

Draft Steps When Considering the Use of Elements of Indigenous Peoples' Traditional Cultural Expressions in Fashion

Consultation Draft



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It is not a substitute for legal advice. Its purpose is limited to providing basic information.

Introduction

Indigenous Peoples have a wealth of traditional cultural expressions that take many different forms including, for example, traditional textiles, attire, ornaments, symbols, and designs. They often inspire others, including fashion companies, who always seek creative input and fresh ideas.

Unfortunately, elements of Indigenous Peoples' cultural expressions have sometimes been used without the consent of their traditional owners or custodians and without benefits being shared with Indigenous communities. When such uses occur, irrespective of intent, they are a matter of concern and mistrust on the side of Indigenous Peoples and can also tarnish the reputation of companies among consumers. At the same time, brand owners are increasingly conscious of the need to be more diverse, inclusive and sustainable, as empowered consumers demand authenticity and equity.

This document outlines six steps that fashion companies are invited to consider if they plan to approach or engage with an Indigenous community regarding the use of elements of its traditional cultural expressions in a design or project. The steps are also relevant in the context of collaborations between a fashion company and Indigenous Peoples, whether the collaboration involves the use of specific designs or patterns as such, an adaptation of such elements by a fashion company, potentially with the collaboration of an Indigenous designer, or a product or parts of it being crafted by Indigenous artisans.

It is hoped that following these steps can lead to mutually beneficial collaborations between Indigenous Peoples and fashion companies and promote and support the ethical and meaningful engagement with Indigenous Peoples over the use of elements of their cultural expressions.

This document was developed by WIPO in consultations with Indigenous Peoples' representatives from different geo-cultural regions, several fashion companies and international experts on fashion, intellectual property and cultural heritage. It is based on documented best practices on respectful and ethical engagement with Indigenous Peoples in other fields and industries.

The draft steps do not offer a ready-made plan for all projects that involve the use of Indigenous Peoples' traditional cultural expressions. They are intended to encourage conversations and the approach to be taken will need to be adapted to each project or situation.

This document is a consultation draft. Comments and feedback are welcomed and should be addressed to the Traditional Knowledge Division of WIPO at grtkf@wipo.int.

Research Cultural Context



Traditional cultural expressions held by Indigenous Peoples are deeply connected to their history, beliefs, spirituality, cultural heritage, traditions, and importantly to their identity. This includes an Indigenous community's traditional clothing, textiles and designs.

Using elements of Indigenous Peoples' cultural expressions without authorization and in inappropriate manners, even unintentionally, could cause offense and harm to Indigenous Peoples. This could also damage a fashion company's reputation and expose it to liability.

Inappropriate use of a sacred or secret cultural symbol or design may cause considerable spiritual offence to an Indigenous community.

If you think that some of your products or designs may incorporate, be inspired by, or refer to an Indigenous Peoples' culture, or if you are considering using traditional cultural expressions in a design or collection, you should carefully research the cultural significance of those cultural expressions.

A cultural significance due diligence check will help in developing a deeper understanding and appreciation for a community's cultural expressions and provide clues as to how to use them in an appropriate and respectful manner.

It could start with the following questions:

- Where does this cultural expression come from? Who may be considered as its legitimate holders or custodians?
- What is the historical, spiritual or social significance attached to this cultural expression?
- Would the use of this cultural expression reproduce offensive stereotypes about its holders or custodians?
- Would its use be offensive or disrespectful to the beliefs and worldviews of the community or peoples it derives from?
- Would it be ethical and appropriate to use this cultural expression in the context of your project/collection/product?

Some traditional cultural expressions are not suitable for wide dissemination, mass communication and public sharing due to their sacred or secret nature. Therefore, it is important to discuss beforehand any restrictions on their use with relevant communities, peoples or other representative groups.

The next recommended step will be to determine whom you should talk to within a community in order to avoid any misuse and misappropriation of that community's cultural expressions.

Conduct Relational Research

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Indigenous Peoples are the custodians and interpreters of their own cultures, whether created in the past or still practiced and being developed by them.

Traditional cultural expressions are generally regarded as collectively originated and held. This may also include cases where cultural expressions are further developed by an individual member of a community.

Collective ownership can take different forms and every element of an Indigenous Peoples' cultural heritage has its traditional holders or custodians, who can be, for example, a community as a whole, a particular family or clan within that community, an association or representative body, or even an individual who has been taught, initiated or entrusted to be a particular cultural expressions' custodian.

The traditional holders or custodians of an Indigenous Peoples' cultural expressions are usually determined in accordance with their customs, protocols, laws and practices.

Actively reaching and seeking out the right person(s) or body within a community will allow you to learn more about the cultural expression that is of interest to you and its appropriate and ethical use.

It will also help you clarify who should be your focal point when discussing or negotiating the use of a particular cultural expression.

When conducting relational research, be aware that:

- One Indigenous community or people cannot speak for another Indigenous community or people.
- While speaking to individuals, do not assume that they necessarily have the authority to speak on behalf of their community unless there is a clear understanding that they are entitled to represent the community's political or cultural leadership.
- It may be erroneous to presume that anyone of Indigenous descent necessarily possesses a deep expertise on their community's cultural expressions and has authority to speak on behalf of the community.
- Two or more communities, within one or more countries, may share identical or similar cultural expressions.

Conducting relational research will help ensure that you are interacting with those who have the authority and knowledge to engage with you on behalf of the legitimate holders or custodians of a cultural expression.

Build Relationships and Trust



Building intentional and meaningful relationships based on trust, respect and mutual understanding is a crucial step towards a successful collaboration between an Indigenous community and a fashion company.

This involves engaging in open and transparent dialogue, actively listening to a community's concerns and aspirations, and demonstrating a genuine commitment to collaboration.

The relationship should be nurtured prior to and throughout the collaboration. **Here are some key aspects to consider:**

- **Invest time in building relationships**

Building relationships and trust with Indigenous communities or individuals takes time and effort, so be patient and consistent. This should be factored into your planning and timeline as trust may be harder to achieve when faced with tight timelines at a later stage.

- **Approach with respect**

Showing respect to the Indigenous culture is an important step towards building meaningful relationships. Recognize that Indigenous communities have a rich cultural heritage and unique perspectives. Approach them with respect and a willingness to learn.

- **Learn the Indigenous ways**

Research and learn about the culture, customs and dynamics in the community, and of course the cultural expression you are interested in. Indigenous communities may also have specific cultural or community protocols or customs on how they wish to be acknowledged and approached. Familiarize yourself with these protocols and ensure that you adhere to them. You may seek guidance from a knowledgeable community member or a cultural consultant to navigate cultural sensitivities appropriately.

- **Be aware of a community's governance structure**

Many Indigenous Peoples are sovereign and autonomous, which could imply building relationships with governing bodies. Respect to the roles, dynamics and leaderships should be taken into account.

- **Be aware of a community's governance structure**

Many Indigenous Peoples are sovereign and autonomous. They have the right to self-determination according to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). This could imply building relationships with governing bodies.

- **Build a forward looking relationship**

Some Indigenous communities and their members may express grievances about a negative experience with the fashion industry in the past. Listen and learn about their views and perspectives on these experiences. At the same time, be ready for questions concerning your company's corporate culture and history and its values.

Reach an Agreement

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Reaching an agreement on the terms of use of a cultural expression with its legitimate holders or custodians is an essential step in establishing a mutually beneficial collaboration between a fashion company and an Indigenous community.

The process of reaching an agreement with the holders or custodians of a cultural expression should follow the principle of **prior and informed consent** and the terms of the collaboration should be **mutually agreed**.

"Prior" means that the consent is given before the initiation of any project or collaboration involving a traditional cultural expression. **"Informed"** means that the information about the proposed project or collaboration is detailed and comprehensive and has been provided to the Indigenous community in a manner that they can understand (for example, in their language) and access.¹

The following good practices can be considered to facilitate the reaching of an agreement:

- **Create a space for open and honest dialogue**, where all parties can express their needs, concerns, and expectations.
- Strive for a **consensus-based approach** that respects the diverse perspectives and values of all stakeholders.
- **Collaborate on equal footing**. Treat Indigenous communities as trusted partners in the collaboration. Recognize their expertise and involve them in decisions that may affect their interests.
- **Be transparent and accountable**. Clearly communicate your goals, objectives, and limitations. Be accountable for your actions and commitments.
- **Record the agreement in writing and ensure that the terms are clearly understood by all parties**. This will enhance clarity on the scope of the consent and the terms of collaboration.

Where cultural expressions are shared between two or more communities, communication with, and consent from each identified group should be sought. If consensus is required and cannot be reached, the project or collaboration should be reconsidered.

In some cases, the holders or custodians of a cultural expression may decide not to agree to its use. This may be due to various reasons that do not necessarily relate to the specific fashion company that has approached them. This decision should be respected.

Even if an agreement has not been reached, there is an opportunity to gain knowledge, build trust, and foster goodwill for future projects or collaborative endeavors.

1 The concept of prior and informed consent (PIC) is recognized in international law in instruments such as ILO Convention 169, the Convention on Biological Diversity and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) refers to free, prior and informed consent

Give Acknowledgement and Attribution



Before sharing the final project, collection or product, which incorporates Indigenous cultural expressions, with the public, be ready to give proper acknowledgment and attribution to the relevant Indigenous community, or individuals within that community, for their involvement.

Giving proper acknowledgement involves crediting the Indigenous community for their traditional designs, patterns, techniques, and know how, in relevant promotional materials and product descriptions.

Indigenous Peoples are the best interpreters of their own stories, of their culture and its elements. They should be consulted on how to communicate appropriately about their values and cultural expressions.

Here are some key aspects to consider:

- **Consult with the Indigenous community** to understand their preferences and wishes regarding how they would like to be acknowledged.
- Ensure that you clearly **refer to the Indigenous community or individuals you collaborated with** and describe the nature and extent of your collaboration to your customers. Sometimes even collaborations that are meant to be ethical may raise doubts if this information is not communicated clearly.
- Ensure that you **make reference to the collaboration in all relevant contexts**.
- Where applicable, an Indigenous community's or an Indigenous artist's **intellectual property rights**², such as copyright or trademarks, must be indicated.

By ensuring proper acknowledgment and attribution, fashion companies can demonstrate their commitment to ethical and respectful collaborations with Indigenous communities, fostering positive relationships and cultural appreciation.

2 A brief overview of the main intellectual property types and how the law protects them can be found www.wipo.int/publications/en/details.jsp?id=4528.

Share the Benefits

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When using elements of Indigenous Peoples' traditional cultural expressions, it is important to consider ways in which they could benefit from the use of these expressions.

Benefit sharing means that Indigenous Peoples receive a fair and equitable share of the benefits that users of their cultural expressions derive from those uses.

Consult with the community on what benefits would be preferred for their participation in the project or collaboration.

Various types of benefits could be considered. They include monetary and/or non-monetary benefits.

Monetary benefits could include, for example:

- Up-front or milestone payments;
- Payments of royalties or license fees;
- Special fees to be paid to trust funds supporting cultural and educational projects;
- Joint ownership of relevant intellectual property rights.

Non-monetary benefits could include, for example:

- Participation in product design and development (in exchange of a remuneration);
- Investment in community development programs;
- Contributions to education and training for the communities;
- Other initiatives to uplift the community's wellbeing.

Benefits should be negotiated on mutually agreed terms and should be based on the community's priorities and needs.

