



Indigenous Peyote Conservation Initiative

www.IPCI.life

Mission

Empower Indigenous communities to conserve and regenerate their sacred Peyote medicine for spiritual use for generations to come. IPCI is a conservation effort for generations to come; promoting health, well-being, and native cultural revitalization through sovereignty and sustainability of the Sacred Peyote plant and the lands on which it grows.

Via Electronic Submission to: TribalConsultWIPOIGC2023@uspto.gov

WIPO IGC FORMAL TRIBAL CONSULTATION 2023

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| Attention: | U.S. Department of Commerce, Patent and Trademark Office |
| Filing organization: | Indigenous Peyote Conservation Initiative |
| Respondent Type: | Tribal non-profit organization |
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Introduction

On behalf of the Indigenous Peyote Conservation Initiative (“IPCI”), thank you for the opportunity to submit comments in response to the October 24, 2023 Federal Register notice, 88 Fed. Reg. 73000, issued by the U.S. Patent and Trademark Office (“USPTO”) regarding the on-going negotiations at the World Intellectual Property Organization (“WIPO”) aimed at developing international legal instruments to protect Indigenous knowledge, including traditional knowledge (“TK”), traditional cultural expressions (“TCEs”), and genetic resources (“GRs”) and associated TK. As discussed below, Peyote and the Indigenous way of life that revolves around it is a perfect example of the need to strengthen both domestic and international laws, policies and norms pertaining to Indigenous knowledge and its different facets.

Article 31 of the UN Declaration on the Rights of Indigenous Peoples recognizes Indigenous Peoples’ right to maintain, control, protect, and develop their cultural heritage, including their traditional knowledge, cultural expressions, genetic resources and associated traditional knowledge, and associated intellectual property rights. Article 31 also mandates that nations take effective measures, in conjunction with Indigenous Peoples, to recognize and protect the exercise of these rights. The United States has stated its support for the UN Declaration. Thus the USPTO must follow these principles as it engages WIPO in high level negotiations that bear on these critical resources to Indigenous Peoples. And, as an instrumentality of the United States government, the USPTO has an affirmative duty to

protect and advance the cultural rights and resources of federally recognized tribes and their members. This is especially true concerning Peyote. See *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210 (5th Cir, 1991) (“We hold that the federal NAC exemption allowing tribal Native Americans to continue their centuries-old tradition of peyote use is rationally related to the legitimate governmental objective of preserving Native American culture. Such preservation is fundamental to the federal government’s trust relationship with tribal Native Americans.”) It is with that obligation in mind that IPCI offers these comments.

Background

IPCI is an Indigenous formed and led non-profit organization under federal and State of Texas law, established in 2017 for the purpose of advancing the goals of conserving the remaining, fragile population of the sacred Peyote medicine on the private ranch lands in south Texas, as well as fostering the reconnection of Indigenous Peoples to traditional spiritual pilgrimage and harvesting practices. (See www.ipci.life). IPCI has an all-Indigenous Board of Directors comprised of Peyote Roadmen with deep personal and familial ties to this sacred way of life, and therefore to the area of south Texas known affectionately as the Peyote Gardens. IPCI writes here to raise attention to its interests and concerns in protecting Peyote, a sacred medicine for many Indigenous Peoples in the Americas. IPCI is uniquely situated to provide a perspective on how to protect the specific and important body of Indigenous knowledge of and relating to Peyote, and the direct relevance of protecting Indigenous knowledge to protecting the remaining population of Peyote in south Texas, and in turn an entire Indigenous way of life.

As IPCI’s mission makes clear, it is not a religious organization, but was formed to serve the interests of the many Native American Church (“NAC”) entities throughout North America. The NAC is made up of chapters and individual members thereof. The Church entities may vary somewhat culturally, socioeconomically, linguistically, and ceremonially. But they all share a deep and abiding commitment to Peyote, their most sacred medicine/sacrament. *Azee Bee Nahagha of Dine Nation* [ABNDN], is comprised of chapters from all over the Navajo Nation, whereas other NAC organizations include chapters ranging from south Texas all the way into Canada, mostly west of the Mississippi River.

The Peyote religion is considered a primal religion due to its ancient origins. The Peyote religion dates back 5,000 years, and is probably the oldest known religious tradition in the western hemisphere. One of the central tenets of the tradition is called “The Peyote Road”, and the NAC is the modern version of the tradition. For NAC members, the Peyote Road includes an acknowledgement of Peyote’s Sacramental status. Peyote’s significance is derived from its ability to communicate with people, assist with prayer, heal sickness, and help people live better lives overall. Peyote was given to American Indian people by the creator in the more traditional version of Peyotism as a part of the Creator.

Peyote (*Lophophora williamsii*) is a small spineless cactus, averaging less than 3 centimeters in height and less than 8 centimeters in diameter, native to the Chihuahuan Desert in Northern Mexico and Southwestern Texas. The word Peyote comes from the Aztec word, *peyotl*. Its harvestable range spans from Southwest Texas in the Rio Grande Valley into Northern Mexico, measuring approximately 60,000 square miles between the Sierra Madre Occidental and the Sierra Madre Oriental ranges and as far south as San Luis Potosi. Most of

the range of Peyote spans into Mexico and is not accessible to Tribal Nations because United States and Mexican laws do not permit importation.

Peyote is known and revered by many Native North American people for its spiritual and healing properties, its ability to prevent hunger and thirst, and its use in the treatment of alcoholism, drug addiction, and mental and emotional problems. Peyote is ingested in the forms of tea, dried granules, and sometimes as fresh buttons. Peyote ceremonies last all night and include sharing, prayer, drumming, and singing. Federal law has acknowledged the right of members of federally recognized Indian tribes in the United States to use Peyote for over 50 years, clarified most recently in 1994 (see below).

The earliest evidence of Peyote in the archaeological record is over 5,000 years B.P.E. from the Shumla Caves in southwest Texas. See www.shumla.org According to site documentation, desiccated buttons strung on cord and granulated specimens from later associations were also collected. Additional archaeological records including textiles, rock art, and American Indian use ceramics date back two millennia. This scientifically documented evidence of Peyote dating back thousands of years show its ceremonial and religious uses. These materials are also known to exist in the Peyote Gardens in the Rio Grande River Valley.

In order to protect their sacramental use of Peyote, Native American tribal groups began incorporating as individual Native American Churches in 1918. In the following decades the religion grew significantly. However, the legal rights of Indian people to use Peyote were plagued by non-Native misunderstanding and a patchwork of inconsistent laws and court cases. Decades of religious persecution occurred in the 19th and 20th centuries. Finally, in 1994, Congress enacted the American Indian Religious Freedom Act Amendments of 1994, 42 USC 1996a, which clearly and specifically protect the rights of members of federally recognized Indian tribes to use, possess, transport and cultivate Peyote for their traditional religious purposes throughout the U.S.

Broadly speaking, IPCI's comments are premised on conveying considerations USPTO should take into account in formulating the most effective measures to protect Indigenous knowledge, both domestically and internationally. The overall approach of the federal government in the WIPO IGC negotiations should, of course, primarily be informed by Indigenous voices received through robust consultation, and the approach should be carefully planned to avoid undermining the ultimate goals of the WIPO negotiations to protect TK, TCEs, and GRs.

But the federal government's approach should also be informed by examining a proper range of specific instances of Indigenous knowledge, so as to identify particular circumstances surrounding different instances of Indigenous knowledge that should be kept in mind to best protect them. Concrete examples help refine legal instruments and identify blind spots that could create issues with effective implementation across the board. Peyote, in particular, has a unique history and present-day status that make it fit within the WIPO IGC paradigm somewhat differently than other forms of Indigenous knowledge. Peyote's positioning in the legal landscape is largely grounded in the fact that in the United States—pursuant to the Controlled Substances Act, 21 U.S.C. 812(c) (“CSA”) and the American Indian Religious Freedom Act Amendments of 1994, 42 U.S.C. 1996a (“AIRFA”)—Peyote is a Schedule I drug and is exclusively legal only for *bona fide* religious use by Indigenous practitioners who are members of federally recognized tribes. With this in mind, IPCI does not read USPTO's

questions as necessarily reflecting an understanding of how Indigenous knowledge may be best protected from misappropriation in the short-term; this could be, for instance, by keeping Peyote illegal for possession or use outside of the Indigenous Peoples to whom it belongs. It is possible the final WIPO IGC texts will provide an extra layer of binding and enforceable legal protection for such Indigenous knowledge that already enjoys a degree of protection by alternative means. It is also important, however, to not interfere with existing legal protections and to, indeed, be aware of and enforce existing legal protections. IPCI seeks to help fill the gap with its comments, using Peyote as a helpful example of an incredibly important GR with associated TK.

IPCI's Responses to Specific USPTO Questions

8. Please share your views regarding whether genetic resources, traditional knowledge, and/or traditional cultural expressions that have been widely diffused to the public are capable of protection, whether they should be protected, and, if so, how they should be protected, including any specific examples you may have. Please also share your views on whether there should be any exceptions to such protection.

The fact that Indigenous knowledge relating to Peyote has become widely diffused in the last 60 years should in no way be seen as a justification for relaxing current legal and policy mechanisms. Indeed, given the history of the persecution of the NAC in the United States, and the decades long effort by Indigenous Peoples to fight against that persecution and to prevail, against enormous odds, USPTO's trust obligations should compel it to do all that it can to protect, preserve and advance Peyote's current domestic legal status, and advocate for increased international protection.

Widespread diffusion not only threatens the spiritual integrity of Peyote, but also its very existence. Recent years have seen ever-mounting threats to the sacred and vulnerable Peyote plant, stemming not only from overharvesting and poaching, as well as harmful land management practices on the private ranch lands where Peyote is found, but from recent efforts to decriminalize, legalize and commercially exploit entheogenic plant medicines. The best way to protect Peyote from these threats in the present is through continued strict enforcement of existing laws; thus Peyote should remain a Schedule I drug and legal only for religious use by Indigenous peoples. Expanding protections for all facets of Indigenous knowledge concerning Peyote, including GR, TK and TCE need to be advocated for by USPTO, domestically and internationally.

Adding to the increasing diffusion and dwindling of the supply of Peyote by overharvesting, poaching, and lack of care for the environment, patenting and commercialization initiatives implicating Peyote represent an especially concerning affront to Indigenous communities, their spiritual practices, traditional medicine, and their intellectual property rights. Patenting and commercialization of entheogenic substances, which will only continue to flood the global market in sway with the so-called "psychedelic renaissance", magnifies the risk of Peyote becoming dispersed to the point of becoming inaccessible to Indigenous Peoples. Patenting and commercialization initiatives also tend to disregard Peyote's protected status for exclusive use by Indigenous Peoples under United States law. Thus, to protect Peyote from commercial decimation, Peyote should remain a Schedule I drug only available for religious use by Indigenous Peoples.

Peyote can additionally be shielded from harms by patenting and commercialization by recognizing that, under the currently prevailing understanding of domestic intellectual property laws, Peyote cannot be patented, given its status as “prior art.” Prior art is a broad category encompassing anything that, prior to submission of an application, is publicly accessible. This may include products already available for sale; in commercial use; or that are referenced in articles, publications, journals, presentations, or previously filed patent applications. Indigenous communities have used Peyote since time immemorial, including for therapeutic and medicinal purposes. This has been confirmed in several sources of primary and secondary research dating well back into the 20th century. Even so, IPCI has seen a concerning amount of activity in markets both domestically and abroad to profit off Peyote by filing patents on Peyote or patents that would encompass Peyote and other plant-based mescaline. USPTO should be mindful of the bad actors seeking to patent Peyote for financial exploitation and it should reject patents whose effect would be to patent Peyote and its associated GR, TK and TCE.

A key feature of the instrument under negotiation before WIPO is a “disclosure requirement” that would require anyone filing an application to patent an invention (like a new medicinal drug containing mescaline or Peyote) to disclose the origin or source from which they obtained GR and/or TK that were necessary or material to the development of the invention. IPCI supports the inclusion of this feature in patenting decisions undertaken by USPTO or related international bodies. Such disclosed information should be used to determine whether GR and/or TK have been appropriately accessed. The disclosure requirement should be expanded to require other types of information—that is, other information should be disclosed in the patent application in order to protect tribal rights in genetic resources and associated traditional knowledge (such as medicinal plant knowledge).

9. Please share your views regarding whether genetic resources, traditional knowledge, and/or traditional cultural expressions that have been widely diffused to the public can continue to impact holders and, if so, please share any specific examples you may have.

IPCI incorporates the comments to #8, above. NAC entities and their members have witnessed and experienced significant negative impacts with Peyote being diffused to the wider public. Public fascination with Peyote in the 1960s and 70s led directly to widespread trespassing and poaching on the private ranch lands in south Texas. Ranchers scrambled to build 8 foot-high barbed wire fences to keep “hippies” out. IPCI’s concerns now only grow in the shadow of the “psychedelic renaissance” underway now internationally, and attendant initiatives of local, state and local governments to “decriminalize” entheogenic substances, which efforts often do not properly consider how to protect Peyote. Some proposed legislation even appears poised to decriminalize or legalize Peyote for all people, Indigenous and non-Indigenous alike, and interests, medicinal or otherwise. As these initiatives have expanded, current anecdotal information provided by local ranchers to IPCI reflects a serious uptick in trespassing and poaching, and a proliferation of a black market in south Texas to feed the increasing domestic (and illegal) appetite for Peyote. There is also evidence of increased illegal importation of Peyote from Mexico into the United States to feed the illegal demand. USPTO should also be aware that this also places stress against the Indigenous Peoples of Mexico who follow this sacred way of life. The impacts of the impending diffusion can be predicted by past and present-day harms Indigenous Peoples have suffered as Peyote has been misappropriated.

10/12. Please describe your recommendations, if any, on how to identify [traditional knowledge/genetic resources] that have entered the public domain and, therefore may be freely used by others.

IPCI incorporates its responses to ##'s 8 and 9 herein. IPCI addresses ##'s 10 and 12 as one, given that Peyote is both a GR and is adorned abundantly in TK. In IPCI's view, Peyote should not be considered to fall within the public domain, as its use is governed by Indigenous Peoples' own laws and protocols and consent has never been given by Indigenous Peoples for Peyote and its associated TK to be free for use by anyone. Moreover, Peyote remains a Schedule I drug only legal for possession and use by Indigenous Peoples for *bona fide* religious practices under the strict dictates of AIRFA, and therefore is not free for use by others. Peyote's status as a Schedule I drug serves in part to protect it from catastrophic loss due to exploitation to the point of possible extinction, at least pending the WIPO IGC negotiations and subsequent implementation of better legal protections.

Especially given that the WIPO IGC negotiations are perhaps long from being concluded and because the nature of the ultimate legal protections that precipitate (such as their degree of enforceability) is unknown, it is important that USPTO identify and deploy existing legal measures to ensure that Indigenous knowledge is not understood as 'free for use by others' under the law. Whatever USPTO's ability to directly influence enforcement of other laws that afford some measure of protection to Indigenous knowledge, the way it discusses Indigenous knowledge should presume that such knowledge is not 'free for use' by just anyone.

18. Please provide your recommendations, including any real-world examples, regarding how best to address unauthorized uses of genetic resources, traditional knowledge, and/or traditional cultural expressions.

To summarize the above, Peyote, and Indigenous Peoples' relationship to it and their sacred way of life associated with it, spans millennia in North America. Beginning first with the Spanish Inquisition in 1620, European settlers in North America strategically devised laws and practices – effectuated by governments and religions – to attempt to persecute the Peyote way of life out of existence. The Peyote religion, along with other Indigenous religions, effectively went underground to survive. This saga has been well documented in several leading books on the religion. See, e.g., Stewart, Omer, *Peyote Religion: A History* (University of Oklahoma Press 1987); Maroukis, Thomas C., *The Peyote Road* (University of Oklahoma Press 2010). United States law and policy has significantly transformed in the past 60 years. Peyote is now protected under federal law for the possession, transportation, use and cultivation by members of federally recognized Indian tribes. Federal drug laws prohibit Peyote's use by the general public, as a Schedule I drug. USPTO has an obligation to protect this status of Peyote under federal law, as an instrumentality of the United States and as a trustee to Indian tribes and their members. Therefore, all decisions by USPTO concerning patent applications and other administrative activities must protect Indigenous GR, TK and TCE associated with Peyote. Federal law must also guide the USPTO in its negotiations and other activities before WIPO. And the way we discuss access to Peyote and other forms of Indigenous knowledge should presume that they are not free for use by anyone other than the Indigenous Peoples to whom they belong; USPTO should conduct itself and use its influence accordingly.

Thank you for this opportunity to provide comments. We look forward to further engagement with you and your staff.

Sincerely,

Board of Directors
Indigenous Peyote Conservation Initiative

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