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Intellectual property rights and indigenous dress heritage: Towards more social planning types of practices via user-centric approaches

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Abstract *The chapter explores the role of legal design in tackling challenges related to balancing protection and access while applying intellectual property rights to indigenous dress heritage (DH). First, we address the problems with the current mainstream approach to IPR, where the main focus is on economic incentives, while societal values are generally less considered. We then contextualize this discourse within the framework of indigenous DH, focusing on Sámi DH. Our analysis shows how moving from a purely economic-centric to a more social-planning type of justification for IPR could help in better reflecting societal values into IP. We argue that a design thinking approach would be important to reach this goal and we elaborate on how legal design could trigger such positive development.*

Keywords: IPR, Indigenous dress heritage, social-planning theories, design thinking, legal design

1 Introduction

The chapter explores the role of legal design and design thinking in tackling some of the longstanding challenges related to balancing protection and access while applying intellectual property rights (IP, IPR) to the innovations and creativities of Indigenous dress heritage (DH) (understood as a part of Indigenous cultural heritage (CH)).

The ability of the IP system to respond to societal expectations and needs has been increasingly criticized lately.[1] Indeed, there is an ongoing debate[2] related to the

1 See eg, Taina Pihlajarinne and Rosa Ballardini, 'Paving the Way for the Environment – Channeling Strong Sustainability into the European IP System' (2020) 42 European Intellectual Property Review 239.

2 See eg, Ballardini Rosa Maria, Kaisto Janne and Similä Jukka, 'Developing Novel Property Concepts in Private Law to Foster the Circular Economy' Journal of Cleaner Production (forthcoming in 2020).

need to expand the reach of IPR to better include and consider broader perspectives than purely economic incentives. The case of indigenous peoples' DH provides us with a clear example to demonstrate some of the shortcomings of the IP system when it comes to respecting and considering fundamental societal values like the Indigenous right to self-determination (IRSD),[3] the right to culture, and ethical values like fairness.[4] In addition, claims have also been made that our current IP framework purely reflects the view of a 'majority' culture, where the interests and views of minorities are largely, if not totally, disregarded. For instance, the concept of IRSD plays an important role when considering exclusive rights to indigenous CH.[5] IPR are directly relevant to self-determination claims, in particular the cultural development of Indigenous peoples.[6] Accordingly, Indigenous communities should have the right to determine the use of their creative output, as well as the right to determine whether they want to disseminate creative elements of their culture still under their immediate control to non-members.[7] Thus, Indigenous groups' traditional cultural expressions, such as DH, should be protected from unwanted exploitation.[8]

However, in the contemporary Western IP system, economic interests seem to surpass societal ones.[9] This approach might conflict with the Indigenous right to control their own culture.[10] As we show below, there are already several examples that demonstrate the shortcomings of the IP system in embedding and reflecting certain societal values in the context of indigenous DH. We argue that utilizing legal design thinking to tackle these issues might enable moving from a purely economic and incentive centered system, to one that is more respectful of also ethical values. As Margaret Hagan notes, design thinking allows us to 'put the focus of law on

3 The United Nations Declaration on the Rights of Indigenous Peoples by the General Assembly on 13 September 2007, Article 3.

4 Laurence R Helfer and Graeme W Austin, *Human Rights and Intellectual Property. Mapping the Global Interface* (Cambridge University Press 2011) 447; Josephine Asmah, *Stepping Outside the Box: Traditional Knowledge, Folklore, Indigenous Textiles and Cultural Appropriation – Is There Room for Folklore Protection under Intellectual Property Law?* (University of Ottawa, Faculty of Law, 2010) 298. See also, UNESCO Universal Declaration on Cultural Diversity (2001), Articles 4–6 about human rights and cultural diversity.

5 Mattias Åhren, *The Saami Traditional Dress & Beauty Pageants: Indigenous Peoples' Right of Authorship and Self-Determination over Their Cultures* (Universitet i Tromsø, Juridisk fakultet, 2010) 218–19.

6 Helfer and Austin (n 4) 448; Matthew Rimmer, 'Introduction: Mapping Indigenous Intellectual Property' in Matthew Rimmer (ed), *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar Publishing 2015) 7.

7 Åhren (n 5) 218–19. See also, Georg Simmel, *Muodin filosofia* (*Philosophie der Mode*) (Kustannus Oy Odessa 1905) 27; Asmah (n 4) 196–201, 290.

8 Asmah (n 4) 291.

9 Minh-Ha Pham, 'Feeling Appropriately: On Fashion Copyright Talk and Copynorms' (2016) 34(3 (128)) Social Text 51, 69.

10 See also, Michael F Brown, 'Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property' (2005) 12 International Journal of Cultural Property 40, 50–51.

innovating, testing and building systems that serve the agency of the people involved in them'.[11] Many of the issues discussed in this chapter, such as IRSD, relate to actual possibilities for Indigenous communities to have more control on the ways their culture is used. This chapter introduces a simple structure for the design process, divided into three phases: defining the problem, developing the solutions and testing and prototyping. This method is applied on two levels: on a systemic level, relating to novel ways of applying the existing laws as well as to the possibility of passing new legislation, and on a user level, looking at the individual who navigates the system. Design thinking allows us to take into consideration the needs of the target groups by involving the users in the design process, instead of the top-down solutions typical of law-making.[12]

After introducing the concept of design thinking in law (section 2), the chapter addresses the problems with the current mainstream approach to IPR, where the main focus is placed on economic incentives, while other societal values are generally less considered (section 3). This discourse is then contextualized within the framework of Indigenous cultural heritage, especially dress heritage, with examples from Sámi culture. Our analysis shows how moving from a purely economic-centric to a more social-planning type of justifications for IPR could help in better reflecting societal values like IRSD, the right to culture and fairness into IP, fostering innovations and creativities that are not only economically valuable, but are also respectful of Indigenous societies (section 4). We argue that a design thinking approach would be particularly helpful in reaching this goal and we elaborate on how legal design could trigger such positive development (section 5). Finally, we summarize and draw up general conclusions for how to take a step forward towards a more ethical and inclusive IPR system within the context of Indigenous DH (section 6).

2 Design thinking in law

Legal design is an emerging discourse and could be considered as a counter-solution to the typical way of judicial rational-analytical problem-solving.[13] Design thinking has been defined as 'a creative and collaborative approach to solving problems, or, more completely, a systematic and collaborative approach for identifying and

11 Margaret Hagan, 'Law by Design' (2016) <https://www.lawbydesign.co/> accessed 1 June 2020.
12 See eg, Gerlinde Berger-Walliser, Thomas D Barton and Helena Haapio, 'From Visualization to Legal Design: A Collaborative and Creative Process' (2017) 54 American Business Law Journal 347.
13 ibid 360–61.

creatively solving problems'.[14] In general, legal design stands for merging legal thinking with design thinking.[15]

Design thinking can be applied in several occasions. Roughly divided, we can consider the ways a lay person navigates the legal system and the ways to make the legal system better suited to lay people (ie users). Ways to make the system easier and more satisfying to use include for instance information design, visual design and service design.[16] These methods focus on functionality in delivering a message effectively to people and a user's journey from problem situation to resolution, and how the user's experience can be improved along this pathway.[17] However, legal design methods can also be used to improve organizations and systems.[18]

This chapter operates on both the user level as well as systemic level. We build on a simple framework of design thinking, which includes defining the problem, developing possible solutions and testing and prototyping. The first phase requires gaining information from the users of the system. This can mean for example interviews and workshops. Design thinking takes as its starting point the holistic understanding of human action, needs, feelings and motives.[19] Based on this understanding of the user the solutions can be developed. This happens in an iterative process, where the aim is to develop as many ideas as possible. As Hagan notes, while lawyers tend to make a sport out of shooting down ideas as quickly and thoroughly as possible, in this phase there are no bad ideas. The aim is to explore and test ambitious ideas before trashing them.[20] These innovative and potentially impossible ideas will then be tested and prototyped quickly to see what works. This takes us back to the first phase: did we correctly define the problem and if not, what other ideas could be developed based on the information that was collected? Instead of top-down solutions, design thinking requires the designer to spend time with the user collaboratively exploring the product/solution.[21] As Berger-Walliser, Barton and Haapio note, in the legal context 'this means that when drafting [eg] a legal document the user should be involved, and his or her needs should be taken into account'.[22]

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14 Michael G Luchs, 'Intro' in Michael G Luchs and others (eds), *Design Thinking* (John Wiley & Sons 2015) xxii.

15 Stefania Passera, *Beyond the Wall of Contract Text: Visualizing Contracts to Foster Understanding and Collaboration within and across Organizations* (Aalto University 2017) 37.

16 Hagan (n 11).

17 Hagan (n 11).

18 Hagan (n 11).

19 Satu Miettinen, Miikka Raulo and Juha Ruuska, 'Johdanto' in Satu Miettinen (ed), *Palvelumuotoilu: uusia menetelmiä käyttäjätiedon hankintaan ja hyödyntämiseen* (Teknologiainfo Teknova 2011).

20 Hagan (n 11).

21 Berger-Walliser, Barton and Haapio (n 12) 367.

22 ibid.

It has been noted on several occasions that Sámi are not necessarily involved in the decisions concerning them.[23] In this regard, the principles of user-involvement and bottom-up approaches might serve as an option to traditional stiff ways of legislation such as formal hearings. This means that the target group should be involved throughout the process, instead of, for instance, just choosing from different options drafted by experts. A bottom-up approach means essentially considering the issues at local level. Design methods might at times sound like reinventing the wheel, however, for example workshops allow direct participation for the people concerned. Workshops are also a valuable way to identify the problem, making it possible to address the fundamental issue, instead of only the symptoms.

As mentioned, this chapter introduces some possible solutions on both user and systemic levels. We begin by defining the problem and then proceed to create options to tackle the issue. These ideas might seem radical, but this should also be considered as part of the process. To truly find out what eventually works, these ideas should be prototyped and tested in interaction with the users of the system. As for now, we hope that these ideas will serve as an opening for further discussions in the field of IPR and indigenous CH.

3 Cultural heritage and IPR: is there a need for social-planning based practices?

We will begin by defining the problem at hand. However, first it is necessary to outline certain features of the IPR system. Partly, the clash between IPR and certain societal values presented above has been caused by the types of theories that are currently forming the basis for the justification of the IP rights. Prominent theorists like Fisher argue that IP rights can be viewed through the following four political lenses:

1. Utility theory (or utilitarianism), which attempts to maximize net social welfare;
2. Labor theory, which recognizes and rewards individuals for their work;
3. Personality theory, which acknowledges that creation is a form of self-expression and selfhood;
4. Social planning theory, which views property as a good that can be used to build a just and attractive culture.[24]

23 See eg, Juha Guttorm, *Saamelaisten itsehallinto Suomessa – dynaaminen vai staattinen? Tutkimus perustuslaissa turvatun saamelaisten itsehallinnon kehittymisestä lainsäädännössä vuosina 1996–2015* (Sámi Self-Government in Finland – Dynamic or Static? Study on the Development of Constitutional Protection of the Sámi Self-Government in Legislation 1996–2015) (Lapin yliopistopaino 2018).

24 William Fisher, 'Theories of Intellectual Property' (1987) <https://cyber.harvard.edu/people/tfisher/iptheory.pdf> accessed 1 June 2020.

Currently, the mainstream IP system predominantly relies on the utility theory, which aims to assign to inventors and authors exclusive rights 'sufficient' to incentivise them to develop and make available inventions and works of art that they otherwise would not produce. The theory heavily focuses on economic aspects and incentives and has a strong owner-centric approach.[25] This way of conceiving private property in IP is clearly problematic in the context of Indigenous peoples' DH, where other values than the economic expectations and interests of individuals should play a major role.

These arguments become quite clear, for instance, when looking at several of the practices used in some Western IP legal systems. Generally speaking, the IP system should provide the incentives to foster innovative and creative activities, by awarding an exclusive, temporary, and limited in scope right to the creator of an artistic work or the inventor of a technical innovation, while balancing also the societal interest. This is the underlying structure of the IPR framework, independently from which theory the legislator relies upon. However, what relying on one theory instead of the other does change, is how much focus is placed on protection in respect to access. Under the current economic and incentive-based approach to IP, public interests, like the IRSD, the right to culture or even societal values like fairness, are often taken for granted or subordinated to private economic interests. As such, societal values like these ones are, even when considered, channeled into the system via the backdoor of the exceptions and limitations to the right, rather than taken into account directly while defining the actual scope of protection that such rights should give.[26] However, we must not blithely assume the role of IPR as an incentive. There is already a significant amount of literature that challenges the role and need of IPR as incentives.[27] As such, a shift towards practices that reflect more a social-planning type of theory, that is a vision according to which intellectual property rights can, and actually should, foster the development of a just and attractive culture, might be highly desirable for the IP system to become more inclusive and respectful of society. But how can this shift take place in a smooth yet effective way in our current system?

25 Lynda L Butler, 'Property as a Management Institution' (2017) 82 Brooklyn Law Review 1215, 1215.
26 See Pihlajarinne and Ballardini (n 1).
27 See eg, Linda J Lacey, 'Of Bread and Roses and Copyright' (1989) Duke Law Journal 1532, 1989; Jessica M Silbey, *The Eureka Myth: Creators, Innovators and Everyday Intellectual Property* (Stanford University Press 2015); Christopher Sprigman, 'Some Positive Thoughts about IP's Negative Space' in Kate Darling and Aaron Perzanowski (eds), *Creativity without Law* (NYU Press 2017).

4 Dress heritage and IPR: a case in point

4.1 Cultural heritage and dress heritage: a synopsis

What do we mean by 'cultural heritage'? Defining the concept is not unambiguous. Indeed, the term has sometimes taken different meanings depending on the context. The term has also been contested. While attention to CH has increased in recent years[28], also the variety of terms used to define it has multiplied. An often used definition for CH is the one provided in the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, which defines CH as: 'practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.'[29] According to this definition, CH (which includes both tangible and intangible heritage) is passed on from one generation to the other, providing a sense of identity and continuity. On the other hand, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions defines 'cultural expression' as: 'those expressions that result from the creativity of individuals, groups and societies, and that have cultural content'.[30] The Finnish Sámi Parliament has defined Sámi CH as: 'Sámi culture comprises of the Sámi language, Sámi cultural heritage, cultural expressions, Sámi art, Sámi traditional knowledge, traditional Sámi livelihoods and their modern forms, as well as the norms, practices and forms of the Sámi culture as an Indigenous people'.[31]

This chapter refers to the term CH as an umbrella term for all of these concepts. The term is used to refer to both traditional cultural expressions and traditional knowledge. However, it should be noted that Indigenous cultures, just as any other culture, do not stay static in perpetuity, they undergo certain changes in the course of time. In addition, it should be noted that for instance not all Sámi culture is traditional. In other words, Indigenous cultures, like Sámi, are living cultures which continue to recreate and evolve themselves. Therefore, also non-traditional cultural expressions can belong to the definition of CH.[32]

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28 Eg, Convention on the Value of Cultural Heritage for Society (Faro Convention 2005) and Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005).

29 Unesco Convention for the Safeguarding of the Intangible Cultural Heritage, Article 2.

30 ibid Article 4(3).

31 Saamelaiskäräjät (Sámi Parliament), 'Kulttuurisesti vastuullinen saamelaismatkailu' (Culturally Responsible Sámi Tourism) <https://www.samediggi.fi/meneillaan-olevat-hankkeet/kulttuurisesti-vastuullinen-saamelaismatkailu/> accessed 1 June 2020.

32 Tuomas Mattila, 'Saamelaisten tarpeet henkisen omaisuuden suojaan tekijänoikeussuojan ja tavaramerkkisuojan näkökulmasta – erityisesti duodji-käsityön ja saamenpuvun osalta' (Needs of the Sámi People for Intellectual Property Protection from the Perspective of Copyrights and Trademarks – Especially Regarding Duodji-Handcraft and Sámi Dress) (Opetus-ja kulttuuriministeriön julkaisuja 2018:39) 12.

Dress heritage is a part of CH. It is a tangible traditional cultural expression.[33] For many Indigenous peoples, dress heritage is perhaps the most remarkable and visible part of their cultural heritage. In this chapter, the term dress heritage refers to Indigenous traditional costumes that are essential parts of Indigenous cultures, distinguishing them from the majority population and having evolved during a long period of time. It is typical for this kind of traditional dresses that the techniques, patterns and motifs are culturally embedded and transmitted from generation to generation. The garments are most often handmade. In general the value of heritage craft protection dwells on their faithfulness to tradition, rather than makers' original intervention.[34] Sometimes Indigenous customary law governs the use of a traditional dress: there might be for example rules that govern the appearance of the dress in relation to the gender, family and marital status of the person wearing the dress. The traditional dress might carry a lot of silent information about its owner, that is visible for members of the culture, but impossible for outsiders to read. For example, the traditional Sámi dress *gákti* is an example of Indigenous DH, and the use of gákti is governed by Sámi customary law.[35] Gákti can tell a lot about its owner, including gender, marital status, origin and family.[36] Only a Sámi person is entitled to wear a gákti.[37] It is important not to 'mix and match' gákti elements from different Sámi regions or to wear a summer gákti during the winter (or vice versa). Also, men should not wear garments or accessories that are part of the Sámi women's traditional dress, and women should not wear parts of the traditional Sámi men's costume.[38]

4.2 Regulating dress heritage via IPR: existing shortcomings

Many lawyers and activists believe that IP law holds the key to heritage protection.[39] IPR legislation is indeed a meaningful tool to regulate the use and creation of DH, since traditional cultural wearables and DH are potential intangible assets.

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33 WIPO, 'Intellectual Property and Traditional Cultural Expressions/Folklore' (WIPO Publication No. 913(E)) 6.

34 Amalia Sabiescu, 'Problematising Heritage Crafts Authorship and Ownership: Steps Towards the Intellectual Property Protection of the Traditional Romanian Blouse' in Abbe EL Brown and Charlotte Waelde (eds), *Research Handbook on Intellectual Property and Creative Industries* (Edward Elgar Publishing 2018) 183. See also, Piia Nuorgam and Juha Karhu, 'Saamelaiskäsityön (duodjin) oikeudellinen suoja osana saamelaiskulttuuria' (Legal Protection of Sámi Handicraft (duodji) as a Part of Sámi Culture) in Kai T Kokko (ed), *Kysymyksiä saamelaisten oikeusasemasta* (Questions About the Legal Position of Sámi People) (University of Lapland 2010) 175–78.

35 Nuorgam and Karhu (n 34) 176, 178.

36 'Sano se saameksi: pikaopas saamelaiskulttuuriin' (Say It in Sámi: A Quick Introduction to Sámi Culture) <http://sanosesaameksi.yle.fi/pikaopas-saamelaiskulttuuriin> accessed 1 June 2020.

37 Nuorgam and Karhu (n 34) 178.

38 Nuorgam and Karhu (n 34) 176–78; Saamelaiskäräjät (Sámi Parliament), 'Kuvaohjeistus koskien saamelaisia ja saamelaiskulttuuria' (Guidelines of Presenting the Sámi People and the Sámi Culture) 17 October 2016.

39 Michael F Brown, *Who Owns Native Culture?* (Harvard University Press 2003) 55.

At the international level, there are no treaties nor agreements specifically directed at Indigenous intangible CH. Article 31 of the United Nations Declaration on the Rights of the Indigenous Peoples (UNDRIP), although not exactly an IPR piece of legislation, states that 'they [Indigenous peoples] also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions'. The last sentence creates circumstances which allow us to consider Indigenous communities as holders of IPR over their cultural and dress heritage. Indeed, for example Sámi have emphasized the need to consider them as rightsholders instead of just one stakeholder group among many others.[40] Even though the declaration is not legally binding for the member states, it should set certain guidelines for interpreting existing legislation. This notwithstanding, however, the spirit of Article 31 can hardly be seen in the Western IP system, while only a few efforts have been made in some national laws.[41] As Brown points out, 'it is easy to declare that intangible cultural property now enjoys protections analogous to copyright or patent. It is another matter to determine what qualifies as intangible culture in the first place and then to devise cost-effective mechanism to protect it'.[42]

The fact that CH presents several clashes with the existing IP system is nothing new. For example, the requirement of material expression of an idea in copyright law raises difficulties in applying copyright protection to traditional knowledge and expressions of folklore, as they are often conveyed orally or through physical action.[43] In the same way, copyright was not designed to apply to collective creativity, which is a typical form of creativity in those Indigenous and native societies that are copied to catwalks.[44]

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40 For example, Tiina Sanila-Aikio, the President of Finnish Sámi Parliament at the time of writing this article, has explicated this point in relation to Arctic Railroad initiative. See Aletta Lakkala, 'Saamelaisilta täystyrmäys Vesterbackan Jäämeren rata -suunnitelmille – Saamelaiskäräjät yllätettiin jo toistamiseen' (Sámi Oppose Vesterbacka´s Arctic Railroad Plans – Sámi Parliament Surprised for the Second Time) (*Yle*, 9 May 2019) <https://yle.fi/uutiset/3-10775103> accessed 1 June 2020.

41 For example, United States has The Indian Arts and Crafts Act (Act) of 1990 (PL 101-644).

42 Brown, 'Heritage Trouble' (n 10) 51.

43 Brown, *Who Owns Native Culture?* (n 39) 59–60. See also, Boatema Boateng, 'Adinkra and Kente Cloth in History, Law, and Life' in *Textile Society of America 2014 Biennial Symposium Proceedings: New Directions: Examining the Past, Creating the Future* (2014) 8.

44 Graham Dutfield, 'Protecting Traditional Knowledge and Folklore' (International Center for Trade and Sustainable Development (ICTSD) International Environment House 2003) 24; Åhren (n 5) 135–36; Jessica C Lai, 'What Is an "Indigenous Right to Intellectual Property"?' (2017) 1 Intellectual Property Quarterly 78, 87–88, 90; Asmah (n 4) 77, 126, 183; Rimmer (n 6) 3–7; Boatema Boateng, *The Copyright Thing Doesn't Work Here: Adinkra and Kente Cloth and Intellectual Property in Ghana* (University of Minnesota Press 2011) 11. See also, Helfer and Austin (n 4) 438. For more information about this, see Yovana Reyes-Tagle, *The Protection of Traditional Knowledge Associate with Genetic Resources: The Role of Databases and Registers* (University of Helsinki, Faculty of Law, 2011).

One of the reasons why the currently existing practices in most Western IPR systems do not reflect societal needs and values, such as those that are at the core of Indigenous' cultural and dress heritage, relates to the way we conceive and justify private property in IP law. Generally speaking, there are three broad forms of property (and intellectual property) regimes, namely:

1. Private property, which refers to the ownership of property by non-governmental entities. This perspective stems from individual owners;
2. Collective property (also called cooperative property), that reflect the perspective of a community, or a group of non-governmental entities, as right holders;
3. Public property, owned by a State entity.[45]

In addition, one could conceive a category of property where no exclusive rights are included. For instance, in IP law, inventions or creations that either do not qualify for protection or where the IP right has expired fall under the category of 'no-property', also called 'public domain'.

The current IP law system is fully based on type 1), namely private property. As explained before, the mainstream IP framework, especially, relies upon utility types of theories to justify the property rights, where economic and incentives goals and owner-centric perspectives, are the main drivers.[46] This is based on the driving forces and philosophy of the market (or even mixed) economy, on which Western societies' economies are currently based. Indigenous law, instead, conceives cultural heritage (as well as other properties, such as land and water) mainly relying on type 2) collective property, where the perspective is not the one of individual owners, but rather of communities or groups of owners. While Indigenous values, beliefs and practices are as diverse as Indigenous people themselves, most of them find common roots in a relationship to *inter alia* culture and knowledge radically different from the Western notion of property in IPR. For instance, Åhren explains that the IP counterpart to the *terra nullius* situation of Indigenous land rights is public domain, and that the reason behind the lack of protection is the same in both cases: these legislative creations of the 'majority culture' were not designed to fit Indigenous minority cultures and their conception of property. At the same time, however, one cannot say that Indigenous communities would lack any kind of exclusive right systems and that everything falls under category 3) public domain. Many traditional societies have their own custom-based IPR systems, which are sometimes very complex and governed by customary rules, where the perspective stems from the community, not from the individual owner.[47]

45 See eg, Robert Cootes and Thomas Ulen, *Law and Economics* (6th edn, Pearson 2014).
46 Butler (n 25).
47 Dutfield (n 44) 24. See also, Boateng, 'Adinkra and Kente Cloth in History, Law, and Life' (n 43) 6.

The major differences between the way property is conceived and justified in IPR in respect to Indigenous laws and traditions inevitably leads to multiple shortcomings when it comes to applying IPR to Indigenous culture, such as dress heritage. First of all, the custom-based IP systems of Indigenous communities are usually in conflict with the IP system of the surrounding Western society.[48] Second, and importantly, the mainstream Western IPR system usually does not reflect nor recognize Indigenous cultures. One of the major consequences of this is that detrimental activities like Indigenous culture appropriation are not necessarily forbidden by the current IP system (as further explained below). To solve this dilemma, at least two approaches could be followed. On the one hand, one could try to dig into Indigenous laws and traditions in order to make propositions as to how such rules could be shaped to better adapt to the characteristics of the Western IP and property systems. On the other hand, the task could instead be to work on the current predominant owner-centric and incentive-based IP private property framework to better reflect societal values, such as those clearly reflected in the context of Indigenous dress heritage. In this chapter, we pursue the latter.

4.3 Indigenous dress heritage and IPR conflicts

The Western fashion industry has always been 'inspired by' dress heritage of other cultures, for example Indigenous cultures and cultures that – even though they are mainstream in certain parts of the world – are considered 'exotic' in the Western world.[49] This phenomenon is widely referred as 'cultural appropriation'. Simply put, cultural appropriation can be described as a 'movement of cultural elements from politically weak to politically strong'.[50]

As previously explained, there are some significant difficulties in applying IP law to Indigenous cultural and dress heritage, and, as a consequence, Indigenous DH is often considered as a part of the public domain in the eyes of Western legal traditions. Regardless, excluding cultural and dress heritage from the scope of IP creates some serious problems when it comes to fairness. For instance, there are three major problems when it comes to use of Indigenous DH by outsiders and without the consent of the source culture. First, the imitation (even if the intentions were good), often fails to credit and/or bring anything back to the source culture, Second, the imitation lacks understanding of the original meaning of the elements that are

48 Dutfield (n 44) 26; Helfer and Austin (n 4) 485; Asmah (n 4) 221–24; Rimmer (n 6) 8–10; Boateng, *The Copyright Thing Doesn't Work Here* (n 42) 6 and Asmah (n 4) 151–52.

49 See eg, Deirdre Clancy, *Costume Since 1945. Couture, Street Style and Anti-Fashion* (Herbert Press 1996) 89; Pham (n 9) 51.

50 Brown, 'Heritage Trouble' (n 10) 44. See also, Susan Scafidi, *Who Owns Culture?* (Rutgers University Press 2005) 9, 115–25 on 'permissive appropriation'. See also, Asmah (n 4) 134–35.

brought into the public domain.[51] Third, the source cultures that are exploited are often in a disadvantaged position, possibly even with a history of discrimination.[52] Furthermore, there is a risk of dilution: utilization of a cultural element that distinguishes a minority group from the majority culture might further dilute the already thin cultural borders preventing the minority from being absorbed into the majority society.[53]

Cultural appropriation of Indigenous DH is not a new phenomenon.[54] However, not until recently has the fashion industry started to acknowledge the ethical problems that are related to treating the DH of marginalized cultures as if it was in the public domain.[55] For example, Orientalism infused a vision of the East in Western dress and was particularly popular in the 1920s. In the 1960s and 1970s, Native American inspired wearables became fashionable with the help of the hippie movement that emphasized an unrefined and organic lifestyle.[56] In the 21st century, Nordic fashion brands have been inspired by the indigenous Sámi culture and used elements from the culture in question in their design and advertising.[57]

In recent years there has been plenty of public debate in Finland whether Indigenous dress heritage is in the public domain or not. In 2015, Finland's Miss World contestant *Carola Miller* represented her country in a fake Sámi dress that was bought from a joking costume store. Miller and the Miss Finland organization were criticized for appropriating the Sámi culture and ignoring the meaning that the dress has to its source culture.[58] Also Disney's blockbuster animation Frozen (2013) has been considered problematic from Indigenous people's perspective.[59] The film, which takes place in an Arctic environment, has elements that are borrowed from the Indigenous Sámi culture. The problem is that even though Disney is generating massive profits with the help of Sámi heritage, the Sámi community is

51 About the understanding of the original meaning, see Åhren (n 5) 281; and Boateng, 'Adinkra and Kente Cloth in History, Law, and Life' (n 43) 1, 5.

52 See Brigitte Vézina, 'Curbing Cultural Appropriation in the Fashion Industry' (CIGI Papers No. 213, Centre for International Governance Innovation 2019) 1; Åhren (n 5) 2; Brown, 'Heritage Trouble' (n 10) 44.

53 Åhren (n 5) 216–17.

54 Vézina, 'Curbing Cultural Appropriation in the Fashion Industry' (n 52) 1.

55 Dutfield (n 44) 26.

56 Scafidi (n 48) 98; Pham (n 9) 65.

57 See eg, Linda Tammela and Mira Rauhala, 'Lumi Accessories mainostaa epäaidolla saamelaislakilla suomalaista designia' (Lumi Accessories Advertises with a Fake Sámi Hat) (*Yle*, 18 August 2016) <http://yle.fi/uutiset/3-9102317> accessed 1 June 2020.

58 Anne Aikio, 'Suomen Miss Maailma -kilpailija edustaa pilailupuodin lapinpuvussa' (Finland's Miss World Contestant Represents Finland in a Joking Costume Store's Fake Lappish Dress) (*Yle*, 1 December 2015) <https://yle.fi/uutiset/osasto/sapmi/suomen_miss_maailma_-kilpailija_edustaa_pilailupuodin_lapinpuvussa/8493787> accessed 1 June 2020.

59 Also *Pocahontas* (1995) and *Moana* (2016) have been criticised for the same reasons.

not gaining anything from this success, nor receiving any kind of compensation.[60] Furthermore, there is another, perhaps even bigger issue: Disney might be able to claim copyright protection to the Sámi elements it uses in its animation, or register them as its trademarks. In this situation, Disney could – at least in theory – be able to enforce these rights against Sámi people, who are using their own CH. Indeed, this possibility highlights the power imbalance that comes to the type of creativity that the IP system protects.[61]

In some cases, that have caused media outrage about cultural appropriation, brands have taken the accusations seriously and decided to withdraw their criticized designs from the markets. For example, in 2019 Nike was accused of pirating a protected traditional design by Panama's indigenous Guna community. A special-edition Air Force 1 model shoe featured a traditional 'mola' design by the Guna community, however no permission of the Guna community to use such design was acquired. This was heavily criticised by the Guna people. Ironically, the limited-edition shoe was described as 'a tribute to Puerto Rico but the Guna community of Panama said it used their traditional "mola" pattern'. As a result of these accusations, Nike apologized for their mistake and stated that the product will no longer be available.[62]

Because the right to use and reproduce certain elements in clothing may be determined by customary laws that are not recognized outside of the community, it is very difficult for traditional communities to use legal means to prevent these elements from being copied and used for commercial purposes by others, if these elements are not kept secret.[63] A major problem with outsiders' commercial use of Indigenous heritage is that the source culture is not the party that gains any kind of profit from it. The contrast is particularly striking when the members of the source culture live in financially disadvantaged conditions and the appropriating party is a luxury firm.

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60 Mikko-Pekka Heikkinen and Jussi Pullinen, 'Disney kävi Inarissa tutkimassa saamelaista elämää Frozenin jatko-osaan – Saamelaiset haluavat korvausta' (Disney Visited Inari to Research Sámi Way of Life for Frozen Sequel – Sámi Wish to be Compensated) (*Helsingin Sanomat*, 23 September 2016) <https://www.hs.fi/kotimaa/art-2000002922271.html> accessed 1 June 2020.

61 See Pham (n 9) 60–70.

62 Brigitte Vézina, 'Curbing Cultural Appropriation in the Fashion Industry with Intellectual Property' (*WIPO Magazine*, August 2019) 9; 'Nike Cancels "Puerto Rico" Shoe Over Panama Indigenous Design' (*BBC*, 22 May 2019) <https://www.bbc.com/news/world-latin-america-48363024> accessed 1 June 2020. See also, Brown, 'Heritage Trouble' (n 10) 43; Pham (n 9) 52, 67. For more cultural appropriation cases in the fashion industry, see Vézina, 'Curbing Cultural Appropriation in the Fashion Industry' (n 52) 3–6.

63 Dutfield (n 44) 26. See also, Åhren (n 5) 3.

5 Design thinking to move towards a more social-planning type of IPR

5.1 Making IPR more just and inclusive via legal design methods

As mentioned, one of the main reasons behind the failure of the current IPR system to respect Indigenous cultural and dress heritage relates to the types of property concepts used in IP, which deeply differ from those of the Indigenous laws and traditions. In other words, this might mean that for the IP system to be able to better reflect the societal values related to *inter alia* Indigenous dress heritage, the perspective shall be reviewed and somewhat switched from a mainly economic and owner-centric view to a more ethical and community-centric one (ie from utilitarian to social planning justifications). But would this radically destroy the meaning of the whole IP system? Is there any way to reach this ultimate goal, while at the same time not negatively distorting the IPR framework and functions? Indeed, while considering any such a move, it is important to closely look at what repercussions it would have on the entire IP framework.[64]

We argue that a user-centric and user-involvement approach could help towards a transformation that would effectively integrate social planning considerations without unduly distorting the current dominant paradigm of IP law. We have aimed to illustrate here a picture of this complex issue that is a clash between traditional IPR frameworks and Indigenous cultural and dress heritage. Design thinking can relate to multiple contexts. Here we will approach the issue of DH from the perspective of the legal system as well as an individual who navigates the system.

5.2 Making the system better

When considering the issue of whether exclusive rights to Indigenous DH should be granted, a user-centric approach would acknowledge the needs of the community in question. The first option towards this end could be to interpret some of the existing IPR provisions more broadly, so that they could also be used in order to prevent things like dress heritage misappropriation. An observant reader might at this point wonder: what has the interpretation got to do with legal design? Is it not just part of the usual practicing of law? Interpretation of the existing provisions is usually associated with the doctrinal study of the law. Aarnio, for example, defines doctrinal study 'as a discipline which has to (1) produce information about the law and (2) systematize the legal norms'.[65] Seen this way, the emphasis is often on the system-building: a need to produce a coherent set of different norms which is guided by

64 For discussion on reflexivity in law, see Samuli Hurri, *Birth of the European Individual: Law, Security, Economy* (Routledge 2014). For critical views on whether IP should or not include other values than economic and incentives, see Mark Lemley, 'Faith-Based Intellectual Property' (2015) 62 UCLA Law Review 1328.

65 Aulis Aarnio, *Essays on the Doctrinal Study of Law* (Springer Netherlands 2011).

the underlying principles of each field of the law. For example, as we have explained above, in the context of IPR these principles tend to rely on economic aspects. While the suggestions made in this section also largely rely on doctrinal study, ie the interpretation of the law, the purpose of such interpretation is derived from the legal design methodology. This way, the interpretation is done not so much in order to systematize and produce information but rather, as Hagan puts it, 'to make legal outcomes more aligned with those its users desire, and to create ambitious new visions for how legal services can be provided'.[66] This type of user-centric, rather than system-centric, interpretation of the existing provisions might turn out to be useful in order to meet some of the goals of design thinking: empowerment, improving people's comprehension of the rules and giving them the power to navigate the legal system in a more strategic and intelligent way.[67]

For example, the Finnish Copyright Act, Section 53 (protection of classics) in its current form could be interpreted in a way that it would provide a tool for Sámi people to prevent misappropriation of their dress and cultural heritage. According to this section of the Act:

> If, after the death of the author, a literary or artistic work is publicly treated in a manner which violates cultural interests, the authority to be designated by decree shall have the right to prohibit such an action, notwithstanding that the copyright therein is no longer in force, or that copyright has never existed.

On a larger scale this section represents one of the principles of copyright law: ensuring the collective, cultural benefit. The possibility of applying the protection of classics to DH (particularly Sámi DH) has been previously presented – although rather briefly – by Karhu and Nuorgam. They claim that broadening the interpretation of Finnish Copyright Act § 53 to include Sámi DH would already be possible now, without any need to re-word the section, and regardless of the collective nature of DH authorship.[68] Also Haarmann particularly mentions folklore as an example of a type of art that should benefit from the classics' protection, which further supports the interpretation of Karhu and Nuorgam.[69] This kind of broader and more inclusive way of interpreting pre-existing IP provisions would help in making the current concept of property in IPR less 'purely-economic centric', and at the same time helping to preserve Indigenous CH.

This type of holistic understanding of Indigenous creativity, CH and DH in legal policy making would also respect the IRSD.

66 Hagan (n 11).
67 ibid.
68 Nuorgam and Karhu (n 34) 181–82.
69 Pirkko-Liisa Haarmann, *Tekijänoikeus ja lähioikeudet* (Talentum 2005) 151.

Another way to design the IP system in a more inclusive and user-centric manner in this context could be to work out the scope of protection of IPR to actually exclude Indigenous DH or CH as a whole. For instance, in most European countries patent and trademark laws include a provision according to which inventions and signs that are contrary to ordre public or morality are not protectable subject matter.[70] Thus far, these provisions have been interpreted quite narrowly. In patent law, the European Patent Office (EPO) Guidelines for examination affirm that 'the purpose of this is to deny protection to inventions likely to induce riot or public disorder, or to lead to criminal or other generally offensive behavior' only. The provision has thus far been applied only to the context of biotechnologies, such as stem cells research and gene-related technologies, where ethical issues related to the manipulation of human and lives has emerged at several occasions.[71]. Moreover, the Guidelines themselves explicitly state that 'this provision is likely to be invoked only in rare and extreme cases'.[72]

Similarly, in the case of trade mark law, 'public policy' or 'accepted principles of morality' have, thus far, been interpreted according to the European Union Intellectual Property Office (EUIPO) guidelines as eg signs which consist of names of individuals or groups connected with terrorism, dishonest signs or signs instigating racial, political or religious intolerance, signs which promote violence, racism, crimes, as well as signs which consist of the symbols and names of unconstitutional parties or organizations which are prohibited in Germany and in Austria and symbols of totalitarianism and pejorative, as well as discriminatory, indecent and vulgar signs, if a so-called reasonable person with normal levels of sensitivity and tolerance would feel that.[73] However, it could be easily envisioned that such provisions could be interpreted also in relation to dress and cultural heritage in general. In Finland, for instance, the trademark act could be interpreted in such a way that trademarks that draw from Sámi culture in a manner that could be offensive to Sámi, should not be eligible for registration. The same could happen in relation to patents, where

70 See Article 53 (a) of the European Patent Convention and Article 3(1)(f) of the Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks [2015] OJ L 336/1 (EU Trademark Directive).

71 See eg, Case C-34/10 *Oliver Brüstle v Greenpeace E.V.* [2011] ECLI:EU:C:2011:669; *Onco-Mouse* (T 0019/90) EP:BA:1990:T001990; [1990]; *Relaxin/Howard Florey Institute* (T 0272/95) EP:BA:2002:T027295; [2002] at *[4], [6]–[7]; cf. Howard Florey/Relaxin [1995] EPOR 541; Cf. Breast and ovarian cancer/UNIVERSITY OF UTAH* (T 1213/05) EP:BA:2007:T121305; [2007]; *Mutation/ UNIVERSITY OF UTAH* (T 0666/05) EP:BA:2008:T066605; [2008] *and Method of diagnosis/ UNIVERSITY OF UTAH* (T 0080/05) EP:BA:2008:T008005; [2008].

72 See European Patent Office, 'EPO Guidelines for Examination' Part G-II, 4.1 <https://www.epo.org/law-practice/legal-texts/html/guidelines/e/g_ii_4_1.html> accessed 1 June 2020.

73 European Union Intellectual Property Office, 'EUIPO Guidelines for Trade mark' Part B, Section 4, Chs 7 and 9. <https://euipo01app.sdlproducts.com/1004922/903898/trade-mark-guidelines/section-4-absolute-grounds-for-refusal> accessed 1 June 2020.

if inventions are claimed in a patent application derived from Sámi's traditional knowledge or from Sámi plants or animals, they should be denied protection. These goals could be achieved via fostering inclusion of Sámi into the process. For instance, advisory bodies like the Māori Trade Marks Advisory Committee and the Māori Patents Advisory Committee, currently being used in New Zealand[74] for these matters, could also be implemented in the Finnish patent and registration office, as well as in the EPO and in the EUIPO (and in any other patents and registration offices of countries where indigenous communities are present).This change of approach could provide a good tool against DH or CH misappropriation via IPR, without distorting the functionality and main purposes of the IP system; that is, it would enable IP to provide the needed economic incentives while at the same time better consider societal values.[75]

In addition, the system could be make more user-centric via enacting provisions outside the pure IP framework, but that anyways affect the IPR system. For instance, the US Indian Arts & Crafts Act is a truth-in-advertising law that attempts to prohibit misrepresentation in marketing of American Indian or Alaska Native arts and crafts products within the United States.[76] Indeed, the problem with any such types of 'vertical' types of regulations is that they often do not horizontally affect other legal frameworks. In our case, IPR procurement and management tend to remain outside the reach of such provisions.

Finally, customary law-based self-regulation and other soft law measures can also be counted as an option. For example, the Sámi have published guidelines and regulations for wearing their traditional gákti dress[77] and use of Sámi culture in tourism activities.[78] Currently ethical guidelines are being developed for research involving Sámi[79], as well as use of archive materials relating to Sámi CH.[80] Ethical guidelines

74 See New Zealand Intellectual Property Office, 'Māori Advisory Committees' <https://www.iponz.govt.nz/about-ip/maori-ip/maori-advisory-committees/> accessed 1 June 2020.

75 For similar types of participatory tools considered in different IPR contexts, such as those related to morality and *ordre public* see, for instance, the new clause in the Norwegian patent act and the creation of an Ethic Committee to be consulted upon need. See Act No 9 of December 15, 1967 on patents (The Norwegian Patents Act), Session 15b <https://www.patentstyret.no/en/norwegian-patents-act> accessed 1 June 2020.

76 See Indian Arts and Crafts Act (Act) of 1990 (PL 101-644) <https://www.doi.gov/iacb/act> accessed 1 June 2020.

77 Saamelaiskäräjät (Sámi Parliament), 'Kuvaohjeistus koskien saamelaisia ja saamelaiskulttuuria' (n 38).

78 Kirsi Suomi, 'Kulttuurisesti vastuullinen saamelaismatkailu' (Culturally Responsible Sámi Tourism) (Saamelaiskäräjät (Sámi Parliament), 24 September 2018).

79 'Saamentutkimuksen eettisten ohjeiden työryhmän perustaminen' (Setting Up the Working Group for Creating Ethical Guidelines for Sámi Research) (*Lapin yliopisto*, 20 September 2018) <https://www.ulapland.fi/news/Saamentutkimuksen-eettisten-ohjeiden-tyoryhman-perustaminen/38013/13c44e13-b915-4f43-ba63-0457e533e95f> accessed 1 June 2020.

80 'The Digital Access to the Sámi Heritage Archives Project' <https://digisamiarchives.com/> accessed 1 June 2020.

governing the use of CH, for example in research, currently form a common way to enhance rights and IRSD.[81] However, the problem with the customary-law based self-regulation is that they are severely handicapped when it comes to outsiders. Outsiders may either ignore customary law rules even when aware of their existence on the grounds that they do not agree with them or view them as binding, or they may be ignorant of the existence of these laws.[82] Third parties being reluctant to follow the customary law rules have been seen for instance in Finland, where the tourism industry continuously fails to respect the Sámi customary law rules that govern the use of gákti. Legal design could also help in increasing the importance and influence of tools like soft and customary law amongst business and society by, for instance, raising awareness of such rules as an effective policy measure.

5.3 Making the system more user-friendly

It should not be forgotten that ways to make the system better relate also to ways in which the users can navigate the system more efficiently.[83] For example, it is known that use of Sámi CH elements in tourism is common. In relation to tourism activities, design thinking approach could mean firstly identifying the problem by means of eg interviews and workshops. Why does tourism appropriate Sámi CH? The assumption then might be that this is because of ignorance or negligence. This hypothesis would then need to be tested and specified. During the process it might turn out that tourism entrepreneurs wish to offer experiences of 'real' Lapland, and Indigenous culture appears to serve this purpose. Then possible solutions would be looked for by offering different options to meet these needs. How could tourism offer the experience of Lapland without appropriating Indigenous culture?

Finally, when it comes to ethical guidelines, one issue is that these tend to be quite lengthy. While the emphasis is, and should be, on promoting Indigenous rights, real commitment to the guidelines requires also consideration of the end-user who comes from outside of the culture. However, this should not be understood in a way that Sámi should 'make ethics fun' but rather dividing the responsibility between Indigenous community and, for instance, Finnish people. How could ethical guidelines become better understandable? One option that has been deployed in design approaches is giving the instructions in the format of a comic.[84] This way the message is communicated in a concise manner, people tend to remember it better and it catches the attention of the users more easily. Another option in relation to

81 See eg, The Australian Institute of Aboriginal and Torres Strait Islander Studies, 'Guidelines for Ethical Research in Australian Indigenous Studies' (2012) <https://aiatsis.gov.au/sites/default/files/docs/research-and-guides/ethics/gerais.pdf> accessed 1 June 2020.

82 Asmah (n 4) 291.

83 Hagan (n 11).

84 This type of approach has been previously used eg in employment contracts with people who have low literacy level, see eg, Passera (n 15) 50.

digitizing Sámi cultural heritage materials is integrating the guidelines into user interfaces. This way, the ethical dimension follows the user throughout navigating the website instead of being in one location from where the guidelines need to be separately looked.[85]

Another issue is that the IPR system can sometimes be difficult to understand even for lawyers. Design thinking approaches would take this into account in order to empower the users of the system. In this context that could mean eg programs to educate Indigenous groups about IPR. An example of this is WIPO's work relating to traditional knowledge and traditional cultural expressions. WIPO offers 'training opportunities for Indigenous peoples and local communities to strengthen their capacity to make strategic and effective use of IP'.[86] In practice WIPO organizes seminars and practical workshops for Indigenous groups. Design-thinking and bottom-up approaches fit into these kinds of activities especially well. Workshops also offer a valuable way to gather information for solutions that take place on a systemic level: the important thing is to listen to participants and define the issue. What kind of skill-set do the users need? This does not necessarily mean everyone should be trained to become a lawyer, but eg in WIPO's context it means offering basic information about IPR so that Indigenous groups can create IP rights in their CH, exercise control and make informed decisions on access to the CH and commercialize their CH if they so wish.[87]

5 Conclusions

The importance of reflecting and embedding also societal values other than economic efficiency into the IPR system, in order to foster creativity and innovation via balancing protection and access is becoming an issue of increasing importance. The fact that the mainstream IPR system is primarily based on economic incentives, with a focus on individual ownership lies at the center of this controversy. Arguably, a move towards conceiving and justifying IPR more as items that can be used to build a just and attractive culture, as propagating by social planning types of theories, could achieve the ultimate goal of better balancing protection and access to the innovations and creativities at stake. In this regard, legal design and user-centric tools are crucial. The example of Indigenous' CH and, especially, DH clearly shows the relevance and conceptuality of these type of arguments. This case shows that applying IP law to cultural wearables is certainly not simple, but not impossible

85 This type of prototype has been developed in Digital Access To Sámi Heritage Archives-project in a workshop at the University of Umeå, 23–25 September 2019.

86 See WIPO, 'Traditional Knowledge' <https://www.wipo.int/tk/en/> accessed 1 June 2020.

87 See WIPO, 'Training Program' <https://www.wipo.int/tk/en/resources/training.html> accessed 1 June 2020.

either. Notably, protecting the DH of marginalized groups is a question of choice of values, a choice where economic values should not be the only driver in IP. Brown points out that 'We should be asking not "Who owns native culture?" but "How can we promote respectful treatment of native cultures and indigenous forms of self-expression within mass societies?"'[88] Applying IP law would be an effective way to promote and respect these traditional cultural expressions, and to prevent situations where outsiders commercially exploit Indigenous DH without giving anything back to the community. At the same time, however, effective protection of DH and traditional cultural expressions requires an IP system which recognizes values such as Indigenous' right to culture, as well as ethical values like fairness behind national borders. As this chapter has shown, user – or people – centred design thinking applied to IP law, which refers to genuine openness towards other ways of doing things, could be a very useful way to develop more inclusive practices in IPR that would ultimately enable the IP system to provide the right incentives to foster creativity and innovation while being respectful of fundamental values in society (following a social-planning vision).

We hope that this chapter succeeds in provoking thoughts in its readers and perhaps promoting some methods of design thinking amongst lawyers. The purpose here is not to offer a simple solution to this complex issue - such a solution does not exist. Instead, what we have tried to do is develop many ideas that might improve the system as well as its usability. These ideas should be understood as a beginning for the process of making the IP system more 'just'. These ideas should be tested and prototyped to see what works and what does not. While this is not possible within the limits of this chapter, we hope that these openings will raise discussion and feedback. In this sense, perhaps we could think that this chapter serves as our prototype.

88 Brown, *Who Owns Native Culture?* (n 39) 10.

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