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Intellectual Property Options for Protecting and Marketing Traditional Textiles

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Russian Nesting Dolls © istockphoto / Bart Sadowski, 2007

There are many unique and popular traditional textile products being produced by Indigenous groups around the world. Often, these products are made, marketed and sold by Indigenous or Indigenous-affiliated organizations without a solid understanding of intellectual property and the benefits it could confer. There are some examples of traditional textile producers using intellectual property (IP) laws and principles to quell copy cats from misappropriating their culture and to secure higher prices for their genuine products. This success story will look at these examples and glean lessons that others can use.

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I. The Cultural Goods Marketplace

[D]ata suggests global trade in cultural services is growing very fast, just as other commercial services are growing faster than traditional exports of merchandise goods.¹

Countries include a different range of goods and services in their domestic reviews of culture and global trade. That being said, cultural goods contribute significantly to most countries' GDPs. At the end of 2006, the Organization for Economic Cooperation and Development (OECD) hosted a workshop on the International Measurement of Culture in Paris. In its draft discussion paper, the OECD found that a "considerable amount of cultural activity takes place in establishments whose primary classification is non cultural,"² and that there is "an increasing interest in data on the culture sector."³

While there is little empirical data currently available about the scope of international trade in traditional textiles, its importance can be deduced from a variety of factors:

Arts Law Centre of Australia, the national community legal center for the arts, provides expert legal advice, publications, education and advocacy services to more than 5000 Australian artists and arts organizations. The Centre has noted the demand for help from Indigenous artists has grown tremendously; in 2006, it had 308 Indigenous subscribers, an increase of 91% from 2005.⁴



Photo courtesy of Texda (Textile Development Agency), Uganda, East Africa

¹ Culture, Trade and Globalization, UNESCO Report, Questions and Answers, available at http://www.unesco.org/culture/industries/trade/html_eng/question3.shtml (last visited Dec. 6, 2006).

² John C. Gordon and Helen Beilby-Orrin, International Measurement of the Economic and Social Importance of Culture, Statistics Directorate, Organization for Economic Cooperation and Development, 23 August 2006, Draft 2006-08-9.

³ *Id.*

⁴ Letter from the Arts Law Centre of Australia to Dr. Ian Holland, Secretary, Environment Communications Information Technology and the Arts Committee, page 3.

Auction prices for aboriginal art continue to climb and museum exhibitions are held around the world focusing on Indigenous art. There is palpable interest from non-Indigenous buyers in Indigenous art and artists.⁵

There is currently a gap of unfulfilled demand for high quality Indigenous and cultural product.⁶

The following success stories and practical tips for employing IP in a business plan -- for even the smallest artisan shops -- are meant to provide a menu of options that may be tailored to a given culture-based enterprise. In addition to marketing and selling arts and crafts, a business owner should be aware of any elements of traditional knowledge or traditional cultural expression that are inherent in his goods; he or she may need to contact a relevant Indigenous community before incorporating those elements into his goods. In the event the business owner represents that community, he or she may want to employ different IP mechanisms to protect them from improper exploitation after they have been put into the stream of commerce.



Tupilaks by Eli Larsen, Nuuk. Caribou antler. Image courtesy of Arctic Art Sales



Woman with water buckets, driftwood. Late Rasmus Singertat, Tasiilaq. Image courtesy of Arctic Art Sales

Traditional knowledge is a term used in international parlance that includes a wide range of acquired knowledge about such topics as agriculture, the environment, health, and medicine. All of these have characteristics that would qualify them for IP-like protection except that they do not fit into the rubric of Western IP laws because, for example, there is no one single inventor of record in whom a patent could vest. *Traditional cultural expressions*, which also have IP-like qualities but which often lack a single author or which are not fixed in a particular format, include such things as Indigenous music, art, designs, names, symbols, dances, stories, architectural forms, and handicrafts.

⁵ See, e.g., John Oster, Executive Director, Desart, Aboriginal Community Art as Sustainable Business, Desart Knowledge Symposium Address, Nov. 2, 2006.

⁶ Thelma Karaitiana, *Demand is High for Quality Maori Product*, Te Ao Maori Mai I Te Tairawhiti, Dec. 2005, citing D. O'Connor, 2005.

Because “culture,” “tradition,” and “Indigenous” are terms that are understood differently on the international platform and within international legal parlance, the use of these terms can be misunderstood or misconstrued. As such, the following examples are not intended to act as a legal guide but rather to illustrate business decisions and legal devices that can help differentiate one producer’s goods from another’s and strike the best balance between promoting sales of cultural goods and maintaining an appropriate level of respect for their source cultures and artisans.

II. The Importance of Branding

A. Creating and Using a Trademark

Trademarks identify producers and sellers and allow prospective purchasers to distinguish their products in the marketplace. Trademark status may be granted to distinctive symbols, pictures, words, unique packaging, color combinations, building designs, product styles, and overall presentations. The owner of a trademark has the exclusive right to use it on the product he or she meant it to identify and, usually, to use it on related products. Service marks enjoy similar legal protection as trademarks but are meant to distinguish services rather than products.

Jurisdictions protect trademarks differently. For example, some grant protection to the first legal entity to use the mark while others protect the first entity to register it with the appropriate government office. Another example is that some jurisdictions protect scent trademarks while others do not. Conceiving and using a trademark are important choices for any business owner.

He or she will want to avoid trademarks that are similar to other trademarks. The more arbitrary and fanciful the mark, the stronger its protection will be. For a business owner dealing in cultural products or traditional textiles, it may be important to avoid utilizing cultural or religious signs, symbols or words that a given Indigenous culture or tribe may object to without first seeking permission or soliciting legal advice.

Examples of strong arts and textiles trademarks that are marketed internationally include the following:



^s
Coopa Roca is a cooperative of talented seamstresses in Rocinha, Brazil. This mark, No. 821242610 registered in the database of the Instituto Nacional da Propriedad Industrial, operates as the Coopa Roca trademark



Iris Ceramica is the parent company of a multinational manufacturer of ceramic floor and wall tiles for residential, commercial and industrial projects. This mark is registered with the USPTO, No. 2763595

a. Coopa Roca, Brazil

The Coopa Roca trademark above provides a dovetail to a success story of trademark adoption and use within a small business that has grown and changed over the course of twenty-five years.

Coopa Roca is a cooperative of women located in Rocinha, Brazil. Rocinha is one of the poorest neighborhoods in Rio de Janeiro. Maria Teresa Leal, the daughter of a Brazilian physician who did volunteer work in the slums of Rio, graduated with a degree in social science and a license to teach elementary school from the Federal University of Rio de Janeiro. In 1981, Leal founded Coopa Roca as a sewing cooperative. The cooperative's first projects included using recycled fabric remnants to produce quilts and pillows for the local market. It employed traditional Brazilian techniques including drawstring appliqué, crochet, knot work, patchwork, and fuxico – a traditional technique that involves embroidering with pieces of fabric.

Because of its high standards for quality workmanship and use of traditional Brazilian artisan techniques, Ms. Leal decided the cooperative could pursue a different market niche, however, and Coopa Roca now makes expensive high-fashion clothing, markets itself worldwide, and sells its wares in high-end boutiques. Having established solid relationships with a few reputable clothing retailers, Coopa Roca employs more than 100 women, most of whom do their sewing at home only visiting the office to drop off their finished garments or procure fabric. The conditions in Rocinha continue to be difficult but the women who are employed at Coopa Roca have said that the co-op “has given them a chance to improve their quality of life dramatically.”⁷

⁷ Meet the New Heroes, Oregon Public Broadcasting and Malone-Grove Productions, available at http://www.pbs.org/opb/thenewheroes/meet/p_leal.html



Coopa Roca seamstress at work. Photo by Pedro Lobo, courtesy of Coopa Roca

Coopa Roca’s business model has expanded and changed since its inception. Because of its unique link to traditional Brazilian sewing methods, Coopa Roca’s “most original creations juxtapose ‘homestyle’ techniques with unexpectedly luxurious fabrics: silk patchwork; crochet on an evening gown.”⁸ Along with its output and style, Coopa Roca’s business model and structure have undergone a metamorphosis. Until 1988, Coopa Roca did not have a headquarters and the co-op’s membership has grown almost exponentially, from eight members in 1982 to 70 members in 2003 to its current size of around 100 seamstresses, each of whom contracts individually with Coopa Roca. Ebay has recently proposed to Coopa Roca that it sell some of its wares online; Ms. Leal is currently developing a business plan that could accommodate this new direction.⁹

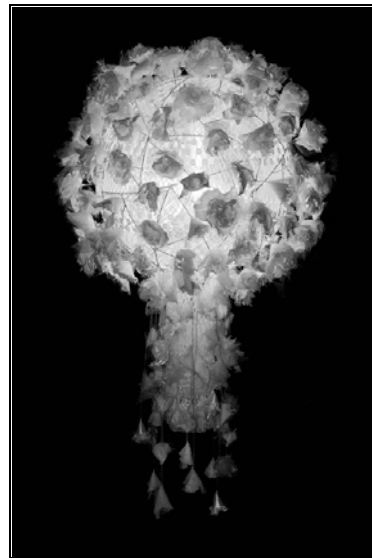


Photo of model by Juliana Coutinho, courtesy of Coopa Roca. Necklaces and clothing by Coopa Roca; this photograph was taken at a fashion show in Casa França, Brazil, Nov. 2006. Photo of chandelier entitled *Come Rain Come Shine* by Coopa Roca and designer Tord Boontje, by Pedro Lobo, courtesy of Coopa Roca

Aside from the tireless work and inspiration of its founder and members, the way in which Coopa Roca attained and maintains its status as a unique and high-quality

⁸ Shannon Walbran, *Shanty Town Seamstresses Fuel the Fashion Industry*, Global Envision, May 20, 2003.

⁹ Telephone conversation with Ms. Leal, Feb. 9, 2007, notes on file with the author.

organization can be attributed to its branding. The trademark Coopa Roca has used for the past several years has gained a reputation for high quality and a certain unique aesthetic. Coopa Roca's name and logo have been seen at museum exhibitions, in international fashion magazines, on European catwalks and in an array of articles about the fashion industry. Vigilant monitoring of the trademark has helped quell counterfeiters and ensured its reputation for artistry and quality.

Some agreements drawn up between Coopa Roca and other high fashion labels or haute couture names specify that the partner label may use some of Coopa Roca's designs without using the Coopa Roca trademark but stipulating that it will promote Coopa Roca in some other way. Having gained exposure and a reputation through persistent hard work and selecting trustworthy retailers and talented seamstresses, the Coopa Roca name and trademark are very real assets for the cooperative. Ms. Leal has conceived a plan to use a certification mark (discussed below) to bolster Coopa Roca and other like-minded businesses.

B. Geographic Indications

The term 'geographical indication' generally refers to words or marks used on goods (1) having specific geographical origins, which are (2) endowed with certain qualities that are attributable to that region.

Geographical indications (GIs) are often the names of the place from which something comes. Some examples include Roquefort cheese (from Roquefort, France) and Florida oranges (from the state of Florida in the United States). Agricultural products such as these tend to have qualities that could not be reproduced elsewhere since those qualities are derived from climates or soils unique to that region. Domestic laws play a significant role in whether a certain product receives GI status. For example, debate continues on the international platform whether certain kinds of wine names have become so generic internationally as to negate their classification as a GI. Chablis, for example, is widely regarded as a white wine that tastes a certain way as opposed to a white wine made from a specific grape in the Chablis region of France. Jurisdictions protect GIs differently. France, for example, has a very detailed legal scheme for the protection of GIs while the United States uses the same mechanism as trademarks and does not recognize a different legal status for GIs.

Individual countries can gain significant economic advantages from adopting GI laws. Indigenous communities sometimes look to GI laws to protect goods that are so wedded to their individual culture or history that they qualify for GI status and thereby gain international recognition or a certain quality stature. There are several examples from all over the world pointing to the conclusion that GI laws and their trademark-like protection of unique, geographic-based qualities results in broad foreign interest and consumption and provide protection against goods that would profit from unique reputations of quality that are inherent in only a small set of goods from a certain place.

a. Ngwenya Glass, Swaziland

In the small Southern African country of Swaziland, there exists a mountain resembling a crocodile (“ngwenya” in the Native language of siSwati). The nearby village of the same name is home to Swazi craftspeople who make some of the most unique and beautiful handmade glass. The products include a range of tableware, drinking glasses, vases, jugs and ornamental African animals.



There is some international discussion about what the term geographical indication (GI) means; whether it simply indicates the place in which a product is made or whether it is more indicative of a special relationship that the product has to that place. For example, many countries use “Swiss” as a geographical indication for watches. But a Swiss watch could presumably be manufactured in Australia if the people, factories and know-how were transferred to Australia. For agricultural products, that transferability is questionable because geographical climate, soil and other place-specific factors may come into play. Rochefort cheese may really only be produced in Rochefort, France.

With regard to Ngwenya Glass, the word “Ngwenya” may function more as a trademark than a geographic indication because it seems possible that the factory could be uprooted and transferred to any other city; depending on the law relevant to the products’ sales, this understanding of geographic indication may come into play and define Ngwenya Glass as a trademark only. The glassmakers use recycled glass for their work that could be found almost anywhere. Furthermore, when Ngwenya Glass was reopened and reinvigorated in 1987 by a Swazi family (it was first opened in 1979 by Swedish Aid), some of the apprentices traveled to Sweden to work with some of the world’s leading glassblowers and one of the original artists at Ngwenya Glass learned some new techniques from studying at the renowned Pilchuck Glass School in the State of Washington, USA.

Today, Ngwenya Glass enjoys a very fine reputation and its wares are collected by individuals and commissioned by the most prestigious hotels worldwide. It has opened a boutique in Cape Town, South Africa as well as an offshoot factory, Shades of Ngwenya, in Johannesburg. It has maintained the same name and original factory since it opened in 1979. Having begun with and sustained a high level of quality and artistry, Ngwenya Glass’s logo is now a very valuable asset.

b. Kullu Shawls, India

Based upon its Geographical Indication of Goods Act of 1999, the Government of India has registered 28 Indian products on its GI Registry. One of those products is the Kullu shawl. Originally derived from intricate designs of the Kinnauri, (a community of Indigenous people native to the Kinnaur district of the Indian state of Himachal Pradesh) the shawls tend to be made of mill-spun yarn in wool, Angora, or Pashmina; dyed in various colors; and decorated with patterned borders.

The Secretary for the Department of Science and Technology of the Hamachal Pradesh Government, which realized the market potential of the shawl and which accorded GI status to it, noted: “[T]he quality and specific uniqueness of the shawl will be maintained and the brand will be promoted and the misuse would be stopped.... The people who are involved in the production of (the shawl) will get the benefit of the brand name.”¹⁰ A sales executive at the Bhunter Cooperative Society stated that, after “getting the status, we can also export the Kullu shawls, and its demand is also likely to increase. World over there is a craze for Kullu shawls. We are sure that after getting the GI status, the sales (and) production will increase.”¹¹

Doctor Mangala Hirwade, a librarian at the Shivaji Science College and Dr. Anil W. Hirwade, who works for the Patent Information System, have found that GI protection for the Kullu shawl has prevented unauthorized use of the Kullu name and has boosted exports of the shawl.¹²

C. Certification Marks

As opposed to a trademark specifying a specific producer or manufacturer of a good or service, a certification mark is usually applied to a product by an outside “certifying” body. Certification marks are an indication to consumers that certain standards have been met, and certification marks therefore have a “stamp of approval” function.

a. Cowichan Knitters, British Columbia

Cowichan Bay in Canada grew up as a kind of resort amidst the local logging and shipping. Mrs. Hill, a local resident, opened Hill’s Indian Crafts and “virtually put the Cowichan Indian sweaters on the map.”¹³ Native Cowichan women from the region continue to knit these “distinctive bulky garments,” having accumulated over a century of skill in spinning and knitting lanolin-rich wool. “No patterns exist for the real items, only traditional designs in the knitter’s memory are used.”

¹⁰ Rajiv Kimta, *Himachal Pradesh Gives Geographical Status to Kullu Shawls, Kangra Tea*, Plentea.com, Jan. 25, 2005.

¹¹ *Id.*

¹² Geographical Indications: Indian Scenario, available at <http://eprints.rclis.org/archive/00006813/01/EF6C0C53.pdf>

¹³ Cowichan Bay History, available at <http://cowichanbay.net/cowichanbayhistory/index.html>

One distributor of Cowichan sweaters, Sa-Cinn Native Ent. Ltd., has had trouble with the designs from the sweaters they sell being misappropriated from his website. Sa-Cinn works with a few local First Nations (the term Indigenous communities in this region use to refer to themselves collectively) individuals to present and market their work. The Sa-Cinn logo itself depicts a likeness of a real woman and her headdress; an image rife with cultural meaning.



Reproduction of trademark courtesy of Sa-Cinn Native Ent. Ltd.
Registered in CIPO, Canada's Trademark Office, No TMA653077

A layer of cultural concern is therefore added to the business model. The manner in which the wool is prepared and the designs that are incorporated on each sweater are culturally significant to the Cowichan Natives. To protect the quality of their work, and the cultural and spiritual significance of the patterns they employ on their sweaters, a group of Indigenous Cowichan knitters has decided to hand-number each of the garments they make and to attach a label with a registration number indicating a genuine "Cowichan Indian Knit." The knitters then select a small number of trusted retail operations to market and sell their wares.¹⁴ Sa-Cinn, the retailer noted above, cannot keep up with its orders for its high quality authentic sweaters.¹⁵

The authenticity tag that the knitters employ falls under a species of trademark called a "certification mark." As opposed to a general trademark specifying the specific producer or manufacturer of a good or service, a certification mark is usually applied by an outside "certifying" body.

For example, Australian Wool Services owns the "Woolmark" certification mark and describes its role in applying it as follows:

Through ownership and licensing of the *Woolmark*, *Woolmark Blend* and *Wool Blend* we provide unique worldwide quality endorsement. Our brands and symbols are protected by rigorous and extensive control checks and recognised

¹⁴ The Cowichan Sweater: *A Native Knit Original*, www.nativeonline.com/athentic.htm (sic)

¹⁵ E-mail correspondence, on file with author.

globally as unrivalled signs of quality and performance. If a wool product carries our brands, it carries our guarantee of product quality. We work with textile processors, designers and retailers in both the apparel and interior textile markets throughout the world. We operate globally so you will benefit from our services and specialist support wherever you are.¹⁶

Thus, the group applies the Woolmark or other marks to already-trademarked products to indicate that the wool from which that product is made reaches a certain threshold of quality. A consumer may find the Woolmark attached to a Brooks Brothers scarf, for example; the scarf would be recognized as coming from a specific brandname – Brooks Brothers -- and the material with which it is made would be certified by the Woolmark.



Woolmark, USPTO Certification mark no. 2338440; Brooks Brothers USPTO Trademark no. 78538066

In the case of the Cowichan knitters, they do not appear to use individual trademarks (i.e., every knitter or group of knitters could ostensibly have its own trademark) but rather only employ an authentication certification mark. Nonetheless, the “Cowichan Indian Knit” label functions as a certification mark that permits a prospective purchaser to know that he or she is buying a garment made in the traditional manner, employing patterns and graphics that have legitimate cultural significance. “Imitation sweaters, sometimes erroneously rendered in pastel blues, now flood the market. None approaches (sic) the quality of the natural-colored originals....”¹⁷ To combat sweaters being passed off as authentic when they are not, the few retail stores that sell genuine Cowichan sweaters emphasize certain qualities about the sweater that tend to be missing from inauthentic versions, including the certification mark, a continuous line of stitching (as opposed to seams attaching sleeves to the bodice) and use of pure wool processed with lanolin, which makes the sweaters resistant to water.¹⁸

b. Coopa Roca Reprise

Discussed above, Coopa Roca is building on its now-strong trademark. Ms. Leal, who has achieved initial success with the trademark and log, has grander ambitions for Coopa Roca than local success. She is planning to make and use a designation for “green handicrafts” and she projects that certification will be a major breakthrough “for small producers hoping to compete in high-end markets currently dominated by famous brands and foreign manufacturers.”¹⁹ Adding societal value to merchandise, she believes, will introduce the public to a new form of consumerism.

¹⁶ Australian Wool Services Limited, About Us, available at <http://www.woolmark.com/about.php?id=1&PHPSESSID=0850b95f6fc84277d135d1bebd66de34> (last visited Dec. 11, 2006).

¹⁷ <http://www.nativeonline.com/athentic>

¹⁸ See, e.g., Cowichan Sweaters, available at http://www.quwutsun.ca/cowichan_sweaters.htm.

¹⁹ <http://www.ashoka.org/node/3415>

c. UNESCO

The United Nations Educational, Scientific and Cultural Organization (UNESCO) has begun a similar pilot program in Southeast Asia called the Seal of Excellence.²⁰ This seal, or certification mark, is given jointly by UNESCO and the Association of Southeast Asian Nations (ASEAN) Handicraft Promotion and Development Association (AHPADA) on an annual basis. The Seal is awarded to specific craft products conforming to a rigorous standard of cultural, environmental and production excellence.

The Seal provides a variety of benefits. It can be used as a promotional tool - a certification mark - to indicate the quality and authenticity of a specific product; it can be used in training workshops where recipients of the Seal can assist others to improve their product lines; it can be used for advertisement purposes on the AHPADA website, where all Seal products are available for purchase; and it can be used as a ticket for submission for the biannual UNESCO Crafts Prize. Recipients of the Seal have recognized that the program has helped them achieve greater confidence in their own work “as well as gaining buyers’ confidence and credibility.”²¹



UNESCO Mark. USPTO Servicemark No. 89000176

One of the core objectives of the SEAL program is to generate income for artisans; however, it is not always feasible or possible to bring certain products to the mass market. The artisan may not have production capacity, may not want to produce in mass quantities or there may not be sufficient financial capital to produce on a grand scale. Measurable success has flowed from partnering with current art and craft markets that offer special promotion or placement for SEAL products. One such success is the Santa Fe Folk Market. In 2006, a total of approximately \$20,000 was generated over two days for craftspeople who had earned the SEAL for their crafts.²² Compared to the other high-quality artisan booths, which received revenue in the average amount of \$10,000 per booth, the UNESCO SEAL artists earned more financial returns.

²⁰ For more information about the Seal, see http://portal.unesco.org/culture/en/ev.php-URL_ID=21804&URL_DO=DO_TOPIC&URL_SECTION=201.html

²¹ UNESCO Seal of Excellence for Handicraft Products, Facts and Figures, available at http://www.unescobbk.org/fileadmin/user_upload/culture/SEAL/2006/Documents/2001_-_2005_Seal_of_Excellence_Facts_Figures.pdf

²² Correspondence with Kari Adams, UNESCO SEAL representative, Feb. 21, 2007, and with Judith Espinar, Creative Director of the Santa Fe International Art Market, March 16, 2007. For both, correspondence on file with the author.

d. *Toi Iho* Mark, New Zealand

The Maori people comprise the Indigenous population of New Zealand. Their native language is Maoritanga. Prior to British colonization, Maori literature and culture was passed down to succeeding generations orally and includes many legends, songs and dances. Another notable part of Maori culture is the art of the tattoo. *Moko*, full face tattoos, are traditionally applied to men in a variety of recognizable Maori patterns and designs; women's tattoos are applied to select areas of the face.



Maori Sculpture, New Zealand © istockphoto / Marjan Thys 2007

Toi Iho, registered as a trademark in New Zealand, functions as a certification mark to “promote and sell authentic, quality Maori arts and crafts.”²³ Designed in part by Te Waka Toi, the Maori arts board of Creative New Zealand, and Maori artists, the mark signifies to the buying public that a certain artistic product meets a certain standard of quality and that it was made by a Maori artist. The *toi Iho* mark has two further iterations; the *toi Iho* Mainly Maori Mark and the *toi Iho* Maori Co-Production Mark. The former was designed for groups of artists, most of whom are of Maori descent, who work together in the production, presentation or performance of artworks. The latter, the Co-Production Mark, is designed for collaborations between Maori and non-Maori people.



New Zealand Trademark Office Mark No. 629775 and others, by Creative New Zealand

²³ See *Toi Iho*, About Us, available at <http://www.toiho.com/aboutus/>

The purpose of the *toi Iho* marks is to assist Maori people retain control over their cultural heritage as well as maintain the integrity of their art and culture.²⁴ Indeed, there are several examples of Western businesses that have inappropriately used aspects of Maori art or culture without the consent or knowledge of the Maori people. Such international companies as Lego,²⁵ Philip Morris,²⁶ as well as music labels²⁷ and apartment complexes,²⁸ have misused and profited from an array of Maori culture.



Photograph courtesy of Shane Kawenata Bradbrook, Te Reo Marama, the Maori Smokefree Coalition

As such, to protect the culture of the Maori as it manifests itself in the crafts industry, the *toi Iho* mark allows consumers to identify and purchase crafts that have this “seal of approval” on them. In 2006, 45 *toi Iho* licenses were granted and four new stockists were approved to sell *toi Iho* crafts; a 25 percent increase in just one year. This brought the total number of artists with *toi Iho* licenses to 180 and the number of stockists to 19. Also in 2006, issues related to misappropriation were tackled and distilled in an evaluation of the *toi Iho* mark; recommendations are currently being considered by the New Zealand government.²⁹

e. Silver Hand Mark, Alaska

A final example of the certification mark approach is the State of Alaska’s Silver Hand Program. Established in 1961 and managed by the State’s Art Council as of 1998, the mark has “stood the test of time as an authenticated program for Traditional Alaska Native crafts and the artisans who produce these unique cultural products.”³⁰ Saunders

²⁴ <http://www.toiio.com/faq>

²⁵ See, e.g., Kim Griggs, *Maori Take on Hi-Tech Lego Toys*, BBC News, Oct. 26, 2001, available at <http://news.bbc.co.uk/2/hi/asia-pacific/1619406.stm>.

²⁶ See, e.g., Peter Lewis, *Philip Morris Apologizes for Using Maori Name and Images to Sell Cigarettes*, The World Today, ABC, April 28, 2006, available at <http://www.abc.net.au/worldtoday/content/2006/s1626384.htm>.

²⁷ See, e.g., Auahi Kore, http://www.auahikore.org.nz/initiatives/maori_mix_speech.htm

²⁸ See, e.g., Jason Edward Kaufman, *New Zealand Maoris Furious Over Plans for a Themed Apartment Complex in Texas*, The Art Newspaper, Oct. 19, 2006.

²⁹ Arts Council of New Zealand Toi Aotearoa, Annual Report 2006, page 29.

³⁰ Alaska Wilderness, Ecotourism and Cultural Trip Planning Information, available at <http://www.awrta.org/index.cfm?section=arts>

McNeill, the Director of the Program, said there is “no question” that the Silver Hand tag helps to sell all kinds of works, ranging from thimbles to oversize statues.³¹ The tag has gained strong recognition over the years from consistency of quality and educational training. Customers, including tourists coming in to Alaskan cities from large cruise ships, ask specifically for Silver Hand-certified arts and objects. Online discussion forums from cruise vacationers make specific mention of the tag: “[L]ook for a little black tag with a silver hand attached to the item.... ONLY those items are certified to be by a Native....”³²

The Silver Hand Program is currently undergoing scrutiny and its managers are introducing a Bill to the Alaskan House of Representatives and Senate to make some changes to the decades-old statute that began the Program. The proposed changes would make the range of art objects eligible for Silver Hand protection more inclusive and would allow more deference to tribal decisions regarding who they consider members of their tribes and what kinds of artwork should receive a Silver Hand tag.



Alaska Silver Hand Emblem, conforming to Alaska Statute AS 45.65.030

Currently, eligible artists are assigned a permit number, supplied annually with a total of 150 tags and stickers, provided training in marketing and offered additional opportunities in exchange for \$20.00 for two years.³³ The area in need of the most improvement in the Silver Hand Program is its enforcement. The Program is currently an unfunded Alaska State mandate and, as such, it is relationships with enforcement organizations, including the Federal Trade Commission, the Alaska State Attorney General’s Office and various Native Commissions that can offer surveillance and subsequent action.

Ms. McNeill noted that in her role as Director, she has achieved her most notable enforcement successes by acting as a liaison between Native artists and other agencies. In her role as an outreach and education coordinator, she has also made strides in finding and solving problems. One of her current challenges is the black market for Silver Hand tags – some Natives eligible for the Tag are selling it to non-Natives for up to \$300 per tag. This problem, amongst others, will be addressed in the newly proposed bill.

³¹ Telephone conversation with Saunders McNeill, February 5, 2007. Notes on file with the author.

³² See post from April 12, 2005, at <http://boards.cruisecritic.com/archive/index.php?t-163386.html>

³³ *Id.* See also AKASCA, Native Arts, available at <http://www.eed.state.ak.us/aksca/native.htm>



Mask and soapstone art that use the Silver Hand tag. Images courtesy of Michael Larsen, Native Artist, <http://www.okporuk.com/>

f. The Igloo Tag

In 2001, Inuit designers and seamstresses from communities in Nunavut (Northern Canadian Indigenous community), Nunavik (Quebecois Indigenous community), Panama and Peru joined Pauktuutit (a Canadian Inuit organization) in a consultation workshop on protecting Inuit intellectual property. One of the strongest recommendations was to create a “cultural property” mark for such goods as the *amauti*, a woman’s parka that has a deep hood at the back in which babies and children are placed.³⁴



Amauti from Atanarjuat: The Fast Runner (c) Igloolik Isuma Productions, www.isuma.ca. Photo courtesy of Igloolik Isuma Productions

A similar mark came about in Canada and is currently undergoing study with regard to its viability: the “igloo tag,” administered by the Canadian government, was at one time affixed by recognized cooperatives to Inuit art objects. The mark indicated both the geographic origin and the creator of the artwork and is applied to a variety of products. Although the tag has been inactive for about twenty years, the Indian and Northern

³⁴ Alison Blackduck, *Pauktuutit to Continue work on Amauti Protection*, Nunatsiaq News, June 1, 2001.

Affairs Department in Ottawa will soon be publishing a report concerning the tag's future.³⁵



Canadian Trademark Office Mark No. 0900583



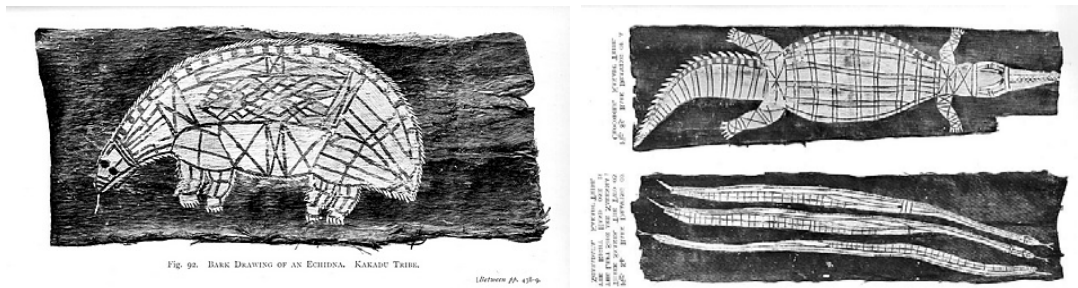
Whale tail pendant with chain; mammoth tusk ivory
Image courtesy of Arctic Art Sales

III. Trade Agreements, Customary Law and non-IP Approaches

Aside from intellectual property law, some governments and courts have looked to other routes of protection for traditional textiles. This happens for a variety of reasons, including whether Indigenous or customary law is respected, whether other non-IP laws are in place that could address the issue at hand and whether a strong Indigenous culture is supporting cultural goals. Federal deference to Indigenous customary law, discussed below, is another factor that influences how a judge might handle a specific case.

a. The Carpet Case, Australia

One example where a court has looked outside of intellectual property law to decide an IP issue is the Australian court case *Milpururru and Others v. Indofurn*.³⁶ The case concerned an interesting conflict between traditional cultural expressions as embodied by the bark paintings of three contemporary Aboriginal artists. The artists' works were reproduced in several authorized publications in Australia.



Examples of bark paintings. Baldwin Spencer, *Native Tribes of the Northern Territory of Australia*, Macmillan Co., Ltd, London 1914. Chapter XIV. Photo research courtesy of Martin Wardrop, Director, Aboriginal Art Online, Australia.

³⁵ Correspondence from Viviane Gray, Manager of the Indian and Inuit Art Centres, Ottawa, on file with the author.

³⁶ (1996) AILR 20; (1996) 1 AILR 28

A Vietnamese carpet manufacturer obtained a copy of one of the publications and reproduced eight artworks either in part or whole on its carpets and exported them back to Australia for sale, stating that they had been designed by Aboriginal artists and that royalties from each carpet sale were paid to the corresponding Aboriginal community. Because the designs used by the artists had long fallen into the public domain, according to Australian copyright law, the court struggled to apply copyright law to the case. According to Indigenous traditions, errors in the reproduction of totemic and other images and symbols can cause great offense but there was no federal Australian law available to deal with this problem.

The plaintiffs had also claimed breaches of sections of the Trade Practices Act, however, with regard to the form of labeling used in connection with the carpets misstating their manufacture and misrepresenting the recipients of the prospective purchasers' money. As such, the court held that the unauthorized importation of the carpets with the fraudulent authenticity labels constituted an infringement of the Trade Practices Act. The trial judge began his damages analysis in a traditional vein but recognized that damages could not be established based on the suffering of a monetary loss (the artists' designs were never on the market). With an unprecedented emphasis on equity for this kind of case, the judge noted that the infringements caused personal distress and potentially exposed the artists to contempt within their communities, if not the risk of diminished monetary returns.

The judge ordered delivery up of the carpets and an accounting of the profits and, in computing the damages to award the plaintiff, he awarded an amount of AUS \$1500 per artwork against each of the respondents under §115(2) of the Copyright Act, reflecting the low quantum of damage attributable to the commercial depreciation. Notably, however, to emphasize the serious nature of the infringements, he awarded an additional sum under §115(4) of AUS \$70,000 to be apportioned in the amounts of AUS \$15,000 to each of the living applicants to "reflect the harm suffered ...[by them] in their cultural environment."³⁷

Some commentators on the case indicate that it establishes the principle that, where the unauthorized reproduction of such works involves a breach of copyright law, customary Aboriginal laws on the subject may be taken into account in quantifying the damage which has been suffered.

³⁷ Transcript of the case, p. 86.

b. The Panamanian *Mola* and Examples of *sui generis* Schemes

Indigenous (people) who are struggling to overcome poverty are deeply concerned and upset to see ‘designers’ steal their traditional designs and patterns. Not only are these designs and patterns one of their few sources of income, they also symbolize their cultural identity.³⁸

Panama introduced a system of copyright-like rights tailored to address some of the problems Indigenous artists face most often, including collective ownership registration. Law 20, introduced in 2000, allows an Indigenous group to own a copyright in a creative work, as opposed to reserving those rights to an individual or a business entity. The legislation, which concerns “the special system for registering the collective rights of Indigenous peoples, for the protection and defense of their cultural identity and traditional knowledge, and setting out other provisions,” includes the right of Indigenous people to contest culturally offensive trademark registrations, does not fix a duration for collective rights, and vests power in Indigenous authorities to oversee cultural protection.

The Panamanian *mola*, a textile design rendered in a special reverse appliqué technique, is recognized by Law 20 as part of the collective heritage of a certain Indigenous group, the Kuna people.



Photo courtesy of Dave Grant, The Ocean Institute

Specifically, Law 20 provides a platform for an alliance between the Panamanian Government, through the Department of Collective Rights; and Kuna authorities, through

³⁸ Protecting Indigenous Women’s Intellectual Property: Tools for thought and action with regard to protecting the traditional designs and patterns of Indigenous women, Rights and Democracy, Canada, available at <http://www.ichrdd.ca/english/commdoc/publications/indigenous/introEnglish.html>

the Kuna General Congress. Much like the New Zealand *toi Iho* mark mentioned above, a seal is affixed to genuine molasses, signaling their authenticity. Non-Kuna people are required to obtain a license from the Kuna to manufacture molasses and they must be sold with a statement informing the prospective purchaser that the molassa was manufactured with Kuna consent but by non-Kuna people. Currently, Law 20 is receiving criticism for some imbalances – it favors the Indigenous population over other Panamanians and could benefit from defining some boundaries to the Indigenous IP right.³⁹

c. Examples of Jurisdictional Deference to Indigenous Law

Panama is not the only jurisdiction that has implemented a *sui generis* legal scheme for traditional cultural expressions; Nigeria and Tunisia also have legislation with new approaches to protection of IP-like assets that do not fall squarely under Western IP laws. Several Latin American countries protect collective rights, including Ecuador, Bolivia, Brazil, Colombia and Nicaragua. Nigeria metes out punishment to third parties that distort certain expressions of folklore or misrepresent their creation.⁴⁰ The salient point this list is meant to demonstrate is that jurisdictions handle Indigenous populations quite differently. The overarching goals of any nation’s policy with regard to its Indigenous population tend to aim for a layer of respect and/or anti-counterfeiting help.

That being said, the mechanisms different countries use are not always grounded in intellectual property law – or in law at all. Venezuela’s Political Constitution of 1999 declares that the collective intellectual property “of collective benefits is warranted and protected. The registration of patents based on these resources and on traditional knowledge, technology and innovations of Indigenous Peoples is forbidden.” In the United States, very specific laws address some special provisions for cultural aspects of Native American groups; the Federal Native American Graves Protection and Repatriation Act (NAGPRA), for example, provides a platform for museums and Federal agencies to return certain Native American cultural items, including human remains, funerary objects, sacred objects, and objects of cultural patrimony, to lineal descendants, culturally affiliated Indian tribes, and Native Hawaiian organizations.

While many of the laws and policies inherent in a country’s overall relationship with its Indigenous populations fall outside the scope of intellectual property and may have no bearing on traditional textiles, they can inform how and whether new policies can be implemented or existing laws can be enhanced to carve out specific protection for works that draw from the knowledge, know-how and creativity of Indigenous peoples.

³⁹ For an excellent discussion of the inception of Law 20 and its predecessors, see Irma De Obaldia, *Western Intellectual Property and Indigenous Cultures: The Case of the Panamanian Indigenous Intellectual Property Law*, 23 B.U. Int’l L.J. 337 (2005).

⁴⁰ See Ikechukwu Magnus Olueze, *Protection of Expressions of Folklore as a Vehicle for Cultural Dissemination under Nigerian Law*, UNESCO Copyright Bulletin, p. 48, available at <http://unesdoc.unesco.org/images/0012/001225/122513eo.pdf#page=48>.

d. Traditional Textiles Online

Another frontier to consider with regard to traditional textiles is the new platforms in which they are being disseminated around the world. Whether they be in museum collections or for sale made by an Indigenous community, traditional objects and textiles face different challenges in the virtual world than they do in the physical world. Museums have different goals than craftspeople, of course; part of most museums' mission statements is to share its art and information with the public; offering digital images of their collections is therefore usually in line with their goals. Craftspeople, on the other hand, may want to advertise their wares online but they do not necessarily want to inspire other would-be craftspeople to make similar crafts or misappropriate their designs. The degree to which they can protect their goods after they place them online for purposes of competing with other craftspeople may be, pragmatically speaking, somewhat difficult.



Candle Holder, Izucar de Matamoros, Mexico, 1995-2000, Image courtesy of the Burke Museum of Natural History and Culture, Catalog Number 2001-111/7



Mask, Inupiaq, Point Hope, Alaska, 1894, Image courtesy of the Burke Museum of Natural History and Culture, Catalog Number 422

One example of craftsmanship appropriated by culturally insensitive business interests can be seen in African art and crafts. A gentleman from South Africa has opened a business in Chicago; he imports art from several African countries and sells it both retail and wholesale, guaranteeing his pieces are authentic pieces of art from Africa:

Our mission at AfricanArt.com is to DIRECTLY support the artisans and their families in Africa in a meaningful and sustainable way. Each purchase on this site is effectively a purchase from the African artist....⁴¹

⁴¹ See AfricanArt.com, <http://www.africanart.com/>

He has come across several circumstances whereby it is very difficult for him to remain faithful to this mission statement and make a profit at the same time. This challenge exists for several reasons including cultural business climate differences between the United States and Africa. Most notably, however, he has found it difficult to compete with cheap replicas of African art made in other countries. A variety of retailers stock African-inspired arts and crafts and neglect to mention where the product is actually made.⁴² The degree to which prospective purchasers might be confused or make assumptions as to the actual origin of such goods is arguable.



Carved Zebra Mask, AfricanArt.com



Small Bamileke stool, AfricanArt.com

Images courtesy of AfricanArt.com

⁴² See, e.g., African Tribal Mask Lamp, Online Discount Mart, <http://www.onlinediscountmart.com/06-35358.html>.

Conclusion

The key points to take away from these examples are:

- Any organization or small business marketing, selling or even educating the public about cultural objects should **take an inventory**, sometimes called an **IP audit**, of the intellectual property inherent in its work. This could include a range of things, including primary products themselves (paintings, statues, designs, etc; either under copyright or industrial design law); client lists (trade secret); the organization's logo (trademark) and an array of other works of the mind.
- Depending on what it is an organization is trying to protect, there is a veritable menu of practical options for achieving those goals. These options include traditional intellectual property routes, including applying for a trademark, using the international symbols associated with the respective IP regime into which goods and services fall: ©; ®; and ™. Although these symbols do not add any further legal protection, they put the public on notice that the expression to which they are fixed is protected by law.
- Use the premises of trademark and/or certification mark law: **“Brand” yourself** such that prospective consumers know your work and know how to differentiate between your work and someone else's. With strong recognition and loyal customers, you will be using intellectual property law to your advantage.
- **Work with** the people and organizations who promote or who are responsible for transporting or selling your goods. This might include your **shippers, relevant customs agents and retail operators**. Getting pertinent information to these people and maintaining open lines of communication with them will help everyone involved in your business understand whether and how IP is being pirated.
- **Educate your current and prospective consumers** about ways in which to identify counterfeit goods and help them understand why they should continue to choose your product. For some types of goods, it is not difficult to be persuasive: counterfeit batteries can cause serious injuries and consumers who are put on notice of possibly lethal consequences will likely look out for fake batteries. For traditional textiles, an appeal needs to be made to prospective purchasers such that they understand the offense they could be causing to the culture they seek to support or the economic loss they are contributing to when they purchase non-genuine goods.
- Intellectual property can be a **powerful tool** in protecting the integrity of your brand and/or culture. It can offer a degree of control as you put your cultural products into the stream of international commerce.