

# Appropriation of Artisans' Intellectual Property in Fashion Design Accessories: Piracy Disguised as Giving Back?

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Introduction Creative industries are industries focused on the creation and exploitation of intellectual property, including art, fashion design, and related creative services, such as advertisement and sales.<sup>1</sup> During a trip to Burkina Faso in West Africa, Keri Fosse was taught by an African woman how to wrap newborns with fabric in a manner that creates a strong bond and frees the mother's hands for other tasks.<sup>2</sup> Burkina Faso has a craft culture and is known for its woven cotton and the textile art of Bogolan.<sup>3</sup> Bogolan is a technique original to Mali and involves the tradition of dyeing threads with bright colors, washing it skillfully, using coated and shiny Bazin, and using indigo from Benin.<sup>4</sup>

After this trip, Fosse and her husband developed a shirt which copies the African lady's, Lalabu's, technique. They developed a product called *Soothe Shirt*; and created a business called *Lalabu*.<sup>5</sup> Lalabu is also the name of the African woman that the Fosses met.<sup>6</sup> They have been successful.<sup>7</sup> The

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1. United Kingdom Department for Digital, Culture, Media, & Sport, *Creative Industries Mapping Documents 2001*, GOV.UK (Apr. 9, 2001), <https://www.gov.uk/government/publications/creative-industries-mapping-documents-2001> (this information can be found on pages four and five in the Forward of the 2001 report, which can be downloaded from this webpage as a PDF).

2. Erin Bernhardt, *Lalabu: How One Woman in Burkina Faso Is Changing the Face of Mommy-Wear in America*, HUFFINGTON POST (Dec. 6, 2017), [https://www.huffpost.com/entry/lalabu-how-one-woman-in-b\\_b\\_3359807](https://www.huffpost.com/entry/lalabu-how-one-woman-in-b_b_3359807) [<https://perma.cc/32C9-RGAB>].

3. *Id. See Burkina Faso: Traditions from Western Africa*, TISSUS & ARTISANS DU MONDE (Fr.) (2016), <http://tissusetartisansdumonde.fr/en/burkina-faso/> [<https://perma.cc/43WZ-2CKK>].

4. *Burkina Faso: Traditions from Western Africa*, *supra* note 3. Bazin is hand-dyed, polished cotton. Kingsley Ighobor & Aissata Haidara, *Malian Women Create Beauty — and Profit*, UNITED NATIONS AFR. RENEWAL (Apr. 2012), <https://www.un.org/africarenewal/magazine/april-2012/malian-women-create-beauty-%E2%80%94-and-profit> [<https://perma.cc/4JU7-XDHZ>].

5. Brian Fosse & Keri Fosse, *Lalabu Is a Family Business*, LALABU, <https://shop.lalabu.com/pages/about> [<https://perma.cc/8YG2-TZTS>].

6. Bernhardt, *supra* note 2.

7. *LD #6: Investor Readiness with Lalabu, Simple Babywearing*, LEADERDIALOGUE, <https://leaderdialogue.com/ld-6-investor-readiness-with-lalabu-simple-babywearing/> [<https://perma.cc/96UG-YUYN>].

Fosses have stated that they got the idea from Lalabu, but redesigned it for production.<sup>8</sup> The couple advertises that they “give back” by giving two percent of each purchase to help female African entrepreneurs through micro-financing.<sup>9</sup> By offering micro-loans, the Fosses claim that when the African women repay the loan, they reinvest the money into the micro loan fund.<sup>10</sup>

This study advocates that practices like the Fosses’ are not representative of socially responsible entrepreneurial endeavors. Instead, these are instances of intellectual property piracy. The following sections are a discussion of the relevant legal foundation, theoretical foundation, and existing best practices. With respect to best practices, what is missing is shared ownership. Although the open appropriation of fashion designs may be commonplace in America, the appropriation of cultural artisan crafts created in other countries by Americans beg special attention.

## I. LEGAL FOUNDATION

This section provides the legal foundation of intellectual property rights (“IPRs”) in fashion, the attempts to enforce these IPRs, and the importance of cultural sustainability in the control of IPRs.

### A. IPRS IN FASHION

As per the 1967 Convention Establishing the World Intellectual Property Organization (“WIPO”), IPRs are rights relating to: (1) literary, artistic and scientific works; (2) performances of performing artists, phonograms and broadcasts; (3) inventions in all fields of human endeavor; (4) scientific discoveries; (5) industrial designs; (6) trademarks, service marks and commercial names and designations; (7) protection against unfair competition; and (8) all other rights resulting from intellectual activity in the industrial, scientific, literary, or artistic fields.<sup>11</sup> WIPO is an agency of the United Nations and serves as the global forum for the development of international intellectual property services, policy, information, and cooperation.<sup>12</sup>

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8. *Id.*

9. Lalabu, *A Day with Lalabu, Our Story*, YOUTUBE (Oct. 28, 2015), <https://www.youtube.com/watch?v=lxjdGXqBa4> [<https://perma.cc/4GUR-PYRR>] (“We give 2% of all sales back to moms in Africa, supporting mom entrepreneurs through micro-finance.”)

10. *LD #6: Investor Readiness with Lalabu, Simple Babywearing*, *supra* note 7.

11. WORLD INTELL. PROP. ORG. [WIPO], WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW, AND USE 3 (2d ed. 2008), [https://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo\\_pub\\_489.pdf](https://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf) [<https://perma.cc/AJU4-DM8Z>].

12. *Inside WIPO*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/about-wipo/en/> [<https://perma.cc/78EP-H8UK>].

In many countries, fashion is considered an apparel in textiles.<sup>13</sup> WIPO classifies fashion apparel, textiles, and footwear as a partial copyright industry.<sup>14</sup> However, in the United States of America (“U.S.”), there has historically been limited copyright protection for fashion designs because the United States views fashion apparel as a useful work rather than a pictorial work of art, which would receive copyright protection.<sup>15</sup> Some courts have extended protection for U.S. garments in very limited circumstances, but this has been inconsistent and arbitrary.<sup>16</sup> The focus has been on protecting brands rather than other attributes.<sup>17</sup> This has resulted in open appropriation of high-end fashion designs by mass marketers like big-box retailers such as Walmart and Target.<sup>18</sup> Appropriation is the act of taking something for one’s own use.<sup>19</sup> Misappropriation is the intentional, illegal use of another’s property.<sup>20</sup> Textile pattern lawsuits have increased greatly, more than doubling between 2012 and 2015, as shown in Figure 1 below, with the four leading plaintiffs as Star Fabrics, Unicolors, LA Printex, and United Fabrics International.<sup>21</sup> Star Fabrics is the top plaintiff in fabrics copyright cases and Coach is the top plaintiff in fashion; and top defendants include the retailers Ross Stores, TJ Maxx, and Amazon, among others.<sup>22</sup>

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13. World Intell. Prop. Org. [WIPO], GUIDE ON SURVEYING THE ECONOMIC CONTRIBUTION OF THE COPYRIGHT INDUSTRIES 188 (rev. ed. 2015), [https://www.wipo.int/edocs/pubdocs/en/copyright/893/wipo\\_pub\\_893.pdf](https://www.wipo.int/edocs/pubdocs/en/copyright/893/wipo_pub_893.pdf) [<https://perma.cc/W3UX-3WNV>].

14. *Id.* at 60.

15. Lisa J. Hedrick, Note, *Tearing Fashion Design Protection Apart at the Seams*, 65 WASH. & LEE L. REV. 215, 217, 222–24 (2008).

16. Kevin V. Tu, *Counterfeit Fashion: The Interplay Between Copyright and Trademark Law in Original Fashion Designs and Designer Knockoffs*, 18 TEX. INTELL. PROP. L.J. 419 (2010).

17. *Id.* at 430.

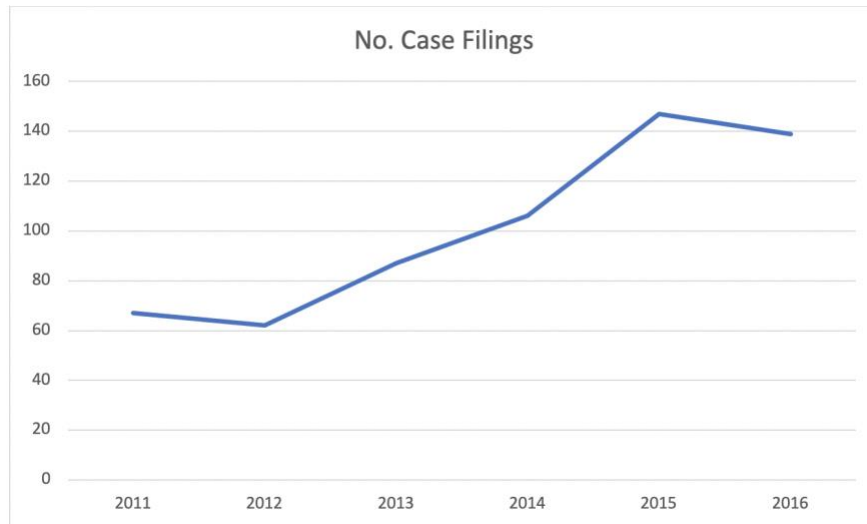
18. *Id.* at 437–38.

19. Lynsey Blackmon, *The Devil Wears Prado: A Look at the Design Piracy Prohibition Act and the Extension of Copyright Protection to the World of Fashion*, 35 PEPP. L. REV. 107 (2007).

20. *Id.*; *Misappropriation*, CORNELL L. SCHOOL (July 2020), <https://www.law.cornell.edu/wex/misappropriation> [<https://perma.cc/X4XL-2RAL>].

21. BRIAN C. HOWARD, LEX MACHINA COPYRIGHT LITIGATION REPORT 2016, at 3 fig.1 (2017).

22. *Id.* at 8. Top defendants also include Burlington Coat Factory, Rainbow USA, Walmart, JC Penney, Forever 21, Sears, Nordstrom, and Target. *Id.*



**Figure 1. Textile Pattern Litigation<sup>23</sup>**

Some scholars have advocated that the lack of copyright protection for high-end fashion designs has not deterred investments in the industry nor design innovations.<sup>24</sup> However, design patent protections in the United States have not deterred imitations; and the top fashion designers remain on top regardless because their designs are the first to get to the wealthiest customers.<sup>25</sup>

#### B. ATTEMPTS TO ENFORCE IPRS IN FASHION DESIGNS

The Design Piracy Prohibition Act (“DPPA”) was introduced to the U.S. Congress four times between 2006 and 2009 and provided for a structure that would recognize, respect, and better protect fashion designs in the United States.<sup>26</sup> However, the DPPA was never enacted.<sup>27</sup> In 2012, the Innovative Design Protection Act (“IDPA”) was introduced to the U.S. senate, but was not enacted either, despite three attempts.<sup>28</sup>

The DPPA and IDPA were intended to extend copyright protection to fashion designs. The Council of Fashion Designers of America supported

23. *Id.* at 3 fig.1.

24. Brian Hilton, Chong Ju Choi & Stephen Chen, *The Ethics of Counterfeiting in the Fashion Industry: Quality, Credence and Profit Issues*, 55 J. BUS. ETHICS 345, 347 (2004); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1688–89 (2006).

25. Susan C. Azzarelli, Book Note, *Against Intellectual Monopoly*, 21 SYRACUSE SCI. & TECH. L. REP. 130 (2009) (reviewing MICHELE BOLDRIN & DAVID K. LEVINE, *AGAINST INTELLECTUAL MONOPOLY* (Cambridge Univ. Press 2008)).

26. Blackmon, *supra* note 19; Sara R. Ellis, Note, *Copyrighting Couture: An Examination of Fashion Design Protection and Why the DPPA and IDPPA Are a Step Towards the Solution to Counterfeit Chic*, 78 TENN. L. REV. 163 (2010); Emma Yao Xiao, *The New Trend: Protecting American Fashion Designs Through National Copyright Measures*, 28 CARDOZO ARTS & ENT. 405 (2010).

27. H.R. 5055, 109th Cong. (2d Sess. 2006); H.R. 2033, 110th Cong. (1st Sess. 2007); H.R. 2196, 111th Congress (1st Sess. 2009).

28. S. 3728, 111th Congress (2d Sess. 2010); H.R. 2511, 112th Congress (1st Sess. 2011); S. 3523, 112th Congress (2d Sess. 2012).

this congressional effort to better protect fashion designers.<sup>29</sup> Skeptics of the DPPA believed that it would be hard to enforce.<sup>30</sup> They advocate that there needs to be IPR protection against “close copies” but not against “looser forms of borrowing or similarity.”<sup>31</sup> The looser forms include minor variations such as changing the length of a skirt hem or sleeve, fabric type, or fabric color.<sup>32</sup> Opponents of protecting U.S. fashion designs argue that unlike fabric designs, garment designs are merely utilities which are publicly available and not meant to be given exclusive ownership rights.<sup>33</sup> Also, skeptics argue that there is a social dynamic in innovation that cannot be ignored.<sup>34</sup> An individual’s creative uniqueness in their work is often tied closely to works by others done in the past or concurrently. Further, new digital copying technology has altered the dynamics and pace of innovations and copying.<sup>35</sup> Digitally printed textile is growing steadily annually at about twenty percent.<sup>36</sup> Besides ease in customization for a wider variety of designs and improved design aesthetics, digital copying has contributed to sustainability due to its beneficial shorter lead times, shorter delivery times, workflow efficiencies, cost reduction, and waste elimination.<sup>37</sup> These social gains could be prevented by enforcing IPRs in fashion.

There are also skeptics who argue that enforcing exclusive rights against fashion design infringers is costly and time consuming because the value of fashion designs changes rapidly as they can quickly go out of vogue.<sup>38</sup> However, this is not the case for cultural artisan fashions and fashion accessories, which do not go out of vogue because of their cultural significance. Further, the wealth factor for these artisans does not come into play given that most of the cases of piracy occurs in impoverished villages.<sup>39</sup>

29. Hedrick, *supra* note 15; Casey E. Callahan, *Fashion Frustrated: Why the Innovative Design Protection Act Is a Necessary Step in the Right Direction, But Not Quite Enough*, 7 BROOK. J. CORP. FIN. & COM. L. 195, 205 (2012).

30. Scott C. Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147 (2009).

31. *Id.* at 1185.

32. Hedrick, *supra* note 15.

33. Tu, *supra* note 16.

34. Hemphill, *supra* note 30.

35. *Id.* n.82.

36. ESWARA PRASAD & PRATIK MANDON, DIGITAL TEXTILE PRINTING MARKET OUTLOOK – 2027, ALLIED MKT. RSCH. (May 2020), <https://www.alliedmarketresearch.com/digital-textile-printing-market> [https://perma.cc/2MC7-KXN9].

37. M. KORGER ET AL., INNOVATIVE DIGITAL TEXTILE PRINTING APPLICATIONS - A CONTRIBUTION TO SUSTAINABILITY AND CUSTOMIZATION (Nov. 2015).

38. Hedrick, *supra* note 15, at 255.

39. “Wealth factor” in this context refers to the overarching net worth potential of an individual. In a study of millionaires, their wealth factor may be related to a number of different behaviors such as being responsible, frugal, confident, not succumbing to social pressures, being a planner and focused. Hillary Hoffower, *A Woman Who Studied 600 Millionaires Found How Rich You Can Get Boils Down to 6 ‘Wealth Factors,’ No Matter Your Age or Salary*, INSIDER: PERS. FIN. (Jan. 21, 2019, 9:15 AM), <https://www.businessinsider.com/millionaire-study-wealth-factors-confidence-focus-2019-1> [https://perma.cc/EQF3-ENU9]. For the impoverished, variables such as a person’s ability or talent, hard work, and having the right connections was studied in Western and Post-Communist Countries. Martin Kreidl, *Perceptions of Poverty and Wealth in Western and Post-Communist Countries*, 13 SOC. JUST. RSCH. 151 (2000).

Thus, while in the United States, the open appropriation of fashion designs may be commonplace, the appropriation, by Americans, of cultural artisan crafts created in other countries begs special attention.

Since a portion of garment manufacturing activities engaged in by companies such as *Lalabu* is related to copyrighted works and may involve creation, production, manufacturing, performance, broadcasting, communication, exhibition, distribution, and sales, then these are considered partial copyright industries.<sup>40</sup> In a study of different countries, partial copyright industries were found to only comprise eight percent of the copyright industries' total value added, yet fifteen percent of its employment because these have incredibly labor intensive production processes.<sup>41</sup> However, in Indonesia, the largest contributor to their creative industries is fashion, at forty-four percent.<sup>42</sup> Besides Indonesia, crafts and designs are creating economic opportunities for women in Pakistan.<sup>43</sup> Fifteen percent of the employees are in crafts and related service-sector work, particularly the manufacture of textile materials. Thus, the reported issue of intellectual property theft is a serious threat to the economy of these countries.<sup>44</sup>

Other countries have sought to protect their indigenous crafts. A sample is provided in Table 1 below. These are countries that participated in the 2007 WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.<sup>45</sup> This Committee convened subsequent to the 2003 adoption of the United Nations Educational, Scientific and Cultural Organization ("UNESCO") Convention for the Safeguarding of the Intangible Cultural Heritage, ratified by seventy-eight states.<sup>46</sup> This Convention was focused on standard-setting for the intergenerational transmission of traditions including, but not limited to, traditional handicrafts.<sup>47</sup> The Committee's goal was to work out effective and practical approaches for the mutual benefit of intellectual property rights holders and their governments.<sup>48</sup>

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40. World Intell. Prop. Org. [WIPO], *supra* note 13, at 60.

41. *Id.* at 62.

42. Nila K. Hidayat, Dibia Abduh & Fiter Abadi, *Competence Development Strategy Resources Industry Players Through Creative Education, Skills and Culture in the Creative Industries in South Tangerang*, in FIRST INT'L CONF. ON ENTREPRENEURSHIP 29 (2014).

43. CALVIN TAYLOR ET AL., CULTURAL AND CREATIVE INDUSTRIES IN PAKISTAN (2014), [https://www.britishcouncil.org/sites/default/files/cultural\\_and\\_creative\\_industries\\_in\\_pakistan.pdf](https://www.britishcouncil.org/sites/default/files/cultural_and_creative_industries_in_pakistan.pdf) [<https://perma.cc/ZRJ5-X6XQ>].

44. *Id.*

45. Intergovernmental Comm. on Intell. Prop. & Genetic Res. Traditional Knowledge & Folklore, Adopted Report of Its Eleventh Session WIPO/GRTKF/IC/11/15 (2008), [https://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_11/wipo\\_grtkf\\_ic\\_11\\_15.pdf](https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_11/wipo_grtkf_ic_11_15.pdf) [<https://perma.cc/H8MP-S6Z8>].

46. *Id.* at 31.

47. *Id.* at 32.

48. *Id.* at 29.

Country	Tribe	Desired Intellectual Property and Traditional Knowledge Protection includes but is not limited to:
Amauta Yuyay	Tupaj Aman	How women carry children on their shoulders
Burkina Faso		Artistic, intellectual creations that are cultural traditions
Canada	Pauktuutit Inuit	Clothing designs
Ecuador	Quichua	Crafts; textiles
Ethiopia		Handicrafts; traditions; customs
India		Handicrafts and local, cultural, and socio-economic environment rural industries; "know how, skills, innovations, practices that formed part of traditional wisdom embodied in the traditional lifestyle"
Kyrgyzstan		Traditional, cultural handicrafts
Mexico		Crafts; textiles; costumes; tapestries
Morocco		Textiles
Sudan		Handicrafts

**Table 1. Sample Desired Intellectual Property and Traditional Knowledge Protection<sup>49</sup>**

One issue that the Canadian representative noted in these goals was that IPRs were often confusing to the Inuit women of Canada and not sufficient to protect their traditional know how or to obtain prior informed consent or a contract for the access and use of their traditional knowledge.<sup>50</sup> Another issue in working towards these goals pointed out by the delegates was how to define traditional cultural expressions. The Italian delegation at the Committee meeting believed that traditional cultural expressions should be protected by Article 2 of the Berne Convention, but would not include handicrafts and designs.<sup>51</sup> The delegation from Burkina Faso believed that it is a mistake to refer to the Berne Convention to find a definition of traditional cultural expressions.<sup>52</sup> They stated that it is necessary to simply look toward the artistic, intellectual creation to identify what should get protected.<sup>53</sup> Thus, there is a desire by the people of Burkina Faso to protect their cultural traditions, but there is controversy in how to do so appropriately.

#### C. THE IMPORTANCE OF CULTURAL SUSTAINABILITY IN IPR CONTROL

With respect to corporate social responsibility ("CSR"), sustainability throughout a product's supply chain is often touted as a positive practice. An example is environmental sustainability. Environmental problems are caused

49. *Id.* at 29, 41–42, 51, 55, 88, 90, 113–14, 117.

50. *Id.* at 42–43.

51. *Id.* at 51.

52. *Id.* at 53. The Berne Convention was first held in 1886 to deal with the protection of works and the rights of their authors. *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, WORLD INTELL. PROP. ORG., [https://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](https://www.wipo.int/treaties/en/ip/berne/summary_berne.html) [https://perma.cc/NY9B-6RU7]. A "series of provisions determining the minimum protection to be granted, as well as special provisions available to developing countries that want to make use of them" was developed. *Id.* There is a Berne Union with member countries. *Id.* There is a listing of literary and artistic works that is protected. Berne Convention for the Protection of Literary and Artistic Works art. 2, Sept. 9, 1886, 1161 U.N.T.S. 3. The listing includes works of applied art. *Id.* The works are to enjoy protection in all countries of the Berne Union and this protection shall operate for the benefit of the author and his successors in title. *Id.*

53. *Id.*

by overuse of resources, waste, environmental pollution, and environmental justice issues, such as unethical labor conditions.<sup>54</sup> Yet, besides technological improvements in production practices, when viewed holistically, sustainability also concerns cultural dimensions of fashion product designs.<sup>55</sup> The creativity of communities and the forging of creative industries can be an enduring, sustainable resource for the development of fashion product designs.<sup>56</sup> While garment manufacturing has migrated from work done in high-wage countries to low-wage, developing countries, there is some reversal of this trend.<sup>57</sup> This is because of the benefits designers gain by producing locally, such as better quality-control and copyright control.<sup>58</sup> Nevertheless, with respect to IPRs, the appropriation of indigenous artisan's intellectual property seems to be growing in popularity and is touted both as an act of CSR and a solution to improve the lives of impoverished, marginalized people, a win-win solution.

Besides *Lalabu*, another example of appropriation is *X Ltd*, a company that works with women entrepreneurs in Sri Lanka to develop unique handloom designs.<sup>59</sup> *X Ltd* advocates that its practices are fair because it complies with the World Fair Trade Organization's ("WFTO") practices.<sup>60</sup> Yet, these practices do not include licensing the intellectual property created by the local artisans.<sup>61</sup> Like *Lalabu*, *X Ltd* provides credit lines to the local artisans and encourages them to become entrepreneurs.<sup>62</sup> Empowering the poor by encouraging entrepreneurship, and giving raw materials and credit lines, is not enough if their cultural intellectual property is being appropriated without compensation from licensing royalties.

Further, appropriation is just one of many programs in the fashion industry. The Ethical Fashion Initiative ("EFI"), is a program of the International Trade Centre ("ITC"), a joint agency of the WFTO and the United Nations Conference on Trade and Development ("UNCTAD").<sup>63</sup> EFI attempts to connect fashion designers, such as Stella McCartney, with

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54. D. G. K. Dissanayake, Srimala Perera & Thushari Wanniarachchi &, *Sustainable and Ethical Manufacturing: A Case Study from Handloom Industry*, 3(2) TEXTILES & CLOTHING SUSTAINABILITY 1 (2017).

55. KATE FLETCHER, *SUSTAINABLE FASHION AND TEXTILES: DESIGN JOURNEYS* 43 (Routledge, 2d ed. 2014).

56. United Nations Educ., Sci. & Cultural Org. [UNESCO], *Statistics on Cultural Industries: Framework for the Elaboration of National Data Capacity Building Projects*, CLT/07/OS/049-100, at iv (2007).

57. Tarek E. Virani & Mark Banks, *Profiling Business Support Provision for Small, Medium and Micro-Sized Enterprises in London's Fashion Sector* (Creative Works London, Working Paper No. 9, 2014), <http://www.creativeworkslondon.org.uk/wp-content/uploads/2013/11/PWK-Working-Paper-9.pdf> [<https://perma.cc/GX65-HJCH>].

58. *Id.*

59. Dissanayake, Perera & Wanniarachchi, *supra* note 54.

60. *Id.* at 5.

61. *Id.*

62. *Id.* at 4.

63. ETHICAL FASHIONS ARTISANS, R.I.S.E. IMPACT ASSESSMENT: MIMCO ORDER (2015) (Kenya), <https://ethicalfashioninitiative.org/wp-content/uploads/2018/11/MIMCO-2015-Kenya-Social-Impact-Report.pdf> [<https://perma.cc/3VYC-77FR>].



indigenous craft people from Kenya.<sup>64</sup> Members of the fashion design and product industries collaborate with artisans in African communities and work on transferring craft procedures and patterns.<sup>65</sup> The idea is that crafts promote sustainable lifestyles for marginalized craft persons.<sup>66</sup>

For example, in 2015, the EFI facilitated a deal between MIMCO, an Australian accessories brand, and Ethical Fashion Artisans EPZ Ltd whereby 230 artisans of rural, pastoral nomadic tribes produced 3,732 pouches, totes, and dust bags.<sup>67</sup> The artisans used their Maasai and Sambura tribal East African beading, stitching, embroidery, and brass casting design skills.<sup>68</sup> They designed the MIMCO products, but did not receive IPRs to those products.<sup>69</sup> Yet, the EFI claims that they provided training to “improve” the artists’ skills and provided them with public speaking, leadership, teamwork, and labor law training.<sup>70</sup> In partnership with the EFI, the charitable organization *Value Added in Africa* has built relationships between local producers and the European Union’s retailers.<sup>71</sup> For example, cotton growers of Arusha in Tanzania dye and stitch their cotton into fabrics.<sup>72</sup>

Similar to the EFI, *thr3efold* claims to be an ethical fashion brokerage firm. It introduces garment and accessory manufacturers to ethical factories in developing nations.<sup>73</sup> Its motto is: “*You don’t have to be ‘Made in America’ to be ethical.*”<sup>74</sup> These purported ethically-certified factories do not use child or slave labor, provide fair wages, do not discriminate, provide safe and healthy workplaces, provide the right to unionize, provide clear management communication, and are eco-conscious.<sup>75</sup>

Yet, what happens to the indigenous artisans’ IPRs for their techniques and creations? Are there intellectual property agreements requiring royalty revenue sharing? In order to answer these questions, a lens through which to view this phenomenon must be identified. The theoretical foundation for this research is rooted in CSR theories. The shared value theory is particularly promising as a select theoretical foundation for exploring what happens to these artisans’ IPRs.

64. Yefei Yang, Han Han & Peter K. C. Lee, *An Exploratory Study of the Mechanism of Sustainable Value Creation in the Luxury Fashion Industry*, 9 SUSTAINABILITY 483 (2017).

65. Suzy Menkes, *Bags Made by Hand, in East Africa*, N.Y. TIMES (Sept. 3, 2012), <https://www.nytimes.com/2012/09/04/fashion/bags-made-by-hand-in-east-africa.html> [https://perma.cc/2JH8-2W2Q]; Emanuela Mora, Agnès Rocamora & Paolo Volonté, *On the Issue of Sustainability in Fashion Studies*, 1 INT’L J. FASHION STUD. 139 (2014).

66. Dissanayake, Wanniarachchi & Perera, *supra* note 54.

67. ETHICAL FASHIONS ARTISANS, *supra* note 63.

68. *Id.* at 7.

69. *Id.* (stating the women were paid for the number of pieces made, but not stating anywhere that the women were paid for the intellectual property itself).

70. *Id.* at 7.

71. Yang, Han & Lee, *supra* note 64, at 10.

72. *Id.*

73. Tracey Meyers, *Fashion Start-up Thr3efold Seeks Funding for New Tech Platform*, WOMEN’S WEAR DAILY (July 10, 2018), <https://wwd.com/business-news/business-features/thr3fold-seeks-funding-tech-platform-1202746197/> [https://perma.cc/VH7B-CKWS].

74. *Id.*

75. *Id.*

## II. THEORETICAL FOUNDATION

Howard Bowen, author of the 1953 book *Social Responsibilities of the Businessman*,<sup>76</sup> is considered the father of CSR.<sup>77</sup> Bowen urged managers to take on social responsibilities in addition to profit motives.<sup>78</sup> Garriga and Mele organized the CSR theories into four categories: (1) instrumental theories; (2) political theories; (3) integrative theories; and (4) ethical theories.<sup>79</sup> The instrumental theories category includes maximizing the shareholder value, strategies for achieving competitive advantages, and cause-related marketing.<sup>80</sup> The political theories include corporate constitutionalism, integrative social contract theory, and corporate citizenship.<sup>81</sup> The integrative theories include issues management, the principle of public responsibility, stakeholder management, and corporate social performance.<sup>82</sup> The ethical theories category includes the normative stakeholder theory, universal rights, sustainable development, and the common good approach.<sup>83</sup> Most of the examples of deeds by organizations for the IPRs related to fashion accessories, meant to supposedly help the needy, fall into the sub-category entitled cause-related marketing.<sup>84</sup> They vigorously promote their good deeds while disguising intellectual property piracy.

An ideal phenomenon would be scenarios where there is no intellectual property piracy and there is instead royalty sharing. The theory to explain that ideal phenomenon is the common good sub-category in ethical theories, whereby the common good of society is the referential value for CSR.<sup>85</sup> The theoretical approach is that business must positively contribute to the common good because it is part of society.<sup>86</sup> Business can achieve this end by respecting human dignity while creating wealth and providing goods and services in a fair way.<sup>87</sup>

The CSR theories have also been categorized as simply normative or instrumental. The normative theories justify and explain the CSR

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76. See generally HOWARD R. BOWEN, *SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN* (Univ. of Iowa Press ed., 2013).

77. Edward Morrison & Larry Bridwell, *Consumer Social Responsibility – The True Corporate Social Responsibility 1* (2011) (unpublished manuscript), <http://www.larrybridwell.com/CSR.pdf> [<https://perma.cc/G9H5-TX8Y>].

78. See generally S.R. Abdulrazak & Fauziah Sh. Ahmad, *The Basis for Corporate Social Responsibility in Malaysia*, 6 *GLOB. BUS. & MGMT. RSCH.* 210 (2014); Archie B. Carroll, *A Three-Dimensional Conceptual Model of Corporate Performance*, 4 *ACAD. MGMT. REV.* 497 (Neth.) (1979).

79. Elisabet Garriga & Domènec Melé, *Corporate Social Responsibility Theories: Mapping the Territory*, 53 *J. BUS. ETHICS* 51 (2004).

80. *Id.* at 53–55.

81. *Id.* at 55–56.

82. *Id.* at 58–59.

83. *Id.* at 60–62.

84. *Id.* at 55.

85. *Id.* at 62.

86. *Id.*

87. *Id.*

phenomenon on philosophical, ethical, and moral bases.<sup>88</sup> The instrumental theories explain CSR on the basis of business-centric, pragmatic bases.<sup>89</sup> However, complaints against implementing CSR strategies include that they are superficially driven by compliance requirements, are costly, and that they produce limited reputational benefits.<sup>90</sup>

In 2002, the Shared Value Theory was published and explains how the competitiveness of a firm and societal well-being are shared to the extent that CSR provides a competitive advantage to firms.<sup>91</sup> There are value opportunities for society and value opportunities for companies.<sup>92</sup> The Shared Value Theory relates to the four elements of competitive context, which are: (1) high quality, specialized inputs of production, which are called factor conditions; (2) related and supporting industries; (3) presence of local customers that provide demand conditions; and (4) strategy and rivalry based on the presence of IP protection policies and incentives, and competition that encourage investments and improvements.<sup>93</sup> In applying the shared value process, the five steps include: (1) examining the geographic competitive context; (2) reviewing existing communal obligations, goodwill building, and strategic giving; (3) seeking collective action with partners; (4) assessing shared value creation when selecting grantees, signaling other funders, improving grantee performance and advancing knowledge and practice; and (5) rigorously tracking results.<sup>94</sup>

Related to the collective action partnering, scholar Maximilian Martin advocates that there is a paradigm shift occurring whereby firms are taking on a more ambitious approach to CSR and are willing to *assess joint opportunities for social and financial returns*.<sup>95</sup> Martin coins this Corporate Impact Venturing.<sup>96</sup>

From the viewpoint of this Shared Value Theory, the next section discusses existing current best practices. The best practices that involve Shared Value include implementing country-level policies requiring royalty sharing, hiring artisans, matching customer purchases with 1:1 donations, forming charitable nonprofits, and using ethical manufacturing brokerages.

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88. Abdulrazak & Ahmad, *supra* note 78.

89. *Id.*

90. MAXIMILIAN MARTIN, DRIVING INNOVATION THROUGH CORPORATE IMPACT VENTURING: A PRIMER ON BUSINESS TRANSFORMATION (Impact Econ. Primer Series, vol. 3, 1st ed. 2014), [https://www.impacteconomy.com/preview/PV\\_CIV\\_EN.pdf](https://www.impacteconomy.com/preview/PV_CIV_EN.pdf) [<https://perma.cc/NWW4-EFQC>].

91. Michael E. Porter & Mark R. Kramer, *The Competitive Advantage of Corporate Philanthropy*, HARV. BUS. REV., Dec. 2002, <https://hbr.org/2002/12/the-competitive-advantage-of-corporate-philanthropy> [<https://perma.cc/SY86-FTJP>] (defining competitive context as “the quality of the business environment in the location or locations where they operate”).

92. *Id.*

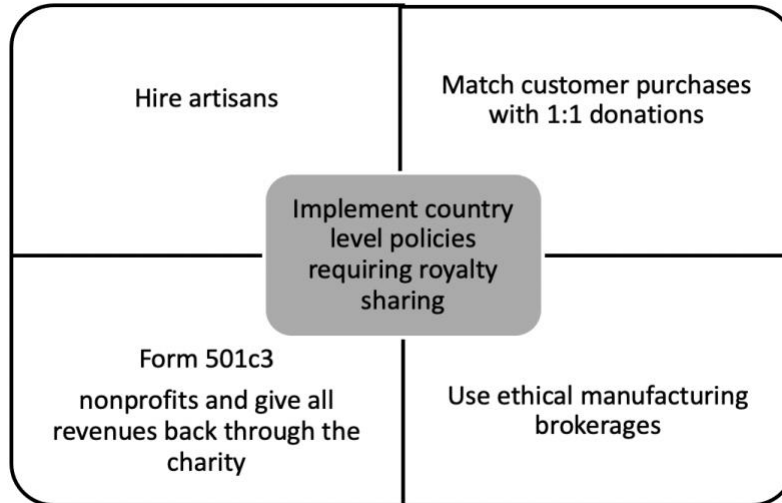
93. *Id.*

94. *Id.*

95. MARTIN, *supra* note 90.

96. *Id.*

### III. CURRENT BEST PRACTICES



**Figure 2. Current Best Practices Concept Model**

Figure 2 is a concept model that depicts the current best practices in CSR which provide for revenue sharing and can potentially avoid the intellectual property piracy of artisan fashion design accessories. The means through which fashion accessory companies can apply these principles are: hiring the artisans that make the goods; matching customer purchases of goods with one-on-one donations to the needy; forming non-profit organizations that donate all proceeds from sales of the fashion accessories to needy artisans; and using ethical manufacturing brokerage houses to make the products. At the core, there needs to be implementation of country-level policies requiring royalty sharing or other agreed upon forms of giving back to these artisans and to their communities. This can be facilitated through an international organization such as WIPO. Each of these means are discussed below.

#### A. ENFORCING COUNTRY-LEVEL DEFENSIVE POLICIES

Some countries do not consider copying fashion from other countries copyright infringement; and the definition of copyrights related to fashion varies between countries.<sup>97</sup> Though not copyright protection specifically, Brazil has policies to protect their cultural expressions as valuable sources of cultural diversity and sustainable development.<sup>98</sup> Brazil requires that fashion brands who are interested in these artistic designs be legally bound

97. Lúcia Carvalho Abreu, *Reconhecimento e Lei Aplicável às Criações de Moda Pelo Direito de Autor* [Recognition and Law Applicable to the Protection of Fashion Creations by Copyright], 8 REV. FACULDADE DIREITO U. LUSÓFONA PORTO 159, 159–62 (2016) (Port.).

98. Lúcia Carvalho Abreu, *Fashion and the Rights of Indigenous and Local Communities*, FASHION L. (2017), <http://www.fashionmeetsrights.com/page/home/77> [https://perma.cc/NDJ3-8S2G].

to their communities of artisans with negotiated contracts.<sup>99</sup> For example, the Brazilian luxury brand Oskien signed a contract with the Ashaninka indigenous community and paid them for the use of their traditional garment designs.<sup>100</sup> The community used the money to pay for a new school.<sup>101</sup> In contrast, the piracy of Portuguese embroidered product designs by Chinese companies has been diluting the Portuguese culture.<sup>102</sup> This cultural diversity is important to Portugal's sustainable development.<sup>103</sup>

As a positive example, organizations such as the Fédération de la Haute Couture et de la Mode (aka, "The Federation"), founded in 1973,<sup>104</sup> can be looked to for ideas in appropriately affording IPRs to artisans. The Federation defends intellectual property rights and collaborates with public administrative services to fight against counterfeiting in France, the European Union, and in other countries.<sup>105</sup> They do this in order to maintain Paris' position as the world capital of fashion design.<sup>106</sup> The defense of indigenous crafts and related IPRs requires a strong advocacy group such as The Federation. WIPO, WFO, ITC, and UNCTAD need to join forces and create a joint entity that advocates for underprivileged artisans' intellectual property rights just as The Federation fights for the rights of Paris' designers.

#### B. HIRING THE ARTISANS AS EMPLOYEES OR INDEPENDENT CONTRACTORS

Instead of micro-loans and credit lines, one recommended best practice is to give needed goods to a developing or under-developed region through hiring artisans. Griffin Thall and Paul Goodman met two impoverished artisans in Costa Rica who made colorful friendship bracelets.<sup>107</sup> They have partnered with these artisans and formed the company *Puravida bracelets*.<sup>108</sup> The company has grown and now partners with more than 800 artisans worldwide.<sup>109</sup> This is providing the artisans with a steady income that they can depend on.<sup>110</sup> Further, *Puravida bracelets* has donated nearly \$2.8 million to charitable causes in return.<sup>111</sup>

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99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *History*, FÉDÉRATION DE LA HAUTE COUTURE ET DE LA MODE (Fr.), <https://fhcm.paris/en/the-federation/history/> [<https://perma.cc/8VHX-9ZKX>].

105. *Fédération de la Haute Couture et de la Mode*, MODEM, <https://www.modemonline.com/fashion/mini-web-sites/fashion-services/references/modeaparis> [<https://perma.cc/AQ73-STCK>].

106. *Id.*

107. *Our Story*, PURA VIDA, <https://www.puravidabraccets.com/pages/story> [<https://perma.cc/3KRX-R89W>].

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

## C. MATCHING EACH PURCHASE WITH DONATED GOODS TO THE NEEDY

Blake Mycoskie's company, *TOMS Shoes*, is considered a leader in giving back. In 2006, he founded TOMS after witnessing children in Argentina growing up without shoes.<sup>112</sup> He developed a simple concept and has impacted over 100 million lives.<sup>113</sup> In the one-for-one concept, TOMS matched every pair of shoes that their customers purchased with a new pair of shoes for a child in need.<sup>114</sup> Though TOMS no longer specifically follows this model, as of 2019 TOMS began changing how it gives back to communities,<sup>115</sup> this is a great example of a CSR practice which became a business model and movement, prompting replication by other companies. For example, *Bombas* is a sock manufacturer that follows the one-for-one business model similar to Toms Shoes.<sup>116</sup> For each pair of socks purchased from *Bombas*, a pair is donated to the homeless.<sup>117</sup>

## D. FORMING A 501C3 NONPROFIT AND GIVING ALL REVENUES BACK THROUGH THE CHARITY

Elizabeth Schaeffer Brown founded a project called Choose Haiti whereby bracelets were made out of recycled newspapers and sold to support Haiti's local businesses after the 2010 earthquake.<sup>118</sup> Brown found it very difficult to meet retailers' product demands and the Haitian women were being trained to make the bracelets in camps that lacked adequate infrastructure.<sup>119</sup> Brown pivoted and formed the company *Maiden Nation* which sells bracelets made in ethical fashion houses around the globe in Haiti, India, Rwanda, Kenya, Argentina, and Sweden.<sup>120</sup> This business method provides the volume of product demanded by retailers.<sup>121</sup> Both of Brown's projects, *Choose Haiti* and *Maiden Nation*, are described as public-private partnerships.<sup>122</sup>

The *Purpose Jewelry* company is another example of the formation of a 501c3 nonprofit that gives all of its financial gifts to charity. The company's mission and goal are to help survivors of human trafficking gain

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112. Blake Mycoskie, *TOMS Founder*, TOMS, <https://www.toms.com/us/corporate/blakes-bio.html> [<https://perma.cc/B32R-VZZC>].

113. *Id.*

114. *Id.*

115. See Dhani Mau, *TOMS Shifts Away from One for One: The Giving Model It Originated*, FASHIONISTA (Nov. 20, 2019), <https://fashionista.com/2019/11/toms-evolves-one-for-one-model> [<https://perma.cc/T3V8-REZK>].

116. *We're Bombas.*, BOMBAS, <https://bombas.com/pages/about-us> [<https://perma.cc/VCZ9-7T8U>].

117. *Id.*

118. Katharine Gammon, *Buy Jewelry from Around the World to Support Developing Economies*, FAST CO. (Nov. 5, 2012), <https://www.fastcompany.com/2680839/buy-jewelry-from-around-the-world-to-support-developing-economies> [<https://perma.cc/NG45-LC98>].

119. *Id.*

120. *Id.*

121. *See id.*

122. *Leadership*, DIGITAL CITIZEN FUND, <https://www.digitalcitizenfund.org/team> [<https://perma.cc/WW4X-DZZH>].

financial independence through making and selling jewelry.<sup>123</sup> Founder Stephanie Pollaro moved to Mumbai, India, to work with girls escaping human trafficking.<sup>124</sup> Her partner, Wendy Daily, assisted with operations in the United States.<sup>125</sup> They taught these survivors how to make the jewelry, providing income and needed resources for the communities.<sup>126</sup>

#### E. USING ETHICAL MANUFACTURING BROKERAGES

As aforementioned, EFI and *thr3efold* claim to be ethical fashion brokerage firms. They introduce garment and accessory manufacturers to ethical factories in developing nations.<sup>127</sup> EFI's manufacturers promote sustainable lifestyles and train craftspeople on labor laws while *thr3efold*'s ethically-certified factories do not use child or slave labor, provide fair wages, do not discriminate, provide safe and healthy workplaces, provide the right to unionize, provide clear management communication, and are eco-conscious.<sup>128</sup> These practices benefit the holders of the cultural knowledge by providing steady income, safe working environments, and leadership opportunities, as well as not further polluting their countries.

IV. Shared Ownership as a Novel Best Practice What is missing from the current best practices is shared ownership such as joint ventures. In the international arena, a common joint venture structure is when a foreign company enters into an agreement with a "local company" to share legal ownership and contribute resources to pursue business opportunities together.<sup>129</sup> Although the local company could be acquired and bought, agreements to create a new, shared company are less risky than outright acquisition due to the lower capital investment required.<sup>130</sup> Yet, craft artisans in third world developing countries are not likely to own a company. Thus, the joint venture would be with the individual artisan.

Thus, the use of artisan fashion can, and perhaps should, have shared parenting (i.e. more than one parental owner) to reduce risk for parent companies while still providing rights and ownership to artisans. The strategic importance of research and development, marketing costs, and product diversity will influence equity shares in these joint ventures.<sup>131</sup>

123. *Behind the Brand*, PURPOSE JEWELRY, <https://www.purposejewelry.org/pages/who-we-are> [https://perma.cc/VB8J-NF8H]; *Meet Wendy Dailey of PURPOSE Jewelry*, VOYAGELA (Aug. 7, 2017), <http://voyagela.com/interview/meet-wendy-dailey-purpose-jewelry-orange-county/> [https://perma.cc/PVE7-FGT6].

124. *Behind the Brand*, *supra* note 123; *Meet Wendy Daily of PURPOSE Jewelry*, *supra* note 123.

125. *Behind the Brand*, *supra* note 123; *Meet Wendy Daily of PURPOSE Jewelry*, *supra* note 123.

126. *Behind the Brand*, *supra* note 123; *Meet Wendy Daily of PURPOSE Jewelry*, *supra* note 123.

127. ETHICAL FASHIONS ARTISANS, *supra* note 63; Meyers, *supra* note 73.

128. ETHICAL FASHIONS ARTISANS, *supra* note 63; Meyers, *supra* note 73.

129. Doris Nagel, *The Pros and Cons of International Joint Ventures*, GLOB. TRADE (Dec. 25, 2017), <https://www.globaltrademag.com/pros-cons-international-joint-ventures/> [https://perma.cc/33KK-4VMC].

130. *Id.*

131. Nathan Fagre & Louis T. Wells Jr., *Bargaining Power of Multinationals and Host Governments*, 13(2) J. INT'L BUS. STUD. 9 (1982); JOHN M. STOPFORD & LOUIS T. WELLS JR., *MANAGING THE MULTINATIONAL ENTERPRISE: ORGANIZATION OF THE FIRM AND OWNERSHIP OF THE SUBSIDIARY* (Basic Books 1972).

Importantly, Dr. Killing researched thirty-seven joint ventures involving North American and Western European companies and noted that the more successful ones had managerial flexibility.<sup>132</sup> Managers who are not fans of joint ventures view them as dissatisfying, too inflexible, ambiguous, and complex.<sup>133</sup> The double parenting is difficult because the owners can disagree about a number of things and having representatives from each parent can result in confusion, frustration, and slowness. There may be clashes in culture, operational control, and operational policies.<sup>134</sup> Further, in the early 1980's, joint ventures had a high failure rate<sup>135</sup> and still have few high-profile successes.<sup>136</sup> Yet, not all are prone to failure and, when managed well, they can be very successful.<sup>137</sup>

Killing noted that there are two types of joint ventures. One is the type that has a dominant parent.<sup>138</sup> In the case of a U.S. company venturing with an artisan from a developing country, the U.S. company may serve as the dominant parent that selects the functional managers for the shared enterprise.<sup>139</sup> Another option is a shared management venture. However, dominant parent ventures outperform shared management ventures.<sup>140</sup> These are best in artisan fashion because, when a partner is chosen for reasons such as intellectual property or access to resources such as craftsmanship, rather than managerial input, the venture's flexibility allows for better creative output.

The size of the prospective partners is key to dominance as well. The size of the target home partner (e.g., third-world artisan) relative to the foreign firm (e.g., developed-country partner), by characteristics of the industry, and cultural characteristics of the partners influence the choice to enter into joint ventures.<sup>141</sup> Also, trust is a key factor influencing performance in international joint venture relationships.<sup>142</sup> Trust begins with the perceived self-interest of the partners of the joint venture.<sup>143</sup> Then,

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132. J. Peter Killing, *How to Make a Global Joint Venture Work*, HARV. BUS. REV., May 1982, <https://hbr.org/1982/05/how-to-make-a-global-joint-venture-work> [<https://perma.cc/822B-VJKQ>].

133. *Id.* Anoop Madhok, *Revisiting Multinational Firms' Tolerance for Joint Ventures: A Trust-Based Approach*, 26(1) J. INT'L BUS. STUD. 117 (1995).

134. Nagel, *supra* note 129.

135. Killing, *supra* note 132.

136. Alexander Roos et al., *Getting More Value from Joint Ventures*, BOS. CONSULTING GRP. (Dec. 17, 2014), <https://www.bcg.com/publications/2014/m-a-divestitures-more-value-joint-ventures> [<https://perma.cc/JX63-RW9H>].

137. *See id.* PAUL W. BEAMISH, *MULTINATIONAL JOINT VENTURES IN DEVELOPING COUNTRIES* (Routledge 2013); Killing, *supra* note 132.

138. Killing, *supra* note 132.

139. *Id.*

140. *Id.*

141. Richard E. Caves & Sanjeev K. Mehra, *Entry of Foreign Multinationals into US Manufacturing Industries*, in *COMPETITION IN GLOBAL INDUSTRIES* 449 (Michael E. Porter ed., 1986); Bruce Kogut & Harbir Singh, *The Effect of National Culture on the Choice of Entry Mode*, 19(3) J. INT'L BUS. STUD. 411 (1988).

142. Margreet F. Boersma, Peter J. Buckley & Pervez N. Ghauri, *Trust in International Joint Venture Relationships*, 56 J. BUS. RSCH. 1031 (2003).

143. *Id.*



promissory and goodwill-based trust develop and evolve through direct personal interaction.<sup>144</sup>

In addition, the structural framework of an industry needs to be taken into consideration when forming joint ventures. There are differences between the industry structures of people-intensive technology industries and capital-intensive technology industries.<sup>145</sup> Artisan craft fashion is a people-intensive industry.<sup>146</sup> Embryonic industries have structural dimensions which include venture capital arrangements, cooperative agreements, and arrangements to recognize asset mobility.<sup>147</sup> In the dominant parent type of joint venture, if the craft is in a well-established industry, there may be the development of technology in-house, in-house venturing, less sharing of knowledge with the child partner, and slow technology transfer to the child.<sup>148</sup>

The dominant parent, whether dominant in technological manufacturing or in marketing investments, may desire close coordination with the joint venture's activities if the venture customers are important or demanding.<sup>149</sup> The dominant parent that provides marketing support needs to provide close coordination if there is volatile competition or erratic price fluctuations.<sup>150</sup> If competition is not volatile, then the venture's autonomy and coordination needs are lower.<sup>151</sup> The level and extent of coordination simply depend on the critical resources shared by the parent and child.<sup>152</sup> In embryonic industries, the interests of parent and child may conflict if venture managers seek to explore new competitive approaches and technologies on their own, freely and uninhibited.<sup>153</sup> Close coordination by the parent is necessary in order to sustain competitive advantages in industries with differentiable products under certain circumstances.<sup>154</sup> These circumstances include instances when the joint venture partners cannot ensure that competitors will not enter their market niche, shares facilities with the marketing parent, technology is changing rapidly, and prices are lower than what operating costs would be if either party conducted business alone.<sup>155</sup>

While the current best practices are a significant step in the right direction, co-ownership will greatly assist in the success of these ventures and the IPR of the knowledge creators.

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144. *Id.*

145. See Kathryn Rudie Harrigan, *Joint Ventures and Competitive Strategy*, 9 STRATEGIC MGMT. J. 141, 152 (1988).

146. See generally *id.*

147. *Id.* at 153.

148. *Id.*

149. *Id.* at 149.

150. *Id.* at 152.

151. *Id.*

152. *Id.*

153. *Id.* at 154.

154. *Id.* at 155.

155. *Id.*

## V. FUTURE RESEARCH

With respect to potential future research, the United States' Government Accountability Office ("GAO") completed a study entitled "Intellectual Property Observations on Effort to Quantify the Economic Effects of Counterfeit and Pirated Goods."<sup>156</sup> This same type of study needs to be conducted on African cultural artisan crafts.

Author Brian Hilton and his co-authors argue that there should be no rush to ethical judgment on the IPR cases involving the copying of fashion designs.<sup>157</sup> These researchers argue that there needs to be studies about the norms in the industry (i.e. whether the copying is condoned), disparities in cultural values, and consideration of the economic resources between the countries involved.<sup>158</sup>

Further, case studies and ethnographic research methods are recommended to explore examples of fashion appropriation and other ethical fashion practices. This research would likely be useful in creating a strategy for protecting artisans and for creating sustainable operations.

## CONCLUSION

The primary aim of this paper is to profile examples of garment manufacturers in developed countries using cultural artisan crafts of individuals located in under-developed countries without acquiring licensing agreements and without paying royalty payments to the creators. This is IPR piracy disguised as CSR giving back to the needy. It is deceptive. The Portuguese model should be used as a best practice.

The profits made by *Lalabu* could be made by the African women, including Lalabu. The production of indigenous artisan designs, such as the newborn baby bonding garment, could become an essential component of Africa's economic growth. Micro-loans of twenty-five to five hundred dollars are a dubious strategy. Instead, an enforceable intellectual property policy framework is needed.

Thus, it is recommended that companies, such as the Fosses' *Lalabu*, enter into legal licensing agreements to obtain non-exclusive licenses to use the African women's traditional designs, such as the baby wrap. Individuals producing imitations have an advantage unless access is restricted by IPRs. Imitation organizations catch up with countries that have a technological lead. But, are micro-loans the best solution for an African artisan who has a potentially profitable craft: but no economic lead and a developed country imitator who ignores the artisan's intellectual property rights? No, although small creative businesses can certainly benefit from learning entrepreneurial competencies with the use of micro-loans and can benefit from obtaining

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156. U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-423, INTELLECTUAL PROPERTY OBSERVATIONS ON EFFORTS TO QUANTIFY THE ECONOMIC EFFECTS OF COUNTERFEIT AND PIRATED GOODS (2010).

157. Hilton, Choi & Chen, *supra* note 24.

158. *Id.*

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wide access to capital.<sup>159</sup> Yet, there is no evidence that programs like *Lalabu* and EFI provide these benefits. Rather than micro-loans, these companies need to enter into intellectual property licensing deals or shared-ownership business arrangements with the cultural fashion design and fashion accessories artisans.

Fashion involves high and low tech. The innovations discussed are frugal innovations. The technology transfer that occurs via licensing is a supply chain network in and of itself. Minority Serving Institutions (“MSIs”) with doctoral programs in the United States seem well suited for leading these types of licensing deals. In particular, MSIs advocate for people of color (e.g. African descendants, Asians, Pacific Islanders, and Hispanics); have business schools capable of providing technical assistance for the shared-ownership arrangement; and several Historically Black Colleges and Universities (HBCUs) have expressed an interest in improving their involvement and leadership in intellectual property licensing.<sup>160</sup>

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159. Hidayat, Abduh & Abadi, *supra* note 42.

160. See Clovia Hamilton, A Tool Kit for Building HBCU Technology Transfer Supply Chain Networks Using an Advanced Planning System (Aug. 2016) (Ph.D. dissertation, University of Tennessee), [https://trace.tennessee.edu/cgi/viewcontent.cgi?article=5402&context=utk\\_graddiss](https://trace.tennessee.edu/cgi/viewcontent.cgi?article=5402&context=utk_graddiss) [<https://perma.cc/BC6W-A2WP>]; Clovia Hamilton, *Emerging Research Institutions' Technology Transfer Supply Chain Networks' Sustainability: Budget Resource Planning Tool Development*, 45(4) INST. ELEC. & ELECS. ENG'RS ENG'G MGMT REV. 39–52 (2017); Clovia Hamilton, *HBCU Technology Transfer Supply Chain Networks Sustainability Budget Resource Planning Tool Development*, 38 PROC. AM. SOC'Y ENG'G MGMT: 2017 INT'L ANN. CONF. 117 (2018); Clovia Ann Hamilton, *Black Americans Past and Present Created Frugal Innovations and Embraced Circular Economy Principles: The Marketing Dilemma*, 11 ANN. CONF. EUROMED ACAD. BUS. RSCH. ADVANCEMENTS NAT'L & GLOB. BUS. THEORY & PRAC. 591 (2018).