

Study unit 3

Case study: traditional crafts

Overview

In this study unit you will be introduced to some of the issues relating to the protection of traditional crafts. You will also be introduced to the possibility of protection by existing intellectual property rights, such as copyright, certification marks, unfair competition, and geographical indications.

Learning outcomes

- After completion of this study unit, you should be able to —
- ☐ identify the issues relating to the protection of traditional crafts
 - ☐ understand the limitations of copyright protection in this context
 - ☐ understand the possible use of certification marks in this context
 - ☐ understand the impact of protection against unfair competition in this context
 - ☐ understand the impact of the protection of geographical indications in this context

Setting the scene

- ☐ The Kwakiutl Indians on the west coast of Canada had this experience in the mid-1980s. For centuries, the women of the Kwakiutl have knitted sweaters with a traditional thunderbird motif. Two Japanese businessmen visited the Indian reservation. They purchased some sweaters and mass produced them for sale in Asia. Apparently, the sweaters sold raked in some \$100 million. The Kwakiutl were outraged – all they received was payment for a handful of sweaters. This incident fueled the movement for the protection of the rights of indigenous peoples in Canada.
- ☐ The crafts industry has been estimated by the International Trade Commission to generate \$30 billion

annually. Other analysts have estimated the amount to be double that. For example, India has the single largest crafts industry in the world. Its annual revenue of this industry is \$5.6 billion dollars; it employs some 9 to 10 million artisans.

Discussion

Copyright protection

limitations

The Kwaikutl motif is protected as an artistic work by copyright, of course. But the limitations of copyright protection in this context are clearly illustrated by two Australian cases.

bank notes

In *Yumbulul v Reserve Bank of Australia* ((1991) 2 IPR 481), representatives of the Galpu clan unsuccessfully sought to prevent the reproduction by the Bank of the design of a Morning Star pole on a commemorative banknote. A member of the clan had been created the pole. He had obtained his knowledge and authority to create the pole through initiation and revelatory ceremonies. The clan claimed that he owed a communal obligation to the clan to prevent the design of the pole being used in a manner that was culturally offensive.

culturally offensive

copyright law does not apply

The trial judge ruled, however, that the artist had successfully disposed of his intellectual property right through a binding agreement. The judge did lament, though, that 'Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin' (at 490).

designs on carpets

Milpurrruru v Indofurn Pty Ltd ((1995) AIPC 91) concerned the importation by a company based in Perth of carpets made in Vietnam. These carpets reproduced designs of certain Aboriginal artists, a portfolio of whose work had been produced by the Australian National Gallery. The court awarded substantial damages for copyright infringement to the Aboriginal artists whose designs had been reproduced on the carpets. But the court did not find itself able to compensate the communities whose images were used in culturally inappropriate ways – 'the statutory remedies do not recognize the infringement of ownership rights of the kind which reside under Aboriginal law in the traditional owners of the dreaming stories' (at 39,081).

no statutory remedy

communal harm

Copyright law, then, does not recognize the communal harm

that may result from the unauthorized reproduction of indigenous designs, and so does not compensate communal harm.

Kente weaving

More satisfactory answers, albeit to a limited extent only, can be given to the question as to whether legal protection can be established in respect of statements such as 'Kente weaving from Ghana', or 'Mola designs from Panama'.

Certification marks

labels of authenticity

certification marks

collective interests

In Australia, for example, the preferred legal technique to protect against non-indigenous people who manufacture and sell indigenous artifacts at the expense of the indigenous artistic community is through the use of certification marks, serving as labels of authenticity (Leanne Wiseman 'The protection of indigenous art and culture in Australia: the labels of authenticity' 2001] *European Intellectual Property Review* 14). (A certification mark, in terms of the Trade Marks Act 1995 (Cth), is a sign used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade, and certified in relation to quality, accuracy, or some characteristic (such as origin, material, or mode of manufacture), from other goods or services dealt with or provided in the course of trade, but not so certified (section 169). Certification marks symbolize and promote the collective interests of certain groups of traders – by preventing traders whose goods do not comply with the certification process from using the mark, the integrity of those traders whose goods are certified is maintained.)

*Aboriginal or Torres
Strait Islander origin*

The National Indigenous Arts Advocacy Association registered the first of two proposed national indigenous labels of authenticity as certification marks in Australia. These labels will be applied to goods and services of Aboriginal or Torres Strait Islander origin, which will make it more difficult for non-Aboriginal people to pass off their works as if they were authentically Aboriginal. (The term 'goods' may connote, for example, fabrics, boomerangs, coolamons, nets, traps, seed and shell necklaces, didgeridoos, musical recordings, sticks, and sculptures. The term 'services' may connote, in turn, activities such as theatre, dance, concerts, and educational and tourism programmes, and so on.)

label of authenticity

The first mark – the label of authenticity – will be applied to products or services that are derived from a work of art

created by, and reproduced or manufactured by Aboriginal or Torres Strait Islander people who satisfy the definition of 'authenticity'. An artist who has successfully applied to use this label will be referred to as a certified Indigenous creator.

collaboration mark

The second mark – the collaboration mark – will be applied to products or services derived from a work of art which has been created by an Aboriginal or Torres Strait person or people who satisfy the definition of 'authenticity'. This mark recognizes that products and services are often produced, reproduced, or manufactured under licensing agreements with indigenous people. The collaboration mark will be applied to such products and services, provided that the licensing arrangements are 'fair and legitimate'.

limited protection

It has to be recognized that although these labels of authenticity will raise the profile of indigenous artists and help to make sure that they are properly remunerated, they will provide only limited protection to these artists. It is unlikely that, by themselves, they will prevent the production, import, or export of forgeries. Also, since the marks are registered in a national registry, their effect is limited to that national territory, unless, of course, in the rare situation where they qualify for protection as well-known marks.

national territory

Unfair competition: misleading the public

Using misleading indications of origin may constitute unfair competition.

Paris Convention

The Paris Convention for the Protection of Industrial Property, for example, requires countries to grant protection against 'indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods' (article 10^{bis}(3)).

WIPO Model Provisions

The WIPO Model Provisions on Protection Against Unfair Competition are more explicit. They state that any act or practice, 'in the course of industrial or commercial activities, that misleads, or is likely to mislead, the public with respect to an enterprise or its activities, in particular, the products or services offered by such enterprise', constitutes unfair competition (article 4(1)). They add that '[m]isleading may arise out of advertising or promotion and may, in particular, occur with respect to ... the geographical origin of products or

services' (article 4.2).

national protection

Again, the main problem with protection against unfair competition is that it is confined to national level, and so differs from country to country. While this kind of protection may protect indigenous artists against misappropriation within their national states, it offers no protection at international level.

Geographical indications

non-competing goods

One of the intellectual property issues for developing countries is the unauthorized use of a geographical indication on non-competing goods, such as TAJ MAHAL for a hotel in Nevada. It is a complex issue. It has been noted the issue 'here is not necessarily a question of misleading consumers' but 'also a question of the reputation of the geographical indication' (Ludwig Baeumer 'Considerations concerning a definition of geographical indications', paper presented to the WIPO Symposium on the International Protection of Geographical Indications, Santenay, France, 9–10 September 1989). At the same time, the protection should not overreach – it has been argued that while the protection of geographical indications against unauthorized use on all types of goods is excessive, protection should be given against 'a blatant misuse of reputation' (Marie-Hélène 'The possible content of a new treaty on the protection of geographical indications at the multilateral level (Part I)', paper presented to the WIPO Symposium on the International Protection of Geographical Indications, Santenay, France, 9–10 September 1989).

no overreach

seizure upon importation

In terms of the Paris Convention, goods in respect of which a false indication of source is used, should be seized upon importation (article 9(1)), or seized in the country into which they are imported, if the false indication had been applied in that country (article 9(2)), or barred from importation (article 9(5)), or subject to such other actions and remedies as are available in such cases to nationals of the country in question (article 9(6)). Any producer or manufacturer engaged in the production or manufacture of the goods to which the geographical indication refers can take action against the use of a false indication (article 10(2)).

production or manufacture

deceptive indications of source

The Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods extends this

protection to 'deceptive' indications of source. Although a deceptive indication may literally be true, it is still misleading. For example, where two geographical areas in different countries have the same name, but only one of them has been used to indicate the source of certain products, and such indication is then used for goods originating from the other area in a way that leads members of the public to believe that they originate from the first area, such use is deceptive – the public believes that the products originate from the geographical area in respect of which the indication traditionally has been used (Baeumer op cit).

appellations of origin

The Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration provides strong protection for certain geographical indications, called 'appellations of origin'. The term 'appellation of origin' connotes 'the geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality or characteristics of which are due exclusively and essentially to the geographical environment, including natural and human factors' (article 2(1)). This protection is based on an international registration of an appellation of origin, effected by WIPO. The main factor limiting the scope of application of this Agreement is the requirement that an appellation of origin be protected as such in its country of origin before it can be registered as such with WIPO (article 1(2)).

TRIPS Agreement

The TRIPS Agreement defines 'geographical indications' as 'indications which identify a good as originating in the territory of a Member [of the WTO], 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' (article 22.1). (Although this definition is based on that of an 'appellation of origin' in the Lisbon Agreement, it is broader in one respect: the TRIPS Agreement protects goods which derive a reputation from their place of origin without their having a quality or other characteristic that is due to that place (Baeumer op cit). The scope of protection expressly extends also deceptive indications within the meaning of that term in the Madrid Agreement (article 22.4). Protection should be available against misleading use of a geographical indication and against acts of unfair competition (article 22.2), and against the registration of a trademark that contains, or consists of, a geographical indication relating to goods not originating in the territory indicated, if use of such a trademark is of such a nature as to mislead the public about the true place of origin

misleading use

acts of unfair competition

wines & spirits

(article 22.3). Geographical indications in respect of wines and spirits enjoy additional protection (article 23). Members of the WTO have agreed to enter into negotiations to raise the level of protection of individual geographical indications (article 24). Some developing countries have argued in the TRIPS context that the work mandated in respect of the establishment of a notification and registration system of geographical indications for wines be extended to other products recognizable by their geographical origins, such as handicrafts and agro-food products (see, for example, the communication submitted by Kenya, on behalf of the African Group, to the General Council of the WTO, in preparation for the 1999 Ministerial Conference in Seattle (WT/GC/W/302 of 6 August 1999)).

*extend to handicrafts &
agro-food products*

Conclusion

You should now be able to identify the issues relating to the protection of traditional crafts, and understand the limitations of copyright protection in this context. You should also be able to understand the use of alternative forms of intellectual property protection — certification marks, unfair competition, and geographical indications.