

Abstract

The recent decision of the High Court of UK in the Melton Mowbray case, raises relevant issues regarding the protection of geographical indications for a developing country like India which has an abundance of products that could be registered as geographical indications. However, before one embarks to register these names, it is relevant to examine whether these products still qualify as geographical indications or have become generic terms by disuse and lack of protection. Also, there are certain prerequisites to be met before registering a geographical indication such as putting in place systems for quality control and arriving at a consensus among the producers to follow uniform methods of production so that the consumer gets end products of consistent quality. Absent such exercise, not only bona fide users of generic names are displaced but also consumers are deceived into buying products that do not really possess any unique characteristics

Key Words

Melton Mowbray

Geographical indications

EC Regulation 2081/92

TRIPS Agreement

Generic term

Traditional knowledge

THE MELTON MOWBRAY PORK PIE CASE: LESSONS FOR INDIA?

By Latha R Nair, K&S Partners, New Delhi – published in the Journal of Intellectual Property Rights Vol. 11, May 2006

There would surely have been an age when nothing under the sun was owned by anyone and everything was freely available and accessible. Perhaps, that was around the time when ignorance was truly blissful, for none bothered about what they possessed or were deprived of, not even intellectual property. Today, we are living in an age where, in the name of intellectual property, it is possible for anyone to register and appropriate anything including names that you believed you could rightfully use without interference from any quarters. The Melton Mowbray case, decided by the High Court of UK, is perhaps a true illustration of this.¹

The history of this case, the arguments taken in the course of the proceedings and the final decision pose many relevant questions in the Indian context where awareness of the relevance of the protection of geographical indications as a tool of economic growth is still in the nascent stages. This article, besides analyzing the Melton Mowbray case, examines the concept of protection of geographical indications and the lessons India may learn from the decision.

Melton Mowbray case: Fight for a share in the pie?

“Melton Mowbray Pork Pie”, a delicious pie made out of pork, lard, flour, water, salt and pepper, has been touted as a geographical indication by the recently founded Melton Mowbray Pork Pie Association (MMPPA). The case was initiated by Northern Foods, a leading food manufacturer in the UK against the Department of Environment, Foods and Rural Affairs (DEFRA), wherein MMPPA was joined as an interested party. By way of this suit, Northern Foods challenged the decision of DEFRA to forward to the European Commission, MMPPA’s application to register ‘Melton Mowbray Pork Pie’ as a geographical indication, under the European Commission Regulation 2081/92.

The history of Melton Mowbray Pork Pies dates back to the middle of the 18th century. Melton Mowbray in Leicestershire used to be an area popular for fox hunting and the hunting season coincided with the slaughter of pigs. Some of the pork went into pork pies which used to be consumed by the hunt servants and the hunters themselves. In the early 19th century, pork pies originating in Melton Mowbray started to be carried to London. The judgment notes that the early part of the 20th century saw a decline in the trade and that in 1998 the MMPPA was formed to bring together producers of what they would 'claim to be authentic Melton Mowbray' pork pie.

Northern Foods claim to produce these pork pies since the 1800s and the case arises from the commercial interests of Northern Foods and the members of MMPPA. Although the pie originated in Melton Mowbray, not many pork pies now originate there and many of MMPPA's members market pork pies made in regions closer to Melton Mowbray. The application filed by MMPPA, therefore, covers a large area including Leicestershire, Nottinghamshire, parts of Northamptonshire and Lincolnshire. Whereas the pork pies produced by Northern Foods come from Trowbridge, Wiltshire and Shropshire. In other words, Northern Foods do not comply with the specification of the geographical area in MMPPA's application and, therefore, they object that the geographical area of production of the pie covered by the application is a large area. Their claims in the case were as follows:

- That the pies, to qualify as Melton Mowbray pork pies, must originate in Melton Mowbray and, since they do not, the application ought to be rejected;
- That the "defined geographical area" for the purposes of Article 2(2) (b) and 4(2) of the EC Regulation 2081/92 is a specific place or region and not a wide geographical area.

- That, therefore, the ‘geographical area’ defined in Article 4(2) (c) as part of the specification must be “Melton Mowbray” and not areas outside or around Melton Mowbray.

In defense, DEFRA and MMPPA argued as follows:

- That the ‘defined geographical area’ under Article 2(2) (b) of the Regulation can be a wider area;
- That if Northern Foods’ argument is correct, a number of registrations have already been made where the specification extends beyond the specific region, thereby being in violation of the Regulation. They gave examples of registrations under the Regulation such as *Pruneaux d’Agen* that includes not only Agen, but other areas and *Agneau de Pauillac* that again covers large areas other than Pauillac.

It would be instructive to examine the contents of Article 2(2)(b) and 4 (2) of the Regulation to understand this argument better. Article 2(2)(b) reads as follows:

“2(2)(b) –geographical indication [PGI] means the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff;

- Originating in that region, specific place or country, and
- Which possesses a specific quality, reputation or other characteristics attributable to that **geographical origin** and the production and/or processing and/or preparation of which take place in the **defined geographical area.**”

Article 4(2) reads as follows:

“4(2) : The product specification shall include at least:

- (a) the name of the agricultural product or foodstuffs, including the designation of origin or the geographical indication;
- (b) a description of the agricultural product or foodstuff including the raw materials, if appropriate, and principal physical, chemical, microbiological and/or organoleptic characteristics of the product or the foodstuff;
- (c) the definition of the geographical area
- (d) evidence that the agricultural product or the foodstuff originates in the **geographical area**, within the meaning of Article 2(2) (a) or (b), whichever is applicable;
- (e) a description of the method of obtaining the agricultural product or foodstuff...;
- (f) the details bearing out the link with the geographical environment or the **geographical origin** within the meaning of Article 2(2) (a) or (b), whichever is applicable;”

The counsel for Northern Foods argued that “the defined geographical area” refers to the same specific place (or region or country in appropriate cases) and to the same geographical origin. Hence, the geographical area defined in Article 4(2)(c) must here be “Melton Mowbray” although this could include the immediate vicinity of “Melton Mowbray”. This was the core argument of Northern Foods. The counsel for Defra and MMPPA asserted that the “defined geographical area” can be a wider area since the wording of these Articles themselves points to that conclusion. If the intention was otherwise, the Regulation would use different words, they argued.

In reaching a conclusion, the court drew a comparison between 4 (2) (d) and 4 (2) (f) and found that these provisions stipulate that the foodstuff must originate in the geographical area and have a link with the geographical origin. Further, the court felt that such a comparison strongly pointed to two different concepts, namely, ‘geographical area’ and ‘geographical origin’. The court also took into account the numerous other registrations already made by several parties for names such as *Pruneaux d’Agen*, *Agneau de Pauillac* etc., where the specifications of geographical area extended beyond the regions concerned. Accordingly, the court rejected the claim of Northern Foods and held that the

“defined geographical area” for the purposes of Article 2(2)(b) and 4.2 may be different from the “specific place” (or “region”) where the foodstuff originated and hence, DEFRA were correct in their interpretation of Article 2 and justified in forwarding the application to the Commission.

Interestingly, Northern Foods’ arguments in the matter were confined only to one of the grounds of objection (relating to compliance with the specification of the product in question which includes even the geographical area) to an application for registration under the Regulation provided under Article 7.4 therein. They never raised arguments based on the remaining two grounds namely:

- Registration of the name proposed would jeopardize existence of products that have been legally on the market for at least five years preceding the date of the application; and
- That the name has become generic

Arguments based on these two grounds would have been more convincing in the circumstances of the case to avail a relief at least in equity. Reports indicate that Northern Foods’ petition seeking leave to appeal the decision of the High Court was rejected on January 26, 2006.²

Concept of geographical indications and their protection

The respective stands of Northern Foods and MMPPA as to the status of Melton Mowbray Pork Pie as a geographical indication were contradictory to each other. While one argued that it is indeed a geographical indication, the other disputed this claim. That takes us to the question as to what is a geographical indication and how it should be protected.

Protection of geographical indications in a formal way is a relatively new phenomenon for many developing countries including India. The compulsion to formally protect

geographical indications arose out of the obligations under the Agreement on Trade Related Aspects of Intellectual Property (TRIPS), which mandates that member states of the World Trade Organization must provide legal means of protection for geographical indications. However, geographical indications as a concept existed even in the 1800s and were recognized in various international agreements such as the Paris Convention and the Lisbon Agreement, albeit the scope of protection offered by these agreements was limited compared to that under TRIPS. Among others, the protection of a geographical indication has two main objectives, namely, to preserve the collective rights of all the legitimate users of the product and to protect the consuming public from being deceived into buying false products.

Unlike trademarks that may be created and adopted overnight, geographical indications are recognized over a period of time. In other words, while the birth of a trademark may be instant sans any public perception or recognition, geographical indications are conceived by public perception and recognition of these names as those associated with the respective products originating in the relevant geographical area and possessing certain characteristics, qualities or reputation essentially attributable to that geographical area. Hence, public perception has to precede a geographical indication well in advance for it to be recognized as such.

Generating and establishing such public perception cannot be possibly achieved in a short span of time and is usually a slow process. Such public perception must be so strong that upon hearing the name, an instant association with the product and its qualities, characteristics or reputation is made by members of the public. For instance, Champagne today is one of the most well-known geographical indications. Although a consumer may not know all of the qualities of Champagne or the exact origin of the famous wine, she will certainly know that it is a unique and expensive wine from France having a certain taste and fineness that other wines do not possess. The day such a public perception about the uniqueness of the product and its geographical origin is formed is the day when the geographical indication is truly born.

The right to use the geographical indication vests with all the legitimate producers in the geographical area. Legitimate producers are those producers who have been producing these products possessing certain unique qualities, characteristics or reputation over a period of time. The uniqueness of the product, which makes it a premium product, therefore, requires to be protected, because if the uniqueness is diminished or deteriorated or destroyed, the consuming public will no longer perceive the product to be associated with that specific geographical region and having these unique features. In due course it will degenerate into a generic name for the product concerned. Consequently, the product will no longer fetch a premium in the market.

How can the uniqueness in a geographical indication be preserved so that the geographical indication does not become a generic expression?

There are two important steps in achieving this. The first step towards this is to identify what makes the product unique. It could be various factors such as the raw materials used, the production methods employed, the particular time or season in which the good is harvested, produced or manufactured, a reputation of the skills employed in the production or a combination of all or any of these and other factors. Once identified, all the producers in the geographical area must reach a consensus to protect and preserve these factors that make the product unique and follow them diligently and consistently. In particular, there must be a consensus to follow uniform practices as far as these factors are concerned. This will ensure that the end product consistently possesses the characteristics, quality or reputation the consumer is looking for, irrespective of which producer it comes from.

In the initial stages of evolution of a potential geographical indication product, it would be easy to follow these practices owing to lesser number of producers. However, as the product gains a reputation and gradually starts moving into the domain of geographical indications, the number of producers also multiplies due to increasing demand for the product. This is the point when it becomes imperative for all the producers to get together and lay down the rules of production lest there will soon be producers who would want to

cash in on the evolving reputation in the product and enhance the profits by experimenting with cost effective and faster production methods thereby diminishing the features of uniqueness that the public associates with the product. . If, therefore, uniform practices are not followed, the quality of the final product will vary from producer to producer. Consequently, over a period of time, the consuming public ceases to identify the product with the characteristics, quality or reputation as well as the geographical origin and the product will be pushed out of the domain of geographical indications into the generic domain.

The second step to preserve the uniqueness of a geographical indication is to constitute an inspection body which will ensure that the product that is released into the market as a geographical indication has indeed been produced or manufactured following the uniform practices that all producers have agreed to. The inspection body so constituted is bound to carry out periodic market checks to ensure that the legitimate producers are indeed complying with the laid down set of practices to preserve the features of uniqueness of the product.

If these two steps are not followed as a precursor to protection of any geographical indication, the objectives of protection of geographical indications as mentioned before would be rendered meaningless. In other words, any attempts to protect a geographical indication without complying with these two steps would tantamount to placing the cart before the horse. Consequently, the claim of uniqueness about the product will turn out to be artificial and the consuming public will be deceived into buying what they believe to possess certain unique properties. Gradually, the geographical indication will move to the generic domain.

Economic implications of the protection of geographical indications

Geographical indications and trademarks are vectors of national identities. For instance, the name Scotland is evocative of Scotch Whisky, Switzerland is reminiscent of Swiss chocolates, Swiss knives and Swiss cheeses, Japan brings to your mind Sony branded

electronic goods, Sri Lanka might remind you of teas, China might remind you of silks, Russia of Vodka etc. Protection and proper use enhances this sort of public perception and ensures that the product remains in the domain of geographical indications or trademarks as the case may be. However, if not properly protected, both geographical indications and trademarks can become generic terms that are not associated by the public with the specific place or source as the case may be.

An example of protection of a geographical indication from a developing country is that of “Colombian Coffee”.³ Colombian coffee is one of the best and sought after coffees in the world. The producers of Colombian coffee had the clairvoyance to protect the quality of the coffee and preserve the goodwill in the name way back in 1927 when they formed the *National Federation of Coffee Growers of Colombia* (FNC). FNC has as its objectives, inter alia, promotion of Colombian Coffee to the world, development of agronomic expertise and improving the living conditions of the growers. Quality control of the product is observed at various stages including growing of the coffee plant, harvesting of the coffee beans, processing of the coffee beans and packaging of the coffee beans for export or consumption. The FNC insists on consistent high quality of the coffee as a vital element in order to maintain the worldwide popularity of Colombian coffee. It uses all available means of modern marketing and advertising to promote Colombian coffee around the world. Colombian coffee is marketed around the world using the Juan Valdez logo, the right to use of which is obtained only after the FNC is convinced that the product meets some minimum standards. The logo is licensed to be used only on whole bean or ground roast 100% Colombian coffee, caffeinated or decaffeinated without flavor enhancers. In short, FNC ensures that by protecting Colombian coffee, two main objectives are achieved, namely, securing the collective rights of the coffee growers in Colombia in the name “Colombian Coffee” and preventing the consumers from getting deceived into buying low quality coffee.

The story of protection of Colombian coffee is truly inspiring for developing countries like India where many a geographical indication exists owing to the cultural and social diversity. Absent proper and diligent protection, a lot is at stake for these geographical

indications. Oftentimes, due to lack of awareness and protection, geographical indications pass into the public domain thereby either rendering the process of protection meaningless or making it impossible to protect the name as a geographical indication.

Many of these geographical indications survived without statutory protection in the absence of any international mandate for protection till 1995. However, after the Geographical indications (Protection and Registration) of Goods, Act, 1999 came into effect on September 15, 2003, the Government of India through its various agencies and Registry of Geographical indications, have been spreading awareness about geographical indications and encouraging the right holders to come forward and register these names. All these factors have led to several applications being filed for varied products from all over India. A few examples of registered geographical indications in India today are Darjeeling tea, Chanderi Saris, Mysore silk, Aranmula mirror etc.

In the light of the above, let us examine what lessons Indian right holders can take from the Melton Mowbray case and the order of the High Court of UK therein.

Lessons for India

Geographical indications, if properly identified and protected, are capable of contributing to a significant portion of revenue for a developing country like India. And yet this fact remains highly understated. India's rich culture and tradition have given birth to many a geographical indication, be it a product of handicraft or agriculture or culinary skills. For a country whose history goes back to over several thousands of years, it is impossible not to have products that are unique to specific regions. However, the downside of this is that some of these products, owing to their sheer fame, ceased to be produced in the specific regions alone and are being produced all over the country by traders who want to make a quick buck. Attempting to bring these products back to the domain of geographical indications may raise two issues.

The first issue pertains to displacing the rights of all those users outside the region who have been using the name for marketing their products legitimately for many years. In law or equity, can they be now asked to stop using the name on the ground that there is a law for protection of geographical indications and, therefore, the name has to be registered? What about their prior rights established through use of the mark prior to the law came into force? Aren't the proposed applicants guilty of delay in initiating action against these users?

The second issue is that of public perception of the name as a geographical indication. In the situation at hand, public perception of the concerned product as a geographical indication has already waned off and we are looking at a product which is identified by the public to possess certain features and made anywhere in India. As a hypothesis, let's say there is a place X in India which used to originally manufacture a certain type of leather footwear having a certain appearance. Owing to its popularity, many traders started making look-alikes of the said footwear outside X over the last 25 years and, therefore, today it is no longer exclusively associated by the members of public with its original place of origin, i.e., X. To the average member of public, it is simply a type of footwear made in leather and having a certain appearance although historically it originated from X. Any registration now will create an artificial aura of uniqueness and geographical origin around the name since the name no longer meets the parameters of a geographical indication in reality. For a country as vast as India, it would be a Herculean task to bring it back into the domain of geographical indications by first creating a public perception and then displacing other right holders to claim exclusivity associated with the original area. While it may be possible to do it, it is certainly not advisable in law or equity to do so.

That brings us to the issue of how to deal with situations like the one in the hypothetical example as above. Now that it is possible to register product names as geographical indications per se in India, can we register any name as a geographical indication? The following are some aspects to be considered by aspiring applicants when they consider registering names as geographical indication.

- Objectively examine if the name that is proposed to be registered as a geographical indication is worthy of it. In other words, does the product have unique characteristics, quality or a reputation associated with that geographical area? Is the geographical area in question the only area where the product is produced or are there third parties outside the region who are involved in the production of similar products using the same name? If so, how long have they been using the name? Have there been any attempts by the producers in the region to stop these outsiders from using the name on their similar or identical products? To put it differently, if the producers in the area are seeking to create an artificial definition for the name by disregarding other users outside the area, whose use they never objected to, it may not be a wise idea to proceed with the application.
- Once it is ascertained that the producers in the region are the only ones involved the use of the name and that they have always asserted their right to the use of the name against third parties outside the region, the next aspect to be looked into is to form an association of producers of the product. Under the Indian geographical indication law, it is possible to register a geographical indication only through an association of persons or producers of the product in question. To protect their collective right in the use of the name, it is important that there is consensus on what is to be protected. Hence, while finalizing the specifications for the product, there has to be consultation with all the interested parties lest after registration each one is following a different procedure or process resulting in products having inconsistent quality. In the event there are several processes followed in the production, a balanced approach has to be adopted where the specifications are broad and yet there is no compromise on the final quality of the product the consumer is looking for. In other words, the producers must strive to be consistent in the processes of production since this renders the uniqueness associated with the product in question.

- One of the aspects of specifications is the geographical area. It may be possible that over the years the production has spilled over to adjoining areas. In a situation like this whether to exclude these areas from the specification depends on two aspects. First, whether the producers in this area are producing the same using identical production methods as those in the original area, thereby resulting in identical quality products. In the case of agricultural products, it is also important to examine whether the agro-climatic factors contribute to the uniqueness of the product and if so, whether these regions possess these agro-climatic factors. The second aspect is whether these adjoining areas are contiguous to the original area of production.
- Once the specification and geographical area are agreed to, form rules and regulations of production. Such rules and regulations must be directed towards preserving the unique features of the product that makes it a geographical indication. This would include, inter alia, adhering to a uniform method of production and limiting the geographical area.
- Form an inspection body which will be entrusted with the task of quality control of the product on which the geographical indication is used. The inspection body must ensure to conduct periodical market checks to see that the final product that reaches the market has complied with all the specifications of production.
- Resist the temptation to mechanize the production if it affects the final quality and features of uniqueness associated with the geographical indication. In fact, the charm of many a geographical indication is that it is untouched by mechanization and has a rural and indigenous touch to it.
- Resist the temptation to adopt recent fashion trends if it jeopardizes the unique features associated with the product by the purchasing public.

The above points would ensure to a large extent that the objectives of protection of geographical indication are met with. It is important to bear in mind that not all products which have a geographical name associated with them are capable of registration as geographical indication. If that were so, *French Fries*, *Patiala salwar* and *Shimla Mirch* would be registered as geographical indications.

The judgment in the Melton Mowbray Pork Pie case, therefore, poses several germane issues like the ones discussed above in the process of protection of geographical indications to a country like India. While it is patriotic and politically correct to get emotional about our cultural heritage, it is also time to do an objective and dispassionate soul searching to see if we are on the right track in suggesting that everything under the sun should be protected as intellectual property. Cultural heritage and traditional knowledge must be protected, but not at the cost of displacing existing right holders and creating artificial rights and thereby attempting to revive generic terms to geographical indications. Failure to appreciate this could eventually harm the process of protection of geographical indications in India which will be helpful neither for genuine right holders nor for the consumers.

© 2006, *Latha R Nair, New Delhi*

¹ Decided by the High Court of Justice Queen's Bench Division, Administrative court on December 21 2005. Neutral Citation Number [2005] EWHC 2971 (Admin), Case No. CO/3184/2005. Source <http://www.bailii.org/ew/cases/EWHC/Admin/2005/2971.html> (March 14, 2006)

² It is learnt that on January 26, 2006, the UK Court of Appeal denied Northern Foods the right to appeal against the decision. Source http://www.just-food.com/news_detail.asp?art=63204 (March 14, 2006)

³ The success story of Colombian coffee and the role of the National Federation of Coffee Growers is well documented on the website www.juanvaldez.com (March 14, 2006)