonstrates the advantages of adding the cultural passing-off theory, even if trademark law could offer some solutions.

B. Gucci’s Use of Turbans

A more challenging context tests the viability of the cultural passing-off theory. In 2018, Italian fashion house Gucci faced accusations of cultural appropriation for featuring non-Sikh models donning turbans on the

Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc., 696 F.3d 206, 226 (2d Cir. 2012) (holding that trademark protection requires evidence that a mark has acquired secondary meaning through consistent use in commerce); Planetary Motion, Inc. v. Techsplosion, Inc., 261 F.3d 1188, 1194–98 (11th Cir. 2001) (discussing use requirements necessary to establish trademark ownership rights).

393. *In re Kent Pederson*, Serial No. 85328868 (T.T.A.B. 2013); Lanham Act, 15 U.S.C. §1052(a).

394. *In re Kent Pederson*, Serial No. 85328868, 15 (T.T.A.B. 2013).

395. For a detailed discussion of the limitations of current laws, see *supra* Section I.C.

runway.³⁹⁶ The turban is a sacred symbol that male members of the Sikh religion wear, according to the traditions of their Gurus, to mark the distinctiveness of their community.³⁹⁷ Sikhism is the fifth-largest religion, with twenty-seven million followers globally.³⁹⁸ Thousands of Sikhs publicly communicated their disappointment and anger over what they believed was a cultural appropriation of one of their most sacred symbols.³⁹⁹

Given this background, there is a relatively strong argument that collective goodwill is associated with the turban used in Sikhism. The factors outlined as part of the collective goodwill element are self-identification, the cultural cohesiveness of the group, geographical location, legal recognition of the community as a cultural group, shared ethnicity, and the group's use of common language and symbols.⁴⁰⁰ The religious rules and practices result in a cohesive cultural group. Although a minority of Sikhs are found in various corners of the world, the overwhelming majority reside in the Punjab region of India.⁴⁰¹ Even if the group may not have an independent legal identity with U.S. law, Sikhs are recognized as a distinct religious group by the public with most members having shared ethnicity and language, including the iconic turban.⁴⁰²

There is evidence to prove that the element of misrepresentation is present in Gucci's use of the turban—it is a commercial use of a distinct cultural symbol. Although Sikhs reside in every corner of the globe, the overwhelming majority—over 80% of believers—reside in India, where

396. AL JAZEERA, *supra* note 5.

397. W. H. MCLEOD, THE SIKHS: HISTORY, RELIGION, AND SOCIETY (1989); Shanti Kaur Khalsa, *Why Do Sikhs Wear Turbans?*, SIKH DHARMA INT'L (Mar. 21, 2016), <https://www.sikhdharma.org/why-do-sikhs-wear-turbans> [<https://perma.cc/ZCM9-A5SQ>].

398. See *Sikhism by Country 2025*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/sikhism-by-country> [<https://perma.cc/ZB8T-GNME>].

399. AL JAZEERA, *supra* note 5.

400. See *supra* Section III.B.1.

401. Office of Multicultural Affairs, *Culture and Religion: Sikhism*, N. TERRITORY GOV'T, <https://dpsc.nt.gov.au/media/docs/multicultural-affairs/other-religion-fact-sheets/nt-sikhism-fact-sheet.pdf> [<https://perma.cc/EG2Z-WAEA>] (stating that 80% of Sikh reside in India, and particularly in the Punjab region, and significant members of the religion reside in Canada, U.K., U.S., Australia, New Zealand, East Africa, Malaysia, Singapore, and Thailand). The Sikh Coalition is the largest Sikh American organization representing the interests of Sikhs in the U.S. *History*, THE SIKH COAL., <https://www.sikhcoalition.org/about-us/history> [<https://perma.cc/SYJ7-5TND>]. It was established in response to violent attacks against Sikh Americans in response to the 9/11 attacks. *Id.* For more about the organization's history, see *id.*

402. See generally MCLEOD, *supra* note 397 (discussing Sikh history, religion, and society).

various political and institutional frameworks advocate for the interests of the Sikhs.⁴⁰³ Furthermore, the existence of religious rules, processes, and rites offers clarity in terms of identity and membership.⁴⁰⁴ As such, the turban falls on the distinct line of the distinct-diffused spectrum.

Gucci's use of the turban is also primarily commercial. The show in question took place during Milan Fashion Week, an event primarily to advertise and promote a commercial brand.⁴⁰⁵ The use of this headwear in its fashion show reveals the symbol's inherent association with the marketing and sale of its fashion designs.⁴⁰⁶ The symbols are part of the "fashion design" consumers care about when contemplating purchasing Gucci's products.⁴⁰⁷ In trademark law parlance, the symbols are placed on the goods, their container, or associated displays.⁴⁰⁸

Finally, applying the element of harm—deprivation of material advantage—is more challenging. The turban is one of the most important cultural symbols of Sikhism.⁴⁰⁹ Followers of the religion purchase the cloth and wear it based on a traditional style.⁴¹⁰ Therefore, there is a market for the symbol. Gucci's use of the turban has the potential to deprive the community of a material advantage, especially if the use implies to the public that the company is collaborating with the Sikh community.

However, this argument reveals a challenging aspect of the cultural passing-off theory. While the arguments outlined earlier may pose strong claims against Gucci's use, equally strong arguments support the opposite conclusion, making the application of the cultural passing-off theory complicated. First, Sikhism follows a decentralized governance system.⁴¹¹

403. Office of Multicultural Affairs, *supra* note 401.

404. See, e.g., *Akal Takht*, BRITANNICA, <https://www.britannica.com/topic/Akal-Takht> [https://perma.cc/N8Q2-X69Q] (Sept. 15, 2025) (also highlighting that the Akal Takht is the highest temporal seat in Sikhism and is based in Amritsar, Punjab State, Northwestern India).

405. See Lela London, *How Much Does Fashion Week Cost (and What Is the ROI)?*, FORBES (Feb. 14, 2019), <https://www.forbes.com/sites/lelalondon/2019/02/14/how-much-fashion-week-cost-what-is-roi> (reporting that Gucci's ROI was \$19.4 million in the fashion season following the event, Spring and Summer of 2019).

406. See *id.* (discussing the significance of fashion shows to fashion companies, including Gucci, as a "platform to reach the digital savvy consumer").

407. See *id.*

408. Lanham Act, 15 U.S.C. § 1127.

409. See *Identity*, THE SIKH COAL., <https://www.sikhcoalition.org/about-sikhs/identity> [https://perma.cc/2T2D-C5LB].

410. See *id.*

411. See *A Revolutionary Blueprint for Sikh Sovereignty in the 21st Century*, PANTH-PUNJAB PROJECT (Apr. 24, 2025), <https://www.panthalpunjab.com/p/a-revolutionary-blueprint-for-sikh> [https://perma.cc/M8TB-E3GY] (discussing that there is no centralized governance

As a result, there may be disputes about the internal governance structure. For instance, one of the community groups that opposed Gucci's use is a coalition of Sikh civil rights groups based in New York.⁴¹² If this New York-based group's reaction to the use conflicts with other believers, for instance, in India, deciding how to address such a dispute will be challenging. The lack of a centralized governance structure will be a core challenge in claims of cultural passing off.

Second, the fact that most Sikhs reside in India introduces a layer of challenge, i.e., bringing legal claims across international jurisdictions.⁴¹³ Suppose the lawsuit is to be brought in Italy, based on where the appropriation took place. In that case, Italian courts must entertain cultural questions about a cultural symbol that does not play a prominent role in Italy. If the lawsuit is brought in the U.S., there will be challenges with standing and jurisdiction of U.S. courts.⁴¹⁴

Third, the fact that Sikhs, similar to other religious groups, reside in various regions of the world⁴¹⁵ means that the turban falls on the diffused side of the distinct-diffused spectrum, not because the symbol is diffused but because of the lack of a clearly distinct source community. Applying the cultural passing-off elements will be even more cumbersome if that is the case.

Fourth, proving that the type of headgear Gucci displayed during its fashion show is one exclusively associated with the Sikh community rather than being shared by other communities is an arduous task. Given the diversity and history of headdresses in various cultures, such a claim poses a considerable challenge to the application of the cultural passing-off theory. However, this complexity is familiar to U.S. courts. For instance, with intellectual property law, claimants must prove the likelihood of confusion in trademarks⁴¹⁶ and substantial similarity in copyright law⁴¹⁷

system like the Catholic Church for Catholicism). This decentralized governance structure makes it challenging to find a specific entity that can provide authoritative statements about how a particular use of Sikh cultural symbols would be seen by members. Such a question would need to be addressed on a case-by-case basis.

412. AL JAZEERA, *supra* note 5.

413. See Office of Multicultural Affairs, *supra* note 401.

414. See Jacopo Crivellaro, *Shooting Down Moths – How Foreign Plaintiffs Are Denied Access in U.S. Courts*, 2 CIV. PROC. REV. 202, 215–18 (2011) (describing how recent U.S. Supreme Court decisions have heightened pleading standards and expanded the forum non conveniens doctrine, effectively restricting foreign plaintiffs' access to federal courts).

415. Office of Multicultural Affairs, *supra* note 401.

416. CASS & HYLTON, *supra* note 351, at 137–38.

despite the availability of comparable symbols or expressions to that of the claimant.

Lastly, the sacredness of the symbol means that commercialization is usually not a primary concern for community members. Thus, it will be difficult to prove the harm of deprivation of material advantage. This reveals a significant limitation of this theory—that it addresses a relatively smaller subset of the concerns around cultural appropriation. As explained earlier, however, such limited scope is needed if legal intervention is to take place without disrupting fundamental rights and protections within the U.S. legal system.⁴¹⁸

V. CONCLUSION

This Article makes two novel contributions. First, it introduces a method to categorize cultural appropriation into four types based on two factors: the level of diffusion of a cultural symbol and the degree of its commercial use. The classification identifies four quadrants: diffused non-commercial, distinct non-commercial, diffused commercial, and distinct commercial. The Article argues that legal remedies for the first three categories are largely unworkable without significant disruption to long-standing fundamental rights such as freedom of expression and intellectual property rights.

The Article's second and more significant contribution is developing a new theory of "cultural passing off." The theory proposes a new claim triggered within the fourth category of cultural appropriation: a claim against the commercial use of a distinct cultural symbol that falsely suggests an affiliation with an identifiable source community. The Article reinterprets the tort of passing off, extended passing off, and trademark law to fit this context, suggesting claimants prove three elements: collective goodwill, commercial misappropriation of a distinct cultural symbol, and deprivation of material advantage to the source community.

The cultural passing-off theory aims to fill the gap in current law by providing a more targeted and balanced approach to addressing specific

417. *Copyright Litigation 101*, THOMSON REUTERS (Dec. 16, 2022), [https://legal.thomsonreuters.com/blog/copyright-litigation-101/#what-are-elements-of-a-copyright-infringement-claim? \[https://perma.cc/667F-2TVT\]](https://legal.thomsonreuters.com/blog/copyright-litigation-101/#what-are-elements-of-a-copyright-infringement-claim? [https://perma.cc/667F-2TVT]).

418. For a discussion of the challenges of introducing a legal right against cultural appropriation, see *supra* Section I.C. For an analysis of the narrow scope of the theory of cultural passing off, see *supra* Sections I.A–B.

types of cultural appropriation without overreaching to protected speech or non-commercial use that may benefit social progress. The theory of cultural passing off would allow for limited but effective legal intervention in cases where the harm caused by cultural appropriation is primarily economic, thereby avoiding broader legal reforms that may conflict with established rights.