

## PROTECTION OF INDIGENOUS TEXTILES UNDER CURRENT INTELLECTUAL PROPERTY SYSTEM

### PROTECCIÓN DE LOS TEXTILES INDÍGENAS BAJO EL SISTEMA DE PROPIEDAD INTELECTUAL

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#### **Abstract**

Despite certain negotiations and dialogues that have taken place at an international level, there is currently no legislation that truly protects the unique creations of different indigenous communities, such as their fabrics and textiles. Due to this lack of legislation, the rights of indigenous communities are often violated since people frequently misuse and misappropriate their traditional cultural expressions.

However, nowadays, some communities are becoming aware of the negative consequences that they suffer due to the lack of legal protection, so they have raised their voices asking for the creation and development of mechanisms that would help them fairly protect their knowledge and work. For this reason, this investigation seeks to explain some of the concerns and challenges that have arisen, as well as some of the legal solutions that have tried to address the issue.

#### **Keywords**

International legislation, textiles, collective rights, traditional knowledge.

#### **Resumen**

A pesar de ciertas negociaciones y diálogos que ha habido a nivel internacional, actualmente no existe una legislación que realmente proteja las creaciones únicas de las distintas comunidades indígenas, tales como los textiles. Por esta falta de legislación, los derechos de las comunidades indígenas se vulneran con frecuencia, pues las personas hacen mal uso y se apropian indebidamente de sus expresiones culturales tradicionales. Sin embargo, hoy en día, algunas comunidades están tomando conciencia de las consecuencias negativas que sufren por la falta de protección legal, por lo que han alzado

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su voz pidiendo la creación y desarrollo de mecanismos que les ayuden a proteger de manera justa sus conocimientos y su trabajo. Por ello, esta investigación busca mostrar algunas de las inquietudes y desafíos que han surgido, así como algunas de las soluciones jurídicas que han intentado abordar el tema.

### **Palabras clave**

Legislación internacional, textiles, derechos colectivos, conocimiento tradicional, creaciones únicas.

### **Sumario:**

1. Introduction 2. Guatemala 3. Intellectual Property 4. Traditional Knowledge 5. Protecting Traditional Knowledge Under Current Intellectual Property System 6. Conclusion.

## **1. Introduction**

Indigenous people around the world, including Guatemala (a country with a great cultural background), have been known throughout history as great artists, who create and produce unique and traditional textiles, among others. Because of this, they argue that they have the legitimate right to protect their traditional knowledge and traditional cultural expressions and products, such as their fabrics and textiles, to avoid the misuse or misappropriation of others. Even though with time, the value of indigenous knowledge discussion has become more relevant, and some negotiations and dialogues have been made, “there is not yet an international consensus about how indigenous rights to the protection of their knowledge systems can be secured, either within an intellectual property regime or through some other overarching legislative or policy framework”<sup>2</sup>. Neither there is a national law in Guatemala that achieves this protection, which leaves the indigenous communities in a vulnerable situation, since third persons can easily violate the rights, indigenous people should have over their own creations.

Because of this, the protection of traditional knowledge, expressions, and creations, such as textiles, in Guatemala and the rest of the world, has achieved certain purposes and raised several unresolved questions. Indigenous communities have raised their voice to express their disagreement and concerns related to the lack of protection of their textiles and other types of art. Nevertheless, there are many unresolved questions as: Is it appropriate for indigenous fabrics to be protected through the Intellectual Property system? Can traditional knowledge be protected under the current Intellectual Property system? Are there other figures that could satisfy the protection they seek?

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<sup>2</sup> Anderson, Jane. 2010. Indigenous/Traditional Knowledge and Intellectual Property. North Carolina, U.S.A., Center for the Study of the Public Domain, Duke University School of Law. Pg. 1 <[https://web.law.duke.edu/cspd/pdf/ip\\_indigenous-traditionalknowledge.pdf](https://web.law.duke.edu/cspd/pdf/ip_indigenous-traditionalknowledge.pdf)> Visited 03/22/2022.

## 2. Guatemala

The Republic of Guatemala is a country located in Central America and has one of the highest percentages of indigenous people in Latin America. Nearly half of its population identify themselves as indigenous of different ethnic groups such as Mayan (largest group), Garifunas, and Xinkas. Even though there might be several definitions for “indigenous people”, it “essentially refers to “people existing under relatively disadvantageous socio-economic conditions...”<sup>3</sup>. They all have different languages and unique cultural traditions, art, food, and dances. Between the different expressions of their art, one can find clothing, textiles, different handicrafts, accessories, etc. Guatemala’s handmade textiles are worldwide recognized, because of their exclusive colors, amazing designs, and their unique way of weaving, which requires a hard effort that adds great value to them.

## 3. Intellectual Property

Intellectual property is the “creation on the mind, such as inventions; literary and artistic works; designs; and symbols, names, and images used in commerce”<sup>4</sup>. Because of its relevance, Intellectual Property is protected by law. The law protects intellectual property from unauthorized use by others. It is considered an individual right, but, since indigenous communities started raising their voices, some have started to develop the new concept of “Collective Intellectual Property of the Indigenous People”. This can be defined as “As the area of study that confers exclusive rights to a community, indigenous peoples, who recognize themselves as such, seeking to protect or preserve his intellectual creations”<sup>5</sup>. However, that particular collective element makes it difficult (if not impossible or inadmissible) to identify the creators or inventors of their art and other creations. Intellectual Property has two main branches, Copyright and Industrial Property, which will be briefly explained.

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<sup>3</sup> 12. Ogwezy, Michael. 2012. Protection of indigenous or traditional knowledge under intellectual property laws: an examination of the efficacy of copyright law, trade secret and sui generis rights. Faculty of Law, Lead City University. Pg. 15. < <https://sciendo.com/abstract/journals/iclr/12/1/article-p7.xml>> Visited 03/21/2022.

<sup>4</sup> World Intellectual Property Organization. What is Intellectual Property? < <https://www.wipo.int/about-ip/en/>> Visited d on 03/22/2022.

<sup>5</sup> Salazar, Daniel. 2016. La Propiedad Intelectual Colectiva en el Derecho Constitucional Contemporáneo. Universidad Andina Simón Bolívar. Pg. 33. < <https://repositorio.uasb.edu.ec/bitstream/10644/5831/1/T2403-MDE-La%20propiedad.pdf>> Visited on 03/22/2022. Translated from Spanish by Mariana Murillo.

### 3.1. Copyright

Regarding Copyright, it can be defined as “a bundle of exclusive rights granted to authors, allowing them to control and prevent different uses of their works by others”<sup>6</sup>. It includes the rights of distribution, reproduction or copying, public performance or display, and the right to make derivative works about musical, literary or musical works, computer programs and related rights. Protecting the rights of these creators is not only fair and just, but it also encourages creative activity. The main requirement for a work to be protected under copyright is originality. That means that it must be the result of the unique inventiveness of its author, different from any other work.

### 3.2. Industrial Property

On the other hand, Industrial Property consists of Patents, Trademarks, Geographic Indications, Industrial Designs, and Unfair Competition. Next, the requirements about the most relevant ones, in relation to the analysis of this paper, are going to be briefly described.

#### 3.2.1. Patents

Patents are the ones that provide the exclusive rights to inventors for their own inventions. Invention is defined in Patent Act, R.S.C. 1985, c p-4: Invention “means any new and useful art, process, machine, manufacture, or composition of matter...”<sup>7</sup>.

Patent systems today require, among others, that an invention be:

A. New or Novel: An invention is novel if it is different from anything previously patented, publicly described or used, on sale or otherwise available to the public anywhere.

B. Sufficient Inventiveness: “An invention is considered to involve an inventive step if, having regard to the prior art, it is not obvious to a person skilled in the art. (PCT guideline 13.01)”<sup>8</sup>.

C. Useful and Reduced to Practice: means that it is appropriately developed to allow someone to make and use the invention.

#### 3.2.2. Trademarks

Trademarks protects intellectual property associated, mostly, with companies, such as phrases, words, designs, or symbols used to identify and promote products or services. They help a business to differentiate their products or services from others. That is why,

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<sup>6</sup> Chow, Daniel and Lee, Edward. 2021. International Intellectual Property, Fourth Edition. U.S.A., West Academic. Pg. 103.

<sup>7</sup> Ibid. Pg. 394.

<sup>8</sup> Yamamoto, Shunshuke. 2016. Examination Guidelines for Patentability- Novelty and Inventive Step. <[https://www.wipo.int/edocs/mdocs/aspac/en/wipo\\_pct\\_ty\\_16/wipo\\_pct\\_ty\\_16\\_3.pdf](https://www.wipo.int/edocs/mdocs/aspac/en/wipo_pct_ty_16/wipo_pct_ty_16_3.pdf)> Visited on 03/22/2022

for trademarks to be eligible for protection they need to principally meet the distinctiveness requirement, which is consider the indispensable component and the reason for being of the brands. “Businesses can become more recognizable and attractive to consumers through the use of their exclusive names, logos and other branding elements, because no other businesses will be permitted to use such elements if they are protected by trademarks”<sup>9</sup>.

#### **4. Traditional Knowledge**

Regarding the Traditional Knowledge, it is important to explain its concept, mention the aspects of its protection, and include the actual concerns that are currently present, as well of some of the legal instruments that have been trying to address this topic.

##### **4.1. Concept**

Traditional Knowledge is a term that refers to “knowledge, possessed by indigenous people, in one or more societies and in one or more forms, including, but not limited to, art, dance and music, medicines and folk remedies, folk culture, biodiversity, knowledge and protection of plant varieties, handicrafts, designs, and literature”<sup>10</sup>. Likewise, the World Intellectual Property Organization (WIPO) defines Traditional Knowledge as “knowledge, know-how, skills, and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity”. Therefore, it can be said that it is collective in nature, having a broad definition. It has an enormous value since is the knowledge that has been acquired over time in a particular community, being a collective intellectual heritage of people and their communities.

##### **4.2. Protection**

In some communities, indigenous people are becoming aware of the negative consequences that they suffer due to the lack of legal protection, they feel unprotected by the current Intellectual Property System. So, they have raised their voices asking, for the creation and development of mechanisms that would help them fairly protect their knowledge and work. The pressure that some campaigning organizations are doing for traditional knowledge to be better protected has led to the creation of an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore in WIPO. Also, the protection of traditional knowledge and folklore is being discussed within the framework of the CBD and in other international organizations such as UNCTAD, WHO, FAO and UNESCO. In addition, the Doha WTO

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<sup>9</sup> National Inventor Hall of Fame. 2022. Guide to Intellectual Property: What is a Trademark? <<https://www.invent.org/blog/intellectual-property/trademark-definition>> Visited on 03/22/2022

<sup>10</sup> Ogwezy, Michael. Op. Cit. Pg. 11.

Ministerial Declaration highlighted the need for further work in the TRIPS Council on protecting traditional knowledge”<sup>11</sup>, among other examples.

#### 4.3. Concerns

In its report on a series of fact-finding missions, WIPO sought to summarize the concerns of indigenous knowledge holders as follows: a) concern about the loss of their traditional lifestyles and traditional knowledge, and the reluctance of the younger members of the communities to carry forward traditional practices; (b) concern about the lack of respect; (c) concern about the misappropriation of traditional knowledge... Another source more succinctly classified these and other possible reasons for protecting traditional knowledge as: (e) equity considerations the custodians of traditional knowledge should receive fair compensation if the traditional knowledge leads to commercial gain; (h) Prevention of appropriation by unauthorized parties or avoiding “biopiracy”<sup>12</sup>. These real concerns must be addressed, because Indigenous communities, like everyone else, deserve to be fairly treated and protected by laws to stop the several infringements of their rights that they have been experiencing throughout history.

#### 4.4. Legal Instruments

Currently, there are some legal instruments that have addressed traditional knowledge in certain ways.

For example, the United Nations (UN) Declaration on the Rights of Indigenous People. This was adopted in September 2007. “It establishes a universal framework of minimum standards for the survival, dignity, and well-being of the indigenous peoples of the world and it elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of indigenous peoples”<sup>13</sup>. Its article 31, establishes that: Indigenous peoples have the right to maintain, control, protect, and develop their cultural heritage, traditional knowledge, and traditional cultural expressions... They also have the right to maintain, control, protect, and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions...

Likewise, the UN Convention on Biological Diversity from 1992, can be mentioned. This is the international legal instrument for the “conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources”<sup>14</sup>. In article 8 it establishes: “Each Contracting Party shall, as far as possible and as appropriate: ... (j) Subject to its national

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<sup>11</sup> Ogwezzy, Michael. Op. Cit. Pg. 14.

<sup>12</sup> Ibid. Pg. 16.

<sup>13</sup> United Nations. 2007. United Nations Declaration on the Rights of Indigenous People. <<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>> Visited 03/24/2022.

<sup>14</sup>United Nations. 1992. United Nations Convention on Biological Diversity. <<https://www.un.org/en/observances/biological-diversity-day/convention>> Visited 03/24/2022.



legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices”.

In a broader aspect, the Universal Declaration of Human Rights from 1948, establishes in article 27, the following: “2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author”.

## **5. Protecting Traditional Knowledge Under the Current Intellectual Property System**

The attempts to protect traditional knowledge under the Intellectual Property system have failed because it has characteristics that go against the fundamental pillars of Intellectual Property. Currently, there are several alternatives being discussed to achieve this protection. Following, the most relevant ones are going to be explained.

### **5.1. Analysis between Copyright, Patents and Trademark with Traditional Knowledge**

Even though with the previous information it results evident that the protection of traditional knowledge is indispensable nowadays, the Intellectual Property system might not be the best solution for doing it.

#### **5.1.1. Copyright**

There are some relevant conflicts between copyright and traditional knowledge. The first one is that copyright requires identifying the “authors” of the work. Intellectual Property has an individual approach, it has been developed through years as an individual right. On the contrary, indigenous communities most of the time argue that traditional knowledge belongs to the community. Meaning that it allows that an “author” can be either an individual, a group of people or even the entire population in the community. With this lack of individuality, traditional knowledge is contradictory to Intellectual Property principles.

The second relevant issue is that “copyright requires that the work be original, i.e., the result of the independent efforts of the author; originality can be difficult to establish because the traditional knowledge and folklore may have passed through generations without any record, so it becomes difficult to prove originality by an author”<sup>15</sup>.

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<sup>15</sup> Chow, Daniel and Lee, Edward. Op. Cit. Pg. 183.

A third issue is that copyright laws generally require fixation in a tangible medium; but some traditional knowledge and folklore is oral or intangible.

### 5.1.2. Patents

Regarding to patents, some issues can also be described. Traditional knowledge is not able to satisfy the new or novelty requirement that was described previously in this paper. The issue is generated because traditional knowledge is passed from generation to generation. This implicates that it has its origins in tradition, existing since a long time ago, lacking novelty. Likewise, it lacks sufficient inventiveness since, due to prior knowledge, an expert in the matter would consider evident the elaborations of manufactures that are included in the traditional knowledge broad concept.

“However, there are a few authors like David Vivias and Manuel Ruiz, that criticizes this position, arguing that traditional knowledge is evolutionary, so each generation incorporates new elements to it, therefore it is always new”<sup>16</sup>.

The second issue that is found is the disclosure. To get a patent, a disclosure of the invention is needed. Nevertheless, most indigenous communities do not want to disclose their knowledge, because they argue that it belongs only to their community and are against sharing it. Also, “disclosure and description of traditional knowledge is not always possible, since sometimes is about knowledge that often appears mixed and related with cultural and religious concepts and beliefs that not everyone can understand”<sup>17</sup>.

A third problem is patent holders. Traditional knowledge, as it was previously explained, allows that a “holder” can be either an individual or a group of people. Which is contrary to the individual approach that Intellectual Property has.

Another matter that must be taken into consideration are the costs. Most of the time, the application, and proceedings to get the Intellectual Property protection, requires time and money. This can be an inconvenience for many indigenous people since probably they do not have enough economic resources to obtain it.

### 5.1.3. Trademarks

First, is important to clarify that trademarks and traditional knowledge have completely different objectives. The purpose of a trademark is to distinguish products or services from other. On the other hand, the purpose of traditional knowledge is achieving the protection of the knowledge that the specific indigenous community have been passing from one generation to another.

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<sup>16</sup> Tobón, Natalia. Loc. Cit. Translated from Spanish by Mariana Murillo

<sup>17</sup> Loc. Cit.



Second, it is important to remember that distinctiveness is the main requirement to register a trademark and obtain the Intellectual Property protection. As some authors have concluded, the mark that would be used to protect traditional knowledge could meet this requirement. Nevertheless, the problem relies again on the fact that it would be almost impossible to determine who is entitled to be the trademark owner or owners.

Some people may argue this with a collective mark. But it must be clear that “collective marks are made up of letters, words, designs, names, or anything else. There are two types of collective marks: those used by members of a collective (collective membership mark) or those registered by a cooperative, association, or collective with a bona fide intent to use the mark in commerce. This includes marks that indicate membership in a union, association, or other organization”<sup>18</sup>. This means that a collective mark is also an individual right, and it would also be almost impossible to determine who is entitled to be the trademark owner or owners, because it is unrealistic to think that the entire population of the community would be grouped in the same legal entity.

After this analysis, it can be determined that the current Intellectual Property system is not the appropriate solution to achieve traditional knowledge legal protection. “The use of patents, trademarks, and copyrights, among others, to protect the traditional knowledge of indigenous peoples fails because it does not consider that the natives do not accept the concept of private property, they do not agree with the existence of time limits for protection and they refuse to describe their knowledge, as required by regulations”<sup>19</sup>.

## 5.2. Alternatives

As it was analyzed, the attempts to protect traditional knowledge under the Intellectual Property system have failed because it has characteristics that go against the fundamental pillars of Intellectual Property. So currently there are several alternatives being discussed to achieve this protection. Subsequently, the most relevant ones are going to be explained.

### 5.2.1. World Intellectual Property Organization Proposal

International organizations are joining efforts, seeking to create a uniform legal system that protects traditional knowledge of indigenous people that is accepted by all parties involved. That is why the World Intellectual Property Organization (WIPO) Intergovernmental Committee’s 2014 draft articles proposed 2 options for the protection of folklore among members. The first option enumerates 5 exclusive and collective rights for the beneficiaries: 1) create, maintain, control, and develop traditional cultural expression. 2) discourage or prevent the unauthorized disclosure and fixation and prevent the unauthorized use of secret protected traditional cultural expressions. 3) authorize or

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<sup>18</sup> Justia. 2022. Collective Marks. < <https://www.justia.com/intellectual-property/trademarks/categories-of-marks/collective-marks/>> Visited 03/26/2022.

<sup>19</sup> Tobón, Natalia. Loc. Cit. Translated from Spanish by Mariana Murillo

deny access to any use of traditional cultural expressions based on prior and informed consent or approval and involvement and mutually agreed terms. 4) protect against any false or misleading uses of protected traditional cultural expressions, in relation to goods and services... 5) prevent or prohibit use or modification which distorts or mutilates a protected traditional cultural expression or that is offensive, derogatory, or diminishes its cultural significance.

The second option they proposed was “giving members the discretion to determine how to safeguard the economic and moral interests of the beneficiaries concerning their traditional cultural expressions... as appropriate and in accordance with national law, in a reasonable and balanced manner”<sup>20</sup>.

### 5.2.2. Sui Generis

Another alternative that has been discussed is a sui generis system for traditional knowledge. “Sui generis is a Latin phrase meaning “of its own kind”. A sui generis system, for example, is a system specifically designed to address the needs and concerns of a particular issue”<sup>21</sup>. The benefit of sui generis legislation is that it does not have to resemble any current law. It offers an opportunity for participation by indigenous people and flexibility in developing frameworks that deal with knowledge control, use, and sharing. “The role of a sui-generis regime could therefore be to establish a bridge between indigenous/local community and national and international legal systems, to secure the effective recognition and protection of rights which derive from customary law and practice”<sup>22</sup>.

However, there are ongoing debates about how sui generis legislation should be developed. Should international organizations assist in its development, or should it be each nation? Also, there are other visible issues like the diversity of subject matter, the difficulty of identifying owners/custodians, and the applicability, enforceability, and transferability of sui generis legislation across diverse cultural contexts.

### 5.2.3. Modification of current Intellectual Property Framework

Another alternative that has been considered is modifying the actual Intellectual Property framework. In this proposal, there are some interesting points that can be discussed.

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<sup>20</sup> Chow, Daniel and Lee, Edward. Op. Cit. Pg. 182.

<sup>21</sup> World Intellectual Property Organization. 1998-1999. Intellectual Property Needs and Expectations of Traditional Knowledge Holders. < [https://www.wipo.int/edocs/pubdocs/en/tk/768/wipo\\_pub\\_768.pdf](https://www.wipo.int/edocs/pubdocs/en/tk/768/wipo_pub_768.pdf)> Visited 03/27/2022.

<sup>22</sup> Duke Law. Current Proposals: Dangers, Problems and Opportunities. < <https://web.law.duke.edu/cspd/itkpaper4/>> Visited 03/27/2022.

First, the labeling and/or trademarks. Certification marks, and marks of origination, can work for indigenous people mainly when the value of the invention is attached to its derivation within a particular context or by a particular group. “Labeling systems that denote a product’s indigenous origin enable indigenous works to be more easily identified and differentiated from non-indigenous works and/or copies that may be available”<sup>23</sup>. However, this proposal requires infrastructure and administration to be effective, which also includes costs, so for many indigenous people, it would be very difficult to adopt it. Another issue is that it can promote a homogenous indigenous identity.

Second, moral rights have been suggested because they can offer an effective means for protecting indigenous peoples’ rights in works that utilize or derive from indigenous knowledge. Yet, moral rights protect the rights of individuals, not communities, which is a big issue in indigenous communities, as it was explained previously.

Third, some limitations and exceptions to existing legislation have been proposed. “One exception that could be developed within copyright, for example, might target indigenous people as very specific kinds of users of cultural material already existing as copyrighted works”<sup>24</sup>.

## **6. Conclusion**

After this analysis, it can be concluded that the best way to protect indigenous textiles in Guatemala, and around the world, is under the traditional knowledge system, and not under the current Intellectual Property framework. This is because traditional knowledge is a very broad concept that has its own characteristic, that fit in a better way with indigenous communities’ principles and ways of thinking. Due to its relevance, the urgent need for its protection is undeniable. This protection needs to be achieved to avoid the violation of rights that indigenous people have been suffering through years, in relation to their cultural expressions and knowledge, including all types of manifestation of their art, like textiles, for example.

However, as it was demonstrated, protecting traditional knowledge under current Intellectual Property system is not possible either, because these two systems have contradictory principles. Intellectual Property focuses on being an individual right, it is a protection with a time limit, and it requires novelty and originality, consisting of the protection and promotion of innovation. On the other hand, traditional knowledge focuses on being a right to a group of people or to a whole indigenous community, it seeks that a protection does not have a time limit, and it passes from generation to generation, which according to many, it cannot be considered as new.

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<sup>23</sup> Loc. Cit.

<sup>24</sup> Loc. Cit.

Because of the complexity of this subject, it can also be concluded that the alternatives that have been developed lately to find an adequate manner to protect traditional knowledge, and therefore, textiles, still have many unresolved questions, so none of them have been formally adopted yet. That is why international organizations and nations should keep joining efforts to keep analyzing the situation and find the best alternative to protect indigenous communities properly, as they fairly deserve, without actually going against the current Intellectual Property system.

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