

Pattern Recognition: Governmental Regulation of Tartan and Commodification of Culture

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This article delves into the treatment of intangible cultural heritage (ICH) in the broader context of IP systems through the vehicle of examining the regulation, commodification, and cultural branding related to Scottish tartan. The ICH surrounding tartan extends beyond the intangible aspect of intellectual property into traditional craftsmanship and other community activities and practices shaping cultural identity. Especially as ICH tends to fall outside of modern IP protections and most protection efforts focus on developing countries, its value and preservation in developed countries dominated by modern IP raises concerns about the social and economic impact of the subtle erosion or, conversely, the ossification of living heritages that can occur without awareness and preservation. The history of tartan's role in these areas spans a relatively short time period, and this article follows this history and the effect that domestic governmental commodification of ICH in two waves: first, following the Jacobite rebellion and the subsequent Victorian assignment of the tartan to clans; and second, the 2009 establishment of a governmental tartan register which subsumed the community groups' role in self-regulating tartan. While no additional IP rights are claimed by the government and cannot be due to lack of devolution of IP rights, the effect of official regulation may have a chilling effect and the rate at which corporate and nondomestic registrations increase through cultural branding may indicate that the dilution of tartan as a driver of ICH practices in Scotland. The article proceeds to consider alternative IP protections such as a sui generis right, geographical indication, or even legislative action as was taken with another Scottish textile, Harris Tweed. However, ICH is notoriously difficult to attach legal rights to as it is living heritage. Nonetheless, one first step would be joining the 2003 Convention on Safeguarding Intangible Cultural Heritage. Scotland has indicated its desire to do so and has completed a survey of its own ICH, but the British parliament does not wish to join, further complicating the issues with protecting ICH in developed countries. The challenges of reconciling the domestic structures and diverse ICH in the UK feature prominently in this article, and this article seeks to reconcile these challenges as well as the challenges within the IP regime to best protect tartan and the related ICH in Scotland, with hopes of recommending the most viable framework for analogous IP.

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