

Policy Framework for Promoting GIs In Kenya. What The Law and The Policy Prescribe.

**First Training Workshop For a Branding Project Using
Intellectual Property (IP) For The Taita Basket.**

Desert Rose Hotel, Voi, Taita-Taveta County, KENYA:
17th to 19th February 2016.

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Protection of Intellectual Property under the New Constitution in Kenya.

- The Pre-2010 constitution did not capture the essence of IP and related innovations.
- The old constitution provided substantive property guarantees limited to real property as opposed to IP and related concerns.
- In the new constitution enacted, a paradigm shift has been observed:
 - The Constitution expressly protects IP, innovation and technology transfer.
 - Article 26 (c) includes IP in the definition of Property.
 - Art. 40 (5) obliges the state to support, promote and protect the intellectual property rights of the people of Kenya.
 - Art. 69(1) (c) and (e) mandates the State to protect and enhance intellectual property, traditional or indigenous knowledge of biodiversity and the genetic resources of the communities and protect genetic resources and biological diversity.

Kenya Vision 2030

- The Country's development blueprint covering the period 2008 to 2030.
- Aims at making Kenya a newly industrialized middle income country providing high quality life for its citizens by the year 2030.
- The Vision is based on three pillars namely:
 - The Economic Pillar
 - The Social Pillar and;
 - The Political Pillar.
- The Vision comes after the successful implementation of the Economic Recovery Strategy for wealth and employment creation (ERS)

The Economic Pillar:

- Under Vision 2030 the country aims to increase the annual GDP growth rate to an average of 10% over the vision period.
- The following 6 sectors have been identified as key towards the achievement of specific goals under the Economic Pillar:
 1. Tourism.
 2. Increasing Value in Agriculture.
 3. A Better & More Inclusive Wholesale & Retail Trade Sector.
 4. Manufacturing For the Regional Market.
 5. Business Processing Off Shoring (BPO).
 6. Financial Services.

Increasing Value in Agriculture Under Vision 2030

- Kenya aims to raise incomes in agriculture, livestock and fisheries by processing and thereby adding value to her products before they reach the market.
- This will be done in a manner that enables producers to compete with the best in other parts of the world.
- This will be done through an innovative, commercially oriented and modern agriculture, livestock and fisheries sector.
- A number of strategies to transform and improve the agricultural and livestock sector will be used.
- Among the Flagship Projects for the Agricultural and Livestock Sector include:
 - *“Improving the value gained in the production and supply chain through branding of Kenyan farm products”.*

TRIPS Requirements

- Kenya is a member of the WTO (Since 1st January 1995) and thus a signatory of the TRIPS Agreement (Trade Related Aspects of Intellectual Property Rights).
- Intellectual Property (IP) Rights can be defined as rights given to people for the creations of their minds. IP Rights give the creator an exclusive right over the use of his/her creations for a certain period of time.
- For the purposes of TRIPS Agreement Intellectual Property refers to “All categories of intellectual property that are the subject of Sections 1 through 7 of part II of the Agreement (Article 1:2) This include copyright and related rights, trademarks, geographical indications, industrial designs, patents, integrated circuit layout-designs, and protection of undisclosed information.
- Developing countries had to apply the TRIPS Agreement provisions (including the protection of Geographical indications) by 1st January 2000.

What is a GI?

- Most of us are aware of different Geographical Indications (GI) products. They range from **Champagne**, **Gruyere Cheese** to **Scotch whisky**, and **Solingen knives**. Most are registered GIs and are at times referred to as appellations of origin.
- Majority of GIs originate from more developed regions but there are also a number of GIs from developing regions such as **Argane Oil (Morocco)**, **Basmati Rice** and **Cafe de Columbia**.
- There is **no universally accepted** definition of a GI. In Kenya the following is the proposed definition of a GI:
 - “Geographical Indication” means an indication which identifies a product as originating from a territory, or a region or locality where a given quality, reputation or other characteristics of the product are exclusively or essentially attributable to its geographical origin;
 - “indication” includes any name, traditional designation, geographical, or figurative representation or any combination thereof conveying or suggesting the geographical origin of goods to which it applies;

Protection of Geographical Names as Trademarks-The Trademarks Act Cap 506

Due to the general principle that individual trademarks must not be descriptive or deceptive, geographical terms cannot serve as trademarks, unless they have acquired distinctive character through use, or their use is fanciful and therefore, is not deceiving as to the origin of goods on which the trademarks are used. However, this rule does not apply to certification marks and collective marks.

Certification Marks I

Marks, which indicate that the goods or services on which they are used have specific qualities, which may also include geographical origin. The owner of a certification marks undertakes to certify that all goods or services on which the certification mark is used have those qualities. The owner of a certification mark does not have the right to the use of the mark. Generally referred to as the *Anti-use principle*.

Part VII Section 40 of the Trade Marks Act defines Certification Trade Marks as “ A mark adapted in relation to any goods to distinguish in the course of trade goods or other characteristic from goods not so certified shall be registrable as a certification trade mark in Part A of the register in respect of those goods in the name, as proprietor thereof, of that person: Provided that a mark shall not be so registrable in the name of a person who carries on a trade in goods of the kind certified” .

Producers who comply with the standards of production as defined (and deposited with the Registrar of Trade Marks) by the owner of the certification mark have the right to use that mark.

Certification Marks II

- The owner of the certification mark (Private or Public entity) ensures that the goods or services on which the certification mark is used possess the certified quality(ies).
- To enable the carrying out of this certification in a neutral and impartial manner, the owner has to file, together with an application for the registration of the mark, detailed regulations which describe, *inter alia*, characteristics certified by the mark, authorized users and details concerning the certification and control.
- In order to safeguard the objectivity of the owner of a certification mark, he is not allowed to use the certification mark himself. The Kenyan Trademarks Act Cap 506 further provides; “a certification trademark shall not be assignable or transmissible otherwise than with the consent of the court” .
- Protection of a geographical indication in the form of a certification mark is enforced under general trademark law, the Trade Marks Act, Cap 506.

Collective Marks

In practice, difficult to distinguish collective marks from certification marks; difference is one of form rather than substance. Membership usually upon compliance of certain rules, e.g. the geographical area of production of the goods on which the collective mark is used or standards of production of such goods.

Another substantial difference between the two; owners of collective marks are regularly not barred from using the mark themselves.

Collective marks enforced under The Trademarks Act (as amended in 2002)

A collective mark is defined: "A mark capable of distinguishing, in the course of trade, the goods or services of persons who are members of an association, from goods or services of persons who are not members of such an association, shall on application in the prescribed manner, be registrable as a collective mark in respect of the goods or services in the name of such an association".

The Draft GI Bill 2012-*

Preliminary/Administration

Definitions

* Disclaimer: (Technically this can only be properly referred to as “Drafting Instructions” and it only becomes a Bill once legally published by the Government of the Republic of Kenya. The Term “Bill” is therefore used for ease of reference and to avoid the lengthy term “Drafting Instructions for a Geographical Indications Bill 2012”).

- “Geographical indication” means an indication which identifies a product as originating from a territory, or a region or locality where a given quality, reputation or other characteristics of the product are exclusively or essentially attributable to its geographical origin;
- “indication” includes any name, traditional designation, geographical, or figurative representation or any combination thereof conveying or suggesting the geographical origin of goods to which it applies;
- To be administered by KIPi
- Registrar of Trademarks=Registrar of Geographical Indications

The Draft GI Bill 2012: Protection of Geographical Indications (Some Highlights)

- Availability of protection regardless of registration. Protection under this act shall be available regardless of whether a geographical indication has been registered or not.
- Homonymous geographical indications. The Protection under subsection (1) shall be available against a geographical indication, which although literally true as to the territory, region or locality in which the products originate, the geographical indication falsely represents to the public that the products originate in another territory, region or locality.
- Exclusion from protection. Indications that are misleading, deceiving, contrary to public interest, generic, conflicting...

The Draft GI Bill 2012: Registration Procedures

Application for registration and right to file application.

Contents of application.

Designation of inspection authorities or entities.

Examination, opposition and registration of geographical indications.

Administration/Term of a geographical indication/Maintenance of registration.

Right of use.

Labelling.

Change of particulars/Cancellation and Rectification of Register.

Register of Geographical Indications/Correction of Register.

The Draft GI Bill 2012-General Provisions

- Exercise of discretionary powers.
- Extension of time.
- Publication.
- Waiver of fees.
- Regulations.
- Reference to the Tribunal.
- Seeking of Expert opinion.
- International arrangements.

Obtaining Protection in Other Countries

- Kenya has not yet acceded to either of the two international GI agreements (Madrid and Lisbon) concerning the protection of GIs. Only option for mutual protection of GIs with other countries would be bilateral agreements.
- Kenya is a member of both the Madrid Agreement and Protocol since 1998.
- Bilateral agreements typically concluded between two countries on the basis of reciprocity in order to increase protection of the countries' respective geographical indications. So far , we have no Bilateral(s) on GIs in Kenya.
- Bilaterals may be independent treaties or form part of a wider trade agreement. They may simply provide for a prohibition of use of the other party's GIs for goods (usually listed in annexes to the agreements) not having that origin.
- They may also go further and provide for extra-territorial application of the other country's national law, concerning the protection of GIs.

What to expect in the “Product Specification”

- The Name of the Applicant(s) -An Association to be formed?
- The Geographical Indication-**Taita Basket, VIDASI?..**
- Product for the geographical indication-baskets, mats? bags?
- Description of the product.
- Delimitated geographical area to which the GI applies.
- Quality, reputation or other characteristics.
- Detailed methods of production-weaving finishing up to the final product including the sources of raw materials, dyes etc.
- Labelling-Tags, What to put on logo; Basket? Geographical feature?
- Who can use the name and how will the use be administered.
- How to deal with non-compliance.

Way Forward/Challenges expected in branding

- A common association to own the mark will need to be formed.
- The best option for the Taita Basket at present may be a collective mark. The logo may include features such as a basket, woman weaving, sisal-(the raw product), geographical features e.g. Taita Hills, landscape, common features..
- A certification mark requires a certifying body, difficult to arrange under the prevailing circumstances for a small and an entirely rural based industry.
- The current value chain setup in the industry in terms of marketing may be hard to sell to, the idea of branding; They may prefer the status quo to remain.
- Maintenance of quality/standards, even as one thinks of branding; sustaining the quality and standards may be a tall order to the rural based artisans with different weaving skills.
- The different women groups/villages can agree on common standards while maintaining the diversity in weaving within the groups.

Way Forward/Challenges expected in branding cont.

- The volumes of the baskets. The average time taken to make a basket, the logistics of transportation, marketing.
- Just like with other GIs elsewhere, demarcating the the GI zones could be contentious for those producers or weavers who may feel left out.
- The country does not have a long history of protecting GIs, some body(ies) may need to be created to oversee the certification of the products in future.
- Lots of awareness raising activities also needed in order to sell the ideas of GIs to all the producers.
- The cost of registration locally and abroad, branding and marketing have to be borne.
- Enforcement-especially abroad; already some Kenyan names are being misused in certain countries. Words like Maasai, Kenya and the likes.

Thank you for your attention!

Ahsante Sana!!, Chawucha!!

The views expressed herein are solely the views of the author and may not necessarily be the views of the Institute-KIPI nor the Kenyan Government.

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