Feeling Appropriately

On Fashion Copyright Talk and Copynorms

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Perhaps no other set of issues draws as much passionate debate among fashion producers and consumers as those surrounding cultural and intellectual property. While the fashion industry has traditionally avoided linking fashion to overtly political statements and subject matter—preferring to position fashion in the dream worlds of fantasy, aspiration, and self-indulgence—the issues of cultural and intellectual property and theft and the artistic, legal, and ethical implications they present are now cultural and political lightning rods.

With the increased use of social media, stories and issues that have been mostly ignored by traditional media are now passionately (if unevenly) taken up in amateur and professionally generated online sites. In fashion news websites, Internet think pieces, blog posts, and reader comments, the stories receiving some of the most attention involve public incidences of cultural appropriation. Cultural appropriation is wide-ranging and can include anything from a direct copy to a derivative rendering of a racially marked or indigenous-identified sartorial design or aesthetic (e.g., Asian chic, tribal chic, and maquiladora chic). It may also involve capitalizing on the commercial value of racial, ethnic, or indigenous names to sell products that evoke popular ideas and stereotypes of cultural difference (e.g., Urban Outfitters' 2012 "Navajo" merchandise line or Louis Vuitton's 2011 Maasai collection, a fashion must for "the consummate WASP gone native," according to *Vogue*).[1]

For all its multidimensionality, what characterizes cultural appropriation is the structurally differentiated relationship between the appropriator and appropriated; acts of appropriation are rooted in and reproduce a relationship of unequal status and power. Appropriators take and

Social Text 128 · Vol. 34, No. 3 · September 2016
DOI 10.1215/01642472-3607576

profit from cultural expressions, forms, and knowledges at the expense of the appropriated group's power to set the terms of the work's cultural production and consumption. Today debates about cultural appropriation are constant features of contemporary fashion media discourse. Internet "fashion talk" is as likely to focus on new designer collections and trends as it is on issues of free expression, consumer choice, racism, colonialism, cultural theft, and historical amnesia.

Another stream of discourse runs parallel to but separate from the discussions about cultural appropriation. This stream focuses on the issues of creative property, specifically the legal rights, benefits, and protections afforded and not afforded to fashion design work. (While certain fashion elements are protected under US intellectual property laws, the garments themselves are considered "useful articles" and so ineligible for copyright protection despite countless and ongoing efforts to change the law.)[2] The discourse on fashion copyright differs from that on cultural appropriation because it is not concentrated in the world of social media engagement. It is part of the official discourse of the fashion industry, endorsed and sponsored by influential designers, industry gatekeepers (e.g., the editors in chief of *Harper's Bazaar* and *Vogue*), and some of its leading professional organizations (e.g., the Council of Fashion Designers of America [CFDA] and the American Apparel and Footwear Association). And unlike the discourse on cultural appropriation, fashion copyright discourse has raised legal questions.

Since the early twentieth century, industry representatives and their corporate and political allies have worked diligently, if inconsistently, to seek legal protection for their products. One of the first organized efforts to recognize fashion as intellectual property in the United States began in 1932 with the formation of the Fashion Originators' Guild of America (FOGA), the CFDA's historical predecessor. Responding to two conflicting rival economic developments—the emergence of the US commercial fashion industry as a real competitor in the fashion market in the wake of Europe's interwar crises and the concurrent decline of US middle-class consumption caused by the Great Depression—FOGA launched a multifaceted media and consumer outreach campaign and a series of political lobbying efforts intended to quash the competition from mass-market clothing manufacturers and retailers.[3] (At its founding, FOGA's membership was limited to luxury fashion manufacturers and retailers.) Much as today, the luxury sector saddled the mass market with the label of unethical copycats. In influential fashion media outlets, FOGA published a slew of public notices naming and shaming manufacturers that copied its members' products, as well as retailers that did business with them. It also employed a series of contractual mechanisms and penalties to force members and nonmembers to comply with its stringent guidelines,

all while conveniently ignoring that many of its members (including its founders) began and built their companies by copying European designs. Using language meant to appeal to the public's sense of civic, moral, and legal rightness, FOGA was mostly effective until it was found to have violated antitrust laws in a case brought by the Federal Trade Commission in 1941.[4] The court's judgment effectively ended FOGA. Yet FOGA left an enduring legacy despite its short-lived reign. It stigmatized what had been a common and commonly accepted fashion business and consumer practice—copying—as a lower-class and illegitimate activity.

Since 1914 more than eighty bills to expand the Copyright Act to include fashion design have been proposed and introduced to Congress; none of them successful. The latest proposal, introduced by Senator Charles Schumer (D-NY) and heavily lobbied by fashion and fashion media companies, was called the Innovative Design Protection Act of 2012.[5] As with earlier proposals, its advocates cited a severe loss of sales and the immoral nature of copying as reasons for amending the Copyright Act. They also suggested a link between terrorism and intellectual property crimes—referencing news reports and governmental investigations, including the 2003 congressional hearings on the subject—that has driven fashion copyright debates in recent years. All but ignored in more than a century's worth of campaigns and debates are the social dynamics and historical contexts that define and structure creative property as an idea and a material form.

The aim of this essay and the larger project it subtends is to lay the critical groundwork for a different approach to the issues of creative property and impropriety with regard to fashion. Charting the continuities and discontinuities between the discourse of cultural appropriation and the discourse of legal rights is one of this project's key tasks. As already mentioned, the popular debates about cultural appropriation and the political, legal, and economic debates about fashion copyright are rarely addressed together and are even more rarely understood as linked within broader structures of power and meaning. The separation of these two discursive fields has created a bifurcated and contradictory approach to the issues of fashion cultural and intellectual property. Fashion producers and consumers who raise the banners of free expression and the free market (of goods, ideas, and cultural properties) in one hand wave the banners of regulation and protection with the other. By thinking together the issues of cultural appropriation and copyright, I hope to draw out their shared structural logics to reveal when they overlap and why they occlude each other.

An equally important task is to facilitate a shift in critical focus away from the "objective" legal and ethical doctrines of ownership and theft. My concern is not with the content of fashion copyright law, whose

legal status is murky at best, but with the cultural, social, and emotional frameworks that condition and legitimate the everyday standards, language, and behaviors surrounding corporate and consumer copying of fashion designs, trends, and styles. The most significant forces enabling, discouraging, and regulating practices of design piracy and cultural theft, I argue, are not the legal and ethical doctrines of copyright law but the dominant cultural impressions and interpretations that exist about them. Copyright talk and what are called copynorms (the popular attitudes and understandings about intellectual property, ownership, and theft) arise from but also assume a life beyond the law. It is in the broader sphere of copyright law, specifically the parajuridical domains of fashion copyright talk and copynorms, where common sense and hegemonic feelings are marshaled as logics of action that justify and refute different modes of copying. Attention to copyright talk and copynorms shines much-needed critical light on the ways the cultural, social, and historical shape the conventional wisdom of and about fashion copyright law. A highly publicized fashion copyright scandal from 2011 provides an illustrative example of the relevance and need for the tasks outlined above.

In July 2011 Feral Childe, a small, independent, but popular ecofashion label, made headlines when it announced plans to sue the fast-fashion retail giant Forever 21 for copyright infringement.[6] The independent label accused Forever 21 of copying one of its hand-designed prints called Teepees. In a published interview Feral Childe designers Alice Wu and Moriah Carlson explain: "The Feral Childe Teepees print idea was developed over several months, starting from sketchbook drawings and then refined and edited in countless email exchanges between us until we perfected the image. . . . There are hidden pictures of teepees and crowns and pennants in the drawing. . . . How could anyone else come up with that combination?"[7] In addition, the designers issued a public statement making clear that they see themselves as victims of design piracy. The statement paints Feral Childe as the indie/ecolabel David to Forever 21's Goliath: "Without any consideration or respect for the origin of the artwork, Forever 21's mass reproduction of our textile design without our permission is extremely unethical, and in direct violation of the law. It's frustrating that this enormous company, with over a billion dollars a year in revenues, would dare to poach the artistic creations of a small company such as ours."[8] The fashion media and its readers overwhelmingly sided with the indie label. In some ways this is not surprising: in its relatively short history Forever 21 has become a familiar and easy target of derision. Forever 21 was founded in 1984 by a Korean immigrant family in California, and its rapid growth and rapid turnover of cheap, trendy clothes has helped establish its reputation as a retail behemoth bucking the rising tide of fashion industry and consumer ethical norms around

environmental sustainability and so-called slow fashion.[9] Further tarnishing the company's reputation is a long series of accusations (and lawsuits) charging Forever 21 with copying some of the most respected designers and brands in the industry, including Diane von Furstenberg, Anna Sui, Foley + Corinna, 3.1 Phillip Lim, and Trovata.

Forever 21's owners have also been raked over the coals in the media. The racial-religious background of Do Won Chang and Jin Sook Chang, the married couple who own and run Forever 21 with their adult children, has been fashion tabloid fodder. Sensationalist news stories about the Korean immigrant entrepreneurs who are also born-again Christians portray them as clannish, conservative, and fanatical. Hints and outright statements that the Changs' business plan involves employee religious conversions, a religiously hostile and abusive work environment, and a "secret" plan to use Forever 21 products and packaging to religiously indoctrinate an exponentially growing consumer base depict them as economic threats in terms that have racialized implications.[10] Media portrayals of the Changs' company as a "strange, rabid, proselytizing Christian cult"[11] and a "creepy-Christian sweatshop emporium"[12] recall earlier depictions of the controversial Unification Church, founded by Sun Ayung Moon, whose followers were pejoratively known as "Moonies."

Forever 21's reputation, while dented by numerous ethical charges, has not stopped it from building a massive consumer base. Millions of consumers worldwide have remained loyal (or at least unopposed) to the retailer, helping make it one of the largest privately owned US companies. In 2014 Forever 21 generated nearly $4 billion in sales.[13] So why did its legions of consumers—a large proportion of them in the highly vocal social media demographic—remain silent during the Feral Childe–Forever 21 media storm? Why did no voices speak out, if not on behalf of Forever 21 (a difficult thing to do, given fashion culture's prevailing mores and values), then at least to offer a more balanced view of the controversy? Why did Feral Childe's Teepees design not set off a fresh wave of Internet think pieces about fashion's racial politics and consumer and corporate practices of cultural appropriation?

The general silence around the cultural history and politics of Teepees, I suggest, reveals the critical blind spot left by the conceptual gap between intellectual property and cultural property. This conceptual and discursive bifurcation is why it may be odd but not surprising that those advocating for the regulation and protection of fashion design as intellectual property are just as often guilty of appropriating cultural property. Feral Childe is only one of many fashion brands and designers that seem oblivious to the incongruity of their legal position and design practice. In 1932 FOGA members celebrated its establishment as a bulwark against fashion copying with a fashion show at New York's Waldorf Astoria Hotel

that prominently featured turbans and fezzes, designs copied from French and other European designers (who were in the throes of yet another orientalist fashion craze). For more contemporary examples, consider Ralph Lauren and Diane von Furstenberg: Both are vocal proponents of fashion copyright legislation[14] and are actively involved in the CFDA's You Can't Fake Fashion campaign. Both designers' labels also include an array of "Maasai" products—clothing, jewelry, home furnishings, and paint—inspired by but without the permission of or payment to the Maasai people (an ethnic group of southern Kenya and northern Tanzania). If designers like Lauren, von Furstenberg, and the Feral Childe team or their supporters saw the irony in taking a stand against design piracy while appropriating ethnic and indigenous designs and aesthetics, they never acknowledged it. The silence reveals the limits of intellectual property in the popular and legal imaginary—but not necessarily its contradictions.

The Sociocultural Construction of Intellectual Property Rights

In the commons as well as in courtrooms, debates about fashion copyright are framed by a discourse of legal rights that does not encompass the appropriation of subordinated groups' cultural expressions and forms. The nonlegal standing of these cultural sources, though, does not represent a contradiction at odds with the underlying logic of copyright. In fact, their nonlegal standing reflects the colonial enterprise of Western intellectual property rights (IPR) systems. As Rosemary J. Coombe puts it, the "legal rights discourse relies upon . . . colonial categories that shape its parameters."[15] While grants and protections of property rights are often linked to a wide range of freedoms—free human exploration; free trade; free expression; the freedom to protect the labors and investments that go into creating art, ideas, and inventions; the freedom to determine when and how one's creative work is introduced into and circulates in the market—the actual history of property rights suggests different priorities. It has been guided not by an ethical and moral drive to support self-determination worldwide but by political and economic power strategies of control and containment that Vandana Shiva traces to early European colonialism in the Americas:

> The freedom that transnational corporations are claiming through intellectual property rights protection in the GATT [General Agreement on Tariffs and Trade] agreement on Trade Related Intellectual Property Rights is the freedom that European colonizers have claimed since 1492. Columbus set a precedent when he treated the license to conquer non-European peoples as a natural right of European men. The land titles issued by the pope through European kings and queens were the first patents.[16]

For Shiva and others, including Coombe, Keith Aoki, Aziz Choudry, Ruth L. Gana, K. J. Greene, Adrian Johns, and Nell Jessup Newton, the Western IPR system has been a central mechanism for political, cultural, and economic domination. Mapping the complex genealogies of intellectual property law through a wide range of fields, from music and botany to tribal land allotment and economic developmental policies, these scholars have shown that the history of intellectual property is a history of social and geopolitical domination. A couple of examples usefully illustrate the historical antecedents of present-day fashion copynorms and logics.

Throughout the nineteenth and early twentieth centuries in the United States, federal policies designed to "kill the Indian . . . and save the man"[17] relied heavily on the notion of property rights and their associated concepts of individual subjecthood and individual rights. As Newton details, the logic and application of property rights (e.g., the Dawes Act of 1887) played an instrumental role in Indian cultural genocide. "Forced allotment in severalty of tribal land was designed to strike at what was perceived as the heart of native cultural beliefs, that property is held in common. Forcing tribal people to become individual property owners would, it was thought, lead inevitably to the development of respect for property rights instead of communal values."[18] But respect under the Western property system rarely flows in two directions. Certainly no respect was afforded indigenous land and cultural property rights in the nineteenth century. In the neocolonial context of the Global South, similar patterns of appropriation have continued. Shiva's book *Biopiracy* powerfully argues that US corporations' massive land grab of the Third World has been facilitated by the Western patent system. "Patents on life" (human, plant, and animal) provide Western genetic engineering and biotechnology companies a combination of methods to control and limit the Third World's bio-, agro-, and sociocultural production.[19] These methods include everything from setting exorbitant prices for the use of now patented natural resources and indigenous knowledges to the outright exclusion from use of these resources. As Shiva and others (including those mentioned above) have shown, the uneven development of the Global North and Global South is not simply an unlucky phenomenon; it is the direct outcome of the Western IPR system's "unidirectional drain of intellectual resources from the Third World."[20]

The World Intellectual Property Organization (WIPO) has played a major role in aiding and accelerating the upward distribution of resources and benefits toward the Global North. Created in the 1960s, this international administrative body and subagency of the United Nations responsible for monitoring intellectual property standards and policies globally was established at a time when First World Western countries were focused on containing the spread of communism from the Soviet Union.

WIPO members believed that the Cold War restructuring of the global economic order hinged on controlling the meaning, scope, and flow of free trade. The WIPO's founding purpose was to oversee the capitalist development of the Third World. In effect, for Third World countries to be recognized as developed and modern states by international organizations like WIPO and the World Trade Organization (WTO), they were required to look and act like the West.

The expressed purpose of WIPO and other international trade organizations and policies (e.g., the 1943 GATT and the 1993 Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPS]) was to establish a global market of free trade and investment. In reality, they have given the most powerful industrialized states more global political economic control by forcing the rest of the world to adhere to the Western IPR system (and the concepts of private property, individual subjecthood, and market freedom it is organized around). International trade structures exert pressure on developing countries to conform and comply with Western intellectual property laws and logics even when they do not serve local interests. For example, the United States threatened to stall the US-Pakistan bilateral investment treaty unless Pakistan agreed to "pay damages to US companies for their *future* investment in case of the infringement of IPR."[21] *In case of*—not only does this condition "serve as an important vehicle for advancing US global interests in the field of agricultural biotechnology,"[22] but such terms of engagement secure existing relations of domination through mechanisms of biocolonialism. As Choudry explains, the United States "wants maximum concessions from developing countries, because this will make it harder for governments to oppose US demands at the WTO."[23] In equally plain language, Gana argues that intellectual property treaties like TRIPS achieve, "through the potential threat of economic ostracism, what could not be accomplished through negotiations independent of the international economic framework."[24]

If the uneven development and widening gap between rich and poor nations tell us anything, it is that IPR-based developmental policies not only do not benefit developing nations but also may hurt them. It is an ironic but revealing fact that two countries most often accused of IPR infringement, China and Korea, are also the most successful examples of industrialization.

However, the rapid industrialization of China and Korea, like Japan before them, has not necessarily earned them the confidence of Western capitalist societies. While the architects and advocates of the contemporary neoliberal IPR system insist that capitalist models of industrialization are, in the words of globalization champion Thomas L. Friedman, the paths to "shrinking the world . . . and flattening the playing field,"[25]

increased industrialization has not done much to alter the broader global social order. Just as the United States perceived Japanese people in the 1980s as "essentially imitative"[26] (a stereotype fueled, but not created, by the dominance of Japan's supposedly piracy-enabling videocassette recorders), Chinese and Koreans today are seen as culturally uncreative and prone to copying.

Racial narratives about Asian copying as theft inadvertently but powerfully link distinct ethnic groups, historical contexts, and economic activities together. When the term *piracy* (a term not typically used in intellectual property legislation)[27] is repeatedly used in public discourse to describe the activities of Japanese electronics engineers, Indian pharmaceutical scientists, and Chinese and Korean apparel makers—as well as Thai pirates who prey on Southeast Asian "boat people"—this discursive practice not only constructs a racial myth about an Asian propensity for theft but also tacitly associates intellectual property disputes with threats of physical and material harm. Dominant discourses about piracy have worked to stigmatize copying as a racial and foreign menace to the nation and its democratic principles. A characteristic formulation of the orientalization of copying appears in a *Forbes* article about "Chinese knockoffs" published in 2012: "When it comes to innovation, the Chinese won't deliver. . . . China is the total flip side of the US. Piracy goes back to the China world view that individual rights don't matter."[28]

As illustrated by the *Forbes* article, a primary focus of media and governmental discourse today is Chinese design piracy and the larger Chinese copycat culture presumed to explain it. A Google search for "Chinese copycat culture" (and the many hundreds of results it returns) suggests that *copycat* has become a key racial qualifier of Asian difference. Today the racial-economic stereotype of Asians as slavish copycats is pervasive across the political spectrum from sources as disparate as the conservative former presidential candidate Carly Fiorina and the left-leaning CFDA. The racialization of copying, as Anjali Vats points out, buttresses Western intellectual property regimes: "The repeated identification in American political discourses of infringers—with no moral justifications for their actions—as racial Other presupposes the correctness of the legal order that defines those socially constructed crimes."[29] This legal order and the social categories it creates also occlude Asians' authorship claims and the authorial origins of Asian cultural resources. When "Asians" are viewed as a homogeneous, undifferentiated, and unimaginative group, this monolithic conception positions them as racially other to the Western IPR system's central figure of the individual author.

In the nineteenth century, when the concept of intellectual property first entered US law, the courts consistently linked creative production to a single authorizing individual. What has come to be known as the standard

of authorial originality defines originality as the property of the individual authorial subject. This means both that creativity is what makes the author and that an author's creativity—like other kinds of property and economic investments—is recognized as deserving legal protection. Copyright law grants legal subjecthood to those who embody Western (and tacitly white) notions of the possessive individual—people who are recognized as individually unique and whose creative labors are seen as manifestations of their unique individuality. Consequently, it denies legal subjecthood to historically dispossessed individuals, those denied individuality because they were viewed (by the law or social majority) as the equivalent of three-fifths of a white man or as an indistinguishable horde of people. Dispossessed individuals do not own their labor power—much less the products or profits of their labor. They are reduced instead to the embodiment of labor and capital's raw materials.

The colonial conceptual logics underpinning the Western IPR system make it, on the one hand, possible for the Feral Childe designers to claim authorial status and control of a Plains Indian design and, on the other hand, impossible for Forever 21's Korean immigrant owners to do the same with regard to Feral Childe's design. While minoritized communities have characterized the cultural appropriation Feral Childe engaged in as an act of theft coextensive with the history of Western colonialism and settler domination, such acts are rarely understood or treated as legal infringements by the fashion industry or fashion public. Meanwhile, similar practices by Asian fashion producers are consistently and roundly condemned as a legal or at least an ethical violation. The incongruity, as I have already mentioned, is a direct outcome of Western constructions of "the author" that are rooted in the importance of and investments in the unfettered privileges of whiteness (privileges that include unfettered productivity, unfettered access to global resources and markets, and the unfettered exercise and protection of property rights). Additionally, they rely on and reproduce historically ingrained assumptions that non-Western ideas and things are authorless. What the courts and the public generally view as cultural artifacts are imagined to have nonoriginary origins because they lack an authorizing signature.[30] Cultural artifacts are seen as naturally or culturally derived and generationally transmitted among members of a cultural, ethnic, and/or family group. They are associated with heritage and history, not with intellect and innovation. They are perceived not as works of art created through the process of authorship but as unprocessed and unrefined, like so much raw material.

The Feral Childe case is instructive because it evidences how the Western IPR system, including its associated copynorms, grants authorial subjecthood to some while denying it to others. What is more, it reveals

that just as often legal subjecthood is not only granted or denied to a privileged few but also constituted through the objecthood of others.

Authorial Rights as Authorial Feelings

At the height of the Feral Childe–Forever 21 controversy, it came to represent a compelling case study of the need for expanded copyright protection for fashion designers. Expert sources like Susan Scafidi, a fashion law professor at Fordham University and a vocal advocate and legal consultant for two fashion copyright bills, were called on by journalists to interpret the law for a general audience. While Scafidi's public comments about the strength of Feral Childe's case—"My money's on Feral Childe for this one"[31]—may not be effective evidence in a lawsuit, such copyright talk has a powerful impact, especially when amplified by a socially networked media.

The fashion mass media supported and perpetuated the popular consensus that Feral Childe had a rock solid legal and ethical position. The media's depiction of Forever 21 as a menacing company engaging in a variety of unethical practices (e.g., selling fast fashion, trafficking in designer copies, engaging in a business practice that involved the unholy mix of retail and religion, and imposing their culture of Asian clannishness in spaces meant to celebrate the American value of individual expression through consumer agency) coupled with its many portrayals of designers Wu and Carlson as "authors" heavily tilted the public's confidence toward Feral Childe.

As the media attacked Forever 21 as a rapacious billion-dollar corporation run by morally bankrupt people, it gave Wu and Carlson a platform for presenting themselves as authors. The designers' own statements about their creative process (some of which I have quoted above) were reproduced in some form in nearly every story. Feral Childe's media strategy and coverage bolstered the designers' image as authors or individuated "originary creative selves."[32] The media also highlighted the brand's predisposition to ethical business practices by emphasizing its ecoconsciousness. (That Feral Childe manufactures its clothes locally in New York City's historic Garment District was repeatedly emphasized in the media.) Finally, the most decisive factor in favor of Feral Childe (as the media portrayed it to the public) was that the designers had registered the textile print with the US Copyright Office.

So far I have focused on the media coverage about the Feral Childe lawsuit rather than the legal merits of the case. This is partly because the lawsuit was never filed. About one month after the controversy began, Forever 21 pulled the printed tops in question from its shelves.[33] Pleading their ignorance of the Feral Childe print, the retailer explained that it

sources much of its inventory through third-party vendors and unknowingly accepted items that were copyright protected. It is a defense that Forever 21 (among other fast-fashion retailers, e.g., the British chain Topshop) has offered before to shield themselves from allegations of counterfeiting.

The truthfulness of Forever 21's claim went largely uninvestigated. I could find only one article that gave any credence to it.[34] Others who mentioned Forever 21's defense did so only to dismiss it quickly as either a cheap attempt at scapegoating or outright lying (basing the retailer's guilt on its reputed pattern of unethical behaviors). One blog entry at *Fashion Law* offered this odd response intended to challenge the veracity of Forever 21's defense: "Considering that Forever 21 is known first and fo [*sic*] as a fast fashion retailer, I think it is a huge stretch to say that its buyers are not out there looking primarily for copies!"[35] The blogger speculated that the retailer should have known that its vendor was supplying counterfeit products simply because it is in the business of fast fashion. The blogger offered no evidence that Forever 21 had this knowledge or case law holding Forever 21 responsible for its suppliers' actions. The *Fashion Law* blogger's opinion of Forever 21's guilt rests entirely on a presumption that fast fashion necessarily—and sufficiently—implies design piracy.

The image the blogger chose to accompany the op-ed is curious, too. Rather than provide an image of the Forever 21 printed blouse at the center of this controversy, the online article uses images from a previous ad campaign featuring personal style blogger Rumi Neely. Forever 21's relationship with this elite Asian American blogger is used to cast further racial suspicion on the retailer. As I have documented in my 2015 book, the phenomenal rise of elite Asian bloggers like Neely has brought with it increased racial scrutiny expressed through the apparently nonracial language of Asian bloggers' cheap tastes and cheap work and business ethics.[36] In the *Fashion Law* blog supporting Feral Childe, the image of a popular Japanese American blogger is used to evoke negative feelings about the ethical standards of a Korean immigrant-owned brand.

To be clear, few facts of the case or the law were offered in the discourse of legal rights that surrounded the controversy. Instead, widely accepted cultural standards and norms about the racialized meanings of authorship and creative work, originality, and design theft—clothed in legal language and ethical concerns—substituted for actual legal judgments and analyses. A cultural context already sympathetic to indie, eco-conscious brands and increasingly averse to fast-fashion retailers predisposed the public to view Feral Childe's claims supportively. Such cultural preconditions shaped the public discourse about the Feral Childe–Forever 21 controversy and the public's feelings about broader injustice of fashion knock-offs. In other words, racially coded language and feelings directed

the controversy. What is more, the popular production and circulation of cultural norms, values, and biases about the fashion designer as artist and the fast-fashion retailer as a corrupting environmental, economic, and consumer force actually resolved the controversy. Mass-mediated public opinions, beliefs, and attitudes and not the law forced the removal of the printed tops from Forever 21's shelves—which was lucky for Feral Childe.

Lawsuits (which tend to be long and costly) have proven all but ineffective against Forever 21. Of the more than fifty copyright lawsuits filed against the retail giant, it has not lost a single one.[37] Most of the lawsuits never made it to trial, either because the retailer settled out of court or because the lawsuits lacked merit. Only Trovata's lawsuit resulted in a trial, but it ended with a hung jury. Before the scheduled retrial date, Forever 21 settled out of court. This is the second reason the media coverage is so important to consider: copyright case law and the attendant legal scholarship have little direct influence on corporate and consumer practices of creativity and copying, since they are largely inaccessible to the public (whether due to the specialized language of legal discourse or to their restricted location in law journals protected by expensive subscriptions, firewalls, and passwords). Media publicity and public sentiment have been the strongest forces driving corporate and consumer practices.

Feelings are so fundamental to the issue of fashion copying that even the copyright talk of intellectual property lawyers is framed and understood in terms of emotion. In a *Time* article titled "When Native American Appropriation Is Appropriate," Scafidi suggests that the measure of a good or a bad copy is the emotion it arouses. The evidence of the difference between Alber Elbaz and Jason Wu's toga-inspired gowns and Katy Perry's notorious yellowface performance at the 2013 American Music Awards, according to Scafidi, is that the gowns drew applause from "the descendants of Roman senators" while Perry's geisha look "drew criticism." Underscoring her essential point that fashion copying is a matter of feelings, she reminds readers, "A year earlier, Prada's far more transformative Japanese-inspired collection did not [draw criticism]."[38] It is the ephemeral nature of emotions, especially emotions about taste, that leads Scafidi to assert, "Today's taboo may be tomorrow's trend." Fashion copying, in Scafidi's op-ed essay, is a matter of feelings, not facts—not the facts of history, of racism and colonialism, or of commercial capitalism's uneven distribution of costs and benefits.[39]

Just as important as what the media discourse did to help Feral Childe win its case in the court of public opinion is what it did not do. The popular perception and media construction of the legitimacy of Feral Childe's claim depended on turning a blind eye to the ecofashion brand's complicity in design piracy and with it the cultural, social, and historical realities that make such complicity both possible and invisible. Ironi-

cally, it was the discursive and emotional construction of Feral Childe as an ethical brand that provided crucial cover against public scrutiny. By repeatedly holding up the indie label's ecoconsciousness as the evidence and foundation of their righteous moral legal position, the Feral Childe designers and their supporters turned "ethical fashion" into a brand identity. Effectively, the Feral Childe–Forever 21 controversy depoliticized the potentially radical idea that ethical production and ethical consumption might transform fashion's business-as-usual approach that puts profits before people and the environment. Ethical fashion became the sign under which the designers and their supporters acted as hegemonic agents for the preservation of the racial status quo while appearing to promote the socioecological public good.

In Feral Childe's lawsuit and in the media reaction to it, Native Americans' legal and cultural claims on teepee designs were never acknowledged. In fact, Native Americans do not exist as real human subjects at all—they are represented only in object form in the textile print called Teepees (the English spelling for a Lakota word, *thípi*). The popular discussions about the lawsuit suggest two informal but clear consensuses. First, there was an overall and expressed agreement that the print rightfully belonged to Feral Childe—that it was the private property of the designers/authors who head the company. Second, there was a tacit agreement that the general teepee design itself was public property. The publicness of the teepee, the idea that it existed in the public domain, belonging to no one and so was freely available to be manipulated, refined, and transformed into fashion for the use and profit of the Western author, was a belief that literally went without saying.

The Feral Childe case exemplifies how copyright and its popular interpretations or copynorms serve as apparatuses of colonial epistemologies. More to my point here, it demonstrates that copyright and copynorms do not just guard the economic interests of authors; they protect the social hierarchies that underpin formal and informal constructions of legality and legitimacy.

A wider view of the general teepee design provides a more nuanced account of what is actually being protected and not protected by copyright and copynorms. Long before the ecofashion designers began exchanging e-mail messages, Great Plains Indians invented the teepee design as both an architectural and an artistic practice. For millennia the teepee has been a highly regarded cultural symbol, appearing on many kinds of Native American art, from fashion to Plains Indian winter counts (pictorial calendars recorded on various media formats, including fabrics like muslin and linen). Margaret Wood observes in her book *Native American Fashion* that "silhouetted images of teepees" are some of the most commonplace "Indian design motifs."[40] (They are so ubiquitous, in fact, that

Wood implies that they have become an almost hackneyed feature of native fashion.)[41] Yet the Native American fashion history of the design was never mentioned in the popular discussions about Feral Childe's Teepees print.

The bifurcation of the sociocultural context from the ethicolegal questions obscures a number of historical realities. In addition to the already mentioned native history of the teepee design is the history of "native appropriations."[42] Feral Childe's naming of its print and its copyright of it are acts that are both embedded in and coextensive with the national history of co-opting Native American cultural objects, imagery, knowledges, and practices. What Philip J. Deloria calls the "homegrown" myth of native resistance has imbued native objects, imagery, stories, and practices with a special oppositional status, making them attractive in the construction of white countercultural subjectivities (like "indie ecofashion designer"). Native appropriation practices are so deeply entwined with US history that they appear in a key origin story of American identity, the Boston Tea Party. Describing one of the earliest scenes of native appropriation, Deloria recounts: "A chorus of Indian war whoops sounded outside the hall, and a party of what looked like Indian men sprinted down the wharves. Boarding the *Dartmouth* and two other tea ships, the *Eleanor* and the *Beaver*, the Indians 'overpowered' the sympathetic guard and dumped tea into Boston harbor the next three hours."[43] While the meanings and contexts of what Deloria terms Indian play are heterogeneous, we can draw a clear line linking the racial assumptions and desires of revolutionary Bostonians to today's countercultural groups of, say, alternative music listeners who arrive at events like the Coachella Valley Music and Arts Festival adorned in Native American headdresses, fringed moccasins, and dream catcher earrings.

At its core Indian play is a struggle over meaning and the power of interpretation. Recall that the Feral Childe designers insist their hodgepodge print of "teepees and crowns and pennants" is an original creation—apparently so original that the designers defy anyone to challenge their authorship. "How could anyone else come up with that combination?" Their question is meant to be rhetorical, but it is rhetorical only if we accept that the textile print could not possibly have an earlier authorial reference. While I do not claim that the Feral Childe designers were directly influenced by the Plains winter counts, there is a clear structural affinity between them. A comparison of the Feral Childe—or Forever 21—print with the Lakota winter counts that are part of the National Museum of Natural History's archive shows a strikingly similar graphic pattern of line drawings, with one difference being that the Lakota patterns are much less densely packed. The Swan Winter Count (1800–1870) and Lone Dog Winter Count (1800–1870) are especially similar.[44] (Moreover, teepees

and headpieces, among other symbols, are well represented in nearly all the winter counts.)

Though not as rhetorical as it seems, the rhetorical mode of the designers' question is still significant. The question and the indignation underlying it exemplify Deloria's observation that playing Indian gives Americans "a jolt of self-creative power."[45] The identity formation and agency (or "self-creative power") of white countercultural subject positions are constituted through not just the displacement but the dissipation of native meanings. Recall that the Feral Childe designers admonished Forever 21 for showing no "respect for the origin of the artwork." Feral Childe's assertion that the textile print, a design that largely involves teepees, is the *original* result of their creative labor depends on the erasure of both the historical meanings of teepees for Plains Indians and the power to define these meanings.

My purpose in describing the Feral Childe–Forever 21 controversy is not to take either side but to demonstrate that a legal framework of authorship and ownership is inadequate for capturing the full range of issues with regard to fashion copying—not least because legal conceptual categories are rooted in racist and colonialist epistemologies that structure the erasure of the teepee's native origins. What is more, the copyright talk that dominated the media coverage of the controversy actually misinterpreted and in some instances ignored the very facts of the law. A closer examination of copyright law and case histories would have found that Forever 21's liability was less than assumed in the media or at least that Feral Childe's case was not the slam-dunk win that the media stories indicated. (That Forever 21 sourced the printed tops from a third-party vendor rather than manufactured them in house significantly diminishes their liability.) But the facts of copyright law are rarely the guiding factors that shape the common sense about or accepted use of sartorial cultural and intellectual property.

The intellectual property protection available to fashion producers has been ineffective at reducing some of the most common cases of cultural theft. It obscures rather than protects, for example, Native American claims to cultural objects, expressions, and knowledge. Paradoxically, expanding copyright to include fashion design would actually legalize cultural theft rather than curb it. As the examples above illustrate and the Feral Childe Teepees print exemplifies, grants of IPR do not necessarily go to the true author or authorial community but to the individuals or agents that are structurally positioned to best put the IPR system and its underlying assumptions to work for their own benefit. Historically, private property rights have been the supporting conditions enabling the eradication of Native American cultural authority to define, determine, and control the meanings and circulation of native design and fashion.

Furthermore, as Jane Anderson has cautioned, expanding copyright laws and logics premised on Western racially gendered notions of private property would formalize the exclusion of other cooperative, communal, and cultural relationships to materials. This is the colonial power of the IPR system, in Anderson's words, "wherein certain hierarchical power relations are folded into the present and normalized."[46]

Even when Native American groups have made use of the law, it has not discouraged the practices of corporate or consumer native appropriations. While the Indian Arts and Crafts Act (established in 1935 and amended in 1990 and 2010 to significantly increase fines and add jail sentences for infringement) makes it illegal to produce and sell products that falsely claim to be Indian made, countless retailers and vendors sell items with Indian names. One of the more notorious examples is Urban Outfitters' 2012 line of "Navajo" products that included the "Navajo hipster panty" and "Navajo flask." Likewise, while the Maasai people have trademarked their name (in 2013),[47] Western corporate and personal brands continue to appropriate the Maasai name and image. (One estimate indicates that six US and European companies, including those run by von Furstenberg, Lauren, and Calvin Klein, have "each made more than $100 million in annual sales during the last decade using the Maasai name.")[48] Nor has the Maasai trademark held in check touristic desires for otherness. Mindy Budgor, a white middle-class woman from California who left a marketing position at Gucci, made news when she became, and later authored a book about becoming, "the first female Maasai warrior." *Glamour* magazine celebrated her as an "inspirational" figure.[49] We have also seen Pharrell Williams featured on the cover of British *GQ* (October 2014) in arbitrary face paint and clothing styled to evoke the Maasai *shuka*.

These examples demonstrate the crucial point that fashion copyright and cultural appropriation practices are less informed by objective ethical principles and legal regulations and more by common senses or feelings about who deserves protection and who does not, what is art and what is artifact, and what counts as being inspired by a creative source and what counts as theft. The media/cultural constructions about creative property and impropriety have a far greater impact on the practices associated with fashion design and fashion cultural appropriation than do legal statutes, principles, or facts.

Indeed, legal principles are often misunderstood or highly contentious (even among experts), and many of the purported truths about the authorial integrity of Western fashion industries, the purpose and need for fashion copyright, and the nature and extent of the counterfeit fashion problem are flat-out wrong. One of the most widely circulated facts about the problem (or, as it is regularly described, the "danger") of counterfeit

goods is that "5 to 7 percent"—or sometimes "an average of 6 percent"—of world trade involves counterfeit products.[50] The media regularly attributes counterfeit goods to Chinese manufacturers. In fashion contexts, this statistic is offered as evidence of the need for fashion design copyright laws to protect US fashion businesses and entrepreneurs.

Studies by the US Government Accountability Office (GAO) have not backed up this statistic and have in fact shown that claims about the reality and impact of counterfeit trade are massively overstated. In 2007 the GAO estimated that counterfeit goods make up "less than one-tenth of 1 percent" of world trade and that counterfeit clothing and accessories account only for a *declining* percentage of this tiny fraction.[51] A 2010 report stated that counterfeit pharmaceuticals, consumer electronics, and perfumes are on the rise.[52] This report is especially significant because it directly addresses the fake statistic: "The most commonly cited 'rule of thumb' is that counterfeit trade accounts for 5 to 7 percent of world trade, which has been attributed to the International Chamber of Commerce."[53] Citing a 2008 report by the Organisation for Economic Co-operation and Development that the "metrics underlying the International Chamber of Commerce's estimates are not clear," the GAO concludes with a statement about economists' general "skepticism over the estimate that counterfeit trade represents 5 to 7 percent of world trade."[54] This fake statistic reflects and perpetuates another kind of public feeling, a form of moral panic, shaping copyright talk and copynorms.

I suggest that a cultural studies approach to the issues of fashion property and impropriety is necessary to bring into focus both the racial and global dimensions of the struggle over meaning and power and the emotional framework and effects that such dynamics bring to bear on these struggles. We have seen in the Feral Childe–Forever 21 controversy that emotions—Wu and Carlson's stated frustrations as well as the shame that the designers, their supporters, and the media heaped on Forever 21—are the instrumentalizing forces for building and maintaining the public discourse of legal rights and ethical standards that directed the content and outcome of the controversy. What is more, we can understand copyright law not as a system that simply controls and regulates the circulation of creative works but more fundamentally as a system that provides institutional infrastructure for privileging some emotional expressions and occluding others. Recall that Feral Childe's designers articulated Forever 21's violation of their authorial agency in terms of emotion. They accused Forever 21 of having no "consideration" or "respect" and state that "it's frustrating" that this enormous company "would dare to poach the artistic creations of a small company such as ours." Their feelings about Forever 21's legal and ethical violations are central to making their case that they are the true authors of the print. Essentially, their public

statement insists that Forever 21's violations of their feelings have legal consequences.

Copyright law and the copynorms that both emanate from them and assume a cultural life of their own in the popular discourse of legal rights or copyright talk reflect and define a hierarchy of feelings that matter, do not matter, and, more troubling, do not even register in the legal or popular imaginary. In the popular arena, the feelings of those who have accused cultural appropriators of disrespect and condescension are routinely dismissed as either hypersensitive, due to the excesses of political correctness, or insensitive, perhaps to the point of hostility, to the appropriator's freedom of expression. In either case, these feelings are shunted aside.

More often than not, the public discourse about the appropriateness of non-Western cultural appropriation is framed and directed by white Western cultural authorities. We see this in news reports and op-ed essays about cultural appropriation. Consider, for example, that the previously mentioned *Time* magazine piece, which intends to lay the ground rules for "when Native American appropriation is appropriate," includes no specific Native American perspectives. In fact, the term *Native American* is used only three times in the 860-word essay, and only once does it refer to people. In the concluding paragraphs the article vaguely mentions and then immediately rejects Native Americans' feelings about appropriation. The idea that "today's taboo may be tomorrow's trend" runs totally counter to and is dismissive of numerous statements against cultural appropriation by Native American fashion scholars and bloggers like Adrienne Keene and Jessica R. Metcalfe, as well as other writers from marginalized groups that stress in no uncertain terms that "my culture is not a trend" (expressed in social media streams via the hashtag #cultureisnotatrend).

While the harm done to US businesses and entrepreneurs is offered as a moral indictment against copying corporate-made commodities, the harm done to marginalized communities as a result of cultural appropriation is reduced to the capriciousness of changeable trends. Such harm is not a reason to abstain from appropriation but is an obstacle to overcome, in Scafidi's words, for the sake of "our closets and our communities." "Cultural influences on fashion nevertheless have an important role to play—and our closets and our communities would be far emptier without them."[55] Who the "our" of this concluding statement includes and excludes is revealing of what Anderson has called copyright's "normalizing of sensitivity."[56] In copyright talk and copynorms the harm suffered by companies takes precedence over the harm to marginalized people, and they naturalize this hierarchy of feelings through neoliberal economic logics about the possessive individual, multicultural capital accumulation, and market-driven freedoms. Normative and normativizing frameworks

of discourse and feelings cast minoritized ways of seeing, knowing, and feeling out of the legal imaginary. Focusing on copyright talk and copynorms is crucial for bringing back into critical view what is both outside and yet fundamental to the protections promised by the use and idea of copyright.

Notes

An earlier version of this essay was presented at the Global Circuits of Beauty and Fashion research group meeting and symposium hosted by New York University and Parsons School of Design in 2015. I am grateful for the constructive comments received then, especially from Priti Ramamurthy and Heijin Lee.

1. Blanks, "Spring 2012 Menswear."

2. The elements of fashion eligible for legal protection are prints and other surface patterns (under copyright law), brand names and logos (under trademark law), and some forms and styles of packaging (under trade dress law).

3. The development and historical role of FOGA are discussed at length in one chapter of my book in progress on how participatory technology and culture mediate legal consciousness. I focus specifically on the guild's use of the media as a parajuridical tool for doing an end run around legal procedures and the ways its strategies have shaped contemporary fashion copynorms.

4. *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941).

5. The Innovative Design Protection Act of 2012 was approved by a Senate committee and submitted to a lame-duck session of Congress, where it languished, ultimately not surviving the transition between the 112th and 113th Congress (which began in 2013).

6. The term *fast fashion* refers to the lower tiers of the apparel market specializing in low-priced and very trendy fashion items. Fast-fashion retailers produce and introduce new stock constantly (rather than timed with fashion seasons) to keep up with ever-changing fashion trends. With the rise of ecoconscious consumer movements, the term has also taken on pejorative connotations, implying a link between budget fashion and cheap tastes and consumer ethics.

7. DuFault, "Fast Fashion Giant Forever 21."

8. Quoted ibid.

9. Sustainable fashion is part of a broader trend of sustainable design that has modern roots in the 1970s energy crisis. The escalating price of oil pushed scientists, designers (architects, urban designers, and interior designers), engineers, entrepreneurs, and consumers to seek out low-impact and energy-efficient materials and methods of production and consumption. "Green thinking" did not become prevalent in the fashion industry or among fashion consumers until 1989, though, when British designer Katharine Hamnett began using her fame to publicize the dangerous levels of pesticide in cotton fields and to push for industry-wide changes. Hamnett's message was not widely embraced in the early 1990s, but by the early 2000s, with the launch of prestige brands from Stella McCartney and Linda Loudermilk, sustainable fashion (or ecofashion, ecochic, or slow fashion) came to be associated with luxury consumers rather than out-of-touch hippies.

10. As an illustrative example, see Moe, "Secretive Culty Christians."

11. Ibid.

12. Sauers, "Forever 21 Gets Sued for Copying—Again."

13. In 2014 Forbes.com reported that Forever 21's annual revenue for the fiscal year ending February 2014 was $3.85 billion. "#95 Forever 21," www.forbes.com /companies/forever-21 (accessed 17 January 2015).

14. As well as lobbying Congress to pass several fashion copyright bills, von Furstenberg has written a number of articles intended to educate the public on fashion designers' need for copyright protection (e.g., "Fashion Deserves Copyright Protection").

15. Coombe, "Properties of Culture," 81.

16. Shiva, *Biopiracy*, 2–3.

17. This is a shortened version of a motto repeated by Richard Henry Pratt, founder of the infamous and federally funded Carlisle Indian Industrial School in Pennsylvania.

18. Newton, "Memory and Misrepresentation," 207.

19. Shiva, *Biopiracy*, 17.

20. Aoki, "Neocolonialism, Anticommons Property, and Biopiracy," 26–27.

21. Choudry, "Corporate Conquests, Global Geopolitics," 11.

22. Letter from seven food and agricultural trade associations to Robert Zoellick (former president of the World Bank), 21 May 2003, quoted ibid., 13.

23. Ibid., 11.

24. Gana, "Myth of Development," 334.

25. Friedman, *World Is Flat*, 10.

26. Johns, *Piracy*, 456.

27. Vats, "Created Differences," 2.

28. Rapoza, "In China, Why Piracy Is Here to Stay."

29. Vats, "Created Differences," 9.

30. Coombe, "Properties of Culture," 76.

31. Quoted in Sauers, "How Forever 21."

32. Aoki, "Neocolonialism, Anticommons Property, and Biopiracy," 32.

33. Lo, "Forever 21 Accused of Copying Again."

34. Ibid.

35. "Forever 21: Not Just a Retailer."

36. Pham, *Asians Wear Clothes on the Internet*.

37. See Sauers, "How Forever 21"; Hines, "Forever Sued"; Lo, "Forever 21 Accused of Copying Again"; Royal, "Forever 21 Copies Jeremy Scott's Bart Simpson Print."

38. Scafidi, "When Native American Appropriation Is Appropriate."

39. Not only do feelings and their discursive construction shape corporate and consumer understandings of the appropriateness of fashion copying, but they also have been deployed to compel legislative action that would regulate copying. For example, *Harper's Bazaar*'s 2005 Fakes Are Never in Fashion campaign and the CFDA's 2011 You Can't Fake Fashion initiative both advocate for the expansion of copyright protection by using the media to shift the public perception of and sentiment about knock-off fashion.

40. Wood, *Native American Fashion*, 118.

41. Jessica R. Metcalfe references two fashion shows in the 1980s organized by the Institute of American Indian Arts that used the teepee symbol as an organizing theme ("Native Designers of High Fashion").

42. Adrienne Keene, an academic and member of the Cherokee Nation in Oklahoma, coined and popularized this use of the term *native appropriations* on her blog by the same name (nativeappropriations.com), launched 15 January 2010.

43. Deloria, *Playing Indian*, 2.

44. My thanks to Jessica R. Metcalfe for directing me to the museum's collection, specifically to the Swan Winter Count.

45. Deloria, *Playing Indian*, 185.

46. Anderson, "Anxieties of Authorship and Ownership."

47. In 2013 an assembly of Maasai elders registered a Tanzanian nonprofit called the Maasai Intellectual Property Initiative, which outlines a set of bylaws establishing approved uses of Maasai culture, including the name. The initiative was carefully written to reflect traditional Maasai culture, as well as the requirements of Western courts. See Faris, "Can a Tribe Sue for Copyright?"

48. Callahan, "Maasai Want Royalties."

49. Roth, "Meet Mindy Budgor."

50. See, e.g., Bukszpan, "Counterfeiting"; Lieber, "Why the $600 Billion Counterfeit Industry"; Shenkar, *Chinese Century*, 94; Thomas, *Deluxe*, 274; and Tirrell, "Fake Louis Vuitton Bags." This sample indicates the range of sources that perpetuate this fake statistic.

51. US Government Accountability Office, "Intellectual Property: Better Data Analysis and Integration," 17, 28.

52. US Government Accountability Office, "Intellectual Property: Observations on Efforts to Quantify the Economic Effects," 7. While *Chinese manufacturers* and *counterfeiters* are practically synonymous in the public discourse about counterfeit goods, the reality of a globalized economy means that the components of one product (counterfeit or not) are often financed, designed, made, assembled, and finished in several countries. For example, the transnational production chain of one counterfeit product (here, a perfume bottle) is described in an *International Herald Tribune* article about Italy becoming the number-one counterfeit market and manufacturer in Europe: "The scent was produced in the Far East, the bottle was made in a Central European country and the label was designed and attached in Italy" (Galbraith, "Made in Italy").

53. US Government Accountability Office, "Intellectual Property: Observations on Efforts to Quantify the Economic Effects," 26.

54. Ibid., 27.

55. Scafidi, "When Native American Appropriation Is Appropriate."

56. Anderson, "Anxieties of Authorship and Ownership."

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