

Lessons Learned from International Negotiations of Legal Instruments to Protect Traditional Cultural Expressions

WIPO-INDAUTOR VIRTUAL REGIONAL SEMINAR ON COPYRIGHT AND TRADITIONAL CULTURAL EXPRESSIONS,
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Overview

TCE Protection Issues at WIPO

- Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources (GR), Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs)
 - Positive Protection
 - “Defensive” Protection
- Standing Committee on Trademarks, Industrial Designs, and Geographical Indications
 - Draft Design Law Treaty

WIPO



World Intellectual Property Organization (WIPO) Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources (GR), Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs)



Three draft texts:

- **GR: Mandatory Disclosure of Origin (DOO) in utility patent applications**
- **TK: Tiered protection (economic and moral rights)**
- **TCEs: Tiered protection (economic and moral rights)**

May be combined into a single agreement (or reduced to two)

Formerly Lead Facilitator, now Friend of the Chair, WIPO IGC

Origin of Cultural and Genetic Resource Protection Issues at WIPO

Election of Kamil Idris (Sudan) as WIPO Director General in 1997

Establishment of Global Issues Division in 1998, Fact-finding missions on Indigenous Peoples and IP

Introduction of a Disclosure of Origin (DOO) requirement for genetic resources and associated traditional knowledge in the Patent Law Treaty (PLT, formalities treaty)
Diplomatic Conference

Compromise: Creation of Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge, and Folklore (**IGC**) in 2000 (tried to cabin these issues in a separate venue)

Still no agreement in the IGC over 20 years later

Issues with IGC as forum for GR/TK/TCE IP protection negotiations

IGC is not a standing committee, mandate must be renewed every two years,
no agreement on output

some progress since text-based negotiations began in 2009, but no agreement
to date

“IGC Members are paying for **offending the fundamental rationale of intellectual property (IP)**. . . . **the IGC was set up for the wrong reasons. Its creation was not motivated by a common understanding of the international IP community that there was a need to move toward protecting TK and TCEs, but rather as a practical solution to save the negotiations of another treaty, the Patent Law Treaty (PLT), which had nothing to do with the IGC’s purpose and subject matter.**” Nuno Pires de Carvalho, “Sisyphus redivivus? The work of WIPO on genetic resources and traditional knowledge”

Why is it Taking so Long to Reach Agreement? Some possible reasons

- Lack of trust among member states
- Language (some member states not wanting to see “indigenous peoples” some member states saying they do not have IPLCs; any TCEs/TK owned by the state as a whole)
- Some member states wanting to maintain the IP system as is, without creating new rights which could create legal uncertainty for users of TK/TCEs
- Top-down approach (not really informed by successful national legislative approaches)
- Interconnectedness of definitions, criteria for protection, scope of protection, term of protection, sanction and remedies, exceptions and limitations

Why is it Taking so Long to Reach Agreement?

Lack of Trust among member states

Interconnectedness of definitions, criteria for protection, scope of protection, term of protection, sanction and remedies, exceptions and limitations

- Unclear what combination of elements would look like (e.g., broad definition, limited by narrow criteria for protection, broad exceptions and limitations, strength of sanctions) if broad definition but narrow criteria

Broad Definition (or no Definition) Limited by Criteria for Protection (From Draft Articles; Not Agreed)

Definition:

“Traditional Cultural Expressions are any forms in which traditional culture practices and knowledge are expressed, [appear or are manifested] [the result of intellectual activity, experiences, or insights] by indigenous [peoples], local communities and/or [other beneficiaries] in or from a traditional context, and may be dynamic and evolving and comprise verbal forms, musical forms, expressions by movement, tangible or intangible forms of expression, or combinations thereof.”

Protection Criteria/Eligibility Criteria:

“protection shall be extended under this instrument to traditional cultural expressions which are:

- (a) created, generated, received, or revealed, by indigenous [peoples], local communities and/or [other beneficiaries] and developed, held, used, and maintained collectively by them [in accordance with their customary laws and protocols];
- (b) linked with, and are an integral part of, the cultural and social identity and traditional heritage of indigenous [peoples], local communities and/or [other beneficiaries]; and
- (c) transmitted between or from generation to generation, whether consecutively or not. . . .”

Virtually All Provisions are Contested

(all are bracketed)

Preamble

Art. 1: Use of Terms

Art. 2: Objectives

Art. 3: Protection Criteria/Eligibility Criteria

Art. 4: Beneficiaries

Art. 5: Scope of Protection/Safeguarding

Art. 6: Administration of Rights

Art. 7: Exceptions and Limitations

Art. 8: Term of Protection/Safeguarding

Art. 9: Formalities

Art. 10: Sanctions, Remedies and Exercise of Rights/Interests

Art. 11: Transitional Measures

Art. 12: Relationship with Other International Agreements

Art. 13: National Treatment

Art. 14: Transboundary Cooperation

Art. 15: Capacity Building and Awareness Raising

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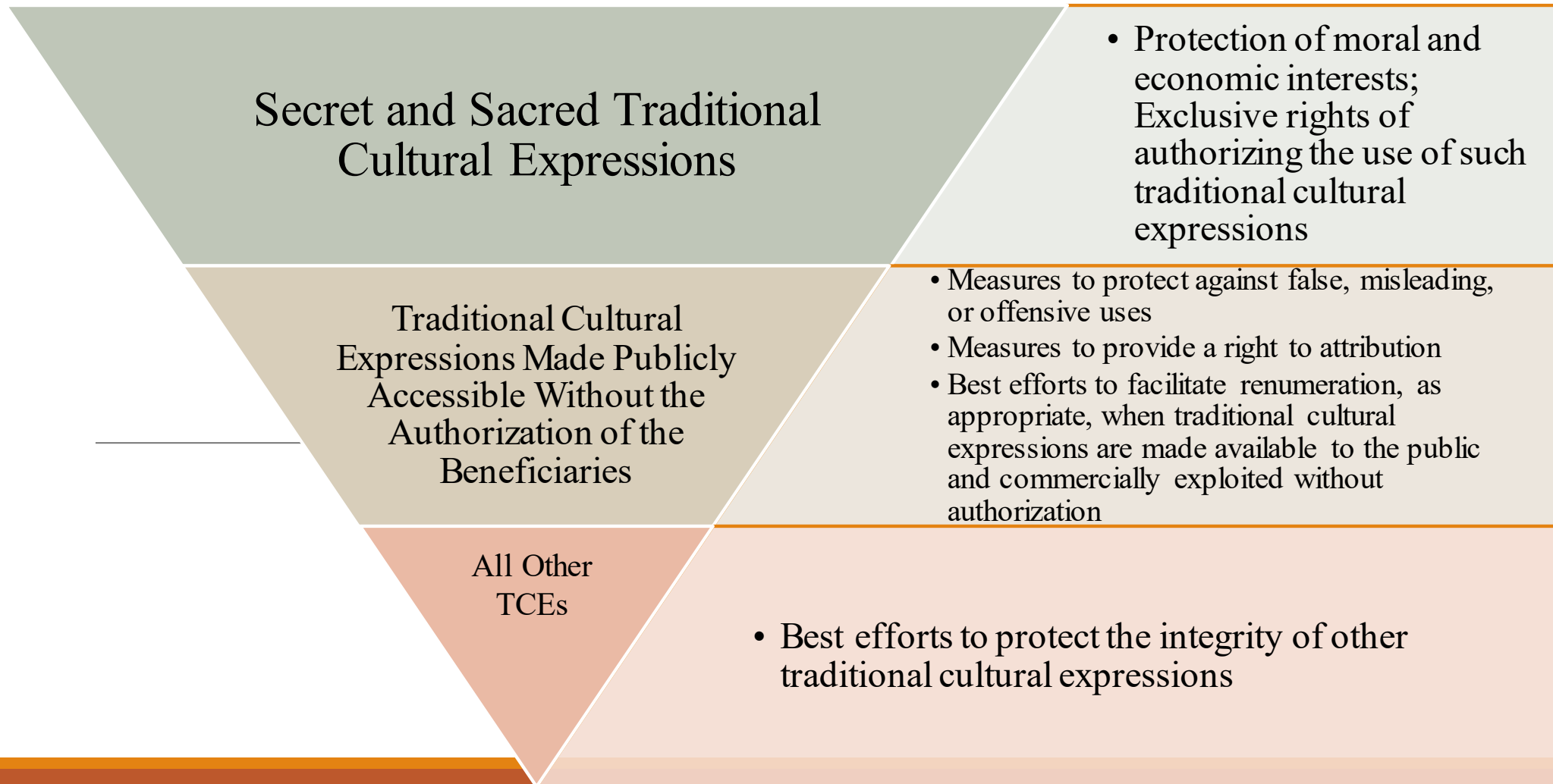
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Protection of Traditional Cultural Expressions: A Tiered Approach to IP Rights



Protection of Traditional Knowledge



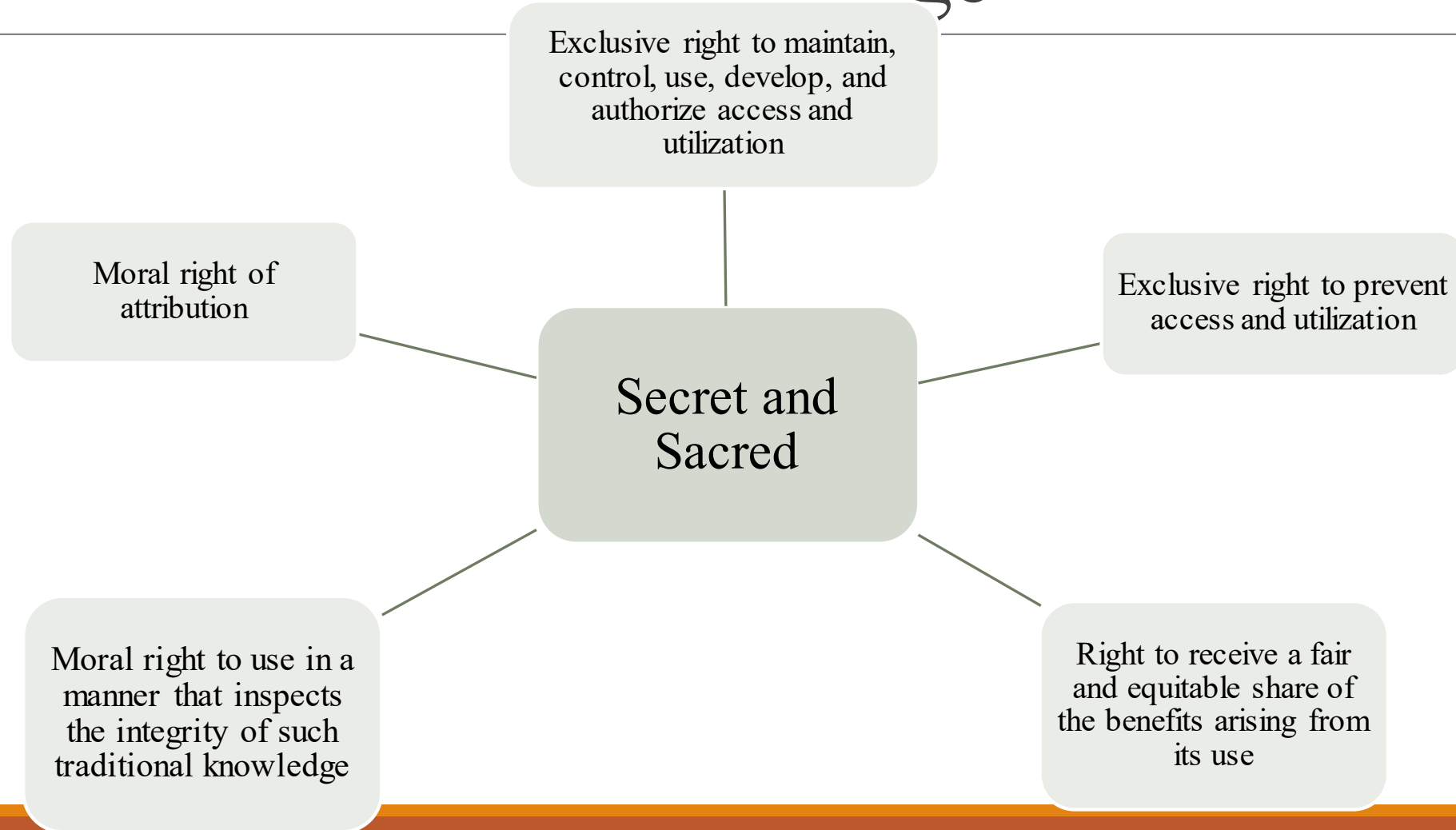
Secret and Sacred Traditional Knowledge

Narrowly Diffused Traditional Knowledge

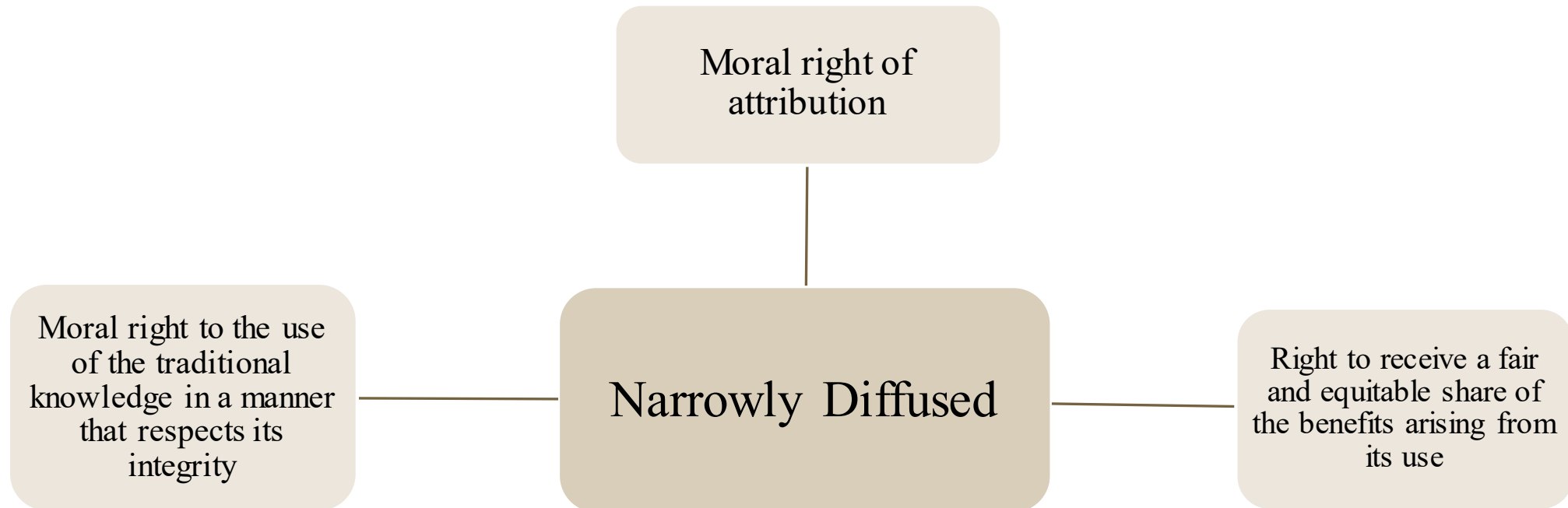
Widely Diffused Traditional Knowledge

All Other
Traditional
Knowledge

Secret and Sacred Traditional Knowledge



Narrowly Diffused Traditional Knowledge



Widely Diffused & Other Traditional Knowledge

Widely Diffused

Best efforts to protect and preserve the integrity of widely diffused traditional knowledge

Other Traditional Knowledge

Beneficiaries may request the rights and protections provided for secret and sacred traditional knowledge from the relevant national authorities

TK/TCEs: Like a “Red-Headed Step-Child”?

Red-Headed Stepchild: “A child who is obviously not your own, a child who is **treated worse than other children in the family.**”

www.urbandictionary.com

Ex. “I beat him like a red -headed stepchild.”

Traditional Knowledge (TK) and Traditional Cultural Expressions are treated like a “red-headed stepchild” in the multilateral IP system



<https://bigseventravel.com/mississippi-slang/>

Examples of Stepchild Treatment (arguments in WIPO IGC)

- Only old TK/TCEs can be protected (50 years or five generations)
- Inability to cumulate protection (TK protection begins where copyright ends)
- The only protection for TK/TCEs should be defensive protection (in databases)
- TK in printed publications can be freely used (unlike for patents)
- Basically, this knowledge should be free for anyone to use if it is not protected in the existing IP system

Traditional Cultural Expressions Draft Articles

Article 3: PROTECTION CRITERIA/ELIGIBILITY CRITERIA

“[Alt 2:Protection should be extended under this instrument to traditional cultural expressions which are:

- (a) created, generated, received, or revealed, by indigenous [peoples], local communities and/or [other beneficiaries] and developed, held, used, and maintained collectively by them [in accordance with their customary laws and protocols];
- (b) linked with, are an integral part of, and are distinctively associated with the cultural and social identity and traditional heritage of indigenous [peoples], local communities and/or [other beneficiaries]; and
- (c) transmitted between or from generation to generation, whether consecutively or not for a **term not less than fifty years or five generations.]]”**

Traditional Knowledge Draft Articles

Article 3: PROTECTION CRITERIA/ELIGIBILITY CRITERIA

“[Alt 2:Protection should be extended under this instrument to traditional knowledge which is:

- (a) created, generated, received, or revealed, by indigenous [peoples], local communities and/or [other beneficiaries] and developed, held, used, and maintained collectively [in accordance with their customary laws and protocols];
- (b) linked with, is an integral part of, and is distinctively associated with, the cultural identity and traditional heritage of indigenous peoples, local communities and/or [other beneficiaries]; and
- (c) transmitted between or from generation to generation, whether consecutively or not **for a term not less than fifty years or five generations.]”**

Examples of Stepchild Treatment (arguments in WIPO IGC)

- Only old Tk/TCEs can be protected (50 years or five generations); requires new TK to be protected, if at all, under existing IP regimes
 - There may be circumstances in which an individual in a current communal context might create TK/a TCE but not be eligible, for reasons of customary law, to seek copyright or patent protection because the origin of the creative content is held by the community.
- “Knowledge is not ‘traditional’ because of its object, nor its subject matter or content, nor its **age or antiquity**, nor its aesthetic qualities. What makes it traditional is **the way it has been preserved and transmitted between generations within a community**: ‘its nature relates to **the manner [in which] it develops rather than to its antiquity**’. . . . The essential characteristics of traditional knowledge are its **linkage with a traditional community as such and its dynamic, intergenerational quality**.” Antony Taubman and Matthias Leister, *Analysis of Different Areas of Indigenous Resources: Traditional Knowledge (2008)*

Opposition to claims of ownership in TK and TCEs

Unlike for copyrighted works

The notion of “cultures owning their characteristic creative expressions”, as tied to the protection of TK or TCEs, is seen by some as potentially standing in the way of the progression of culture more broadly, [which is] achieved when “cultures inevitably interact, take from one another, learn from what they take, and define themselves both through contrast and assimilation.” *The Fashion Law* quoting C. Sprigman

Multilateral TK/TCE Protection IS Hard

- Creating new IP rights in subject matter currently used without compensation
- Perpetual protection not the norm for IP (exceptions trademark with use, trade secrets with limitations)
- Contempt for “traditional” vs. “modern” societies, lack of respect for knowledge holders/creators, Graham Dutfield, “If We have never been modern, they have never been traditional” (2017)
- Discomfort with the different, “alien” even, world view held by some indigenous peoples and local communities (IPLCs) relating to the origins, authorship, and ownership of TK/TCEs, aspects of which appear incompatible with western notions of IP creation and protection.
- Desire to cabin TK/TCE protection, maximize use of existing IP tools not surprising

What is “Positive” Protection?

“‘[P]rotection’ is taken to mean the kind of protection that is most often considered in intellectual property contexts, that is to say **legal measures that limit the potential use of the protected material by third parties**, either by giving the right to prevent their use altogether (exclusive rights), or by setting conditions for their permitted use (e.g. the conditions set by license for a patent, trade secret or trademark, or broader requirements for equitable compensation or a right of acknowledgement).” WIPO IGC, *The Protection of Traditional Knowledge: Updated Draft Gap Analysis (2018)*

Databases as Providing “Defensive” Protection for TK/TCEs

“It would be more appropriate to establish databases that provide information required for examiners to conduct prior art searches and judge novelty and inventive step of patent applications, rather than introducing a mandatory disclosure requirement. Utilizing the proposed databases during the patent examination process would improve the quality of patent examination in the area of TK and ***ensure the appropriate protection of TK.***”

WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore, Report, 32nd Session, WIPO/GRTKF/IC/32/11, para. 269 (Feb. 27, 2017) (statement by the Delegation of Japan).

TKDL Reference from U.S. Patent Application No. 13/582,133 File Wrapper



Claims to sandalwood oil compositions for treating cancer; Examiner cited references from the Indian Traditional Knowledge Digital Library



Key Attributes of TKDL

BA4/1084C



Title of Traditional Knowledge Resource

Knowledge Known Since
200 years

Tila

TKRC CODE :

A01A-1/1483, A01A-1/1720, A01A-1/251, A01A-1/473, A01A-1/754, A01B-1/23, A01C-1/14, B01B-5/195, B01C-1/160, B01C-1/172, B01C-1/273, B01D-20/21, B01F-1/26, B01G-1/195

IPC Code :

A61K 33/06, A61K 33/28, A61K 35/20, A61K 36/185, A61K 36/481, A61K 36/54, A61K 36/67, A61K 36/906, A61P 35/00, C01B 33/22

DETAILS OF PROCESS / FORMULATION :

1. Tila is a therapeutic single / compound formulation consisting of useful parts of following ingredient(s) : dog, Calomel/Subchloride of mercury, Soap stone/talc/ steatitis/hydrated magnesium silicate, * Eleteria cardamomum (Linn.) Maton (cardamom, Lesser Cardamom), Astragalus sarcocolla, Cinnamomum camphora (Linn.) J. Presl (camphor laurel, camphor tree, camphortree, Camphor), Cinnabar, Santalum album Linn. (sandalwood), Piper nigrum Linn. (Black Pepper), Clarified butter

2. Therapeutic composition / formulation is mentioned below :

| | Tongue | to | form | numbers |
|---|--------|----|------|------------|
| 1 dog | - | - | - | 2 gm |
| 2 Calomel/Subchloride of mercury | - | - | - | 2 gm |
| 3 Soap stone/talc/ steatitis/hydrated magnesium silicate | - | - | - | 2 gm |
| 4 * | - | - | - | 2 gm |
| 5 Eleteria cardamomum (Linn.) Maton (cardamom, Lesser Cardamom) | Seed | - | - | 2 gm |
| 6 Astragalus sarcocolla | - | - | - | 2 gm |
| 7 Cinnamomum camphora (Linn.) J. Presl (camphor laurel, camphor tree, camphortree, Camphor) | - | - | - | 3 gm |
| 8 Cinnabar | - | - | - | 3 gm |
| 9 Santalum album Linn. (sandalwood) | - | - | - | 3 gm |
| 10 Piper nigrum Linn. (Black Pepper) | - | - | - | 21 numbers |
| 11 Clarified butter | - | - | - | 42 gm |

3. Therapeutic composition mentioned above is prepared as TILA: Tila is a solution used locally for massage. It can be a solution of the powdered drugs or water extract or oil of the drugs mentioned in the formulation.

4. A composition as described above is formulated as Thin medicated oily preparation for local use .

5. Mode of administration : Liniment .

6. It is useful in the treatment of Cancer

LIST OF DOCUMENTS WITH DATE OF PUBLICATION (PRIOR ART) :

Mohammad Azam Khan Isser Azam, Vol. IV (19th century AD), Matba Nizami, Kanpur, prior art Page 309
1872 AD

The TK reference likely contains more information (previously unknown to the patent applicant) than just the specific fact for which it is being cited

E.g., claims in U.S. Patent Application No. 13/582,133 relate to treating certain cancers with sandalwood oil compositions, and the TKDL references were cited for their disclosure of sandalwood oil compositions used to treat certain cancers.

The TKDL references contain additional information about ingredients and preparation methods beyond the patent application claims, including pir cherum porutkal, Indian aconite, egg, and coriander.

Biologically active compounds in some of the ingredients could have **therapeutic/synergistic properties previously unappreciated in modern medicine**, and might thus make interesting candidates for further research.

Such research would be spurred by, and have originated from, this catalogued traditional knowledge.

album Linn. (**sandalwood**), Civet cat's semen, Musk, Mica / Biotite, Urine, Fuller's earth, Mica / Biotite, Ovum / Egg, Ovum / Egg, Coriandrum sativum Linn. (Chinese parsley, Chinese-parsley, coriander), Wrightia tinctoria (Roxb.) R. Br., Semen / Sperm, Thespesia populnea (Linn.) Soland. ex Correa (Portia tree, seaside mahoe), Aconitum ferox Wall. ex Ser. (Indian aconite), Glycyrrhiza glabra Linn. (cultivated licorice), Goat

2. Therapeutic composition / formulation is mentioned below :

| | | | | | |
|----|---|--------------------------------|-----------------|--------|--------|
| 1 | Mica / Biotite | - | -Purified | - | Q.S |
| * | Karka porutkal (drugs for paste preparation) | -- | | | |
| 2 | Santalum album Linn. (sandalwood) | Seed | -Thick gruel | 35 gm | |
| 3 | Civet cat's semen | - | | 35 gm | |
| 4 | Musk | - | | 35 gm | |
| 5 | Mica / Biotite | - | -Red Calx | 35 gm | |
| * | Pir cherum porutkal (others) | -- | | | |
| 6 | Urine | - | | | Q.S |
| 7 | Fuller's earth | - | -Purified | | Q.S |
| 8 | Mica / Biotite | - | -Purified | | Q.S |
| * | Pir cherum porutkal (others) | -- | | | |
| 9 | Ovum / Egg | - | -Egg white | | Q.S |
| 10 | Ovum / Egg | - | -Egg yolk | | Q.S |
| * | Pir cherum porutkal (others) | -- | | | |
| 11 | Coriandrum sativum Linn. (Chinese parsley, Chinese-parsley, coriander) | Seed | -Cool decoction | | Q.S |
| 12 | Wrightia tinctoria (Roxb.) R. Br. | St.Bark,Leaf,Flower,Fruit&Root | -Cool decoction | | Q.S |
| 13 | Semen / Sperm | - | | | Q.S |
| 14 | Thespesia populnea (Linn.) Soland. ex Correa (Portia tree, seaside mahoe) | St.Bark,Leaf,Flower,Fruit&Root | -Cool decoction | | Q.S |
| * | Choorana porutkal (drugs for powder preparation) | -- | | | |
| 15 | Aconitum ferox Wall. ex Ser. (Indian aconite) | St.Bark,Leaf,Flower,Fruit&Root | -Powder | 1 Part | |
| 16 | Glycyrrhiza glabra Linn. (cultivated licorice) | Root | | | 1 Part |
| * | Pir cherum porutkal (others) | -- | | | |
| 17 | Goat | - | -Urine | | Q.S |

3. Therapeutic composition mentioned above is prepared as Karka porutkal (drugs for paste preparation) mixed with Pir cherum porutkal (others) and prepared as Waxy and sealed/closed and to be kept in sunrays and Puta is given and it is/these are immersed in Oryza sativa Linn. and Puta is given

4. The process is repeated for a01c-1/1 and ground with Pir cherum porutkal (others) and prepared as Waxy, and sealed/closed and burnt and prepared as

Citation by the patent examiner provides the actual TK to the people who can best use or design around it (and the public at large).

"When a patent office denies a patent to someone citing that the claimed invention is TK, it is obliged to disclose the entire gamut of TK associated with the invention as a prior art citation to the applicant. . . it is impossible for patent offices to maintain the secrecy of TK." R.S. Praveen Raj, *Traditional Knowledge: beware of patent protection*, IPKat Blog (Mar. 21, 2017).

The Fallacy of “Defensive” Protection for TK/TCEs

-
- TK/TCEs (in database) may not be patented, but can still be **freely used by third parties** if no positive protection exists granting holders of the knowledge the right to control its uses.
 - Third parties may not be able to directly access the databases, however, the records in the database that are used in rejections **will be made available to the public** at large through access to file histories in the patent office
 - Examiner will not always find the most relevant TK/TCE in database so some patents will still issue covering TK/TCEs
 - Such patents still could be challenged and revoked based on that same traditional knowledge, in a database or not
 - **Database accessible by examiners gives same protection that TK/TCEs would have outside of the database**

World Intellectual Property Organization (WIPO) Draft Design Law Treaty

Negotiations in the Standing Committee on Trademarks, Industrial Designs, and Geographical Indications (since 2008) (but has important implications for IGC)

Formalities treaty: Goal to facilitate multi-country filing of design applications

Limits what countries can require an applicant to include in an application

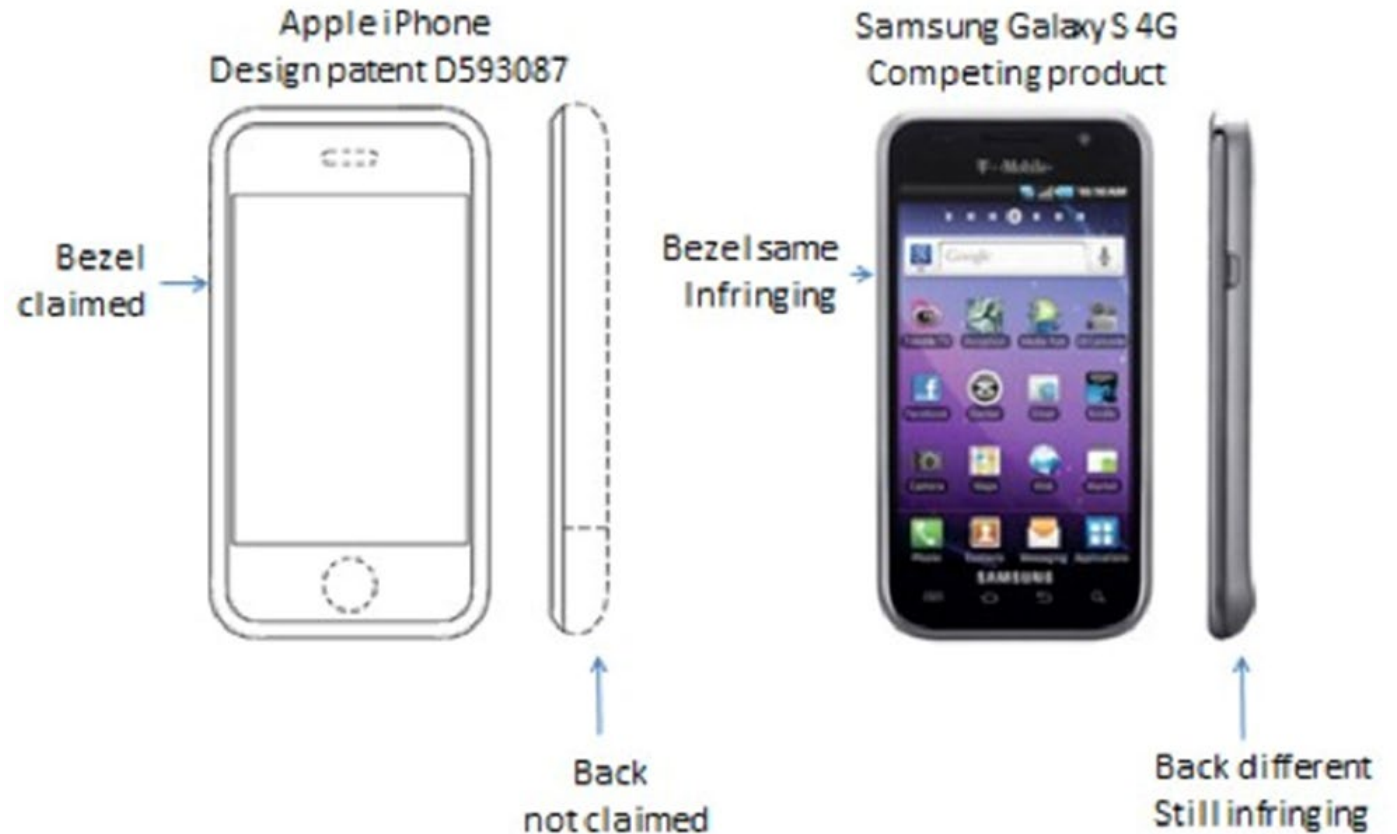
Design Protection can be as Powerful as Utility Patent Protection

Broad subject matter: novel,
ornamental appearance of a
manufactured article

Minimal examination

Injunctive relief and damages
available

\$1 Billion damages award for design
infringement for Apple sparked
renewed interest in design protection



Small, illegible text from a document, possibly a patent or legal filing, located in the top left corner.

| PATENTED DESIGN | PLAINTIFF'S PRODUCT | DEFENDANT'S PRODUCT |
|---|---|--|
|  |  |  |
|  |  |  |

| Accused Product | Oakley's Patent |
|---|---|
|  |  |
|  | |

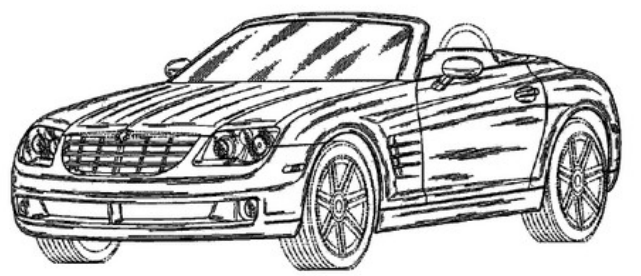




Chart 1: Images Depicting Infringement of NIKE Design Patent D498,914 by the Wal-Mart Shoe

| D498,914 | Wal-Mart Shoe |
|---|---|
|  |  |

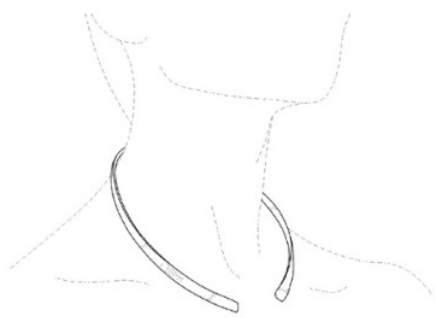
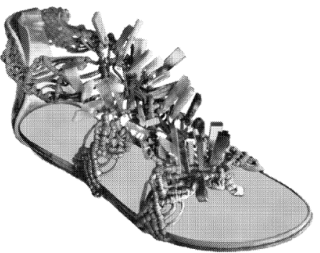


FIG. 1

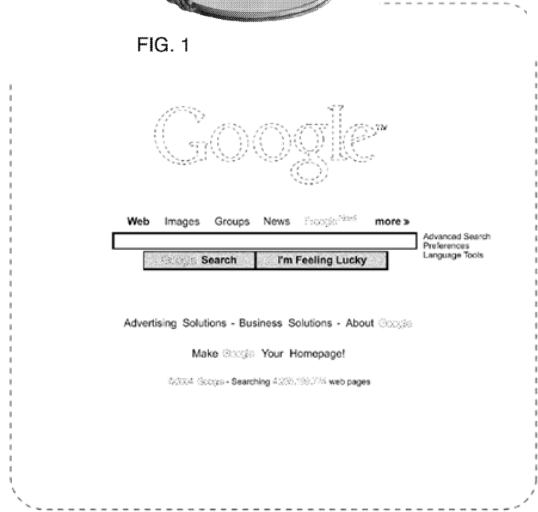


FIG. 2



FIG-1

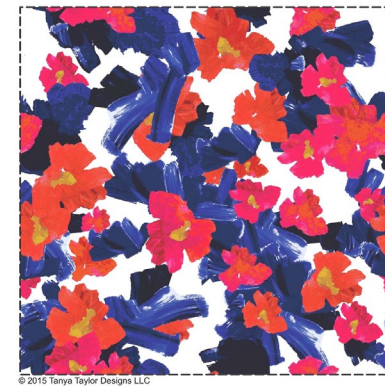


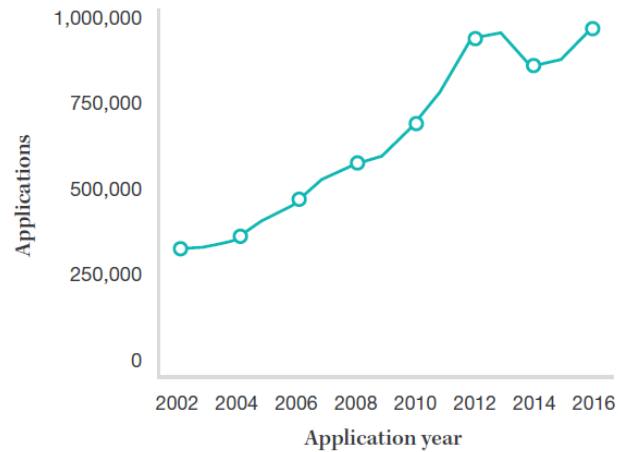
FIG. 2



Most pictures from Sarah Burstein's "Design Patent Look Book"

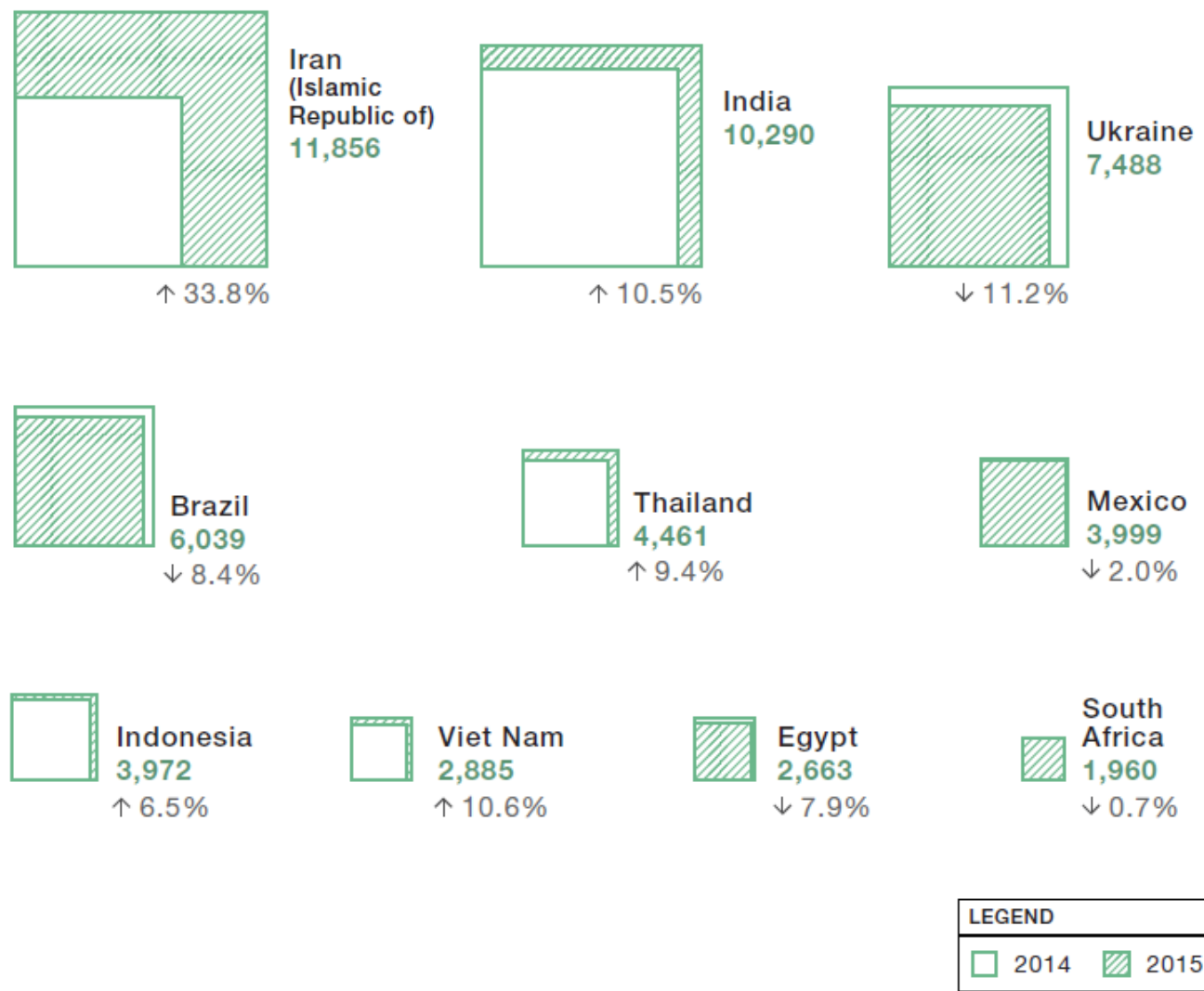
WIPO: “The design count worldwide doubled between 2005 and 2016”

Figure 15
Industrial design
applications worldwide



Double Digit Growth in Design Application Filings in Several LMICs

Several offices in low- and middle-income countries saw double-digit growth



22. Application design counts for offices of selected low- and middle-income countries

Source: WIPO Statistics Database, October 2016.

Some DLT concerns

DLT is designed to **minimize requirements countries can impose on an applicant**, to make it easier for applicants to obtain protection for designs **globally**. Can expect many more applications in foreign countries (including LMICs)

Some African Group DLT concerns

Most design systems are registration systems (no substantive examination), thus, DLT will **facilitate the registration of designs that may not be valid** (not novel) but that can be fully enforced and that innocent third parties will have to defend against if a right was erroneously granted.

These registered designs may include

- **uses or adaptations of traditional cultural expressions**
- **use of traditional knowledge, and/or**
- **incorporate genetic resources**

IPLCs would then have to **fight these rights in even more jurisdictions at great expense.**

Original DLT Draft Article 3: No ability to require Disclosure of Origin

Article 3 Application

(1) [Contents of Application; Fee] (a) A Contracting Party may require that an application contain some, or all, of the following indications or elements:

(i) a request for registration;

(ii) the name and address of the applicant;

(iii) where the applicant has a representative, the name and address of that representative;

(iv) where an address for service or an address for correspondence is required under Article 4(3), such address;

(v) a representation of the industrial design, as prescribed in the Regulations;

(vi) an indication of the product or products which incorporate the industrial design, or in relation to which the industrial design is to be used;

[priority claim] . . .

(ix) any further indication or element prescribed in the Regulations.

(b) In respect of the application, the payment of a fee may be required.

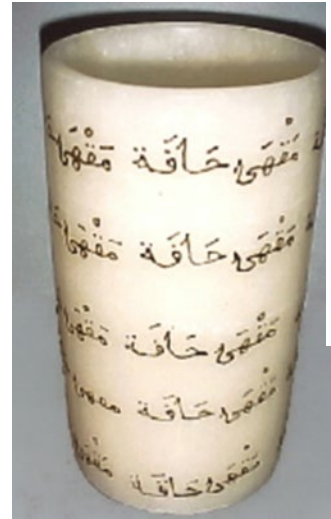
(2) [Prohibition of Other Requirements] **No indication or element, other than those referred to in paragraph (1) and in Article 10 [communications], may be required in respect of the application.**

Need for GR, TK, TCE Disclosure of Origin (DOO) requirement in DLT (and IGC)

DOO requirements may facilitate access and benefit sharing (ABS) compliance and deter misappropriation:

- Can provide information that can be used to **identify violations** of domestic PIC/ABS/MAT laws
- **Existence** of DOO requirements could be a **deterrent** to non-compliance with national protection regimes (e.g., where domestic law requires obtaining permission from owner/creator before use)

Some articles whose appearance can be protected by industrial design law



Artisans Are Sick Of Serving as Fashion Brand's "Inspiration" (<http://www.thefashionlaw.com/home/artisans-are-sick-of-serving-as-fashion-brands-inspiration>)



image: Unsplash

Louis Vuitton (left) & Thakoon (right)

There is More to Modern-Day African Fashion Than Traditional Caricatures
(<http://www.thefashionlaw.com/home/modern-day-african-fashion-is-more-than-traditional-caricatures>)



image: Valentino

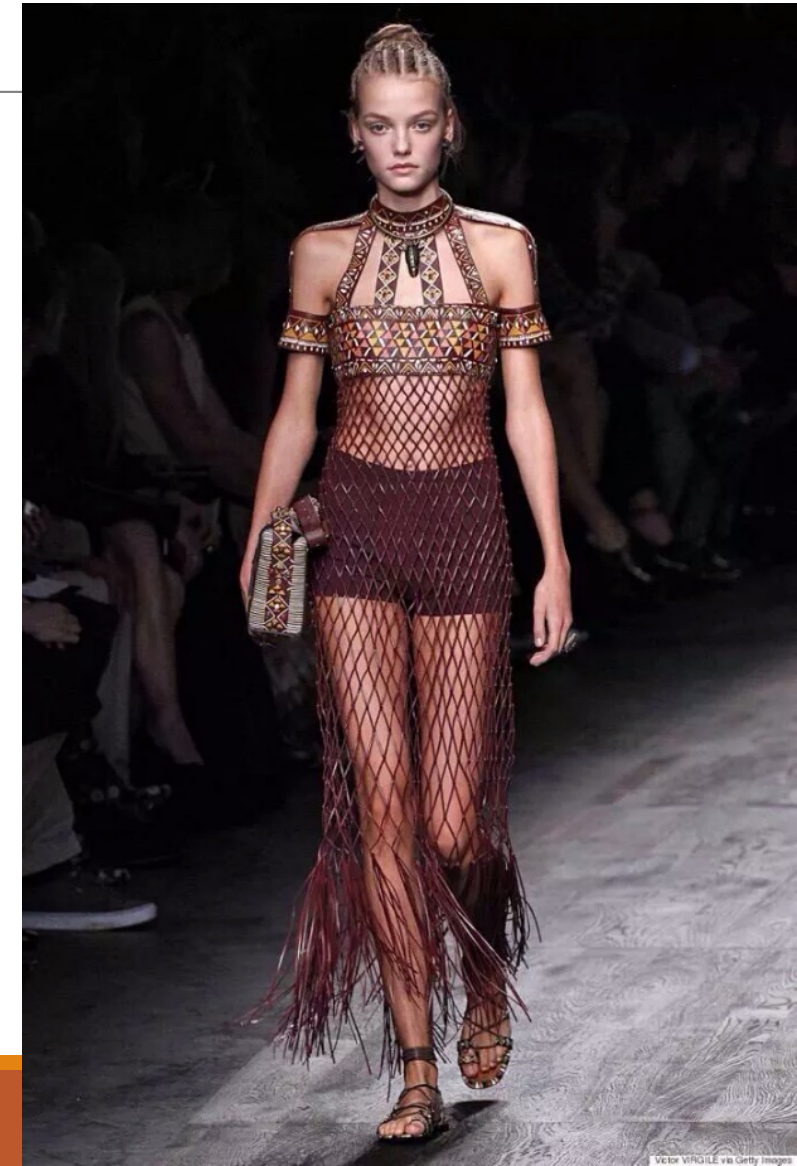
“#Our culture is not your couture” (tweet)



A screenshot of a tweet from ELLE Canada (@ElleCanada). The tweet features a photograph of a woman wearing a white dashiki with vibrant, colorful geometric patterns. The tweet text reads: "The dashiki, everyone. Behold the newest It-item of note: bit.ly/1hpfLOT". Below the text is a "Reply to ELLE Canada" input field.



“Industrial design law is at the heart of the European fashion industry” WIPO



Chokwe mask; Bag from 2016 Valentino collection



Valentino obtains many design protection rights on Handbags, see, e.g., US Design Reg. D0830690



Basotho Blanket (Louis Vuitton shirt)

<https://www.timeslive.co.za/sunday-times/lifestyle/fashion-and-beauty/2017-07-13-the-evolution-of-the-basotho-blanket/>



<http://www.aranda.co.za/catalogue/basotho-heritage-blankets/>

Twitter: "commercial use of adinkra symbol by @verabradley upset some ghanaians. what remedy? @JanewaOT #iprt17"



\$79.99
Zappos.com

\$60.99
Zappos.com

\$95.99
Zappos.com

\$60.99
Zappos.com

\$60.99
Zappos.com

\$69.99
Zappos.com

ADINKRA SYMBOLS



MPATAPO
"knot of reconciliation"
Symbol of reconciliation, peacemaking and pacification.
When two enemies make peace, Mpatapo is the bond or knot that binds them to a peaceful reconciliation.



MATE MASIE
"what I hear, I hear"
Symbol of wisdom, knowledge and prudence.
Understanding means listening and taking into account what another person has said.



ADINKRAHENE
"chief of the adinkra symbols"
Symbol of greatness, charisma and leadership.
This symbol is said to have played an inspiring role in the designing of other symbols. It signifies the importance of playing a leadership role.



AKOMA
"the heart"
Symbol of patience and tolerance.
When someone is said to "have a heart in their stomach", that person is very tolerant.



BOA ME NA ME MMOA WO
"help me and let me help you"
Symbol of cooperation and interdependence.



DWENNIMMEN
"ram's horns"
Symbol of humility and strength.
The ram will fight fiercely against an adversary, but it also submits humbly to slaughter, emphasizing that even the strong need to be humble.



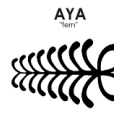
SANKOFA
"go back and get it"
Symbol of importance of learning from the past.
A traditional proverb says: It is not wrong to go back for that which you have forgotten.



DWENNIMMEN
"the Earth is heavy"
Symbol of providence and the duty of Mother Earth.
This symbol represents the importance of the Earth in sustaining life.



DABI ME NSORO-MO BEPUE
"my sis will give me a baby"
Symbol of hope, aspiration and confidence.
Just as all the fruit do not ripen at the same time, so all the stars do not shine at the same time. Mine will shine some day.



AYA
"fern"
Symbol of endurance and resiliency.
The fern is a hardy plant that can grow in difficult places. This symbol suggests that you've endured many adversities and surmounted them with difficulty.



OWIA KOKROKO
"greatness of the sun"
Symbolizes vitality and renewal.



ANANSE NTONTAN
"spider's web"
Symbol of wisdom, creativity and the complexities of life.
Anansi, the spider, is a well-known character in West African folklore.



FIHANKRA
"house/compound"
Symbol of security and safety.
The communal housing compound has only one entrance and exit.



FUNTUNFUNEFU-DENKYEMFUNEFU
"crocodile"
Symbol of democracy and unity.
The crocodiles share one stomach, so neither of them survives without the other. A reminder that infighting and tribalism is harmful to all.



DENKYEM
"crocodile"
Symbol of adaptability.
The crocodile lives in the water, yet breathes the air, demonstrating an ability to adapt to circumstances.

Mexican example



image: Mango's sweater (left) & a Tenango de Doria design (right)

<http://www.thefashionlaw.com/home/artisans-are-sick-of-serving-as-fashion-brands-inspiration>



<https://mexiconewsdaily.com/news/clothing-firm-accused-of-copying-embroidery/>

Cultural Misappropriation: “Inspired by” and “Appreciated” but not compensated



<https://www.thefashionlaw.com/in-a-swathe-of-cultural-appropriation-claims-against-carolina-herrera-what-is-really-going-on/>

Adrija Sen, *Dior Has (Again) Copied a Local Artist's Design. When Are We Going to Hold Brands Accountable?* Vagabomb, (Jul. 2 2018) available at <https://www.vagabomb.com/Dior-Has-Again-Copied-a-Local-Artists-Design/>.

PreFall 2017



Dior

Romanian Sheepskin Vest



The British
Museum

Mary Anderson, The UN Wants to Make Cultural Appropriation Illegal, (Jun. 15, 2017) available at <https://www.revelist.com/style-news/un-cultural-appropriation/8128/the-issue-is-bigger-than-just-copying-a-design--cultural-appropriation-is-one-brand-profiting-off-of-another-cultures-creations/2> (“The issue is bigger than just copying a design — cultural appropriation is one brand profiting off of another culture's creations.”)



ROMANIAN COAT
EARLY 20TH CENTURY
THE METROPOLITAN MUSEUM OF ART



TORY BURCH
RESORT 2018

Cultural Misappropriation: “Inspired by” and “Appreciated” but not compensated



“Over the last 20 years KTZ has always been **inspired by and paid homage to indigenous cultures and tribes** around the world.

It’s part of KTZ’s DNA to celebrate multiculturalism as a form of art and to **encourage appreciation for traditions, ethnicities** and religions’ diversity.

At the time the piece in question was released (January 2015) **the Inuit community was credited** in our press release and online features, for example <http://www.vogue.com/fashion-shows/fall-2015-menswear/ktz>” *Letter from KTZ to Inuit tribe member*

<https://www.thefashionlaw.com/ktz-issues-interesting-apology-for-copied-garment/>

Cultural Misappropriation: may be compensated after the fact?



Louis Vuitton

“Louis Vuitton’s parent company LVMH Moët Hennessy Louis Vuitton has since stated, “We are currently in a relationship with artisans of Tenango de Doria in the state of Hidalgo, Mexico, with the perspective of collaborating together to produce this collection. The French luxury goods conglomerate did not, however, clarify when – exactly – that collaboration came to be.”
<https://www.thefashionlaw.com/an-18000-louis-vuitton-chair-sparks-questions-about-misappropriation/>

U.S. Company selling shower curtains with Maori depictions 'profoundly hurtful' and offensive

<http://www.stuff.co.nz/business/81277960/Store-sells-profoundly-hurtful-Maori-shower-curtains-depicting-tribal-leaders>



Maori Carving



Storming Of Maori Fort



Courtesy of New Zealand Ministry of Business, Innovation and Employment

Christian Louboutin Design Patent, Paloma bag (unclear if design right claimed in pattern)

(12) **United States Design Patent** (10) **Patent No.:** **US D784,012 S**
Louboutin (45) **Date of Patent:** **Apr. 18, 2017**

(54) **HANDBAG** D656,312 S * 3/2012 Gorb D6,232
D689,786 S * 10/2013 Vismara Frank D6,232
D750,372 S * 3/2016 Slosser D6,232
(71) Applicant: **Christian Louboutin, Paris (FR)**
(72) Inventor: **Christian Louboutin, Paris (FR)**
(*) Term: **15 Years**
(21) Appl. No.: **20551,729**
(22) Filed: **Jan. 15, 2016**
(30) **Foreign Application Priority Data**
Aug. 5, 2015 (EM) 002749911
(51) **LOC (10) CL** **03-01**
(52) **U.S. CL** **D3246**
USPC
(50) **Field of Classification Search**
USPC D3/232-233, 240-243, 245-246
CPC A45C 1/024; A45C 3/08
See application file for complete search history.
(56) **References Cited**
U.S. PATENT DOCUMENTS
D587,010 S * 2/2009 Duck D3,246
D596,396 S * 7/2009 McCoy D3,232
D603,694 S * 11/2009 Wang D3,232

CLAIM
(57) The ornamental design for a handbag, as shown and described.

DESCRIPTION
FIG. 1 is a front perspective view of a handbag showing my new design.
FIG. 2 is a front view of the handbag shown in FIG. 1.
FIG. 3 is a rear view of the handbag shown in FIG. 1.
FIG. 4 is a side view of the handbag shown in FIG. 1.
FIG. 5 is the other side view of the handbag shown in FIG. 1.
FIG. 6 is a top view of the handbag shown in FIG. 1.
FIG. 7 is a bottom view of the handbag shown in FIG. 1.
FIG. 8 is a rear perspective view of the handbag shown in FIG. 1.
The broken lines are understood to represent stitching and is not considered part of the claimed design.
1 Claim, 6 Drawing Sheets



Protection for Patterns



(12) **United States Design Patent** (10) Patent No.: **US D766,598 S**
Heidt (45) Date of Patent: **** Sep. 20, 2016**

(54) **PLAID FABRIC**
 (71) Applicant: **University of North Texas**, Denton, TX (US)
 (72) Inventor: **Katherine Heidt**, Kennedale, TX (US)
 (73) Assignee: **University of North Texas**, Denton, TX (US)
 (**) Term: **14 Years**
 (21) Appl. No.: **29/509,089**

D120,159 S * 4/1940 Koehne D5/46
 D122,647 S * 9/1940 Christen D5/46
 D124,966 S * 2/1941 Cummings D5/46
 D128,955 S * 8/1941 Cummings D5/46
 2,956,703 A * 10/1960 Royal B44C 1/1733
 1,562,249
 3,779,190 A * 12/1973 Hower D05C 17/00
 112/475,18
 D235,165 S * 5/1975 Wassenberg D5/46
 D416,391 S * 11/1999 Wittering D5/46
 D439,749 S * 4/2001 Anderson D5/46
 D472,391 S 4/2003 Romero Femenia
 D500,411 S 1/2005 Warren
 D708,859 S * 7/2014 Wallace D5/46
 D709,715 S * 7/2014 Gatto D5/46
 D740,034 S * 10/2015 Cleveland D5/46

(22) Filed: **Nov. 13, 2014**
 (51) **LOC (10) CL** **05-05**
 (52) **U.S. CL**
 USPC **D5/46**
 (58) **Field of Classification Search**
 USPC D5/5, 7, 8, 29, 46-48, 56-66, 99, 53,
 D5/23, 24, 11, 12, 19, 51; D6/582-584,
 D6/588; D25/138; D32/40, 50, 57
 CPC D03D 1/00; D03D 25/00; D04H 1/00;
 D21H 27/02; B44F 1/00; B44F 1/08; B44F
 3/00; B44F 5/00; B44F 9/00; B44F 9/02;
 B44F 11/06; B32B 3/266; B32B 5/024
 See application file for complete search history.

(56) **References Cited**
 U.S. PATENT DOCUMENTS
 D7,804 S * 10/1874 Ayres D5/99
 D20,185 S * 10/1890 Elmore D5/46
 D63,406 S * 12/1923 Lord D5/47
 D64,019 S * 2/1924 Lord D5/46
 D64,021 S * 2/1924 Lord D5/46
 D88,059 S * 10/1932 Willheim D5/7

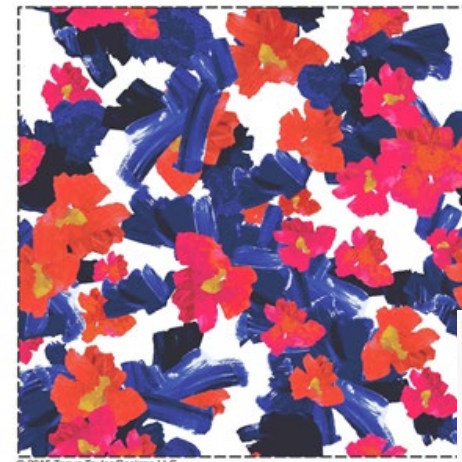
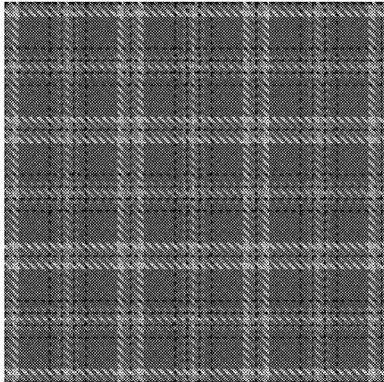
* cited by examiner
 Primary Examiner — Karen S Acker
 (74) Attorney, Agent, or Firm — Daniel J. Chalker, Edwin S. Flores; Chalker Flores, LLP

(57) **CLAIM**
 The ornamental design for a plaid fabric, as shown and described.

DESCRIPTION

The patent or application file contains at least one drawing executed in color. Copies of this patent or patent application publication with color drawing(s) will be provided by the Office upon request and payment of the necessary fee. The sole FIGURE is a top plan view of a plaid fabric showing my design. The broken lines within the drawing depict ornamental features that are part of the claimed design.

1 Claim, 1 Drawing Sheet
(1 of 1 Drawing Sheet(s) Filed in Color)



© 2015 Tanya Taylor Designs LLC

FIG. 2

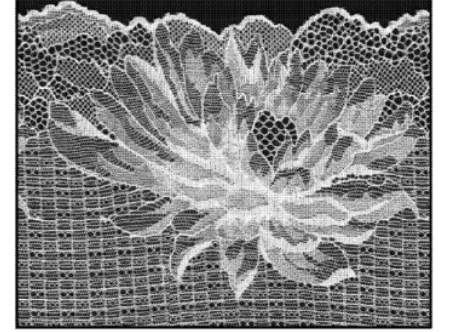
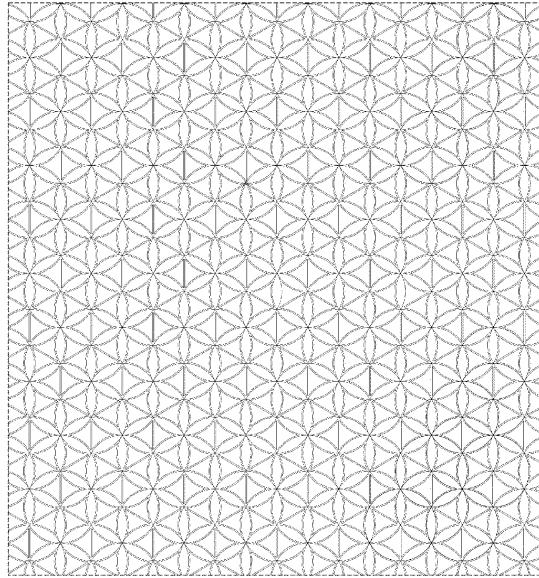
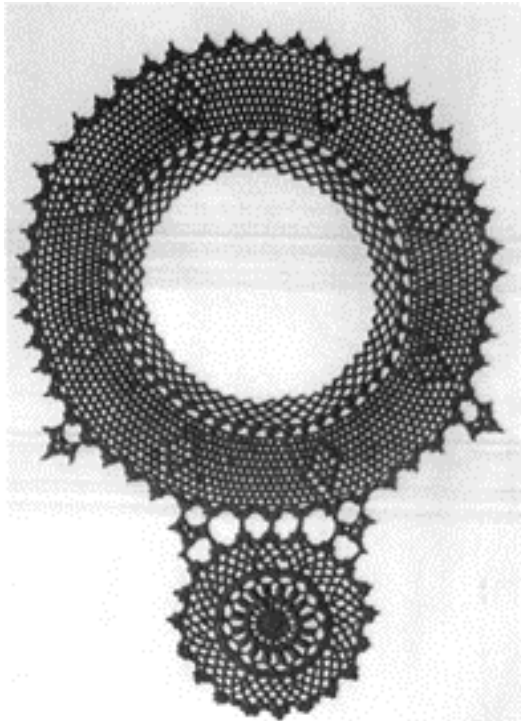


FIG. 2

French Design Registrations (“African Parure”, “African Warrior Decorative Pattern”, “Bride Mule”, “African Box”)



Chinese Design Patents (“Teacup Pad”, “African Mask”); Canadian Design registration (“Totem Bottle”), U.S. Design Patent (Adinkra Alphabet)

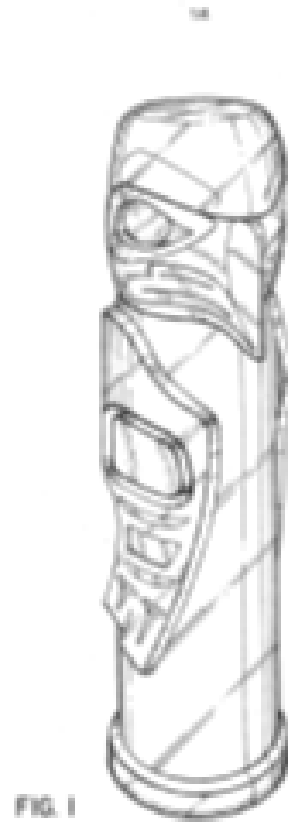


FIG. 1



FIG. 1

Native American Examples



Registration Number

20123822 - 015

Name

"NAVAJO" - BRACELET

Native American Examples



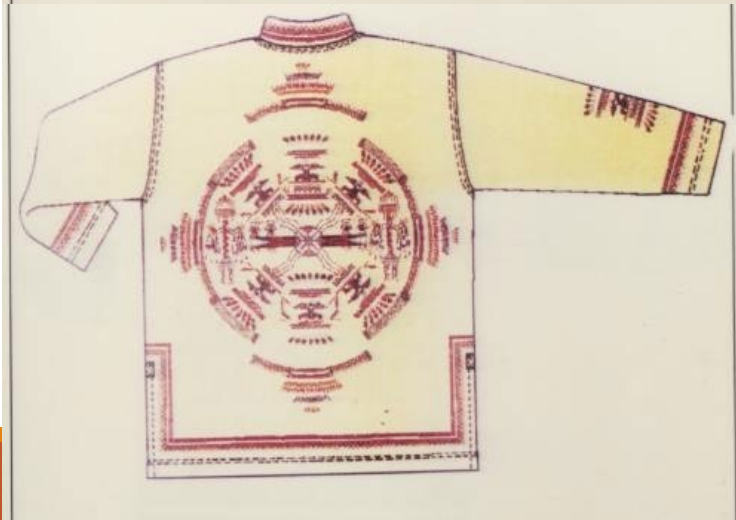
Registration Number

20134945 - 002

Name

Bracelet manchette SIOUX

Native American Examples



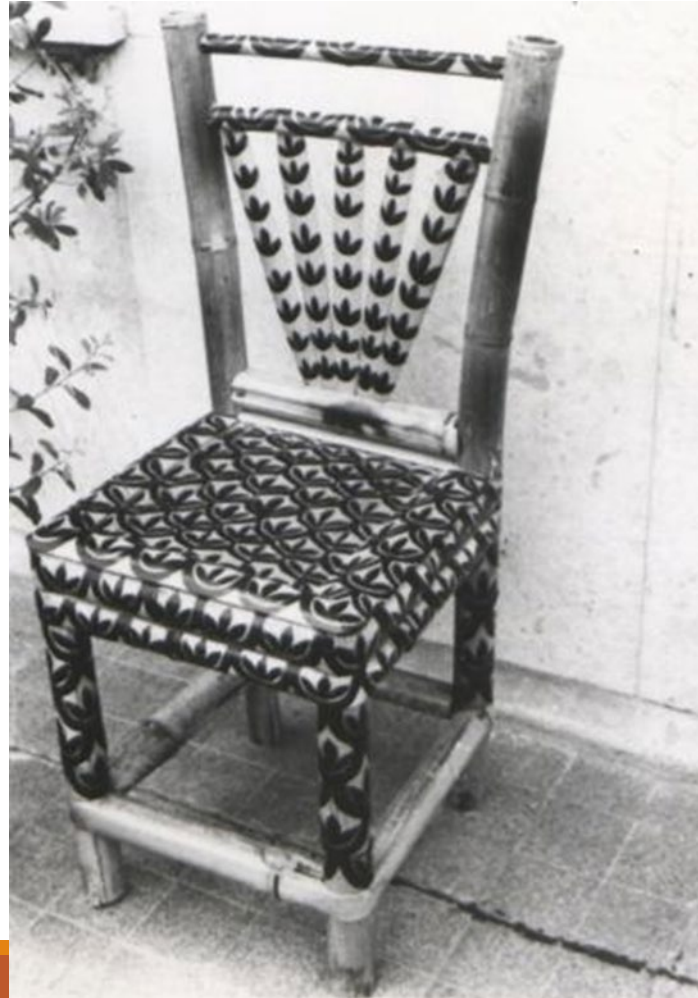
Registration Number

943753 - 012

Name

DESSIN SUR SUPPORT TEXTILE
THEME NAVAJO (4 designs)

Many different kinds of Articles can be protected



French Registration Number

110945-0001

Not all of these examples are the subject of design protection, but they are *eligible* subject matter for design protection

-Design registries are challenging to search (visual vs. verbal)

-Filings are increasing; many companies just starting to consider using design protection

-Most design protection not related to fashion (219 international design classification categories and 5,167 entries, ranging from automobiles and salad bowls to zip fasteners), but unclear how numbers will change in the future.

Amended Article 3 (Controversial AG Proposal 2014/2015); halted negotiations

“Article 3 Application

(1) [Contents of Application; Fee] (a) A Contracting Party may require that an application contain some, or all, of the following indications or elements:

- (i) a request for registration;
- (ii) the name and address of the applicant;
- (iii) where the applicant has a representative, the name and address of that representative;
- (iv) where an address for service or an address for correspondence is required under Article 4(3), such address;
- (v) a representation of the industrial design, as prescribed in the Regulations;
- (vi) an indication of the product or products which incorporate the industrial design, or in relation to which the industrial design is to be used;
- (vii) [priority claim] . . .
- [(ix) a disclosure of the origin or source of traditional cultural expressions, traditional knowledge, or biological/genetic resources utilized in creating or incorporated in the design;]**
- (x) any further indication or element prescribed in the Regulations.”

Reasons for AG Amendment

- It enables **policy coherence** across IP, biodiversity, cultural, human rights, and trade regimes.
- It can **facilitate member state compliance with access and benefit sharing (ABS) obligations** under national, regional, and international laws and agreements by **increasing transparency** in domestic design protection systems.
- **It provides domestic policy space** for beneficial legal experimentation.

Opposition to AG Proposal arguments:

- The African Group proposal was introduced late in the DLT negotiation process when the agreement was largely finalized and members were anticipating a diplomatic conference, and the only outstanding issue was believed to be technical assistance.
- Disclosure of origin requirements are not *common core features of industrial design systems* and thus do not belong in a formalities treaty
- A disclosure of origin requirement would **introduce uncertainty for designers** and create a chilling effect on filings by serving as a basis for rejection or invalidation involving the application of vague criteria (substantive, national law concern).
- The origin of genetic resources, in particular, are widely considered irrelevant to the registrability of a design.

Particular Resistance to Inclusion of Biological/Genetic Resource DOO

Disclosure of origin (DOO) is not a common design application requirement

Design only protects **appearance**, not **material** from which article is made (so genetic/biological resources should be irrelevant to design protection)

Or should they?

Utilization of Genetic/Biological Resources in design creation, Scarf designs from bacterial secretions, fabrics grown from bacterial cellulose fermentation, lab grown cotton, leather, spider silk, GMO silkworms, shrimp-derived bioplastic housewares
www.biodesignchallenge.org (“biologically driven design”)



Using Human DNA to Create Leather from Cloned Skin (Genetic resources in design creation)



“Pure Human”: collection of fashion items that could be made from leather grown from DNA extracted from a hair sample from the deceased designer, Alexander McQueen [the article states no permission was obtained].

“the flesh-toned biker jackets, totes and other items comprising the collection bore freckles, tattoos, and other markings strikingly similar to those on Mr. McQueen’s body.”

Elizabeth Paton, “Fashion that Gets Under the Skin,” The New York Times, July 19, 2016

Mushroom Leather



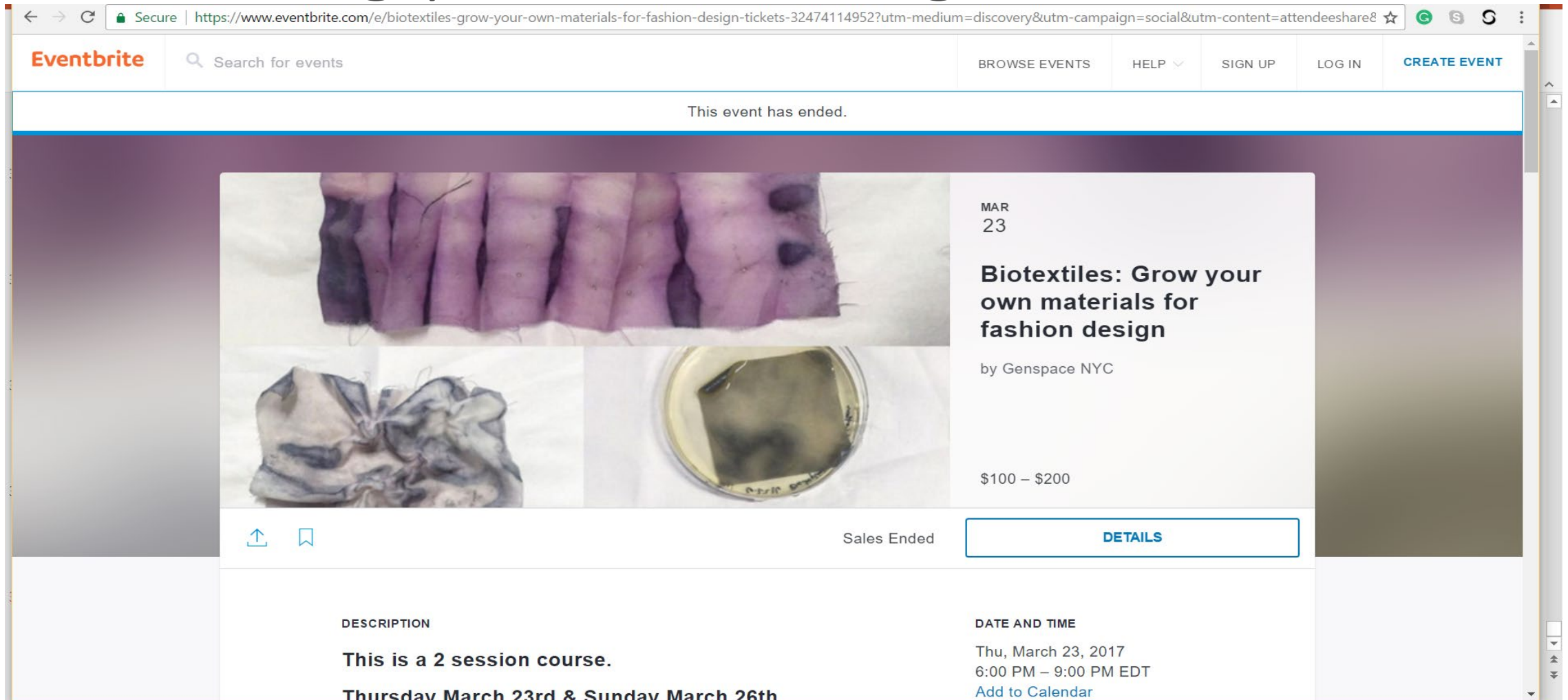
<http://www.popsci.com/next-leather-jacket-will-made-from-mushrooms>

Growing your Own Design Materials

Secure | <https://www.eventbrite.com/e/biotextiles-grow-your-own-materials-for-fashion-design-tickets-32474114952?utm-medium=discovery&utm-campaign=social&utm-content=attendeeshare&utm-source=strongmail&utm-term=listing#>

Eventbrite Search for events BROWSE EVENTS HELP SIGN UP LOG IN CREATE EVENT

This event has ended.



MAR 23

Biotextiles: Grow your own materials for fashion design

by Genspace NYC

\$100 – \$200

Sales Ended [DETAILS](#)

DESCRIPTION

This is a 2 session course.

Thursday March 23rd & Sunday March 26th

DATE AND TIME

Thu, March 23, 2017
6:00 PM – 9:00 PM EDT
[Add to Calendar](#)

Grow Your Own Design Materials

“Today’s biolab is becoming tomorrow’s design studio. Fashion designers have grown materials, garments and accessories from bacteria, yeast, fungi, human bone, synthetic spider silk, and more. In this two-part introduction to biotextiles, you’ll **learn how to grow fabrics from microbes and then use natural and bioengineered bacteria to dye them.**

Our Biotextiles course is a perfect introduction to the **latest breakthroughs in fashion and biology** and a great way to learn how to start growing your own materials and garments. . . .

In the first session, you’ll learn to grow **materials and living dyes** using microbes. The workshop will be paired with an introduction to biotech in fashion. In the second session, you’ll examine the results and then go over finishing techniques for safe handling of fabrics through sterilization.”

<https://www.eventbrite.com/e/biotextiles-grow-your-own-materials-for-fashion-design-tickets-32474114952?utm-medium=discovery&utm-campaign=social&utm-content=attendeeshare&utm-source=strongmail&utm-term=listing#>

Relevance of Biological/Genetic Resource DOO to Design Protection

Designs provide protection for the appearance of a useful article

Registered designs allow owners to **exclude the actual products** whose appearance infringes the design

Countries may choose not to extend protection to the **design** of an article made using illegally/improperly acquired GR/TK/TCEs

EU Registered Community Design provides protection for:

“the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, **texture and/or materials** of the product itself and/or its ornamentation.”

Without DOO policy space in DLT, Parties Foreclosed from Requiring DOO for Designs in IGC Agreements

DRAFT DLT

Identifies closed list of items countries can require applicants to provide

Without including DOO on that list, countries would be prohibited from requiring DOO

Without **express words** (e.g., disclosure, TK, TCEs), countries may not interpret vague language provision to include DOO policy space in light of **negotiating history and external pressure from opposing countries**

Legal effect of provisions embedded in footnotes in treaties unclear in international law

DRAFT IGC TEXTS

Mandatory DOO for GRs in utility patent applications (most likely to result in treaty)

Disclosure relating to TK or TCE in IP applications

Even if agreement to DOO for TK and TCE, would not be able to require it in design applications if DLT closed list disallows such inquiry (policy incoherence)

Conclusions

Successful national TCE protection systems can helpfully inform IGC negotiations

Database systems should be deployed, if at all, in conjunction with positive protection systems for TK and TCEs to avoid misuse of subject matter

Separating more advanced GR text from TK and TCE texts could allow conversion of IGC to a standing committee and expedite work on TK and TCE texts

Provisions in DLT can affect IGC TCE/TK agreement scope and ultimate member state policy space

Thank you!!!