

Pattern Recognition: Governmental Regulation of Tartan and Commodification of Culture

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“...by all the information I could procure their only Crimes (are) Poverty and Tartan, which too often Appear coupled.”¹

-1 August 1747, Jailer Hugh Forbes.

I. Introduction

Cultural heritage provides a unique identity with myriad enriching benefits to regions and peoples. In the face of increased cultural homogenization in part due to globalization, accelerated through technological development, cultural heritage preservation is increasingly an international and domestic concern. Cultural heritage is frequently divided into two categories: tangible and intangible. Tangible cultural heritage, such as art and landmarks, is easier to define and thus easier to categorize and protect under existing legal systems or agencies. While literature generally acknowledges intangible cultural heritage (“ICH”), acknowledgement is often the extent of ICH coverage due to definitional vagaries as well as a

¹ History, THE SCOTTISH REGISTER OF TARTANS, <http://www.tartanregister.gov.uk/history.aspx> (last visited 14 Mar. 2014); *1 August 1747 Hugh Forbes, Musselborough prisoners*, NRS reference: RH15/38/105.

great diversity in regional ICH.² ICH can consist of traditional knowledge, songs, craftsmanship, dance, and other practices skills, as well as the associated cultural artifacts and spaces.³ These are simply illustrative of the concept; global living heritages passed generationally must be allowed to organically evolve, often defying the process of identification so desirable in the realm of legal protections. Pinning down these expressions presents dangers of ossification and loss of meaning as a living practice for the relevant communities, leaving a historical piece of recorded data without present cultural meaning and counteracting the purpose of protection efforts entirely. Additionally, a further consequence of the difficulties in precisely defining ICH is the challenge of measuring value, and thus legislative bodies or non-governmental organisations seeking funding or attempting to design effective ICH protection programmes can face abundant hurdles.

One piece of ICH which has come to define Scotland is the tartan.⁴ The tartan sett, or pattern, instantly creates association with Scottish culture, history, and genealogy. Tartan combines the intangible design element with the frequent manifestation into a tangible article, allowing for an easier transition into a salable form. Thus this type of ICH is more frequently used in cultural branding and marketing as no additional derivative product is needed for commodification. Interested community groups have historically documented and registered tartan designs for reference and posterity, especially following the widespread clan adoptions

² The use of “heritage” rather than “property” is an intentional decision within the field. Even though intellectual property and cultural heritage can overlap, a number of distinctions call for separate terminology. For instance, intellectual property (or in this case, cultural property) indicates monopolistic exclusionary rights which may be commercially exploited by a rightsholder or be parsed into rights that may be lost through legal mechanisms. Particularly for cultural property, the state maintained the property for its own economic benefit. Cultural heritage is more representative of the concept of preserving and protecting expressions and traditions passed through generations, as well as ensuring potential public access. See Prot, L. & O’Keefe, P., ‘*Cultural Heritage*’ or ‘*Cultural Property*’?, 1 INT’L J. OF CULT. PROP. 307-320 (1992) available at <http://dx.doi.org/10.1017/S094073919200033X>.

³ *Convention for the Safeguarding of Intangible Cultural Heritage*, UNESCO (2003).

⁴ “For the purposes of the Register, the definition of ‘tartan’ is that contained within the Scottish Register of Tartans Act 2008 Section 2: ‘A tartan is a design which is capable of being woven consisting of two or more alternating coloured stripes which combine vertically and horizontally to form a repeated chequered pattern.’” *Guidance*, THE SCOTTISH REGISTER OF TARTANS, <http://www.tartanregister.gov.uk/Guidance.aspx> (last visited 14 Mar. 2014).

in the early 1800s. However, in 2009, the Scottish government passed the Tartans Bill, establishing a records division within the National Records of Scotland, to register, preserve, and maintain tartan designs for a fee. The registration does not purport to establish new or affect existing intellectual property rights in the designs; most tartan designs are ineligible for copyright protections already due to unknown authorship or expiration.

This article seeks to explore the effects of government intervention on community ICH regulation and of cultural branding on economic and social cultural value. Part II will explore the historical development and influence of tartan; Part III will examine the structure and effectiveness of community tartan regulation while Part IV explores the nature and impact of governmental intervention in community-regulated ICH; and Part V will consider alternative methods for preserving ICH.

II. History of Tartan and Cultural Influence

While tartan is now inexorably linked with Scotland, early Celtic use dates back to around the 6th to 8th century.⁵ Until 19th century, none of the designs were heraldic, or associated with clans, and were associated only with regions throughout early Celtic migration, and colour variances were due to the availability of dyes and personal preferences. The National Records of Scotland (“NRS”) holds the first known written mention of a Scottish Highland tartan. Dated from 1538, Exchequer records for King James V list chequered pattern tights as ‘Heland tartane.’⁶ Records are sparse following this first mention until the 1700s, and the Dean Orphanage and Cauvin's Trust of Edinburgh maintain one of the earliest tartan production and pattern records.⁷ The spinning book holds records of wool

⁵ *History*, THE SCOTTISH REGISTER OF TARTANS, *supra* note 1.

⁶ *Records of the Exchequer, 1538*, NRS reference: E21/34 available at <http://www.tartanregister.gov.uk/history.aspx> (last visited 14 Mar. 2014).

⁷ *Spinning Book of the Orphan Hospital Manufactory and Paul's Work, Edinburgh (part of the records of the Dean Orphanage and Cauvin's Trust)*, NRS reference: GD417/262 <http://www.tartanregister.gov.uk/history.aspx> (last visited 14 Mar. 2014).

spun and distributed by the Orphan Hospital Manufactory and Paul's Work from 1734 to 1737.⁸ The spinning book also contains a shorter records of tartans supplied from 1751 to 1752.⁹

The Dress Act of 1746 attempted to control Highland clans by banning tartan as well as Gaelic culture and language.¹⁰ The Dress Act was repealed in 1786, and by that point, tartan had already become integrated into mainstream Scottish culture, including the Lowlands. For example, Edinburgh military uniforms displayed tartan patterns, and Bonnie Prince Charlie donned tartan during a visit in 1746.¹¹ The tradition of royalty and tartan continued, and King George V also wore tartan on a Scottish excursion in 1822.¹²

Despite a historically verified royal and public use, Highland tartan was too often associated with crime or poverty for centuries.¹³ For instance, the NRS holds a letter from a Scottish jailer, Hugh Forbes, stating his prisoners have committed only the crimes of poverty and tartan.¹⁴ Around the turn of the century, the image and association of tartan deliberately shifted through royal and Lowland use as well as the Victorian-era romanticisation of the Highlands and invention of clan association.

As tartan became fashionable and a national symbol of Scotland, national branding, marketing, and clan identifications normalized. The first registry to request clan associations was the Highland Society of London in 1778, which sent requests to clan leaders to "be respectfully solicited to furnish the Society with as Much of the Tartan of his Lordship's Clan

⁸ *Id.*

⁹ *Id.*

¹⁰ *Tartan and the Dress Act of 1746*, SCOTTISH TARTANS AUTH., <http://www.tartansauthority.com/resources/archives/the-archives/scobie/tartan-and-the-dress-act-of-1746/> (last visited 14 Mar. 2014).

¹¹ GD128/Box 38/Bundle 4, NRS reference: RH19/36/2.

¹² NRS reference: GD157/2548/3.

¹³ 1 August 1747, Hugh Forbes, *supra* note 1.

¹⁴ "On 1 August 1747, Hugh Forbes wrote a letter concerning the plight of three shearers, imprisoned by the magistrates of Musselburgh: 'by all the information I could procure their only Crimes (are) Poverty and Tartan, which too often Appear coupled'. He urges his correspondent not to allow the shearers to die of hunger now that their 3d (pence) a day allowance has been withdrawn." *Id.*

as will serve to Show the Pattern and to Authenticate the Same by Attaching Thereunto a Card bearing the Impression of his Lordship's Arms."¹⁵ However, many of the clan leaders were unaware of what their official tartan might be but were pleased with the official recognition. For instance, Baron MacDonald responded thusly: "Being really ignorant of what is exactly The Macdonald Tartan, I request you will have the goodness to exert every Means in your power to Obtain a perfectly genuine Pattern, Such as Will Warrant me in Authenticating it with my Arms."¹⁶ The tartan moved so far from its warring Highland clan and criminal associations that it was incorporated into advertising and tourism promotion in the 19th century, with animated traditional Highland dress even found on postcards as early as 1920.¹⁷ Even the present day modern, ancient, and muted colour configurations of official tartans are simply due to the intensity of the dyes available, with the older dyes offering a less intense palate due to transport over long distances and are meant to mimic naturally faded fabrics as chemical dyes were not available. There is no distinct clan identification difference between new and old; this is a clear example of branding and classification formed by modern registries.

Taking into account the ingrained historical and cultural influence of tartan, the Scottish government considers it to be "one of Scotland's most iconic and valuable assets."¹⁸ An analysis commissioned by the Scottish Parliament, executed by ECOTEC, concluded that "the tartan industry is a significant contributor to the overall Scottish economy; and larger in economic terms than suggested by previous industry estimates."¹⁹ Economic benefit is frequently used as a benchmark of cultural value, including when justifying cultural regulation, promotion, or protection; scholars or policymakers may calculate a numeric value

¹⁵ Urquhart, B., IDENTIFYING TARTANS 18 (1994).

¹⁶ *Id.*

¹⁷ NRS reference: GD1/1295/5.

¹⁸ *National Tartan Register to be Set Up*, THE SCOTTISH GOV'T, 09 Jun. 2007, <http://www.scotland.gov.uk/News/Releases/2007/07/09113114>.

¹⁹ *Id.*

through measurement of financial profitability, participant attendance, or production volume.²⁰

While this economic measurement approach provides a tangible, concrete value, this approach poses a serious danger of oversimplifying the social impact of cultural value to the point of reductionism. This reductionist approach to assessing value of intangible cultural heritage may allow for more successful lobbying for preservation, but economic benefit does not encompass the true present cultural value of ICH. Basing cultural value on economic return skews value heavily towards Western structures of ICH regulation and production. Further, if policymakers and stewards of ICH too frequently lean on economic benefits of ICH, ICH with less apparent or indirect economic benefits may dwindle by means of recognition and preservation exclusion.

“Tartan's importance to Scotland cannot be overestimated. It is deeply embedded in Scottish culture and is an internationally recognised symbol of Scotland.”²¹ This symbol serves to maintain identity and local solidarity and also directs positive attention towards Scotland through heritage and genealogical tourism as well as private and public scholarship. This attention to maintaining and preserving Scottish tartans crosses over to preserving and practising other Scottish ICH, such as Highland dance, song, attractions, and historical contributions. The tartan’s powerful Scottish identity reaches globally, serving as a symbol of Scottish pride and nationalism at festivals such as New York Tartan Week and an official Tartan Day in Arkansas.²² In this way, using tartan to brand Scottish culture demonstrates a softer, less political national branding, still seeking to emphasize positive, shared features of

²⁰ Contingent valuation is an alternative economic measurement method used for calculating nonmarket values and may be a more useful economic tool in the cultural value context.

²¹ National Tartan Register to be Set Up, *supra* note 18.

²² *Arkansas Tartan*, THE ENCYCLOPEDIA OF AK HIST. & CULT., <http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=2342> (last visited 14 Mar. 2014).

the community through an intangible piece of property which can be displayed in a tangible fashion.

Despite all efforts, placing a calculable value on cultural diversity may not be possible, and should this be fact even for the present time, a lack of precise value should not hinder or diminish protection of cultural diversity, especially considering the soft or indirect impacts of preserving ICH. Another area facing similar measurement problems is biodiversity and environmental protection. Preservation is based on the ‘precautionary principle,’ a theory that mandates protection in the event of suspected harm to the environment or public good, even in the absence of scientific consensus of such harm.²³ Scientists still make discoveries about intricate interdependencies and new uses and functions for animals and plants previously thought ‘useless’ or ‘unimportant.’ These unforeseen or clandestine functions of existing and evolving diversity should provide sufficient rationale for biodiversity protection as well as ICH preservation whether the true value of the ICH is known, yet unknown, or cannot be calculated at all.

III. Community Regulation

Until recent years, tartan producers and community-led organisations governed tartan documentation and regulation to the exclusion of any government intervention.²⁴ The Scottish Tartans World Register (“STWR”) catalogued tartans centrally in a registry that contained nearly 3,000 designs. The STWR would make note of a design for free and charge

²³ “Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.” RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, UNCED (1992), *available at* <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=116>.

²⁴ Intellectual property law protections regarding rights to relevant aspects of tartan as intellectual property still apply. “Inclusion of a tartan in the Register indicates that the tartan and its name are unique to the Register and meet the registration criteria of the Scottish Register of Tartans Act 2008. No other rights are conferred. For further information on UK design right or to register your design, please visit the UK Intellectual Property Office at www.ipo.gov.uk.” Guidance, THE SCOTTISH REGISTER OF TARTANS, *supra* note 4.

£50 to officially register a design.²⁵ While a fairly comprehensive registry, the STWR did not hold a monopoly on records and registration. The Scottish Tartans Society (“STS”) operated as another independent registry for tartan design.²⁶ Although now defunct as a registry, the STS remains as a web resource.²⁷ In addition to documenting tartans and other Scottish history, the STS also opened a tartan museum in the United States in order to bridge interest from across the pond. The museum still stands in the state of North Carolina, which holds a large population of Scottish descendants.²⁸ Thus the activities of community-led registries extended beyond design documentation and registration to acting as cultural liaisons and networking hubs.

In 2008, Scottish lawmakers moved to create an official government register of tartans, modeled largely after the existing community-based registers, with aims to promote the Scottish tie to international tartans and fuel the domestic economy. During legislative debate, representatives presented arguments which supported official register with legal authority. In addition to improving tartan image and giving confidence to users, lawmakers cited benefits to tourism and related activities, such as genealogical tourism.²⁹ Further, government registration tends to offer commercial neutrality with no exposure to private commercial risk.³⁰ However, much of the basis for co-opting this organizational system can be attributed to a cultural branding which would create indirect benefits for Scotland through assuring continued association with the tartan.

²⁵ *Recording Tartan*, SCOTTISH TARTANS WORLD REGISTER, (site archived, www.scottish-tartans-world-register.com, retrieved Jul. 2008).

²⁶ *FAQ*, SCOTTISH TARTANS MUSEUM, <http://www.scottishtartans.org/faq.html> (last visited 14 Mar. 2014).

²⁷ <http://www.tartans.scotland.net/>

²⁸ *FAQ*, SCOTTISH TARTANS MUSEUM, *supra* note 26.

²⁹ Herbert, S., *Scottish Parliament Information Centre (SPICe) Briefing* (24 Apr. 2008) 7 <http://www.scottish.parliament.uk/SPICeResources/Research%20briefings%20and%20fact%20sheets/SB08-22.pdf>, citing Burnside, R., *Scottish Register of Tartans Bill*. SPICe Briefing No 06/103 (2006) Edinburgh: Scottish Parliament.

³⁰ *Id.*

Strong arguments against establishing a government-run tartan register were also put forth, many of which pointed to the lack of a direct return as purported by supports. The most direct query asks: “Is there any damage being done to the Scottish economy by ‘unregulated tartans’? If the answer is ‘No,’ then Parliament has no business debating this at public expense.”³¹ Of particular relevance to the intellectual property system is the critique that the tartan register is “a toothless tiger,” conveying no additional legal rights and “reinvents the wheel,” as community registers were widely accepted and respected as effective and reliable.³² The government register further depends on existing register cooperation (which did occur) but nonetheless can create confusion among the existing registers. On the side of public administration, this type of redundant register may open floodgates for similarly burdensome administrative public bodies, stressing financial and manpower resources.³³ Finally, a government-run register might make registered tartans more available to the public but does not guarantee consistency or reliability, as such initiatives are subject to administrative changes and budget constraints.³⁴

On 9 October 2008, the Scottish Register of Tartans Bill (“the Tartans Bill”) was passed and received royal assent on 8 November 2008.³⁵ The Tartans Bill took effect on launched on 5 February 2009. The new government-run registry received official support from these community-run registries, and incorporated their existing databases into the NRS registry.³⁶ Further, many of the structural and procedural elements of tartan registration were adopted from the existing community regulators.

³¹ Herbert, *supra* note 29 at 13.

³² *Id.*

³³ *Id.* at 7.

³⁴ *Id.* at 13.

³⁵ *Id.*

³⁶ *Search the Register*, SCOTTISH REGISTER OF TARTANS, <http://www.tartanregister.gov.uk/search.aspx> (last visited 14 Mar. 2014).

While the Tartans Bill states its purpose as promoting and preserving cultural heritage, the cost to register is £20 higher than the STA registration, at £70. “Total costs could reach £75,000 a year for the project, which MSPs were told could run at a loss.”³⁷ Further, an independent briefing concluded that a “full recovery of costs is not possible.”³⁸

Enterprise Minister Jim Mather released the following statement on the Tartans Bill: “I hope the work on a register will continue to be backed by industry and political consensus. And I hope the register will become a focus for authenticating all the superb varieties of tartan *we* design and produce [emphasis added].”³⁹ While Mather states that part of the goal of passing tartan legislation includes authentication of tartan designed and produced in Scotland, the Tartans Bill contains no requirement for association in any way with Scotland. As domestic legislature has limited international powers to restrict international design and production of intellectual property, accomplishing the benefit of Scotland-centred design and production of tartan without creating an internationally recognized right, such as a certification mark or protected designation of origin.⁴⁰ Further, many tartans may be registered with no Scottish company holding a licence to sell or produce a copyrighted tartan held by a commercial entity which is actively economically exploiting the tartan. Notably, lawmakers did bring forth that the official association with Scotland will maintain the link and provide indirect benefits.⁴¹

To more fully compare the motivation and aims of the Tartans Bill with the stated aims, an examination of the text of the Bill will indicate the breadth of influence and reveals the indirect benefits to be primary and the direct purported benefits correlated only if

³⁷ *Holyrood Supports the Tartan Register*, BBC NEWS (19 Jun. 2008) <http://news.bbc.co.uk/1/hi/scotland/7461981.stm>.

³⁸ Herbert, *supra* note 29 at 14.

³⁹ *National Tartan Register to be Set Up*, THE SCOTTISH GOV'T, *supra* note 18.

⁴⁰ See generally, *Types of Protection*, INT'L TM ASSOC. <http://www.inta.org/TrademarkBasics/FactSheets/Pages/GeographicalIndicationsFactSheet.aspx> (last visited 14 Mar. 2014).

⁴¹ Herbert, *supra* note 29 at 14.

occurring at all. Only the following criteria must be met to officially register a tartan with the NRS:

- that the tartan meets the definition contained in the Act and is sufficiently different to all other tartans already recorded in the Register
- that the name of the tartan is unique, acceptable and suitably authorised
- that the application fee of £70 is paid.”⁴²

In addition to thread count and colour information, registrees must provide “a description of the tartan including your reasons for designing it and explaining your choice of colours; the name of the tartan and evidence of your association with that name.”⁴³ If the tartan includes a proper name, the regstree must include disclaimer that anyone sharing the proper name may wear the tartan design. However, the registration affects no intellectual property rights and offers no enforcement mechanism other than removal from the registry.⁴⁴ So while a disclaimer must be made, a regstree could not utilize the Tartans Bill to exclude others from wearing a tartan with a proper name identifier.

The primary criteria for acceptance onto the register centres around the design of the tartan and whether is it ‘sufficiently different’ from designs currently on the register.

“Sufficiently different means that it must be possible to clearly differentiate your tartan from all the other thousands of tartans already recorded, distinguishable by eye at a distance of approximately 2m (6ft). In practice this means that

- i. the geometry of a design must be sufficiently different, ie. the blocks of solid colours and the mixtures used in a design must be arranged in a different pattern to all other designs already recorded.
- ii. a new tartan will use different colours in substantially different proportions and ordered differently to all tartans already recorded. Changing the shades of the colours used is insufficient to differentiate a new design since tartans are traditionally recorded in the base colours

⁴² Guidance, THE SCOTTISH REGISTER OF TARTANS, *supra* note 4.

⁴³ *Id.*

⁴⁴ “Some tartans are for the use of certain groups of people only, e.g., a clan or family tartan, a personal or a corporate tartan. You may record here any restrictions you wish to impose on the wearing, the use and re-use or production of your tartan, however the Keeper is not responsible for enforcing any such restrictions and has no authority to do so. For further information on designs or to register a design in the UK, please visit the UK Intellectual Property Office at www.ipo.gov.uk.” *Id.*

- of red, yellow, green, blue, brown, grey, black and white. Any shade of blue will still be recorded as blue, likewise green etc.
- iii. over-check(s) or additional stripe(s) in contrasting colour(s) can be added to create a new tartan, providing the over-check or stripe is clearly visible when woven.”⁴⁵

The Tartans Bill additionally identifies qualities which will not be counted as sufficiently different. For instance, increasing or decreasing the size of the sett will not create sufficient difference nor will varying a shade of the colour; “Therefore, for example, light blue, navy blue and purple are all considered to be blue and changing the shade from light to dark blue will not change the basic pattern.”⁴⁶

Certain tartan designs are eligible for protection already under international and domestic intellectual property law, and equally important to establishing what the Tartans Bill does do is establishing what it does not. The Tartans Bill does not affect any other intellectual property rights available to a rightsholder or preclude others from using or producing a design independently of other intellectual property rights. The majority of countries around the globe are governed under the Berne Convention for the Protection of Literary and Artistic Rights (“the Berne Convention”), an international treaty setting minimum regulatory standards and national treatment provisions related to copyright.⁴⁷ The Berne Convention mandates protection of patterned designs, like a tartan, subject to no formal registration, as long as the design meets other basic copyright requirements such as authorship and duration.⁴⁸ As the Berne Convention sets minimum standards, domestic lawmakers may set enhanced protections as well, so additional or longer protection may be offered for registrations. In the United Kingdom, tartans might be protected as registered designs under the Copyright and Design Protection Act of 1988 (“the CDPA”) for fifteen years or five years from the date of first sale or hire; this protection comes with the benefit of

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ The Berne Convention for the Protection of Literary and Artistic Works, 1161 *U.N.T.S.* 3, available at <http://www.wipo.int/clea/docs/en/wo/wo001en.htm>.

⁴⁸ *Id.*

not having to prove a reasonable opportunity to copy, as with copyright protections.⁴⁹ In Scotland, intellectual property is further protected under Section C4 of Part II of Schedule 5 of the Scotland Act 1998.^{50 51}

Under the CDPA, intellectual property rightsholders have the exclusive right to copy, make, sell, create derivatives, and pursue infringers for the protected time period.⁵² However, most tartan will be ineligible for any type of conventional intellectual property protection unless it is newly created.⁵³ Likely due to this lack of eligibility for intellectual property protection, litigation surrounding use and misuse of tartan designs is sparse. Thus the intellectual property system as it stands provides little recourse for individuals or clans with cultural associations or ownership in a tartan design in the event of exploitation or commercialisation. However, one recent case, *Abraham Moon & Sons Ltd. v. Thornber & Others*, found infringement of the copyright in a new tartan design and in the ‘ticket stamp,’ the written instructions for expert weavers.⁵⁴ Despite defendants’ cites to numerous cases holding that instructions cannot be copyrighted, the judge was persuaded that the complexity and information held in a ticket stamp communicated a visual image to expert weavers and had ‘real visual significance’; thus it was a graphic work, protected by copyright.⁵⁵ There has yet to be any further case law on tartan, so it is uncertain whether this decision offers any certainty for new designers as previous case law has discounted similar constructs as uncopyrightable instructions.⁵⁶

As existing IP protection seems insufficient to ubiquitously protect tartan, two alternatives might be well suited: geographical indications or a type of *sui generis* protection

⁴⁹ Part III, THE COPYRIGHT AND DESIGN PROTECTION ACT (1988).

⁵⁰ Section C4, Part II, Schedule 5, THE SCOTLAND ACT (1998).

⁵¹ *Do I Need to Register My Design?*, INTELL. PROP. OFFICE, <http://www.ipo.gov.uk/types/design/d-applying/d-before/d-needreg.htm> (last visited 14 Mar. 2014).

⁵² THE COPYRIGHT AND DESIGN PROTECTION ACT (1988).

⁵³ Part I, Copyright and Designs Protection Act (1988).

⁵⁴ [2012] EWPCC 37 (05 October 2012).

⁵⁵ *Id.*

⁵⁶ *Id.*

through legislation. Both types of protection are already used around the globe to protect regionally specific design and thereby the surrounding ICH. Interestingly, Scotland protects another type of pattern and textile production, Harris Tweed, through special legislation and trademark. The Harris Tweed Act of 1993 created the Harris Tweed Authority for the following purpose: "To promote and maintain the authenticity, standard and reputation of Harris Tweed; for preventing the sale as Harris Tweed of material which does not fall within the definition..."⁵⁷ The defines Harris Tweed as "a tweed which has been hand woven by the islanders at their homes in the Outer Hebrides, finished in the islands of Harris, Lewis, North Uist, Benbecula, South Uist and Barra and their several purtenances (The Outer Hebrides) and made from pure virgin wool dyed and spun in the Outer Hebrides."⁵⁸ Passing legislation in accompaniment to a trademark is a unique solution but is highly customized. Harris Tweed is essentially a localized commercial operation, with three mills and self-employed resident weavers, which lent very well to legislative protection. With such a high commercial demand for the tweed, trademarking the product and supporting the local industry with legislation secured the residents livelihoods, maintained the association with the geographical origin, and provided the economic means for islanders to continue the tradition.

Geographical indication (GI), or appellation of origin, is an IP protection which seems to fit nicely into the stated goals of the Tartan Bill. GIs are indications of origin from a region or locality and also indicate a geographically attributable quality or characteristic, which may include the geographical name (as with Scotch whisky) or may simply have acquired a strong association with the designated regions (as with Basmati rice).⁵⁹ Many GIs might appear to overlap with trademark rights; however, they are distinguishable as “

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⁵⁹ Nair, L. & Kumar, R., GEOGRAPHICAL INDICATIONS, LexisNexis, New Dehli 12 (2005).

trademarks as a private monopoly right and geographical indications as a collective public right,”⁶⁰ This distinction makes a GI than a trademark more appropriate for ICH.

In order for tartan to be eligible for GI protection, several high hurdles would need to be overcome. First, GI protection is primarily limited to food and wine in the UK and US, and more frequently these countries use trademark law to protect origin designations, such as Florida oranges.⁶¹ From a practical perspective, pushing for expanding GI protection at WIPO may not be policy the UK wants to pursue, despite the rising implementation of expansive GIs in the EU. Second, while the tartan register does delineate quality and originality standards for registration, it is unclear whether consumers would associate a higher quality tartan with Scottish production origin. Historical origin is distinct from production origin, and if the purpose of a GI is to ensure quality and prevent consumer deception as to origin, tartan may not garner such protection. Practically speaking, the manufacture, design, and distribution is already geographically widespread and attempts to reign in and claw back these elements to Scotland would likely prove futile. Third, based on the goals stated for passing legislation, maintaining global *association* between Scotland and tartan seems to be paramount. Foreign registrations are allowed and encouraged; the Tartan Bill has no requirement for involving Scottish industry or even listing a Scottish connection in the description. A voluntary official register thus serves as a positive reinforcement measure rather than offering negative punitive consequences for not registering. By preserving this association, more indirect benefits through tourism and branding may occur rather than direct, local benefits through defending limited and highly monitored production, as with the Harris Tweed Act.

Despite the apparently suitability of GIs for protecting ICH in general, the system is not widely utilized across the globe. The Lisbon Agreement for the Protection of

⁶⁰ Nair, L. & Kumar, R., GEOGRAPHICAL INDICATIONS, LexisNexis, New Dehli 6 (2005).

⁶¹ Dutfield, G. & Suthersanen, U., GLOBAL INT’L PROP. LAW, Cheltenham, UK 192 (2008).

Appellations of Origin and their International Registration has limited signatories, and the possible expansion and international harmonization of GIs has been contested by some WIPO negotiation members.⁶² Nonetheless, developing countries with primarily agricultural or geographically dependent quality measures, *e.g.*, Antigua coffee or Darjeeling tea, rely upon GIs for economic and associated traditional craftsmanship protection.⁶³ While GIs are often promoted as a ‘pro-development intellectual property right,’⁶⁴ trademarks and GIs are dangerous to use when protecting ICH and ICH-related goods as the protection is exposed to the risk of ‘genericide.’⁶⁵ Genericide occurs when the trademarked name becomes so widely associated with the good that there is no longer a consumer identification function, such as with aspirin or elevator.⁶⁶ These terms were previously brand names which became the overarching term for the product. Thus trademark may not be the best protection on its own if, within a given market, there is a high risk of genericide. This may already be the case with tartan; a consumer may not refer to a non-Scottish checked pattern as ‘plaid’ and the Scottish counterpart as ‘tartan.’ This makes trademark too thin a protection for important ICH and was a likely catalyst for the additional legislative protection for Harris Tweed.

One further issue surrounding a registration system is appointing a single individual or entity to hold registration title. In contrast to much intellectual property regulation, the Tartans Bill does allow an applicant to register a tartan with an unknown designer. Given the age and unknown origin of many of these designs, this is a necessary allowance. However, in an intellectual property context, what rights are conferred to registrees who are not the original designer? As the register guidelines disclaim conferring any intellectual property

⁶² *What’s in a Name? Geographical Indications Stir the Pot at WIPO*, Knowledge Ecology Int’l, <http://keionline.org/node/1977>.

⁶³ Nair, L. & Kumar, R., *GEOGRAPHICAL INDICATIONS*, LexisNexis, New Dehli 8-9 (2005).

⁶⁴ Dutfield, G. & Suthersanen, U., *GLOBAL INT’L PROP. LAW*, Cheltenham, UK 197 (2008).

⁶⁵ Nair, L. & Kumar, R., *GEOGRAPHICAL INDICATIONS*, LexisNexis, New Dehli 205 (2005).

⁶⁶ Nair, L. & Kumar, R., *GEOGRAPHICAL INDICATIONS*, LexisNexis, New Dehli 205 (2005).

rights,⁶⁷ much of the expectations and indirect rights associated with a tartan register are due to piggy backing on already effective, accepted community regulation. Further, if two individuals hold copyrights to tartans that are deemed too sufficiently similar for both to meet the register eligibility requirements, the register operates on a first to file basis. Most removal requests that are approved are related to a brand name trademark infringement.⁶⁸

Obtaining clan approval to register a clan tartan is an interesting adaptation which appears to grant a form community or collective right. While the right does not extend as far as an enforceable intellectual property collective copyright, the structure presents the ability to exercise a form of collective control over an official recognition to ICH.⁶⁹ While older tartans with an unknown designer will fall into the public domain, this official register is offering a form of ancillary intellectual property rights in practice, whether foreseen or not. Consumers, designers, and producers will recognize governmental authority, and the mere listing may deter use of a tartan that is truly in the public domain, especially as the register grants no intellectual property rights, potentially chilling creative contribution to the general public good.

IV. Effects of Regulation and Propertisation – Exploratory Recommendations

This recent conversion from community to government regulation of ICH presents many opportunities for data collection which could indicate the cultural social and economic effects. One indicator of domestic social investment and return is the rate at which new tartans are registered before and after government intervention. The rate of new applications should be measured by both quality and quantity.

⁶⁷ Guidance, THE SCOTTISH REGISTER OF TARTANS, *supra* note 4.

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⁶⁹ “The applicant must be the head or chief of the family or clan, or have the written authority of the head or chief. Where there is no chief or head, the authority of the Clan Society will be acceptable to register a Clan Society tartan.” *Id.*

At most recent count, twelve fictional characters held registered tartans.⁷⁰ However, the effect of associated traditional Scottish Highland garb and culture with fictional characters, corporate entities, and commercial ventures has not been fully investigated; nonetheless, overcommercialisation of culture through branding and marketing presents a danger of loss of cultural value to the community of origin.⁷¹

While measuring commercialisation, the confounding factor of the tartan's previous commercialization during the Victorian era must be considered. The previous commercialisation into a tangible, salable good may mitigate the effect of more recent governmental intervention into community-regulated ICH as the ICH may already be viewed as a marketable product and less a culturally valuable piece of ICH.

Further, social effects of this intervention can be indicators of proper preservation of ICH. For instance, whether modern social traditions, such as clan and celebratory utilization, increased or decreased or changed in nature.

V. Alternative Courses for Cultural Preservation

If the government does choose to step in and intervene in community-regulated ICH, typically it will operate for cultural preservation only, *ie*, not a fee charging registrar but in a museum-like function. Charging an official fee to register ICH without conveying additional rights appears to be an unusual governmental action, atypical of preservation movements that have primarily indirect social and economic benefits.

As of this year, 158 member countries have signed onto the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage ("the ICH Convention").⁷² In contrast to the

⁷⁰ Suehle, R., *Twelve Fictional Characters with Officially Registered Tartans*, WIRED (21 Sept. 2012) <http://www.wired.com/geekmom/2012/09/registered-fictional-tartans/>.

⁷¹ See generally Comaroff, J. & Comaroff, J., *ETHNICITY, INC.* (Chicago 2009).

⁷² *Convention for the Safeguarding of Intangible Cultural Heritage*, UNESCO (2003).

World Heritage List, which focuses on tangible cultural locations,⁷³ the ICH Convention focuses on “Oral traditions and expressions, Performing arts, Knowledge and practises concerning nature and the universe, Social practises, rituals and festive events, Traditional craftsmanship.”⁷⁴ Notably absent from the signatories are the United States and the United Kingdom. While speculation regarding this absence may point to concerns about the integrity of domestic intellectual property systems and sovereignty, a representative for the United Kingdom simply stated that the United Kingdom had no intangible culture to protect.⁷⁵ This claim, while wholly erroneous, is not uncommon in developed countries and is one driver of the acceptability of commercialization of ICH, diminishing its value. At minimum, identification and recognition through joining this international treaty would help to protect the diverse ICH within the United Kingdom.

On the legislation-heavy side, separate law regarding protection of ICH might be implemented. However, this approach is often implemented with minority indigenous populations, who were previously and currently marginalized in representation.⁷⁶ While entire bodies of law meant to protect minority cultures may not be relevant or efficient for domestic ICH legislation, the argument that a majority population needs no legal protection for ICH falls short in the face of globalization and rampant commercialization. Thus some type of legal recognition of ICH and not only of intellectual property or of tangible cultural heritage is necessary.

Should ongoing legislative action to register tartans discontinue due to funding or administration change, a more informal partnership through the NRS could be formed to

⁷³ The ICH Convention was partially motivated as a “corrective” to the World Heritage List exclusion of valuable cultures without maintained cultural locations, which disproportionately affected southern hemisphere countries. Kurin, R., *Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: a Critical Appraisal*, 56 MUSEUM INT’L 66, 69 (2004).

⁷⁴ ICH Convention, *supra* note 72.

⁷⁵ Howell, D., *The Intangible Cultural Heritage of Wales: A Need for Safeguarding?*, 8 INT’L J. OF INTANGIBLE HERITAGE 104, 106 (2013).

⁷⁶ E.g., *Aboriginal Cultural Heritage Reform*, NSW ENVIRONMENT & HERITAGE, available at <http://www.environment.nsw.gov.au/achreform/> (last visited 14 Mar. 2014).

support UK community organisations and to ensure continuity as well as the nature of ICH without stifling evolution of the ICH. For instance, Welsh community organizations continue to run the *Eisteddfod Genedlaethol Cymru*, a traditional festival celebrating Welsh language and traditional culture as well as contemporary manifestations, consistent with the spirit and community benefit that ICH offers.⁷⁷

If the government register does continue, in order to fully accomplish the goals of the Tartan Bill, specifically to fuel Scottish design and production, the Bill could be altered to reflect the political rhetoric surrounding its passage.⁷⁸ Limiting production and licensing to Scottish businesses or mandating a certain amount of compulsory licencing to Scottish businesses could create more of the economic and social benefit sought by the Bill. Alternatively, a direct tie to Scotland in the description and function may better meet the goals of the bill.

Lastly, the government might provide no registration function involvement at all and leave any incentive or identification to the intellectual property system. While the government sought the cooperation and input of existing community registers, no law prohibits alternative registers should the community find the government structure unsatisfying. However, the motivation and return for operating a duplicate register is greatly diminished in the face of officially sanctioned registration. This discouragement of community organization may impact the external benefits which already arose from community regulation of ICH, such as web resources and community-run museums, as well as unknown future events or organizations with social and economic benefits through collective action.

⁷⁷ Howell, *supra* note 75 at 107.

⁷⁸ BBC News, *supra* note 37.

VI. Conclusion

ICH offers many social and economic benefits to the originating culture as well as diverse cultures globally,⁷⁹ and domestic governments as well as international preservation organisations which assess economically developed countries' ICH as lower priority for preservation and less dangerous to brand and market place these equally valuable contributions to ICH at risk. While the risk may appear more pressing in developing countries where scarce resources are allocated to infrastructure and other foundational progress, developed countries becoming increasingly homogenously Westernized are devoting few resources to protecting ICH or are utilizing those resources to commodify ICH.

Cultural heritage which contains tangible and intangible elements, like tartan, offers the opportunity for community groups to leverage the existing knowledge of that heritage for further social and cultural protection. While many Scottish people still carry on their historical tartans, the commercial exploitation of the tartan threatens to lessen the value of this ICH, thus removing the social and economic benefits that many international organisations seek to preserve in developing countries. Further, the global benefit to preserving unique ICH is incalculable and fundamentally enriches cultural diversity.

Further research may indicate whether additional legislative action to preserve cultural heritage in a developed economy would offer sufficient protections to outweigh the administrative implementation and enforcement burden of such lawmaking to ensure a majority ethnic population in a Westernized country can preserve and maintain unique ICH. However, heavy government involvement in the registration and oversight of ICH could ossify the culture in its present state, contradicting the socially transmission and evolving nature of ICH. A positive first step in the protection of UK cultural heritage would be to ratify the ICH Convention rather than to adopt community cultural oversight into

⁷⁹ Comaroff, *supra* note 71.

governmental structures. This ratification would provide the international acknowledgement and resources to best promote and protect UK ICH and allow participation in a global forum as well as communicate a vote of governmental confidence to the unique cultural communities within the country.