



**Intellectual Property - Available
intellectual property tools to protect
Traditional Knowledge (TK) and
Traditional Cultural Expressions
(TCEs)**

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■ “This is not to suggest that intellectual property law meets all the needs of indigenous peoples and local communities.”

But, if used strategically, you may be able:

- to prevent others from exploiting your TK and TCEs without your permission
- to maximize the economic value of your TK or TCEs-related products and services

If you understand the basics of intellectual property ...

You would be better placed to:

- protect your TK and TCEs;
- promote products and services based on your TK and TCEs – if you wish to do so;
- stop others from using the intellectual property system to claim ownership of creations or inventions that are based on or have been developed using TK or TCEs without complying with the relevant legal requirements;
- reduce the risk of free-riding by others on the successful use of TK and TCEs in marketable products in national and international markets.

Intellectual Property – What for?

Provides recognition for and commercial reward from creations and inventions:

- Patents
- Industrial designs
- Copyright

Helps to differentiate goods and services and to make them more attractive to consumers:

- Trademarks
- Geographical indications

Intellectual Property – The basics

- Exclusive rights ... private rights
- Not everything can be protected ... Rules to be respected (substantial and formal)
- Limited protection (in space and in time)
- Can be transferred or licensed
- Balance is needed, in order to nurture a fair environment in which creativity and innovation can flourish

In what ways do intellectual property rights differ?

- Subject matter of protection
- Requirements for the grant of protection
- Conditions for protection
- Nature of the rights granted
- Duration of protection

The standard IP system, TK and TCEs

- The intellectual property system was not designed to protect TK and TCEs.
- Nonetheless, real life examples show that indigenous peoples and local communities have used it to protect their TK and TCEs

Intellectual property relevant for TK and TCEs

- **Copyright: Dreaming stories protected in Australia**
- **Patents: Novel analgesic compounds + Anti-inflammatory compounds**
- **Trademarks: Cowichan + Taita baskets**
- **Geographical indications: Montecristi straw hat**
- Industrial designs
- Protection against unfair competition: Misleading or deceptive labels
 - Trade secrets: The Pitjantjatjara Council's sacred secret

Copyright

- Protects the expression of ideas, not the ideas
- Protects original works.
- Right to prevent others from copying
- Generally, inspiration is allowed
- No need to register works: Automatic protection
- Economic rights + Moral rights
- Economic rights have limited duration: 50 years after the death of the creator

- Whoever writes down TK-related information may be entitled to copyright in the way that TK has been put into words.

- TK is not protected

- But the way it has been expressed is

- What rights do TK holders have?

- Whoever films someone explaining how to use a plant for medicinal purposes (TK) may be entitled to rights in the recording.

- TK is not protected

- The recording is protected

- What rights do TK holders have?

The original artwork / The infringing reproduction



Patents

- Protect inventions (products or processes) that are:
 - New (novelty)
 - Inventive (inventive step)
 - Useful or industrially applicable (utility or industrial applicability)... Known as the patentability criteria.
 - Adequately disclosed
- Grant the exclusive right to make or use the protected invention commercially
 - In a certain territory
 - For a limited period (generally 20 years)

- Patent applications include:
 - A complete and clear explanation of the invention (the specification)
 - One or more sentences which specify the scope of protection (the claims)

- A patent application is filed, assessed (compared to prior art, among others) and, eventually, a patent is granted:
No registration, no patent

- Third parties may alert a patent office to relevant prior art

- A patent application can be rejected.
- A patent can be invalidated.

The specification

BACKGROUND

[0002] Dentifrice compositions are widely used in order to provide oral health. Dentifrices in the form of toothpaste, mouth rinses, chewing gums, edible strips, powders, foams, and the like have been formulated with a wide variety of active materials that provide a number of benefits to the user. Among these benefits are antimicrobial, anti-inflammatory, and antioxidant properties. These properties of dentifrices make them useful therapeutic agents to prevent or treat a number of oral health conditions such as cavities, gingivitis, plaque, tartar, periodontal disease, and the like.

[0009] *Myristica fragrans* (nutmeg) is known as a headache cure and a gastrointestinal drug in the Indian ancient Ayurveda, and has been used for dyspepsia, bellyache, diarrhea and vomiting in the traditional Chinese medicine. *Myristica fragrans* has reportedly been used as a fruit paste and applied to teeth. See U.S. Patent Nos. 6,264,926, and 7,083,779. Extracts of *Myristica fragrans* have been reported to antimicrobial activity against *Escherichia Coli*, *Salmonella*, and other bacteria not typically found in the mouth, and not known to have any implication in causing plaque or gingivitis. Indu, M.N., *et al.*, “Antimicrobial Activity of Some of the South-Indian Spices Against Serotypes of *Escherichia Coli*, *Salmonella*, *Listeria Monocytogenes* and *Aeromonas Hydrophila*,” *Braz. J. Microbiology*, 37: pp 153-158 (2006). U.S. Patent No. 5,124,156 discloses a chewing gum for preventing pyorrhea alveolaris that contains lysozyme of egg whites and mace extract. U.S. Patent Nos. 4,195,101 and 4,263,326 disclose an antimicrobial compound obtained from an extract of mace.

[0014] It has been found that dentifrices formulated with the extract of *Myristica fragrans*, in combination with natural extracts other than *Myristica fragrans*, exhibit antibacterial, anti-inflammatory, and/or antioxidant properties, and has been found effective in treating xerostomia, without the need for an additional antibacterial agent.

CLAIMS

1. An oral composition comprising:
a combination of extracts comprising an extract from *Myristica fragrans* and a natural extract other than the extract from *Myristica fragrans*; and
an orally acceptable carrier.

9. A method of treating a disease or condition of oral cavity soft tissue comprising administering to the oral cavity of a patient in need thereof, a composition according to any of claims 1 to 8.

10. The method according to claim 9, wherein the disease or condition is xerostomia.

Can TK be patented?

An example from Australia: the crocodile hunter

The Jarlmadangah Burru Aboriginal community resides in Kimberley in North West Australia. The marjala plant (scientific name: *Barringtonia acutangula*) is well known to the Jarlmadangah Burru community for its healing properties, including pain relief. It is associated with the creation story of the Fitzroy River.⁵

Mr. John Watson, an elder from the Jarlmadangah Burru community, had his finger bitten off while hunting crocodiles. To stop the pain, he chewed the bark from the marjala plant and put it on his wound. The marjala plant stopped the pain until he was able to get to a hospital. This made his local community think about its commercial potential.⁶

Subsequently, the Jarlmadangah Burru community explored the commercial benefits of the marjala plant and reached a partnership agreement with Griffith University. In 2004, Griffith University and the Jarlmadangah Burru Aboriginal Corporation filed a patent application in Australia for an invention entitled "Novel analgesic compounds, extracts containing same and methods of preparation". As indicated in the patent application, the invention relates to new compounds having analgesic properties and extracts containing them. Such compounds are obtained from plants of the *Barringtonia* species.⁷ A patent was granted to Griffith University and the Jarlmandangah Burru Aboriginal Corporation for this invention.

Another example from Australia: a collaborative research project leads to a patent

The Chuulangun Aboriginal Corporation and the University of South Australia have undertaken research based on bush medicine plants. They have collected plants and tested them in a laboratory to study their pharmacological activities. This has led to the identification of certain compounds that can be used in the treatment of inflammation.

As a result, patent applications have been filed and a patent has been granted to the University of South Australia and the Chuulangun Aboriginal Corporation for an invention entitled "Anti-inflammatory compounds".⁸

One of the inventors, David Claudie, is an elder from the Chuulangun community who knows the medicinal uses of plants that grow there through his father's bloodline.⁹

Thanks to the agreements they have signed and the patent they jointly own, both the University and the Chuulangun Aboriginal Corporation have a say on how the compounds they have identified are commercialized, and will share the commercial benefits.

Trademarks

- Distinguish goods or services of one provider from the goods or services of other providers
- Trademarks
 - Must be distinctive
 - Cannot be generic, descriptive or deceptive
 - Should not be identical or confusingly similar to other marks
- Usually needs to be registered to be protected
- Generally, registration lasts for 10 years. It is **renewable**
- Prevent others from using confusingly similar marks for identical or similar goods or services ... in a certain territory

Special trademarks

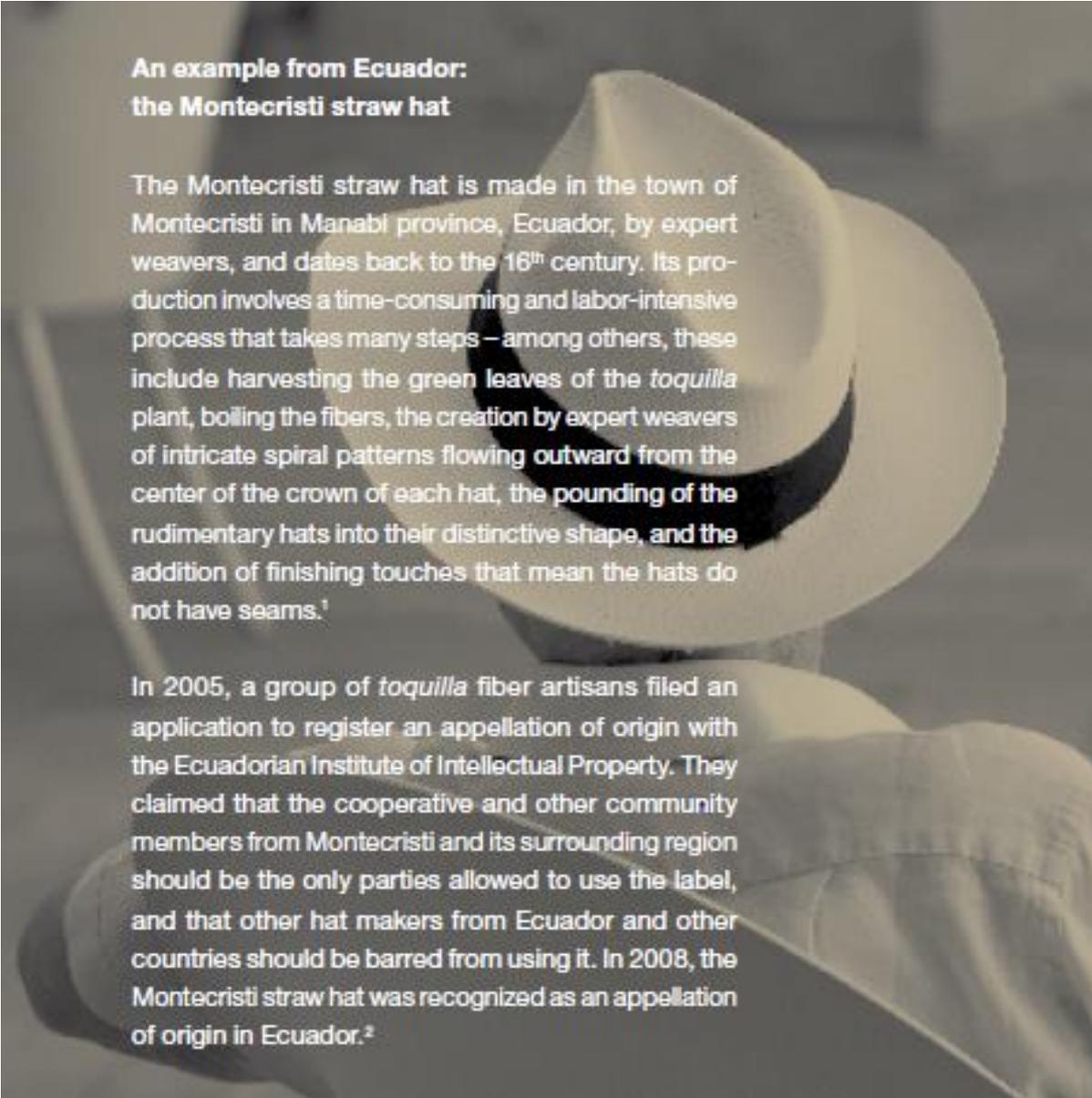
- A **collective mark** is owned by an association or cooperative representing a group of people or businesses
- Can be used by members of the association or cooperative for goods or services that comply with established criteria.
- A **certification mark** can be used by anyone provided its goods or services meet certain prescribed standards.

Geographical indications

- Sign used on products that have a specific geographical origin and possess qualities or a reputation that are essentially due to that origin
- Geographical origin may be important because of:
 - Natural factors – i.e., local soil, climate etc
 - Human factors – i.e., skills, knowledge, practices/traditions
- National laws vary greatly:
 - Some have special laws
 - Others use collective or certification marks

Geographical indications

- At the very least, national laws prevent the use of geographical indications when this might mislead the public as to the true geographical origin of a product.
- TK and TCEs can be included in the specifications or standards for the protected geographical indication



**An example from Ecuador:
the Montecristi straw hat**

The Montecristi straw hat is made in the town of Montecristi in Manabi province, Ecuador, by expert weavers, and dates back to the 16th century. Its production involves a time-consuming and labor-intensive process that takes many steps – among others, these include harvesting the green leaves of the *toquilla* plant, boiling the fibers, the creation by expert weavers of intricate spiral patterns flowing outward from the center of the crown of each hat, the **pounding of the rudimentary hats into their distinctive shape, and the addition of finishing touches that mean the hats do not have seams.**¹

In 2005, a group of *toquilla* fiber artisans filed an application to register an appellation of origin with the Ecuadorian Institute of Intellectual Property. They claimed that the cooperative and other community members from Montecristi and its surrounding region should be the only parties allowed to use the label, and that other hat makers from Ecuador and other countries should be barred from using it. In 2008, the Montecristi straw hat was recognized as an appellation of origin in Ecuador.²

Intellectual Property

- Complex world
- Different tools and different rules
- Common features
 - Creations of the human mind
 - Conditions that need to be complied with
 - Exclusive rights: « prevent others from ... »
 - Generally, protection is limited in time and space
- Key questions: What is/would be really protected? Where? For how long? What formal or substantive requirements (would) need to be met? Are they met / Have they been met?
- Mistakes can be corrected