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INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE: LEGAL AND POLICY ISSUES, edited by Christoph B. Graber, Karolina Kuprecht, and Jessica C. Lai.

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TRADEMARK PROTECTION AND TERRITORIALITY CHALLENGES IN A GLOBAL ECONOMY, edited by Irene Calboli and Edward Lee. Edward Elgar, 2014. 339 pp. Hardback $ 145.

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In the book TRADEMARK PROTECTION AND TERRITORIALITY CHALLENGES IN A GLOBAL ECONOMY, editors Irene Calboli and Edward Lee have included a collection of interesting, informative, and insightful papers by a group of well-respected experts in international and comparative trademark law. Trademarks and trademark rights are generally territorial, or linked to the sovereign powers and borders of individual nations.[1] This means a business usually needs to acquire and enforce its trademark rights on a country-by-country basis, and that each country's trademark laws typically only apply to trademark violations that occur within that country. The chapters in this book explore the tension between this fundamental principle of trademark territoriality and the increasing movement of people, information, goods, services, and brands across borders. The contributors provide excellent background and legal analysis on this issue, and identify certain areas of the law which require a more transnational and uniform approach. Yet this scholarship also suggests that there are still certain circumstances where territoriality, national autonomy, and a local and differentiated approach to regulating trademarks will best promote competition, free expression, and other public interests.

This book is essential reading for attorneys who represent clients involved in disputes involving foreign trademarks, geographic designations for products, or gray market goods, or whose trademark practice includes the acquisition and enforcement of trademark rights in foreign lands. It also serves as a valuable and illuminating resource for scholars, legislators, judges, trademark office regulators, and anyone else considering whether the territorial model of trademark law is an "anachronism" in today's global marketplace.[2] In the first chapter of the book, Graeme Austin introduces the principle of trademark territoriality and provides an outstanding overview of how the expansion of brands beyond their local markets has created various challenges for the territorial approach to trademark law (pp. 1-11). In the chapters that follow, the editors helpfully organize the scholarship by topic and include chapters relating to the protection of foreign marks that are well-known (Part I), certification marks and other geographic designations (Part II), parallel imports and the doctrine of exhaustion (Part III), counterfeiting and

other enforcement challenges (Part IV), and the regulation of domain names in cyberspace (Part V).

Part I focuses on an important exception to the principle of territoriality in international trademark law: the well-known mark doctrine. Each member country of the World Trade Organization (WTO) is required by the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to protect foreign marks that are registered and used in other WTO countries if the foreign marks are well-known by the relevant sector of the public in the country where protection is sought.[3] Even if consumers have never purchased a certain foreign-branded good or service within the borders of their own country, they may still know about the foreign mark because of advertising on the Internet or satellite television, or because they traveled to or immigrated from a foreign land where this well-known mark was used. Such background information regarding the well-known mark doctrine is discussed in the chapter by Marshall Leaffer, and he also provides a useful comparative analysis of how the United States, Canada, Singapore, and South Africa protect well-known marks in their domestic trademark laws (pp. 15-36). Leaffer concludes that the U.S. Congress should amend the federal trademark statute to more clearly implement the country's international obligations to protect foreign marks that are well-known in the United States. In the next chapter, Leah Chan Grinvald explores the important issue of when a foreign mark should qualify as a well-known mark in the country where protection is sought (pp. 37-56). She cogently argues that courts should require evidence that consumers have interacted in some way with the foreign trademark (such as with purchases, inquiries, or website activity), and not focus simply on the ability of consumers to passively perceive the foreign trademark in advertising and promotion.

Part I ends with a chapter about another exception to the principle of territoriality that—like the well-known mark doctrine—protects trademarks in foreign lands where the mark is neither registered nor used. Trademark attorneys in the United States and various countries in Latin America[4] should pay close attention to Christine Haight Farley's chapter about the 1929 General Inter-American Convention for Trade Mark and Commercial Protection (Pan-American Convention) (p. 57-76). Farley notes this treaty is self-executing in the United States and contains provisions that are a significant departure from the traditional territorial approach in U.S. trademark law. Among other things, the Pan-American Convention allows trademark owners with priority in one contracting state to enjoin third parties with knowledge of these trademark rights from registering or using an interfering mark in another contracting state even where the trademark owner has not registered, used, or advertised the mark in the second contracting state and regardless of whether it qualifies as a well-known mark in that country.

In Part II of the book, the focus shifts to the effective use of trademarks, geographic designations, and other indications of quality or identity to signal the characteristics of a country's local products that are sold all over the world. In her

chapter, Margaret Chon provides a detailed introduction to standard-setting and certification in global value chains (pp. 79-99). Among other things, she explains how certification marks can serve a trust function across borders when they accurately inform consumers about compliance with standards such as fair trade or the environmental, health, workplace safety, labor, or human rights characteristics of the goods or their manufacturing process. To increase regulatory accountability and transparency, Chon proposes a renewed focus on the unfair competition provision of the Paris Convention (Article 10*bis*) and argues that nations should use unfair competition law to ensure that consumers who purchase goods in global markets have correct information about the characteristics of products they purchase. In the next chapter, Doris Long encourages countries to "brand the land" and help their citizens reach a global market by using trademarks, geographical indications, and other geographic designators for authentic, locally-produced goods that are unique and valued due to factors that are environmental (such as land or climate) or human (such as traditional methods for making handicrafts) (pp. 100-124). Her informative chapter surveys the various strategies for achieving this goal, identifies certain challenges that may stand in the way, and argues that quality control is critical for local brands to succeed globally. Similar themes are discussed in the last chapter in this Part by Daphne Zografos Johnsson, but with a specific focus on the coffee industry (pp. 125-148). Zografos Johnsson explains how traders in developing countries currently use trademarks and other types of intellectual property to signal quality and other characteristics of their coffee, such as fair trade, organic, and eco-friendly coffee. She provides a useful analysis of how local producers can differentiate their products in ways that create value in foreign niche markets, and enable the sale of the goods at higher prices compared to pure commodity exports.

Next, in Part III, the book provides a useful overview of the challenges created when a foreign-made product has features or packaging designs protected by both copyright and trademark law, but there are different rules relating to the geographic scope of exhaustion of copyright and trademark rights upon the authorized first sale of the product. If a country's law provides for international exhaustion of both intellectual property rights, the parallel importation into that country of goods first sold in a different country is usually not a copyright or trademark violation as long as the gray market goods are authentic, not materially different, and sold with authorization of the rights holder in the country of the first sale. Yet in some countries the law allows for international exhaustion of trademark rights but only national exhaustion of copyright, which creates incentives for trademark owners to use copyright law to prohibit the importation of authentic gray market goods and circumvent the rule of international trademark exhaustion. As discussed in the chapters by Irene Calboli (pp. 151-177) and Mary LaFrance (pp. 178-199), this latter approach was the rule in the United States until the recent *Kirstaeng v. Wiley* decision,[5] in which the U.S. Supreme Court interpreted the U.S. Copyright Act to provide for international exhaustion of copyright.

If the U.S. Congress amends the U.S. Copyright Act to add a rule of national copyright exhaustion, Calboli and LaFrance warn that trademark owners will again attempt to use copyright law to block imports of consumer products where the copyrighted work consists only of a logo, the product packaging, an instruction manual or warranty, or some other incidental feature of the product. If this occurs, Calboli argues that U.S. courts should apply the copyright misuse doctrine to prevent copyright protection of incidental product features in the context of authentic parallel imports. She also suggests that the U.S. Congress revise the U.S. Copyright Act to prevent copyright claims in these circumstances. LaFrance's chapter focuses on this second solution in detail, and also contains a comparative analysis of how Australia, Singapore, Canada, and South Africa have dealt with attempts by trademarks owners to use copyright law to cover "accessories" imported along with products that do not infringe trademark rights. LaFrance argues that the U.S. Congress should look to legislation adopted by Australia and Singapore for guidance, and adopt a statutory exception to the importation right for copyrighted material that is merely incidental to non-copyrightable merchandise. Pierre-Emmanuel Moyse discusses similar themes in the concluding chapter of this Part, but with a focus on Canadian law and Canada's doctrine of exhaustion of intellectual property rights (pp. 200-230). He provides a detailed account of his personal experience as an attorney defending a case involving claims of copyright in the designs on wrappers of chocolate bars sold lawfully abroad but imported without authorization into Canada. In these types of copyright disputes involving parallel importation of authentic goods, Moyse argues Canadian courts should apply the doctrine of abuse of rights.

The book transitions from exhaustion of intellectual property rights to the challenges of enforcement of trademark rights in Part IV. Lee Ann Lockridge's chapter focuses on enforcement of rights in well-known foreign marks in the United States, and certain U.S. courts' misunderstanding of the principle of territoriality in U.S. trademark law (pp. 233-258). Even when marks are not registered or used in the United States, she argues that protection of foreign marks that are well-known in the United States is still consistent with the territorial model of trademark law because the marks are only protected if they signify the brand's reputation and goodwill to consumers within the borders of the United States. Peter Yu's chapter contains a fascinating discussion of China's efforts to stop the sale of counterfeit merchandise before and during the 2008 Olympic Games in Beijing (pp. 259-282). Foreign brand owners often complain that China could do more to prevent the manufacture, sale, and export of counterfeit goods, but China could only control some of the counterfeiting during the Beijing Olympics and had problems stopping it outside of China's major cities. This example therefore demonstrates the challenges of controlling China's massive counterfeiting problem. Yu notes there are developments in China that could possibly lead to stronger protection of trademark rights, and he provides guidance on how to make trademark protection more attractive to policymakers and citizens in China. The last chapter in this Part is Daniel Chow's thought-provoking discussion of counterfeiting and the negative externalities caused by the expansion of multi-national brands into developing countries (pp. 233-304).

Chow critiques the trademark owners' claims of financial losses and other harms from counterfeiting, and argues that counterfeiting primarily harms the innocent citizens in developing countries where the majority of the counterfeiting occurs. He argues that the global counterfeiting trade causes harm to the local public by luring organized crime and corrupt government officials, and by increasing health and safety risks due to the proliferation of counterfeit food, medicines, and other goods.

The last section of the book—Part V—contains a chapter by Jacqueline Lipton and Mary Wong that covers the challenges relating to the regulation of trademarks in cyberspace and the extra-territorial nature of Internet domain name disputes (pp. 307-323). Lipton and Wong provide an informative discussion of the process for creating new generic top level domains (gTLDs)—words and other characters "to the right of the dot" of a domain name—set up by Internet Corporation for Assigned Names and Numbers (ICANN) in 2012. The new gTLDs can include brand names (such as .canon) as well as generic words (such as .sucks), geographic terms (such as .patagonia), and cultural and religious terms (such as .church and .islam). Like ICANN's Uniform Domain Name Dispute Resolution Policy, which was developed to resolve disputes involving third party registration and use of words "to the left of the dot" of a domain name that are claimed as trademarks (such as nike.com), the dispute resolution policies and procedures created for the new gTLD process will need to resolve cross-border conflicts in an effective and efficient manner. As the rule-making will be bottom-up and case-by-case, this will create some uncertainty and unpredictability, and norms and market forces will likely influence this private regulation of the domain name space. Lipton and Wong note that the new gTLD system will have a major impact across borders on Internet commerce and expression, and argue that the rules created for this system (and the decision-makers who implement them) should attempt to balance trademark rights, free expression, and other public interests in disputes involving domain names.

As the above discussion demonstrates, the editors included a variety of diverse and important topics in TRADEMARK PROTECTION AND TERRITORIALITY CHALLENGES IN A GLOBAL ECONOMY. One additional topic I would have liked to see included in more detail in this book is the subject of extra-territorial application of national trademark laws. As noted previously, under the territorial model of trademark law, trademark owners can only enforce their trademark rights acquired under a country's law against third parties who use their marks within the borders of that country. This territorial approach is sometimes abandoned, however, by domestic courts who apply local trademark laws to activity that occurs in foreign countries. For example, in *Steele v. Bulova*, the U.S. Supreme Court held that the U.S. legislature can regulate the unauthorized use of a U.S. trademark in Mexico and other foreign countries under certain circumstances.[6] Graeme Austin briefly discusses this issue in a paragraph of his introductory chapter (pp. 6-7), but it would be useful if the book included a full chapter about this topic. In addition to legal analysis of the cases where U.S. courts apply (or refuse to apply) U.S. trademark law to third party uses of U.S.

trademarks in foreign lands, it would be beneficial to have a section of the book explain whether non-U.S. countries have enforced local trademark rights in more global contexts to stop trademark violations on the Internet or in brick-and-mortar stores across the globe. This is only a minor quibble with the coverage in the book. It is sufficiently comprehensive on the subject of territoriality and trademark law to educate and challenge any reader interested in this topic.

To conclude, this informative book should be part of the legal toolkit of any practicing trademark attorney, and will likely influence future trademark policy and scholarship. The chapters provide an excellent overview of various legal issues that are critical to the global practice of trademark law today. The authors' original legal analysis and practical solutions to the problems set forth in the chapters are an important contribution to the complex and challenging field of international, comparative, and transnational trademark law.

ENDNOTES

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[1] For other scholarship that contains an excellent discussion of this topic by the author of the forward (Graeme Dinwoodie, pp. xv-xvi) and introduction (Graeme Austin, pp. 1-11) to this book, see Graeme B. Dinwoodie, Trademarks and Territory: Detaching Trademark Law from the Nation-State, 42 Hous. L. Rev. 885 (2004) and Graeme W. Austin, The Territoriality of United States Trademark Law, in 3 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 235, Peter K. Yu ed., (Praeger, 2007).

[2] Marshall A. Leaffer, The New World of International Trademark Law, 2 Marq. Intell. Prop. L. Rev. 1, 28 (1998).

[3] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994), art. 16.2-16.3; Paris Convention for the Protection of Industrial Property, Mar. 20, 1883 (as revised at Stockholm, July 14, 1967), 21 U.S.T. 1583, 828 U.N.T.S. 305, art. 6*bis*.

[4] Per Farley, the Pan-American Convention is in force today for ten states: Colombia, Cuba, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru, and the United States (p. 61).

[5] Kirstaeng v. Wiley & Sons, Inc., 133 S.Ct. 1351 (2013).

[6] Steele v. Bulova Watch Co. Ltd., 344 U.S. 280 (1952).

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INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE: LEGAL AND POLICY ISSUES, edited by Christoph B. Graber, Karolina Kuprecht, and Jessica C. Lai. Edward Elgar, 2012. 509 pp. Hardback $199.50.

Reviewed by Laura Nader, The University of California, Berkeley.

The organizers of the workshop/conference that formed the basis of this book – INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE – should be congratulated for their humanitarian impulses. The conference was held in January 2011 at the University of Lucerne in Switzerland and included both expert and stakeholder participation all working at the interface of nation, international law, and indigenous cultures. Some saw the workshop as a reconciliation of the interests of indigenous peoples and other parties mediated by state and international institutions. While it may be true that the interest of indigenous peoples are receiving the attention of policy makers in conjunction with their participation in speaking instead of being spoken to, the levels of plunder, past and present, are the unspoken contexts for such a workshop for the interface of national and international law and indigenous cultures.

This book is the first integrated publication that brings together international law on the topic of Indigenous Cultural Heritage (ICH) issues, and, although there are dramatic unequal power dimensions, the voices of the indigenous are heard on almost every page – mutual respect is at the center of exchange. That is, indigenous peoples should not only be able to participate in the trade of their cultural heritage, they have the right to retain control over their heritage. Yet, how are their interests to be protected while reconciling Western ideas with non-Western values? For example, will the concept of property as collective reign, or will property as individual remain since both the state and international law are structured to protect individual property? And where does the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) enter into the picture?

The methodology and organization of the book is transdisciplinary, with contributions by indigenous and non-indigenous scholars and practitioners from four different countries: Australia, Canada, the United States, and New Zealand. All four countries share Anglo-Saxon roots and all had been colonized under the British crown, thus enhancing comparability of the issues – Australia has Aboriginals and Torres Straits Islanders, Canada the First Nations Peoples, New Zealand the Maori, and the United States American Indians. The book has four

parts: Methodology and Social Context, International Law Perspectives, Country Reports, and Conclusions.

The book was co-edited by Christoph B. Graber, Karolina Kuprecht, and Jessica C. Lai, all members of the Research Centre for Communication and Art Law at the University of Lucerne, Switzerland. The Foreword, written by Paul Chartrand, a participant in the workshop, notes that as nations move into the twenty-first century there is increasing concern in the interest of indigenous peoples from policy makers, particularly in relation to international trade and regulation, and development of international standards that represent the participation of indigenous peoples' representatives both at the state and international levels. He refers to an orientation that finally recognizes conflicting interests at stake given that indigenous peoples around the world live within the territorial boundaries of states that govern them, whether by choice or not. He iterates that the most fundamental challenge is to have states willing to accept the proposition that indigenous peoples, and their collective interests do matter on an equal footing with the dominant powers. Indeed the book is unique as a first publication to address all relevant viewpoints of international law on the topic of ICH trade. We have in one volume a comprehensive picture of indigenous peoples' interests in cultural heritage and development.

There are 21 contributors – two chapters by Graber and Champagne in Part I: Methodology and Social Context, and ten chapters (3 to 12) in Part II: International Law Perspectives, featuring the work of John Scott and Federico Lenzerini, Fiona Macmillan, Susy Frankel, Christoph Antons, Martin Girsberger and Benny Müller, Brigitte Vézina, Rebecca Tsosie, Karolina Kuprecht and Kurt Siehr, Rosemary Coombe and Joseph Turcotte, and, lastly, Francesco Bandarin. Authors of Part II are predominantly professors of law or lawyers working in the field of intellectual property, some connected with UNESCO. Two are indigenous scholars – John Scott, who is Iningai (Australia), and Rebecca Tsosie, who is Yaqui (United States) – and two are in communication and culture studies.

Part III has country representatives: Carole Goldberg on the U.S., Catherine Bell on Canada, Kathy Bowrey on Australia, and Susy Frankel on New Zealand. These representatives ask basic questions only briefly alluded to here: What is indigenous knowledge and cultural heritage in relation to sacred knowledge, or genetic material, or Indian arts and crafts, folklore, and plant remedies? For the U.S. the role of the Native American Graves Protection and Repatriation Act (NAGPRA) is innovative. For Canada the context is different for the Inuit, the Indian, or Métis, meriting different local and national remedies. For Australia the issue is copyright and the question is who are the indigenous, noting that in Australia there is a voluntary code that regulates all issues of indigenous cultural knowledge. For New Zealand, the 1840 Treaty of Waitangi between the Maori and the British Crown provides the Maori with rights to their traditional knowledge. New Zealand's Free Trade Agreement (FTA) refers to the Treaty of Waitangi and offers the Maori some protection for genetic and biological

resources. However, as Sabine Fenton and Paul Moon[1] show, the treaty is still contentious, as it was written in English and translated into Maori by a missionary in a way that obfuscated the treaty's main purpose: to cede sovereignty of all Maori land to the British.

The Conclusions section is most helpful in pulling together the sum total of all of the conference findings, noting the benefits of recognizing the socioeconomic context in each country as well as pointing to previous shortcomings of top-down versus bottom-up approaches. The "Lessons learned" section is an excellent summary of the contributors' explanations. The strong focus on the international level reflects the fact that most indigenous peoples have, since the beginning, had difficulties with their states in relation to property laws, customs, and all that befell them with their conquest by European invaders. Thus the argument that perhaps international attention to indigenous rights will force states to recognize these rights. Yet the authors also recognize that it would be unrealistic to place all bets for solutions on international law. In the United States, NAGPRA – a federal cultural property law – was meant to protect old and tangible, movable Native American property, whereas in Canada the failure of the state to self-act might encourage strategies to involve the international sector to at least politically influence national law in a certain direction in favor if Inuit, Métis, and Indian.

Recognition of the fact that the indigenous communities in these four common-law states are not homogenous in languages, customary laws, and knowledge systems leads in different directions, to policies that address local issues rather than standardized solutions, while also recognizing common concepts and indigenous realities everywhere. Tribal legal initiatives may complement national policies, or in some cases re-interpret existing legal norms to better take into account the interests of indigenous peoples, as for example interpreting the intellectual property public domain in conjunction with customary laws of indigenous peoples. The respect for a bottom-up approach is the central most important initiative underscored in this volume, replacing the usual top-down perspective of states. In so doing, representatives of indigenous peoples' rights need to actually represent their entire group, whether the appointed representative is indigenous or not.

The direction of having international trade law consistent with public international law is even more challenging since it involves international customary law. Here we get into more complexities with the WTO, GATT, and TRIPS agreements, but as the editors note, the devil is in the details, and of course there were differences of opinion. The editors' policy recommendations then focused on two specific examples: the kava ban and the European seal ban, both providing insights into the problems of actually representing indigenous interests in international trade regulations in specific disputes. The editors note that, in fact, trade regulations are not capable of helping indigenous peoples participate more actively in international trade. The discussion then moves into certification marks, as in Fairtrade labeling and consumer laws.

On the very last page of this last chapter, the editors provide a summary of steps forward in which they succinctly note all the major points developed in this volume. Not a bad place to begin the reading of this amazing effort to make sense of all the interconnected issues relevant to international trade in indigenous cultural heritage. The editors can be congratulated on producing an amazingly rich volume that could not have been accomplished without the breadth of knowledge of all the conference attendees. This is legal research at the cutting edge, and for once not so Euro-American centric.

Nevertheless, I am left with a question. The word power is not in the index. We are reading about peoples who have been plundered through decades of the misuse of the rule of law, and they are still being plundered – not only of indigenous cultural heritage, but also of land, water, and resources.[2] Yet the book is about empowering indigenous peoples to more actively participate in the trade of their cultural heritage. Is doing so possible without renouncing their traditional values? Perhaps we should turn the picture around and ask when enough is enough. Western commercialism is environmentally choking the planet. There ought to be a law![3]

It is all well and good that Christoph Graber reminds the reader in his first chapter that the debate should "shift from a defensive attitude to proactive strategy" (p. 3) but on the ground reality doesn't square with the idea that development provides freedom for indigenous peoples. Indeed, in the *longue durée*, development will most likely not provide freedom for any peoples.[4] Perhaps we are all indigenous, at the mercy of the notion that progress means more technology and more trade with all their development consequences.

ENDNOTES

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[1] Sabine Fenton and Paul Moon, "The Translation of the Treaty of Waitangi: A Case of Disempowerment" in TRANSLATION AND POWER, Maria Tymoczo and Edwin Gentzler, eds. (University of Massachusetts Press, 2002).

[2] Ugo Mattei and Laura Nader, PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL (Wiley-Blackwell, 2008).

[3] Ikechi Mgbeoji, GLOBAL BIOPIRACY: PATENTS, PLANTS, AND INDIGENOUS KNOWLEDGE (Cornell University Press, 2006).

[4] Harold Crooks and Mathieu Roy, SURVIVING PROGRESS [film] (National Film Board of Canada, 2011).

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