

A close-up photograph of a Zen garden sand pattern. The sand is light brown and has been raked into concentric circles. Two smooth, dark brown stones are placed on the sand. One stone is in the foreground, and the other is in the background. The background is a solid brown color.

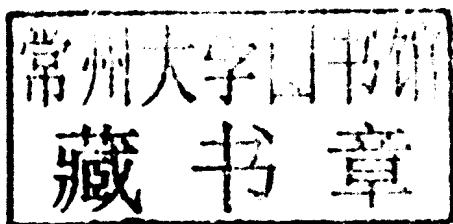
Daphne Zografos

INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS

Intellectual Property and Traditional Cultural Expressions

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Edward Elgar

Cheltenham, UK • Northampton, MA, USA

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Abbreviations

AAC	Alaska Administrative Code
ANKAAA	Association of Northern Kimberly and Arnhem Aboriginal Artists
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
ATO	alternative trade organisation
ATSI	Aboriginal and Torres Strait Islander
ATSIC	Aboriginal and Torres Strait Islander Commission
BIRPI	Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle
CCTV	Chinese Central Television
CTM	Community trade mark
ECJ	European Court of Justice
EEC	European Economic Community
EFTA	European Fair Trade Association
FBI	Federal Bureau of Investigation
FLO	Fair Trade Labelling Organisation International
GATT	General Agreement on Tariffs and Trade
GI	geographical indication
IACA	Indian Arts and Crafts Act
IACB	Indian Arts and Crafts Board
ICTSD	International Centre for Trade and Sustainable Development
IFAT	International Federation for Alternative Trade
IGC	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
IIED	International Institute for Environment and Development
ILO	International Labour Organisation
IP	intellectual property
IPONZ	Intellectual Property Office of New Zealand
IPR	intellectual property right
ISO	International Organisation for Standardisation
ITC	International Trade Centre
NAA	Native American Arts Inc.
NEWS	Network of European World Shops
NGO	Non-governmental organisation

NIAAA	National Indigenous Arts Advocacy Association
OAPI	African Intellectual Property Organisation
OHIM	Office for Harmonisation in the Internal Market
OIG	Office of Inspector General (US Department of the Interior)
OLP	origin labelled product
OTPSA	Organisme Tunisien de Protection des Droits d'Auteurs
OVOP	One Village One Product
PBU	Producer Business Unit
SODACT	Société des Auteurs et des Compositeurs de Tunisie
TCE	traditional cultural expression
TK	traditional knowledge
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TTBA	Trademark Trial and Appeal Board
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UPOV	International Convention for the Protection of New Varieties of Plants
USPTO	United States Patent and Trademark Office
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

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1. General introduction

Over the past few decades, the protection of traditional cultural expressions (TCEs) has generated lively debates within the international community and the questions of whether TCEs should be protected by intellectual property rights (IPRs), and if so how, have been of increasing practical concern for TCEs holders and national policy-makers in various countries. To date, however, work on the protection of TCEs has progressed slowly, and little has emerged in the way of concrete, binding law. Moreover, those instruments proposed as solutions appear unable to meet the whole range of concerns raised by TCEs holders and culturally-rich developing countries.

Concerns raised by TCEs holders can be classified into four main categories. First, they stress the difficulties they encounter in preventing and/or controlling the commercial use of their TCEs by third parties and in benefiting from this commercialisation themselves. Secondly, they express concerns about the inappropriate and offensive use of their TCEs. Thirdly, they wish to be attributed for their TCEs, as well as have the possibility to object to any false attribution. Finally, they emphasise the need to ensure the identification and preservation of existing TCEs, as well as their promotion, dissemination and continued evolution.

The protection of TCEs was initially envisaged on a copyright model, because of the similarity of subject matter between copyright law and TCEs. However, although copyright law seems well suited to meet some of the needs and objectives of TCEs holders, it is limited in its potential for protecting TCEs.

This study argues that ‘origin related intellectual property rights’, such as trade marks, certification and collective marks and geographical indications, as well as passing off and laws against misrepresentation, appear to be conceptually best suited for the protection of TCEs, because of their specific nature and characteristics. Such characteristics include the fact that they are usually produced within a community, which is often linked to a specific place, and according to traditional methods and know-how transmitted from generation to generation, often using raw material from sustainable resources. In addition, this method of protection also seems to accommodate the fact that TCEs are usually already in the public domain and to take into consideration some of the aims of TCEs holders, such as the fact that they would like a protection that is unlimited in time.

It will demonstrate that a system of protection based on origin related IPRs could offer practical advantages for TCEs holders since such category of rights used as such or with minor adaptations would enable them to obtain quick, practical and effective protection. In addition, there would be no need for the creation of a new *sui generis* intellectual property (IP) or IP related system, which would take a long time to establish and may not be politically feasible anyway. The proposed approach would admittedly not address all the concerns of TCEs holders, but it would provide a balanced and workable compromise solution that could satisfy most of their concerns and policy objectives.

In order to support this proposition, it is necessary (i) to identify the needs and expectations of TCEs holders; (ii) to examine and compare policy options that have been adopted at the national, regional and international levels for the protection of TCEs; and (iii) based on this information, to identify the policy approach that would satisfy those needs and expectations best.

Due to the multi-faceted nature of TCEs, their broad geographical reach and the wide range of concerns, which can vary from one traditional community to the other, it is not possible to provide an exhaustive study of all policy approaches or legal provisions that have been proposed or adopted, nor probably to find a one-size-fits-all approach to the protection of TCEs. In this view, the study presents a selection of case studies to better illustrate the main policy approaches. The case studies have been selected as test-sites for the proposition because they provide particularly significant illustrations of certain types of TCEs protection and because, together, they represent a wide range of perspectives, interests and concerns of TCEs holders.

Finally, it should be noted that it is not within the scope of this study to discuss whether or not TCEs should be protected but rather to identify what is the best option for their protection within IP or IP related systems.

1.1 TERMINOLOGY, DEFINITION AND CHARACTERISTICS OF TCES

Over the years, various terms have been used to describe the subject matter that is the object of this book. These include, but are not limited to, 'folklore', 'traditional cultural expressions', 'expressions of folklore', 'indigenous cultural and intellectual property', 'indigenous heritage' and 'traditional knowledge'.¹ The terminology used varies depending on the region and/or the traditional communities using it.

¹ Terminological issues have been discussed by various academics and commentators. See for example Michael Blakeney, 'The Protection of Traditional