

OPINION



Code of silence

Michael Edenborough QC argues that proposals to extend the GI system to non-agricultural products has the potential to stifle competition

GEOGRAPHICAL INDICATIONS (GIs) are highly contentious, and they are about to become even more so, because of the proposed extension from food-related products to non-agricultural products. In order to place this proposal in context, it is necessary to examine the current scheme, and where it fits into the wider issue of intellectual property rights (IPRs) as a whole.

IPRs are a matter of public policy; they attempt to balance the rights of individuals against those of society as a whole. The core rights are copyright, patents and trade marks, which, between them, protect the creative, innovative and commercial integrity of entities, be they natural or corporate. Over the years, additional rights have come into existence that extend the scope of IPRs. In all cases, the right allows a rights-holder to stop some activity being done by another party, and in so doing fetters the freedom of that other party. Commonly, commercial activities are restricted, impinging adversely upon free trade.

DUAL DEVELOPMENT

GIs are the result of two strands of development. First, there are such rights as collective and certification trade marks, whereby a group of traders could form a cooperative, and each member could use the collective mark, or a trade society could certify products as satisfying a certain standard; anyone who complied with that standard could then use the certification mark. As an alternative to registered trade marks, common-law jurisdictions commonly provide that the tort of passing off may confer protection from imitators in suitable cases. Secondly, the *appellation d'origine contrôlée* system relates a specific product to a particular *terroir*. The combination of rights akin to trade marks and the link to the *terroir* resulted in the present-

day GIs for certain agricultural products and their derivatives.

At the European level, GIs are now regulated by Regulation (EU) No 1151/2012. The principal forms of protection are the Protected Designations of Origin (PDOs), Protected Geographical Indications (PGIs) and Traditional Specialities Guaranteed (TSGs). The reputed quality of the product is dependent upon its link to the particular geographical area under consideration, often combined with strict rules on the method of production.

However, the strength of the link to a particular region is different for the various GIs. For PDOs, the product must originate in a specific place and its quality or characteristics must be “essentially or exclusively due to a particular geographical environment with its inherent natural and human factors”; all the production steps must take place in the defined geographical area (as with Stilton cheese, for example). For PGIs, it is only necessary that “the given quality, reputation or other characteristic is essentially attributable to its geographical origin” and “at least one of the production steps” takes place in the defined geographical area (for example, Melton Mowbray pork pies or Cornish pasties). Finally, for TSGs, there is no requirement for a specific geographical link; rather, the name must relate to a specific product or foodstuff that results “from a mode of production, processing or composition corresponding to a traditional practice” (for example, traditionally farmed Gloucestershire Old Spots pork, and *pizza napoletana*). In addition to these core GIs, there are other, less well-known, optional quality terms, such as “mountain product” and the proposed “product of island farming”.

In addition to prohibiting direct or indirect commercial use of the registered GI, the

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Regulation also prohibits “any misuse, imitation or evocation, even if the true origin of the products or services is indicated or if the protected name is translated or accompanied by an expression such as ‘style’, ‘type’, ‘method’, ‘as produced in’, ‘imitation’ or similar”.

As such, a GI gives those eligible to use it great power to stop others producing an identical product and trying to identify that identical product as being in any way related to the product protected by the GI. The strength of GIs may be contrasted with the more limited power conferred by the tort of passing off, which cannot stop the use of such terms as “style” (as in “Greek-style yoghurt”) in cases where the protected product does not benefit from a GI, but still forms an identifiable class that has a collective goodwill that may be enforced by any qualifying member of the relevant group of genuine producers.

DIFFICULT SITUATION

It is relatively easy to justify granting monopoly rights to a group of traders who produce a product that is characterised by distinctive geographical qualities. It is more difficult to justify prohibiting competing traders from indicating truthfully that their product, which does not originate from the defined geographical area (or otherwise comply with the requirements), is nonetheless otherwise identical, and indicating this distinction from the genuine article by the use of such terms as “style”, “type”, “method” or similar. The tort of passing off allows such a distinction to be drawn because, fundamentally, it allows traders to tell the truth. GIs do not even allow competing traders to tell the truth – they are silenced altogether. This, it may be argued, is a step too far in protecting the legitimate commercial

interests of producers of regional products, because it denies the informed consumer the option of purchasing a product that possesses certain characteristics of the genuine product in the knowledge that it is not the genuine product: for example, a yoghurt that was made in the same way as Greek yoghurt, but was not made in Greece. Whether the experience was wholesome or not, the consumer has sufficient information to repeat or decline that choice in the future, thereby protecting the genuine producers from any unfair competition.

The current system has noticeable quirks. For example, Stilton cheese may not be so-called if produced in the village of Stilton, because that is located outside the prescribed region in which genuine Stilton cheese may be produced. In contrast, Melton Mowbray pork pies may be produced outside (as well as within) the village of Melton Mowbray, because the prescribed region is more widely defined than the village.

The proposals to extend the GI system to non-agricultural products might distort competition. The proposals would extend the right to locally manufactured products, such as Menorcan sandals or Basque berets. An important justification for the GI system is the link to the *terroir*, and its influence upon the essential characteristics of the product. If that link is weakened further, such that all that is required is a history of local manufacture of a particular type of artisanal or industrial product, then the room for informed consumer choice will be reduced. In particular, it is foreseeable that there will be a conflict between such proposed rights and generic terms that are used to describe a particular type of product.

Finally, just over the horizon looms the Transatlantic Trade and Investment Partnership. The US does not like GIs, because (it asserts) they fetter competition. So, just as the EU is set to increase the scope of GIs to non-agricultural products, the likely trade agreement between the US and the EU is likely to see their curtailment, or at least restriction in scope. Interesting times lie ahead. ■



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