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Law of the land

The term “geographical indications”, in legal parlance, is used to refer to the mystical relation of certain products and their geographical origin. Examples of geographical indications (GIs) are Darjeeling Tea, Kancheevaram Sarees, Alphonso Mangoes, Champagne, Feni, Coorg coffee, Khadi etc. The legitimate right-holders of GIs are the producers, manufacturers, traders, exporters etc., who can use the GI in the course of trade without any license. GIs are, therefore, intellectual property rights owned by such users.

Often, GIs are confused with another intellectual property right, namely trademark. The essential function of a trademark, which is a perpetual, private, monopoly right of the proprietor, is to distinguish goods of one proprietor from another. A GI, being a collective right and indicative of certain qualities or characteristics of the products, cannot and should not be used or registered as a trademark because by doing so a trader is attempting to acquire private rights in the GI thereby violating the collective rights of the legitimate users of the GI. Unlike a trademark, a GI cannot be licensed. Right to use the GI is acquired automatically. Usually, a trademark and GI are used together on a product to indicate the trade source as well as the quality and reputation of the product. For e.g., “*Lal Quila* Basmati rice” - the italicized portion referring to the trademark and the remaining to the GI.

TRIPS Agreement, to which India is a signatory, warrants that members may enact legislation for protection of GIs. TRIPS warrants two levels of protection for GIs: first, a general level (Art.22), and second, a more specific level (Art.23) where additional protection is stipulated for GIs relating to wines and spirits.

Under the existing trademark law in India, there are two types of protection available to a GI, namely, protection as a Certification Trademark (which certifies that the goods conform to certain standards that are laid down and enforced by the owner of the mark), and protection through a passing off action where a legitimate owner of a GI can stop a defendant from making misrepresentations. In India, “Scotch whisky” is one oft-protected GI through passing off actions.

Ideally, any legislation to protect a GI should simply create a public register of defined characteristics of registered GIs, which will serve as a point of reference for determining whether or not a given product is genuinely entitled to the GI concerned without any formalities as to registration or licensing. Any kind of misuse or abuse of the same will be monitored by the collective body, responsible for the protection of the GI, which could be akin to a traders’ association.

The new GI law of India, namely, Geographical Indication of Goods (Registration and Protection) Act, 1999 is yet to be notified into effect. The Act, in essence, conforms to Articles 22 & 23 of TRIPS. However, it has certain appalling flaws. Foremost, that it has an excessive flavour of trademark law and suffers from conceptual clarity. Specific flaws are: the discrepancy in the definitions of “goods” and “geographical indication” where the latter does not reflect the full ambit of the definition of “goods”; no bar on subsequent applications for the same GI, causing multiple conflicting specifications of a GI besides causing administrative difficulties; impractical and impossible requirement that an application must mention particulars of the producers of the concerned goods; anomalous concept of an authorized user, interfering with the right of use of legitimate producers by subjecting them to a procedure for registration thereby defying the purpose of the law etc. The idiosyncrasies have crept into the Rules framed under the Act too. Sub clause (1) (6) (g) of Rule 32 which stipulates the contents of the application for registration of a GI has certain impossible requirements which makes one wonder whether the Act is more restrictive than liberal to rights holders.

Of the diverse agricultural, natural and manufactured products in various states of India, many are well-known GIs. To name a few, Paschmina shawls from J&K, Sambhalpuri cotton from Orissa, Pochampalli Silk from Andhra Pradesh, Coorg Coffee from Karnataka, Malabar pepper from Kerala etc. Despite the new law, is India any better off in protection of its GIs nationally? Devoid of an effective framework for national protection, how far can India claim protection of these GIs in foreign jurisdictions?

With a legislation that lacks teeth, it is imperative for the rights owners to consider some interim measures to protect their rights. To start with, recognize GI status of the product and create a body to preserve the GI as a GI. Such body should ensure to take action against anyone misusing or abusing the GI. Typically, using the GI as a generic word for the product and spelling the GI like a generic word (e.g., ‘darjeeling tea’ instead of ‘Darjeeling Tea’) are abuses. It is also imperative for such a body to create awareness and increase the visibility of the product as a GI through ad campaigns.

Traders, while making trademark applications in respect of a good which is GI should disclaim any exclusive rights in the GI. Further, while applying for registration of trademarks in respect of a good which is a GI, care must be taken to mention *only* the product concerning the GI in such application and not all the products in the relevant class. For instance, while applying to register a mark ‘X’, for “Basmati Rice” in class 30, the specification of goods should be “Basmati Rice” *only*.

With an ineffective legislation which dilutes the objective of protection of GIs, there is no denying that such interim measures would be the only consolation for GI owners. Till such time the new law takes effect, rights owners can protect GIs as certification trademarks. However, interestingly, both the trademark law and the GI law are silent about the feasibility or otherwise of a simultaneous protection of a GI as a certification trademark as well as a GI.

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