

The Protection of Traditional Cultural Expressions by Geographical Indications

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[to appear in I Stamatoudi, (ed) *Research Handbook on Intellectual Property and Cultural Heritage*, Cheltenham and Northampton MA, Edward Elgar, 2022]

Abstract

This chapter addresses the possibility of the protection of traditional cultural expressions (TCEs) by means of geographical indications (GIs) in the absence of an international *sui generis* instrument to protect TCEs. It commences with a consideration of the international debate around the protection and preservation of TCEs in the context of intellectual property (IP) and as a matter of intangible cultural heritage. This involves a consideration of the initiatives of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and of the World Intellectual Property Organization (WIPO). The chapter compares the definitions of TCEs and GIs to examine the extent to which GIs protection is suitable for the protection of GIs. The chapter concludes with a number of case studies of TCEs which are already protected by GIs, or which have the potential to be protected by them. The conclusion reached is that in the absence of international *sui generis* legislation to protect TCEs, it must the protection of GIs for the tangible manifestations of folklore is a second-best solution.

Introduction

Since 2001, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) of the World Intellectual Property Organization (WIPO) has been debating the protection of Traditional Cultural Expressions (TCEs). The latest version of draft articles for a TCEs treaty was presented to the 40th session of the IGC in Geneva, June 17 to 21, 2019 (WIPO, 2019). The last WIPO General Assembly, held September 30 to October 9, 2019, agreed to the renewal of the mandate of the IGC for the next budgetary biennium 2020/2021, to ‘continue to expedite its work, with the objective of finalizing an agreement on an international legal instrument...which will ensure the balanced and effective protection of ... traditional cultural expressions (TCEs)’.¹

The IGC’s work in the 2020/2021 biennium was described as building on ‘the existing work carried out by the Committee, including text-based negotiations, with a primary focus on narrowing existing gaps and reaching a common understanding on core issues.’² ‘Core issues’ were defined in the mandate to include, inter alia, ‘definitions, beneficiaries, subject matter, objectives, scope of protection, and what ...TCEs are entitled to protection at an international level, ... and considering options for a draft legal instrument’.³ These negotiations were scheduled for September 2020, but had to be postponed because of the COVID 19 pandemic. Further negotiations for a draft text are scheduled for March/April 2021 (IGC 45) and June/July 2021 (IGC 46) with a stocktaking of the progress of negotiations scheduled for the October 2021 meeting of the WIPO General Assembly.

¹ See https://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_mandate_2020-2021.pdf, accessed 1 January 2021.

² Ibid.

³ Ibid.

The failure, after 20 years of negotiations, to settle even the core issues for a draft text, suggests that a treaty to protect TCEs is likely to remain elusive. In the absence of a specific instrument dealing with TCEs resort is being increasingly made to other categories of intellectual property (IP) law, as a second-best approach to the protection of TCEs (see Blakeney, 2015). This chapter looks at the possibility of protecting TCEs through geographical indications (GIs) laws.

TCEs, IP or Cultural Heritage

The international debate around the protection and preservation of TCEs has sometimes been framed in the context of IP and sometimes as a matter of intangible cultural heritage. This oscillation between the two approaches can be seen in the deliberations of the United Nations Educational, Scientific and Cultural Organization (UNESCO). In November 1972, UNESCO adopted the Convention concerning the Protection of the World Cultural and Natural Heritage.⁴ This Convention addressed the protection of tangible material items, considered to possess outstanding value to human history, art, science, or aesthetics. The protection of intangible cultural heritage was proposed by the Government of Bolivia in April 1973 which suggested that a Protocol be added to the Universal Copyright Convention, administered by UNESCO, to protect the cultural patrimony of all nations.⁵ Henceforth UNESCO alternated between proposals for the protection of folklore as an aspect of IP or as a matter of intangible cultural heritage.

In 1975 UNESCO considered with WIPO the development of an international instrument for the protection of folklore, but this was considered to be unrealistic and that the issue ‘was of a cultural nature and, as such, was beyond the bounds of copyright’ (Sherkin, 1999). In May 1978, the Secretariats of UNESCO and WIPO agreed that UNESCO would examine the question of safeguarding folklore on an interdisciplinary basis and within the framework of a global

approach, while WIPO would focus on copyright aspects of folklore (Sherkin, 1999). In 1980 UNESCO and WIPO established a Working Group on the Intellectual Property Aspects of Folklore Protection. The work of this Committee resulted in Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions⁶ which was adopted by both organizations in 1985. After this date UNESCO has focused on the protection of folklore in the context of cultural heritage.

In 1989 the General Conference of UNESCO adopted a Recommendation on the Safeguarding of Traditional Culture and Folklore.⁷ The Recommendation defined ‘folklore (or traditional and popular culture)’ as the

... totality of tradition-based creations of a cultural community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.

The Recommendation called for Member States to identify, conserve, preserve, disseminate, and protect folklore, but was criticised for providing insufficient explanation on

⁴ 1037 UNTS 151, 11 ILM 1358 (1972).

⁵ Government of Bolivia, ‘Official request that a Protocol be added to the Universal Copyright Convention for the protection of folklore’, 24 April 1973, UNESCO doc. DG 01/1006-79.

⁶ Available at <https://www.wipo.int/edocs/lexdocs/laws/en/unesco/unesco001en.pdf>, accessed 1 January 2021.

⁷ Available at http://portal.unesco.org/en/ev.php-URL_ID=13141&URL_DO=DO_TOPIC&URL_SECTION=201.html, accessed 1 January 2021.

implementation (Simon, 1999). The 30th session of the UNESCO General Conference (November 1999) adopted a Resolution to prepare a preliminary study on the ‘advisability of regulating internationally, through a new standard-setting instrument, the protection of intangible cultural heritage.’⁸ Paralleling this development UNESCO was addressing the question of intangible cultural heritage in the context of cultural diversity, which in 2001 culminated in the UNESCO

Universal Declaration on Cultural Diversity⁹. Article 1 noted the diverse forms of culture ‘across time and space’ and observed that ‘as a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature.’ The next logical step was the 2003 UNESCO Convention on the Safeguarding of Intangible Cultural Heritage¹⁰ which entered into force in April 2006. The principal purposes of this Convention were identified in Art 1 as safeguarding and ensuring respect for intangible cultural heritage. For the purposes of this Convention Art 2.1 defined ‘intangible cultural heritage’ as

... the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.

It observed that this intangible cultural heritage, ‘transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity...’ Article 2.2 listed as ‘intangible cultural heritage’, as defined in paragraph 1:

- (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
- (b) performing arts;
- (c) social practices, rituals and festive events;
- (d) knowledge and practices concerning nature and the universe;
- (e) traditional craftsmanship.

The UNESCO Convention on the Safeguarding of Intangible Cultural Heritage followed the approach of the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions in requiring that national measures be taken. However, it should be noted that the UNESCO Convention is concerned with the skills and knowledge involved in craftsmanship rather than the craft products themselves (UNESCO, 2020). The latter are more suitably protected as TCEs and/or GIs.

UNESCO’s Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage has acknowledged that IP rights ‘ensure that the rights of the communities, groups or individuals that create, bear and transmit their intangible cultural heritage are duly protected from misappropriation or abuse of their knowledge and skills’ (ICSICH, 2015, para. 173).

Protection of TCEs as IP

IP rights are generally utilized to facilitate the protection and commercialization of creative works. However, in the field of TCEs, IP can be invoked to prevent others acquiring rights over TCEs, derivations and adaptations of TCEs and representations. This entails the use of

⁸ Resolution 25/B/III 1-1-2-(a)(iii) Records of the UNESCO General Conference, 30th session.

⁹ (2001) 41 ILM 57 (2 November 2001).

¹⁰ 2368 UNTS 1 (adopted on 17 October 2003).

defensive mechanisms to block or to pre-empt third parties' IP rights that are considered prejudicial to a traditional community's interests, and to the integrity of their cultural heritage and cultural expressions. Both defensive and positive protection strategies may be used in parallel by the one community, depending on their assessment of their overall objectives and interests. Defensive protection strategies include protection against:

- unauthorized commercial exploitation of TCEs;
- insulting, degrading or culturally offensive use of TCEs;
- false or misleading indications that there is a relationship with the communities in which the material has originated; and
- failure to acknowledge the source of material in an appropriate way

Existing IP rights which might be used for the defensive protection of TCEs are: the invocation of trademark laws to prevent the acquisition of trademark rights over indigenous or traditional symbols or to prevent the creation of misleading or deceptive links with a traditional community and the assertion of copyright or performers' rights in literary or artistic works that make illegitimate use of traditional cultural works or traditional performances (e.g., a sound recording that includes sampled performances of expressions of folklore).

A positive IP protection strategy may be based on obtaining and asserting rights in the TCEs, compared with a defensive protection strategy which is aimed at preventing others from gaining or maintaining adverse IP rights. Both strategies are typically used in conjunction, in a coordinated manner, and usually a range of positive and defensive forms of protection may be applicable to the interests of any group of TCE holders.

The main disadvantages of traditional categories of IP in protecting TCEs are the requirements of authorship, specific ownership and limited duration of rights (see Blakeney, 2006). As will be seen below, these particular disadvantages are not shared by GIs.

International Negotiations on the Protection of TCEs as IP

The first international consideration of the protection of TCEs occurred in a joint UNESCO/WIPO World Forum on the Protection of Folklore that was convened in Phuket in April 1997. At that meeting the representatives of organisations of Indigenous and Aboriginal peoples called for the promulgation of an international convention to protect TCEs as well as traditional knowledge (TK). At the WIPO General Assembly in 2000 the Member States agreed the establishment of the IGC. Three interrelated themes were identified to inform the deliberations of the Committee:

intellectual property issues that arise in the context of (i) access to genetic resources and benefit sharing; (ii) protection of TK, whether or not associated with those resources; and (iii) the protection of expressions of folklore (WIPO, 2000). In August 2004 the IGC began to consider the 'objectives' and 'principles' that should underpin texts for the protection of TK and TCEs. This legislative task has continued through all the 46 sessions of the IGC to 2021.

Concern has been expressed with the slow pace in formulating an international instrument dealing with TCEs and TK. The African group of countries at WIPO were in the forefront of agitation there to accelerate the international negotiations (see Blakeney, 2016). However, a true reflection of their appreciation of the realistic likelihood of action was the promulgation of a Protocol on the Protection of Traditional Knowledge and Expressions of Folklore by a diplomatic conference in Swakopmund, Namibia, on 9-10 August 2010 organized by the African Regional Intellectual Property Organization (ARIPO). The Protocol, which entered into force on 11 May 2015, will enable local communities in ARIPO Member States¹¹ to

¹¹ Currently, Botswana, the Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Sierra Leone, Somalia, Sudan, Swaziland, São Tomé and Príncipe, Tanzania, Uganda, Zambia and Zimbabwe.

register trans-boundary expressions of folklore at ARIPO, as well as recording expressions of folklore in their territories.¹² The knowledge holders and local communities in the Member States will be able to use the alternative dispute settlement procedures at ARIPO to settle disputes arising from expressions of folklore shared by different communities across national boundaries as the need arise.

The Swakopmund Protocol was the direct inspiration for the Framework Treaty on the Protection of Traditional Knowledge and Expressions of Culture adopted by the Melanesian Spearhead Group (MSG) of countries (Fiji, Papua New Guinea, Solomon Islands, Vanuatu) on 2 September 2011. The treaty established a framework for the reciprocal protection of TK and expressions of folklore by MSG members (see Blakeney, 2011).

The countries of the Caribbean are also discussing a Regional Framework for the Protection of Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources.¹³

TCEs Defined

A 2002 paper prepared for the fourth session of the IGC pointed out that in discussions in various intergovernmental, regional and national and nongovernmental fora, the meaning and scope of the term ‘traditional cultural expressions’ referred “to more or less the same subject matter such as “expressions of folklore” ... and “intangible and tangible cultural heritage”.’ (WIPO, 2002, para 21).¹⁴ In analysing the nature of TCEs ‘relevant to questions of IP protection’ it was pointed out that expressions of traditional culture ‘may be either intangible, tangible or a combination of the two, but that “the underlying traditional culture or folkloric knowledge from which the expression is derived is generally intangible. For example, a painting may depict an old myth or legend – the myth and legend are part of the underlying intangible ‘folklore’, as are the knowledge and skill used to produce the painting, while the painting itself is a tangible expression of that folklore (WIPO, 2002, para 21).

The 2002 paper referred to the WIPO/UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Forms of Prejudicial Action, 1982 which distinguished between intangible and tangible expressions of folklore. This distinction was adopted by the IGC in its eighth session in draft provisions embodying policy objectives and core principles for the protection of TCEs (WIPO, 2005). Proposed Art 1 of the draft text provided:

(a) “Traditional cultural expressions” or “expressions of folklore” are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:

...

tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms which are:

(aa) the products of creative intellectual activity, including individual and communal creativity;

(bb) characteristic of a community’s cultural and social identity and cultural heritage; and

¹² See <https://www.aripo.org/entry-into-force-of-the-aripo-swakopmund-protocol-on-the-protection-of-traditional-knowledge-and-expressions-of-folklore/>, accessed 1 January 2021.

¹³ See <https://sustainabledevelopment.un.org/partnership/?p=7663>, accessed 1 January 2021.

¹⁴

(cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.

This list of tangible expressions is relevant to the consideration of whether TCEs are protectable as GIs. The definition of TCEs has undergone a number of changes over the years in the various IGC drafts of the text of an IGC treaty. The latest definition prepared for the 40th session of the IGC, held in June 2019, defined TCEs in Article 1 as

any forms in which traditional culture practices and knowledge are expressed, [appear or are manifested] [the result of intellectual activity, experiences, or insights] by indigenous [peoples], local communities and/or [other beneficiaries] in or from a traditional context, and may be dynamic and evolving and comprise verbal forms¹⁵, musical forms¹⁶, expressions by movement¹⁷, tangible¹⁸ or intangible forms of expression, or combinations thereof (WIPO, 2019).

The square brackets indicate a failure to agree by negotiators on the bracketed terms. Footnote 4, which refers to tangible expressions, provides in square brackets '[Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.]'.

In the absence of a consensus in the IGC negotiations, it is useful to consider whether these tangible examples of TCEs are protectable as GIs.

GIs

GIs are defined in Article 22.1 of the TRIPS Agreement as 'indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin'. The TRIPS Agreement gives no guidance on what factors are taken into account in assessing what is 'essentially attributable'. Some guidance may be taken from the Lisbon Agreement on Appellations of Origin and Geographical Indications, 1958 (revised in 2015). It defines GI in Article 2 as any consisting of or containing the name of a geographical area 'which serves to designate a good as originating in that geographical area, where the quality or characteristics of the good are due exclusively or essentially to the geographical environment, including natural and human factors, and which has given the good its reputation'. The key words in this definition are 'human factors', which are also relevant to the definition of TCEs, which refer, inter alia, to tangible forms (ie human creations) in which traditional culture and knowledge are expressed.

Handicrafts may qualify as goods protectable by GIs if they are culturally associated with particular localities. For example, where the traditional methods of fashioning them remain the most substantial component of the finished product (Gangjee, D.S., 2002; Zografos, 2010, p.165), also the raw materials are associated with the local source (eg Basole, 2015).

¹⁵ [Such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.]

¹⁶ [Such as songs, rhythms, and instrumental music, the songs which are the expression of rituals.]

¹⁷ [Such as dance, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports/sports and traditional games, puppet performances, and other performances, whether fixed or unfixed.]

¹⁸ [Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.]

The obligation of countries to protect geographical indications is contained in Article 22.2 of the World Trade Organization (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights ('TRIPS'). This provision requires WTO Members to provide the legal means for interested parties to prevent:

- (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;
- (b) any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967).

The TRIPS Agreement does not prescribe how countries might legislate to prevent the misuse of GIs. Giovannucci et al (2010) explain that 111 countries have enacted *sui generis* legislation to protect GIs as a distinct IP category while 56 countries rely upon the protection of GIs through trademark laws. *Sui generis* protection is that specially enacted to deal with this particular category of intellectual property ('IP') right.

Sui generis protection of GIs originated in Europe to protect foodstuffs, wines and spirits (see Blakeney, 2019). This generally involves only collective applications by producers for GI protection, through a system requiring written product specifications are required, containing a definition of the geographical boundaries delineating where the GI production is recognized, a justification of the linkage between the territory and the quality of the GI product, the characteristics of both the production process and the quality of raw materials, and the definition of the final product.

However, it should be noted that while natural factors, such as the climate, geological factors, raw materials and environmental factors, can influence the quality and characteristics for some handicraft products, their human factors such as know-how, skills and production methods can also be territorially linked (see Marie-Vivien, 2013 and 2017; Covarrubia, 2019).

To some extent, the EU has recognised the human content of traditional products by providing for the protection its Regulation 1151/2012 on quality schemes for agricultural products and foodstuffs of Traditional Specialities Guaranteed.¹⁹ This is not a geographical indication, but was designed, according to Art.17 of the Regulation 'to safeguard traditional methods of production and recipes by helping producers of traditional product in marketing and communicating the value-adding attributes of their traditional recipes and products to consumers' (see Tosato, 2013). Article 18 requires 'traditionally used names which describe a specific product or foodstuff that: results from a mode of production, processing or composition corresponding to traditional practice for that product or foodstuff produced from raw materials or ingredients that are traditionally used.' 'Traditional' is defined as proven usage on the domestic market for a period that allows transmission between generations which must be at least 30 years.²⁰

Examples of registered TSGs may involve geographical as well as cultural elements (see Weichselbaum, et al, 2008). For example, the registration, by Poland of the meads, póltorak, dwójniak, trójniak and czwórniak²¹ reference the products in the travel diary of the Spanish diplomat, Abraham Ibn Jacob, written in 966. However, where there is an obvious geographical origin, EU applicants seem to prefer the registration of their products as GIs rather than as TSGs (Deacon, 2018).

¹⁹ OJ L 343, 14.12.2012, p. 1–29

²⁰ Ibid Art. 3(3).

²¹ Registered by Regulation 729/ 2008.

Although the EC has legislated to protect GIs in relation to foodstuffs, wines and spirits, it is currently contemplating legislation to protect GIs in relation to handicrafts, which because of the requirement of a connection to a geographical area, will inevitably cover examples of TCEs. On 15 July 2014 the European Parliament issued a Green Paper as an aid to consultation on whether there is a need, in the EU, to increase GI protection for non-agricultural products, and if so, what approach should be taken (EC, 2014, p.5). On 6 October 2015 the European Parliament passed a resolution in support of the establishment of ‘a protection instrument

... at European level, as part of a broader strategy for promoting high-quality EU products, based on a stronger commitment from the EU institutions to treat manufacturing and craft industries as a driving force for growth and the completion of the single market, thus enhancing the prestige of locally based manufacturing and handicraft production, supporting local economic development and employment in the areas concerned, boosting tourism, and strengthening consumer confidence.²²

The resolution called on the Commission ‘to propose without delay a legislative proposal with the aim of establishing a single European system of protection of geographical indications for non-agricultural products’ taking account of ‘the effects of the new system on producers, their competitors, consumers and Member States’. In February 2020, the EC published a study on the economic aspects of GI protection for non-agricultural products in the EU which evaluated a list of 322 geographically rooted products originating in the EU that could qualify for sui generis GIs protection (Klebba, et al, 2020).

It should be noted that outside the EU a number of countries have enthusiastically embraced the possibility of registering handicrafts and agricultural products as GIs. Thus, in India, between April 2004, when the Geographical Indications of Goods (Registration and Protection) Act 1999 came into force in April 2020 some 350 GIs were registered for agricultural products and handicrafts.²³

GIs and TCEs

In 2008, the IGC commissioned a gap analysis on the protection of TCEs which was designed to describe, inter alia, what obligations, provisions and possibilities already exist at the international level to provide protection for TCEs and identifying gaps in coverage. This analysis was updated in 2018 (WIPO, 2018). The gap analysis referred to the fact that GIs could protect some TCEs, ‘such as handicrafts made using natural resources’ and ‘some TCEs may themselves be geographical indications, such as indigenous and traditional names, signs and other indications’ (WIPO, 2018, p.31).

As Gangjee (2012) points out the cultural aspects of GIs commence when producer groups begin to collectively engage with the process of drafting a product specification as this strengthens social linkages between local actors and can increase self-esteem as their identity and related way of life is recognised and valorised. It has also been pointed out that the content of a GI specification can ‘also help protecting important elements of local cultural heritage, for instance traditional production methods and recipes, endangered animal breeds, or indigenous vegetables’ (Gangjee, 2012 quoting London Economics, 2008). Origin products protected by GIs can act as the focal points for traditional events such as carnivals and fairs which are used to promote a region’s cultural identity. A majority of respondents to the consultation conducted by the EC on whether to extend GIs protection to non-agricultural products agreed that such

²² 2015/2053(INI) at cl.2.

²³ See http://www.ipindia.nic.in/writereaddata/Portal/Images/pdf/GI_Application_Register_10-09-2019.pdf, accessed 1 January 2021.

protection would help preserve products' traditional cultural and artistic heritage (EC, 2014, p.15).

However, although GIs have been identified as 'poor people's intellectual property rights', particularly in the context of the protection of TK (Sunder, 2007, p. 114), a number of scholars have suggested GIs as a means of providing the protection for indigenous knowledge and TCEs in the absence of sui generis regimes to protect those categories (Cottier, and Panizzon, 2004; Kallinikou, 2005; Gopalakrishnan et al., 2007; Blakeney, 2009; Zografos, 2010; Martens, 2012; Ogwezzy, 2012). At the same time it must also be acknowledged that GIs in the context of an IP framework might not be the best way of preserving cultural heritage, because of questions about ownership of traditional creations, collective rights of traditional communities in protecting the creations associated with them, the duration of protection and the enforcement of the rights of a community in relation to its creations (see Blakeney, 2013). On the other hand, the trade in traditional handicrafts are the means of livelihood for a number of communities (Deepak, 2008; Marie-Vivien, 2017). In the absence of an international legal regime to protect these creations, this trade is vulnerable to competition from cheap imitations being marketed by producers in other countries.

To take one example: Kente cloth from the Ashanti region of West Africa dates back to the 17th Century (Ross and Adu-Agyem 2008). It has been described as a visual representation of the history, philosophy, ethics, oral literature, religious belief, social values and political thought of the Ashanti communities. The Ghanaian Kente industry employed 30,000 workers in the 1990s, but that figure has dropped to 3000 today because of competition from cheap Chinese imports (Yeebo, 2015). Current IP law in general and copyright law in particular are not considered to be of much assistance in dealing with this problem (Boateng, 2011).

GIs provide an opportunity to eliminate fake or counterfeit cultural artworks from global markets (Chinedu et al., 2017, p. 80) and to prevent the adulteration and demeaning use of TCEs, such as on tea towels and other mundane items.

Examples of GIs protecting TCEs

The possibility of GIs protecting TCEs has already been foreshadowed in a consolidated analysis of the legal protection of TCEs which was prepared for the 5th session of the IGC (WIPO, 2003). It contained numerous examples of registered GIs which could be considered as already protecting GIs. Portugal had referred to the wines of Porto, Madeira, Redondo, Dão; the cheeses of Serpa, Azeitão, S. Jorge, Serra da Estrela, Nisa; Madeira embroidery; and, honey of Alentejo, Açores (WIPO, 2003, para. 170(a)). Mexico had referred to the appellation of origin OLINALÁ which related to wooden articles made in the municipality of Olinalá in the state of Guerrero, using Mexican lacquers comprising natural raw materials, producing 'clearly an example of the connection between the environment and culture, which makes it eligible for the appellation' (WIPO, 2003, para. 170(b)). Another Mexican handicraft which could have been referred to is Talavera, the brightly coloured glazed ceramic earthenware manufactured using raw materials from the zone of Talavera de Puebla, Mexico (Cisneros, 2001, p.3).

In the consolidated analysis, Mexico also provided the example of Tequila, protected as an appellation of origin in that country, being a spirit produced in various regions of Mexico derived from the heart the blue agave plant (WIPO, 2003, para. 170(b)). The geographical origin of the name may be questioned as production takes place in a number of municipalities in the states of Jalisco, Nayarit, Tamaulipas, Guanajuato and Michoacán. But it was pointed out that the making of tequila involves knowledge that is traditional in the region and dates back to the middle of the sixteenth century.

The Russian Federation provided the examples of: Velikiy-Ustyug niello, Gorodets painting, Rostov enamel, Kargopol clay toy, and a Filimonov toy protected as appellations of origin.

WIPO in 'Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities' provided the Ecuadorian example of the Montecristi straw hat, made in the town of Montecristi in Manabi province, Ecuador, by expert weavers, and dating back to the 16th century (WIPO, 2017, p.49). The Montecristi straw hat was the first registered GI in Ecuador on 22 August 2008, the industrial property office (JEIP) having ruled that human and natural factors had created a superior material and process for hat making unique to the area surrounding Montecristi (Russell, 2010). It was urged that 'if the international community does not support the older generation of Montecristi hatmakers and commit to preserving the art form, either through IP regulation or other channels, a distinct part of Ecuadorian culture will be lost forever' (Russell, 2010, p.711).

Among the 210 GIs for handicrafts registered in India²⁴ are Banarasi Saris and Brocades, registered in 2009 for hand-woven silk fabrics with brocade embroidery and depicting designs of the city of Varanasi, which is situated on the banks of the river Ganges in the eastern part of the state of Uttar Pradesh in north India (Basole, 2015, p.135). Similar GI registrations have been obtained in India for Kancheepuram silk sarees which can be traced back more than 400 years and Pochampally Sarees, woven according to traditional methods in Andhra Pradesh in India (Gopalakrishnan, et al, 2007, 38-39). In addition to these cloths, GI registrations have been granted in India for the handlooms on which they are woven. For example, a GI has been granted for the 'Balaramapuram Handlooms' connected with the former Travancore royal family, manufactured in the Thiruvananthapuram District of State of Kerala from the period of king Balaramavarma 250 years ago (Gopalakrishnan, et al, 2007, 41). 'Aranmula Kannadi' has been registered as a GI by the Parthasarathy HandiCraft Centre of Kerala. This is a copper and tin mirror, which has been manufactured in the Pathanamthitta District of Kerala by a few traditional families for more than 500 years, according to a secret recipe developed for the Maharaja of Travancore (Gopalakrishnan, et al, 2007, 33-34).

Other Indian examples of traditional handicrafts which have been registered as GIs are: Kullu shawls, Bhagalpur silk, Madhubani painting and the handmade carpets of Bhadoi (Kumar and Srivastava, 2017, pp. 43-45).

Other traditional handicrafts which have been suggested for GIs protection include: 'Jamdani' and curd cheese from Northeastern Brazil. Jamdani is a distinctive type of Bangladeshi cloth with a traditional weaving style and cultural elements resulting from the contribution of skilled artisans, utilising local cotton (Karim and Karim, 2017). It should be noted that UNESCO has recognized 'Jamdani handicraft' as the 'sole tradition' and 'intangible cultural heritage' of Bangladesh (Karim and Karim, 2017, p.69). Curd cheese has been produced in the Northeast region of Brazil, for 150 years and is considered a part of the cultural heritage of the region, being described as identity food (Almeida, et al., 2016).

In Nigeria, GIs protection has been proposed for traditional foods and beverages such as ofada rice, palm wine, Kilishi, cocoa/coffee beans and cassava products, such as 'Garri', textiles such as adire and ofi and artworks from the Benin, Igbo and Yoruba communities (Adewopo, 2006; Lawal-Arowolo, 2019).

Conclusion

Traditional handicrafts have been identified as a repository of the cultural heritage of a nation, reflecting the identity of its people and therefore deserving of international protection (Lenzerine, 2011), but it has been questioned whether GIs protection is appropriate for this purpose. From a cultural perspective there may well be a tension between the commercial

²⁴ See http://www.ipindia.nic.in/writereaddata/Portal/Images/pdf/GI_Application_Register_10-09-2019.pdf, accessed 1 January 2021.

objectives of GIs, which are to promote the merchandising and consumption of goods, compared with TCEs which are the repositories of traditional cultures, sometimes with sacred sensitivities (Broude, 2005; Drahos, 2011).

Voon concludes that the culture argument adds little to the basis for GI protection and “the cultural justification for GI protection is largely subsumed within the broader purposes of preventing unfair competition and consumer confusion”.

Of course, it should be noted that not all TCEs can be protected by GIs. This protection can only extend to tangible TCEs, such as traditional handicrafts. In this regard (Gangjee, 2012, p.93) suggests that ‘they are essentially a guest at someone else’s party’.

An important difference between laws protecting TCEs and those protecting GIs is that different stakeholders are involved. In the case of TCEs, the primary beneficiaries are the traditional communities and peoples for whom the tangible expressions have cultural significance. In relation to GIs, the stakeholders include not only the originators and custodians of the TCEs, but also the traders, dealers and governmental agencies which are permitted to act as the proprietors of the GIs. These stakeholders have different objectives. In relation to GIs the objectives are protection and exploitation, which might not always be shared by traditional communities. In relation to TCEs the objectives include preservation and conservation.

In protecting the local *terroir* GIs not only protect TCEs, but provide a useful corrective to the uniformity of globalization (Broude, 2005; Sanders, 2010), however, a danger which has been identified with the protection of TCEs by GIs is their over-commercialisation (Ubertazzi, 2017, p.567; Calboli, 2015)

In the absence of international *sui generis* legislation to protect TCEs, it must be concluded that the protection of GIs for the tangible manifestations of folklore is a second-best solution.

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