

Intellectual Property in Tourism and Culture in Sri Lanka

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Table of abbreviations

CDIP	Committee on Development and Intellectual Property
CLR	Compensatory liability regime
CMO	Collective management organizations
GDP	Gross domestic product
GI	Geographical indication
GR	Genetic resources
IP	Intellectual Property
ITI	Industrial Technology Institute
NDC	National design center
NIPO	National Intellectual Property Office
NTP	National tourism policy
SLEDB	Sri Lanka Export Development Board
SLITHM	Sri Lanka Institute of Tourism and Hotel Management
SLTDA	Sri Lanka Tourism Development Authority
SMEs	Small and medium-sized enterprises
TK	Traditional knowledge
TSP	Tourism Strategic Plan
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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Executive Summary

This study was prepared in the context of the WIPO CDIP project by the national consultant, under the guidance and supervision of the WIPO experts and the National Steering Committee on IP in Tourism and Culture. The objective of this project was to carry out a comprehensive study in Sri Lanka in order to identify and explain best practices on the successful use of the national IP system for the competitive advantage of the tourism sector and the promotion of national and/or regional knowledge, traditions and culture. Tourism is one of the fastest-growing industries around the world and is a dynamic field. As part of their national development strategies, many countries in the world are increasingly developing tourism as an effective driver of economic growth and inclusive development, creating jobs and welfare for communities.

Moreover, the intersection of intellectual property (IP) rights, tourism and culture has attracted a great deal of attention in recent years. The use of IP rights in tourism and cultural promotion is a new business model for the tourism industry. Sri Lanka is a country endowed with a glorious historical and cultural heritage that spans millennia; an island like no other, blessed with an abundance of natural beauty and attractions. From an economic standpoint, the tourism sector is one of Sri Lanka's success stories of the post-war economy. Although Sri Lanka is a top tourist destination, it has barely scratched the surface of its true potential for tourism promotion by reaping the fruits of the innovative and creative efforts of its people.

In the Sri Lankan context, a number of IP rights can play a crucial role in fostering tourism and culture. Furthermore, exclusive rights attached to copyright, patents, trademarks, designs and geographical indications can be effectively harnessed for the improvement of the tourism industry. Furthermore, trade secret protection and protection against unfair competition can be used as effective tools against free-riding on the achievements of other competitors. In that sense, the IP rights regime is a powerful mechanism for strengthening the competitiveness of the enterprises and firms operating within the tourism industry. The time may have come for the Sri Lankan tourism sector to adopt the new business model of using IP rights for the promotion of tourism and culture. It would certainly benefit the country in creating new jobs, reducing poverty and achieving robust economic growth.

Using evidence gathered during field visits and key-informant interviews, the study presents a comprehensive list of case studies along the lines of agreed thematic areas. The cases studies illuminate whether and to what extent IP rights are used in a business way to extract value from the products and services used in the tourism sector in Sri Lanka. It is hoped that this study will assist policymakers in Sri Lanka to think afresh about tourism development and cultural promotion through the use of IP tools and strategies. It offers guidance for the legislature in designing appropriate

tourism development strategies viewed through the lens of IP rights, innovation and creativity.

1. Introduction, Key Concepts and Research Design

1.1 Context

WIPO, the specialized agency of the United Nations that deals with intellectual property rights, at present administers 26 international treaties, including the WIPO Convention. This study is prepared in the context of the WIPO CDIP project. In 2016, Sri Lanka was selected as one of four countries (the others being Ecuador, Egypt and Namibia) and the only country in Asia for the WIPO pilot project on “Intellectual Property, Tourism and Culture”.

1.2 Task assigned

The purpose of the project was to carry out a comprehensive study in Sri Lanka in order to identify and explain best practices on the successful use of the national IP system for the competitive advantage of the tourism sector and the promotion of national and/or regional knowledge, traditions and culture. Specific objectives of the project included the following:

- (a) Researching and documenting best practices on the existing and potential use of IP in Sri Lanka, in connection with the following priority areas:
 - (i) branding of tourism-related products and services, including those with a link to their origin;
 - (ii) tourism-related innovation and design; and
 - (iii) national and/or local knowledge, traditions and culture.

- (b) Making practical recommendations on the use of IP tools and strategies in connection with the aforementioned thematic areas.

1.3 Global tourism landscape

Tourism is one of the fastest-growing industries around the world and is a very dynamic field. A tourist is a person who travels to destinations for leisure, business and/or pleasure. According to the World Tourism Organization (UNWTO)¹ over 1.2 billion tourists traveled internationally in 2016 and international tourist arrivals grew by 4 per cent in 2016 to reach a total of 1,235 million. In fact, tourism is a social, cultural and economic phenomenon which entails the movement of people to countries or places outside their usual environment for personal or

¹ The World Tourism Organization (UNWTO) is the United Nations specialized agency mandated with the promotion of responsible, sustainable and universally accessible tourism. As the leading international organization in the field of tourism, UNWTO promotes tourism as a driver of economic growth, inclusive development and environmental sustainability, offering leadership and support to the sector in advancing knowledge and tourism policies worldwide. UNWTO declared 2017 as the International Year of Sustainable Tourism for Development. See UNWTO, *Annual Report 2016* (UNWTO, Madrid, Spain, 2017) 11.

business/professional purposes.² In terms of purposes of travel, tourism could be categorized as leisure/holiday tourism, business tourism, cultural tourism, ecotourism, religious/pilgrimage, medical/health and wellness tourism, adventure and sports tourism, event-based tourism, agro-tourism and even MICE.³ Tourism is, undoubtedly, the industry that has the greatest inter- and intra-link with all other industries. In that sense, promotion of sustainable tourism with the right set of policies would certainly contribute to social development and economic growth in any country. Perhaps even more importantly, in January 2015, the United Nations General Assembly adopted a resolution recognizing the contribution of sustainable tourism to poverty eradication, community development and protection of biodiversity.⁴ This study will certainly contribute to the above high-level objective envisaged by the United Nations resolution.

1.4 Legal framework governing Sri Lankan tourism

Organized tourism in Sri Lanka is five decades old as at this date, being the outcome of a major policy decision taken by the then Government in 1966 with the enactment of the Ceylon Tourist Board Act, No. 10 of 1966.⁵ It provided for the establishment of a public authority and vested the body with an institutional and legal framework for rapid development of foreign tourism in the country.⁶ Moreover, it simultaneously introduced legislation in Parliament to enact the Ceylon Hotels Corporation Act, No. 14 of 1966, which was created as a joint-stock company with public and private sector participation to undertake investments in tourism projects.⁷ In 1968, after two years of operation of the two institutions, namely the Ceylon Tourist Board and the Ceylon Hotels Corporation, the Government found that the powers and functions entrusted to

² Tourism is defined as a subset of travel and “travel” refers to the activity of travelers. A traveler is someone who moves between different geographic locations for any purpose and any duration. See United Nations World Tourism Organization (UNWTO), *Glossary of Tourism Terms* (as last updated February 2014). As per the definition adopted by the UNWTO a visitor (domestic, inbound or outbound) is classified as a same-day visitor (or excursionist); or as a tourist (or overnight visitor), if his/her trip includes an overnight stay. In this study, the term “tourist” is used in the sense that the UNWTO has defined as the basis for the analysis. See also United Nations, *International Recommendations for Tourism Statistics 2008* (Department of Economic and Social Affairs, New York, 2010) 1-9.

³ MICE, the acronym for Meetings, Incentives, Conferences and Exhibitions, refers to a type of tourism.

⁴ UN General Assembly resolution (A/RES/69/233) adopted on 14 January 2015.

World Tourism Organization (UNWTO): *Annual Report 2015* (UNWTO, Madrid, Spain, 2016) 4.

⁵ S.K. Perera, “Legal and Institutional Framework Established for Organized Development of Tourism” in *Golden Jubilee of Sri Lanka Tourism Commemorative Volume* (Sri Lanka Tourist Board, Colombo, 2016) 28-30, 28.

⁶ H.M.S. Samaranyake, *A Lifetime in Tourism: A Memoir of My Association in Sri Lanka and Abroad* (Vijitha Yapa Bookshop, Colombo 2012) 7-15.

⁷ S.K. Perera, “Legal and Institutional Framework Established for Organized Development of Tourism” in *Golden Jubilee of Sri Lanka Tourism Commemorative Volume* (Sri Lanka Tourist Board, Colombo, 2016) 28-30, 28.

the Ceylon Tourist Board by the Act were ineffective and inadequate. As a result, the Tourist Development Act, No. 14 of 1968 was enacted.⁸

In terms of legal development in the field of tourism in Sri Lanka, the crucial piece of legislation is the Tourism Act, No. 38 of 2005 which came into effect in 2007. As per the preamble, the Act provides for the establishment of the Sri Lanka Tourism Development Authority (SLTDA), and vests the authority with powers to facilitate the planning and implementation of policy relating to the tourism industry and other related industries. It also provides for the regulation and monitoring of the industry. Most notably, the Act has repealed the Ceylon Tourist Board Act, No. 10 of 1966 and certain provisions of the Tourist Development Act, No. 14 of 1968. The objectives of the SLTDA, as set out in the Act, include the development of Sri Lanka as a tourist and travel destination both in Sri Lanka and abroad. Furthermore, Section 40 of the Act provides for the establishment of the Sri Lanka Tourism Promotion Bureau and Section 32 makes provisions for setting up the Sri Lanka Institute of Tourism and Hotel Management (SLITHM).

Even though Sri Lanka is a “Unitary State”, the Thirteenth Amendment to the Constitution of 1978 has, since 1987, to a certain degree at least, devolved power to its Provinces.⁹ Tourism is one such devolved subject, coming under the Concurrent List, as provided by the Ninth Schedule to the Constitution. As a result, provincial councils are empowered to set up a tourism authority for their respective provinces.¹⁰ The idea of provincial/regional tourism has already been implemented in Sri Lanka by establishing “Ruhunu Tourism Bureau” of the Southern Provincial Council, “Tourism Sabaragamuwa” of Sabaragamuwa Province and “Tourism Wayamba” of the North Western Province. There is already an attempt by the Eastern Provincial Council to set up a Tourism Authority for the province by passing a similar statute. The other three provincial councils are following suit. Perhaps even more interestingly, the Ministry of Tourism of the Sabaragamuwa Provincial Council has introduced the “Tourism Policy of Sabaragamuwa Province” with the aim of expanding tourism in

⁸ H.M.S. Samaranyake, *A Lifetime in Tourism: A Memoir of My Association in Sri Lanka and Abroad* (Vijitha Yapa Bookshop, Colombo 2012) 7.

⁹ See the 13th Amendment of the Constitution 1978, read with the Provincial Councils Act, No. 42 of 1987. The Provincial Councils have been established in Sri Lanka since 1988. The 13th Amendment of the Constitution 1978 divides legislative powers that were exercised by the central government prior to 1987 into 3 separate Lists. List I, the Provincial List, specified the subjects in respect of which provinces could exercise legislative powers. List II, the Reserved List, specified the subjects in respect of which the central government could exercise legislative powers. List III, the Concurrent List, specified the subjects in respect of which either the central government or the provinces could exercise legislative powers.

¹⁰ Article 154G(5)(b) of the Constitution provides: “Every Provincial Council may, subject to the provisions of the Constitution, make statutes applicable to the Province for which it is established, with respect to any matter on the Concurrent List, after such consultation with Parliament as it may consider appropriate in the circumstances of each case.”

the province in view of its potential to contribute to the socioeconomic development of the province.¹¹

1.5 Sri Lankan tourism industry and IP rights

Sri Lanka, or the “Pearl of the Indian Ocean” as it was once known, is a country endowed with a glorious historical and cultural heritage that spans millennia. It is an island like no other, blessed with an abundance of natural beauty and attractions. From time immemorial, the island has fascinated travelers from all over the world. Fa Hsien, a Chinese Buddhist Monk, visited in the fourth century; Alexander the Great is reputed to have visited in 330 B.C.; Marco Polo in the 13th century; and Mark Twain, in the nineteenth century.¹² Marco Polo described Sri Lanka in his accounts of his travels as “the best island of its size in all the world”. The depth and diversity of its natural beauty, ranging from the blue ocean and the golden sands to the emerald green mountains and its fauna and flora have enthralled travelers.¹³ This legacy has made the country a prime tourist destination in the world. However, Sri Lanka has yet to meaningfully realize the full potential for strategic tourism promotion. In a market-oriented, globalized world, IP is considered a tool for technological and economic development. Intellectual property rights (IPRs) protect the creative efforts of the human mind. It is therefore of paramount importance that the country explores novel means of economic development through the use of IP in tourism and cultural promotion. Moreover, the intersection of IP rights, tourism and culture has attracted a great deal of attention in recent years.¹⁴

From an economic standpoint, the tourism sector is one of Sri Lanka’s success stories of the post-war economy. Sri Lanka entered a new era after ending a 30-year long civil war on May 19, 2009. The tourism industry is Sri Lanka’s third largest foreign exchange earner, accumulating 3.5 billion US dollars in earnings in 2016, 2.8 billion US dollars in 2015 and 2.4 billion US dollars in 2014.¹⁵ Projected earnings in 2017

¹¹ Ministry of Provincial Roads Development, Rural Infrastructure and Tourism, Sabaragamuwa Provincial Council “Sabaragamuwa Province Tourism Master Plan: Development Policy and Strategy for 2009 and Beyond”, 10-20.

¹² Melanie A Murray, *Island Paradise: The Myth: An Examination of Contemporary Caribbean and Sri Lankan Writing* (Editions Rodopi, Amsterdam-New York, 2009) 15.

¹³ Jayanthi Savanadasa, “Compelling Reasons for the Introduction of Modern Tourism in Sri Lanka” in *Golden Jubilee of Sri Lanka Tourism Commemorative Volume* (Sri Lanka Tourist Board, Colombo, 2016) 24.

¹⁴ See T. Nanayakkara, “Role of Intellectual Property in Enhancing the Competitiveness of the Tourism Industry”. Available at: http://www.wipo.int/export/sites/www/sme/en/documents/pdf/tourism_ip.pdf, accessed on January 20, 2017. D. Hirimuthugodage, “Intellectual property rights as a tool for enhancing ecotourism in Sri Lanka” (2016), Institute of Policy Studies of Sri Lanka. Available at: http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=154851, accessed on February 20, 2017.

¹⁵ Chantal Sirisena, “Sri Lanka’s Tourism Industry and the Foreign Ownership Debate” *The Island* (21 August 2016). Available at: http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=150701, accessed on October 4, 2016.

from the tourism sector amount to 4 billion US dollars. In 2016, Sri Lanka attracted 2.05 million tourists, a 14 per cent year-on-year increase, which is projected to rise further in 2017., The country's target is to attract 4 million tourists and earn 7 billion US dollars by 2020. In addition, the tourism sector accounted for more than 10 per cent of GDP in an economy worth 85 billion US dollars. Moreover, in 2015 the industry employed 135,930 people directly and 183,506 indirectly.¹⁶ The Government of Sri Lanka has therefore identified tourism in its policy agenda as a cornerstone of economic growth.¹⁷

Although Sri Lanka is a top tourist destination, it has barely scratched the surface of its true potential for tourism promotion by reaping the fruits of the innovative and creative efforts of its people. It is therefore imperative that the country explores new means of economic development through the use of IP in tourism and culture. As tourism has a profound impact on the formal and informal sectors of the economy in Sri Lanka, it is a challenge to ensure that the economic benefits of tourism trickle down and create opportunities not merely for multinational and large entities, but also for micro, small and medium-sized enterprises, all the way down to the grassroots level. To this end, the innovative use of IP tools would certainly add value to the tourism industry and cultural promotion.

1.6 Research design

The research was based on specific priority areas of interest, identified in consultation with the Steering Committee of IP in Tourism and Culture. In conducting this study, the consultant was assisted by a team of well-qualified researchers and experts in IP, tourism, culture and traditional medicine.

1.6.1 Methodology

¹⁶ R.N.A. Athukorala, "Paradise threatened; 11.1% GDP contribution by tourism". Available at: <<http://www.ft.lk/article/615361/Paradise-threatened--11-1--GDP-contribution-by-tourism> - See more at:<http://www.ft.lk/article/615361/Paradise-threatened--11-1--GDP-contribution-by-tourism#sthash.A0cnFaAg.dpuf>>, accessed on May 20, 2017.

¹⁷ See Ministry of Tourism Development and Christian Religious Affairs, *Sri Lanka Tourism Strategic Plan 2017-2020*. The 3-year strategic plan (2017-2020) addresses the main challenges faced by the tourism industry at present and future expectations of the country. See also Ministry of Economic Development, *Tourism Development Strategy 2011 – 2016*, which has outlined some of the key objectives to be achieved in 5 years. The Tourism Development Strategy 2011-2016 identifies an urgent need for "The Sri Lankan tourism industry to think beyond traditional boundaries and be actually involved in product development to make visits exciting for the tourist and to position Sri Lanka as unique". The Strategy has set a target of attracting 2.5 million "high spending tourists" by 2016 (against 650,000 in 2010). Sri Lankan Tourism Development Authority, "Tourism Promotional Plan of Year 2016" available at <<http://www.news.lk/fetures/item/11559-sri-lanka-tourism-strategy-2016>>, accessed on January 20, 2017. See also, The Sri Lankan Government's Mid-term Economic Policy Framework presented to the Parliament by Prime Minister Ranil Wickremasinghe on November 5, 2015, which has also highlighted "Tourism Development" as one of its policy goals. Available at:<http://www.news.lk/fetures/item/10674-economic-policy-statement-made-by-prime-minister-ranil-wickremasinghe-in-parliament>, accessed on January 5, 2017.

The methodology of this research blended both qualitative and quantitative approaches to obtain appropriate data to operationalize the specific objectives of the study. The methodology included the following data-collection strategies.

- Firstly, there was a desk review, which consisted in legal research and analysis to identify the key legal aspects of IP protection, including an in-depth legal analysis of the pertinent international legal framework. There was also a comparative legal analysis of IP regimes in selected jurisdictions. In carrying out this research, primary and secondary legal sources were used extensively.
- Qualitative data was collected in order to ascertain the extent to which the existing legal, institutional and administrative mechanisms (gatekeepers, such as the National Intellectual Property Office (NIPO), the Sri Lanka Inventors’ Commission, the National Science Foundation, the Department of Ayurveda, the Sri Lanka Tourist Board, the Sri Lanka Hotels Corporation, etc.) established by Sri Lankan authorities promote and monitor the use of IP in tourism and culture in selected locations.
- Qualitative data was also collected by targeting the existing “best practices” on the successful use of the national IP system for the competitive advantage of the tourism sector and the promotion of culture in connection with the following priority areas: (1) branding of tourism-related products and services and geographical indications; (2) tourism-related innovation and design; and (3) national and/or local knowledge, tradition and culture.
- Quantitative data was collected by interviewing users of tourism-related IP products and services used by both foreign and local tourists in areas such as the hotel industry, spas, etc.
- Both qualitative and quantitative data were collected to assess the use of national and/or local knowledge, traditional medicine and culture in relation to the promotion of tourism (for example, traditional/cultural events, the Ayurvedic sector and traditional knowledge holders).

As the study adopts the “mixed method” approach, the following data-collection techniques were used to gather appropriate data (both qualitative and quantitative) to operationalize the stated research objectives:

- (a) questionnaires and semi-structured interviews (including open-ended);
- (b) in-depth interviews with key-informants;
- (c) focus-group discussions; and
- (d) observations.

The following geographical areas/events were selected for data collection. The sample selection is based on popular tourist destinations in the light of cultural identity.

- Hikkaduwa (Sinhala-speaking, Buddhist cultural background and vibrant hotel industry);
- Jaffna (predominantly Tamil population and cultural background);
- Negombo (Sinhala-speaking and Roman Catholic cultural background);
- Pasikuda (Muslim community);
- Nilaweli (Tamil cultural background);
- Arugam Bay (Muslim, Tamil and Sinhala communities and one of the top surf points in the world);
- Kandy (religious and cultural city – *Kandy Perahera*);
- Sigiriya (cultural heritage destination); and
- Rathnapura (product-origin link – the city of gems).

1.6.2. Objectives

The objectives of this research are as follows:

- Identify and explain best practices on the existing and potential use of the country's IP regime to enhance the competitive advantage of the tourism sector.
- Analyze the challenges and prospects of using IP rights in different sectors in the tourism industry in Sri Lanka.
- Highlight assumptions and risks related to the actual implementation of the aforementioned IP strategies for tourism and cultural heritage promotion.
- Make recommendations for law and policy reform in relation to the effective use of IP rights in the promotion of tourism and culture.
- Make recommendations in order to raise awareness among tourism stakeholders.

1.6.3 Contribution of the study

From an IP perspective, the intersection of IP, tourism and culture has thus far received inadequate attention in the Sri Lankan context. The potential use of IP rights in tourism is thus largely uncharted territory. This research therefore aims to fill this glaring lacuna in IP literature by providing an in-depth investigation of existing and potential uses of IP within the priority areas identified by the Sri Lanka Tourism Development Authority (SLTDA) and the National Steering Committee on IP in

Tourism and Culture (the Steering Committee), while focusing on best practices in Sri Lanka.

1.6.4 Limitations

The obvious challenge the researchers of this study face pertains to the lack of research experience in relation to the use of IP rights in promoting tourism and culture, either in the Sri Lankan or the South Asian context. Given the time and space constraints, this study was mainly confined to three specific areas of IP use in tourism and culture, as set out in the Terms of Reference. Nevertheless, the perspectives of other countries (pilot countries) were taken into consideration when common policy options were discussed. This was contingent on the available resources, time and space for the study.

2. Overview of the Legal Framework Governing IP Rights in Sri Lanka

2.1 International obligations

The most important legal instruments governing the IP legal landscape at the international level are: the Berne Convention for the Protection of Literary and Artistic Works of 1886 (Berne Convention), the Paris Convention for the Protection of Industrial Property of 1883 (Paris Convention), the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) of 1994. The TRIPS Agreement established universal minimum standards of IP protection by creating another milestone in the history of IP law. In this regard, Sri Lanka ratified the Marrakesh Agreement establishing the World Trade Organization (WTO) in June 1994 and is bound by legal obligations imposed under the TRIPS Agreement.¹⁸

2.2 Current IP regime

The IP system in Sri Lanka originated during the British colonial period. As from 1860, a number of British Acts were made applicable to Sri Lanka and such laws continued to apply even after Sri Lanka gained independence. However, after the introduction of the new economic policy, namely, the free market economy in 1977, the Sri Lankan Government introduced an IP regime, namely, the Code of Intellectual Property Act, No. 52 of 1979. The new law marked a turning point in the evolution of the IP system in Sri Lanka. The current Intellectual Property Act, No. 36 of 2003 (IP Act) replaced the Code of Intellectual Property Act in 2003. The Act was introduced to ensure compliance of the Sri Lankan IP regime with TRIPS obligations.

2.3 Main types of IP rights

The IP Act accords protection to the main areas of IP rights recognized by the multilateral IP treaties; namely, copyright and related rights, inventions, industrial designs, trademarks, geographical indications, undisclosed information including trade secrets, protection against unfair competition and layout designs of integrated circuits, etc. However, this section of the report will focus on the main types of IP rights that may have an actual or potential impact on tourism and cultural promotion.

2.3.1 Copyright and related rights

In modern times, IP, especially copyright, plays a significant role in the knowledge economy. As a developing country, Sri Lanka does not escape this reality. The term copyright refers to the area of IP law that deals with rights of the owners, inter alia, of

¹⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments-Results of the Uruguay Round, 33 I.L.M. 1197 (1994) (TRIPS Agreement).

literary, dramatic, musical and artistic works, cinematographic films and sound recordings. The Sri Lankan copyright law, nested in the IP Act of 2003, concerns the rights of the authors of protected works and the management and enforcement of these rights. Undoubtedly, the protection of copyright can contribute positively to the social, economic and cultural development of the country. In Sri Lanka, the IP rights of authors have been protected since 1911 and the IP Act of 2003 provides a comprehensive legal framework for the protection of copyright and related rights (also known as neighboring rights) in compliance with the international standards.

Pursuant to Section 6 of the Act, “works” in the literary, artistic or scientific domain shall be protected under copyright law. These works are protected by the sole fact of their creation and, irrespective of their creative elements, quality or value, do not need to have any literary or artistic merit.¹⁹ However, to qualify for copyright protection, works must be “original intellectual creations”. A work is “original” in the copyright sense if it owes its origin to the author and was not copied from some pre-existing work. More precisely, an original work is one that “originates” in its expression from the author. The phrase “intellectual” involves the communication of thoughts or feelings, that is, the output of the mind, while the term “creation” should be understood as the “shaping of form of expression”. Copyright protection only relates to the form of expression and not to the underlying idea.

Even though several Berne Union countries have established voluntary national registration systems for copyright and related rights, Sri Lanka does not have a system of registration of copyright and copyright protection in Sri Lanka is accorded without any formalities such as registration. Copyright protection in Sri Lanka does not extend to any idea, procedure, system, method of operation, concept, principle, discovery or mere data, any official texts of a legislative, administrative or legal nature or the news of the day as published.²⁰ As in many other jurisdictions, exclusive rights granted by copyright law are subject to certain limitations such as “fair use” or “fair dealing”.²¹ The exclusive rights conferred under copyright law also encompass both economic and moral rights.

Related rights are protected under Sections 17 to 20 of the Sri Lankan IP Act. The law recognizes the rights of performers, producers of sound recordings and broadcasting organizations. These rights safeguard the interests of the persons who contribute to make the copyright material available to the public or to make certain productions that express some kind of creativity or creative talent, or technical or

¹⁹ In this regard, the approach of the Sri Lankan judiciary is similar to the approach adopted by English Courts. See *Wijesinghe Mahanamahewa And Another v. Austin Canter* (1986 1 Sri LR 620, *Vasantha Obeysekera v. A.C. Alles* CA 730/92 (F) (unreported), *Chandraguptha Amerasinghe v. Associated Newspapers of Ceylon Ltd* (SC decided in 2012).

²⁰ Section 8 of the IP Act clearly sets out works that are not protected.

²¹ Sections 11 and 12 provide specific instances of fair use.

organizational skills.²² Pursuant to Section 5 of the IP Act, “performers” mean singers, musicians and other persons such as actors and dancers who sing, deliver, declaim, play in or otherwise perform literary or artistic works or expressions of folklore. Performers have the exclusive right to authorize or prohibit the fixation (recording) in any medium, the communication to the public or broadcast or transmission by cable of their live performance or any substantial part of it, as well as the reproduction of recordings of their live performances.²³

Moreover, Section 24 of the Act provides protection to expressions of Sri Lankan folklore. The law recognizes the importance of folklore as an ingredient of cultural identity and Section 5 of the Act defines the phrase “expression of folklore” as “a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means”.²⁴ As set out in Section 24(1) of the IP Act of Sri Lanka, expressions of folklore are protected against: (a) reproduction; (b) communication to the public by performance, broadcasting, distribution by cable or other means; and (c) adaptation, translation and other transformation, when such expressions are made either for commercial purposes or outside their traditional and customary context. Section 24(6) prohibits and makes illegal the unauthorized commission of any of the acts referred to under the protected rights. The right to authorize these acts has been vested in a competent authority to be appointed by the Minister responsible for IP. IP Regulation No. 4(1), dated October 19, 2005, designates the Director General of IP as the competent authority.²⁵

The Sri Lankan copyright regime also provides for the collective management of copyright and related rights. The collective management system enables the owners of rights to authorize collective management organizations (CMOs) or collective societies of which they are members to manage their rights on their behalf.²⁶ Section 25 of the Act makes provision for the establishment of CMOs in Sri Lanka. All CMOs must be registered with the Intellectual Property Office (IPO) before they can

²² D.M. Karunaratna, *Elements of the Law of Intellectual Property in Sri Lanka* (Sarasavi Publishers, Nugegoda, Sri Lanka, 2010) 98.

²³ See World Intellectual Property Organization (WIPO), *Creative Expression: An Introduction to Copyright and Related Rights for Small and Medium-sized Enterprises* (WIPO publication No. 918, Geneva, 2006).

²⁴ Definition of folklore, as adopted in the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore: “Folklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a 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”. See the General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from October 17 to November 16, 1989, at its 25th session.

²⁵ D.M. Karunaratna, *Elements of the Law of Intellectual Property in Sri Lanka, Op. Cit.*, p. 105.

²⁶ *Ibid*, p. 107.

grant licenses. The CMOs monitor uses of certain categories of works on behalf of creators and are in charge of negotiating licenses and collecting payment.²⁷

2.3.1 Patents

In the eyes of the law, a patent is a legal title protecting an invention.²⁸ Patents grant their owner a set of rights of exclusivity over an invention as defined by the “claims”.²⁹ The legal protection conferred by a patent gives its owner the right to exclude others from making, using, selling, offering for sale or importing the patented invention for the term of the patent in the country or countries concerned by the protection.³⁰ Patents are granted in Sri Lanka in relation to an invention. An invention is defined by the Act as an idea of an inventor which permits in practice the solution of a specific problem in the field of technology.³¹ This means that the Sri Lankan patent law has adopted the “problem-solution approach” to define an invention. Sri Lanka’s IP Act provides protection for inventions relating to both products and processes.³²

Under Sri Lankan law, an invention is patentable if it is new, involves an inventive step and is industrially applicable.³³ Obviously, Sri Lankan IP law has adopted a similar approach to that taken by the TRIPS Agreement in deciding the criteria for patentability, namely, novelty, inventive step/non-obviousness and industrial applicability. Like any other IP right, a patent is a territorial right. Under Sri Lankan law, the statutory life of a patent is 20 years from the date of application for its registration.³⁴ From a legal perspective, a patent is not a right to practice, but a right to exclude.³⁵ In that sense, a patent is a negative right, as opposed to an affirmative right. Pursuant to Section 84 of the IP Act, a patent confers on its owner a set of exclusive rights to exploit the invention. Such rights include preventing third parties not having the owner’s consent from making, using, importing, offering for sale, selling and exporting the patented invention. Moreover, patent owners also have the right to assign, transfer or to conclude licensing contracts with regard to the rights

²⁷ World Intellectual Property Organization (WIPO), *Creative Expression: An Introduction to Copyright and Related Rights for Small and Medium-sized Enterprises* (WIPO publication No. 918, Geneva, 2006).

²⁸ See Article 28 of the TRIPS Agreement.

²⁹ A claim forms part of the specification. The specification is essentially a description of the invention and the best method of performing it.

³⁰ Organisation for Economic Co-operation and Development (OECD), *Patent Statistics Manual* (OECD 2009) 18, 18.

³¹ See Section 62(1) of the IP Act. The word “technology” may be understood as the systematic knowledge essentially required for the manufacture of a product.

³² See Section 62(2) the IP Act: process patents are those patents which are for inventions which perform a function.

³³ See Section 63 of the IP Act which deals with protectable inventions.

³⁴ See Section 83 of the IP Act.

³⁵ Kinney and P.A. Lange, *Intellectual Property Law for Business Lawyers* (2010-2011 edn., West Publishers 2010), para. 2:1.

conferred by the patent. This does not, however, mean that the exclusive rights granted by law for patent owners are without limitations.³⁶

2.3.2 Design protection

An industrial design may be defined as the (outward) appearance of a product or a part of a product which results from the lines, contours, colors, shape, texture, materials and its ornamentation.³⁷ The more appealing such products are, the more likely it is that they will be bought by consumers.³⁸ Designs make a product attractive and appealing; hence they may add significantly to the commercial value of a product and increase its marketability. Design protection is wide enough to encapsulate designs of three-dimensional patterns such as toys, shoes, perfume bottles, cutlery, and even domestic furniture and two-dimensional patterns such as textiles and wallpapers. Industrial design protection has developed worldwide.

The current legal protection of industrial designs in Sri Lanka is governed by Part III of the IP Act. According to Section 30 of the IP Act, “any composition of lines or colors or any three-dimensional form, whether or not associated with lines or colors, that gives a special appearance to a product of industry or handicraft and is capable of serving as a pattern for a product of industry or handicraft, shall be deemed to be an industrial design”. However, Section 30 further states that anything in an industrial design which serves solely to obtain a technical result shall not be protected as an industrial design in Sri Lanka. In order to be eligible for protection under Sri Lankan law, any registerable design has to be new and must not be anti-social, in the sense that it does not consist of any scandalous design or is contrary to morality or public order or public interest or is likely to offend the religious or racial susceptibilities of any community.³⁹ The IP Act does not provide any guidance as to what “public order or morality” means, and arguably, this has to be understood in the light of the moral and sociocultural climate of the country.

Under Sri Lankan law, an owner of a registered industrial design can enjoy his exclusive rights to exploit by preventing others from the unauthorized making, selling, importing or using of any product that is protected by design law.⁴⁰ The registration of an industrial design lasts for five years from the date of application and it can be renewed for two consecutive periods of five years. Thus, the statutory life of

³⁶ The possibility of granting compulsory licenses is provided for in the IP Act under Section 86 and it may operate as a limitation of the owner’s right. Another possible exception to the rights of the owner of a patent is the prior user right recognized under Section 87 of the IP Act.

³⁷ See Art. 3 of the Council Regulation (EC) No. 6/2002 of December 12, 2001 on Community Designs (Community Designs Regulation-CDR).

³⁸ Y Takagi and others (eds.), *Teaching of intellectual property* (WIPO and CUP 2008) 85.

³⁹ See Section 29 of the IP Act. See also D.M. Karunaratna, *Elements of the Law of IP in Sri Lanka Op. Cit.*, p. 116.

⁴⁰ See Section 47 of the IP Act.

a registered design is 15 years from the date of application.⁴¹ In principle, Sri Lankan industries such as textiles and garments, toys, cottage industries like handicrafts, as well as the producers of gems and jewelry should have been the prime candidates for design protection.

2.3.3 Trademarks, certification marks and collective marks

According to IP law, trademarks protect brands and goodwill is associated with brands. Trademarks, therefore, provide the vehicle to protect characteristics specified in trademark law such as signs, words, logos, slogans, etc. Trademarks are prime advertising tools and are of paramount importance in the marketing and commercialization of the goods and services of any business, big or small. Three main categories of marks are recognized under the IP Act, namely, trademarks and service marks, certification marks and collective marks. As spelled out in Section 101 of the Act, a trademark is a visible sign serving to distinguish the goods of one enterprise from those of other enterprises. The exclusive right to a mark under the Act is acquired by registration. Under the IP Act, only a visible sign may be registered. Therefore, non-traditional forms of trademarks, such as single colors, three-dimensional signs (shapes of products or packaging), audible signs (a sound mark) or olfactory signs (a smell mark), motion marks or any other non-visual sign would not qualify for registration under Sri Lankan law.

A mark is admissible for registration if it is not inadmissible on any of the grounds enumerated in Sections 103 and 104 of the Act. Section 103 identified a set of grounds of inadmissibility, known as “objective grounds”, such as shapes or forms imposed by the inherent nature of the goods or services or by their industrial function; descriptiveness; generic designations; signs incapable of distinguishing the goods or services of different enterprises; scandalous signs or signs contrary to morality or public order or likely to offend religious or racial susceptibilities of communities; misleading signs; geographical names or surnames in their ordinary signification; signs that imitate or reproduce State emblems and flags etc.; and marks the registration of which has been sought in respect of goods or services the trading of which is prohibited in Sri Lanka.⁴²

Furthermore, Section 104 sets out certain grounds of inadmissibility which concern third-party rights. They include a mark misleadingly similar to an already registered or validly applied mark and a mark misleadingly similar to an unregistered mark used earlier in Sri Lanka. Under Section 118, registration of a mark lasts for a period of ten years from the date of application and such registration may be renewed for consecutive periods of ten years. In that sense, the trademark right can last forever, provided it is renewed in accordance with the law. The registered owner of a mark

⁴¹ See Sections 45 and 46 of the IP Act.

⁴² *Ibid.*, 187.

has the following exclusive rights in relation to a mark: (a) to use the mark; (b) to assign or transmit the registration of the mark; and (c) to conclude license contracts involving the mark.⁴³

A mark need not be owned or used by just one person, business or organization. Marks can also be owned and/or used by groups.⁴⁴ One other significant aspect of the Sri Lankan trademark regime is that it accords protection for both collective and certification marks under the IP Act.⁴⁵ A collective mark is defined as a mark distinguishing the goods or services of members of the association which is the proprietor of the mark from those of other undertakings. The main feature of a collective mark is that it is used as an indication to the relevant public that goods or services originate from a member of a particular association. It is therefore a sign of membership.⁴⁶ From a business perspective, a collective mark is owned by an association or cooperative representing a group of people or businesses. All the members of the association or cooperative can use the collective mark for goods and/or services that comply with criteria established by the association or cooperative.⁴⁷ Under Sri Lankan trademark law, another type of mark that can be used by a group is a certification mark. The owner of a certification mark allows anyone to use it, provided they meet certain prescribed standards.⁴⁸ A certification can be defined as a mark indicating that the goods and services in connection with which it is used are certified by the proprietor of the mark in respect of origin, material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics.⁴⁹ The main feature of a certification mark is that it is used not by the proprietor of the mark but instead by his authorized users for the purpose of guaranteeing to the relevant public that the goods or services possess a particular characteristic.⁵⁰ Moreover, in order to develop a joint marketing campaign for their products, the use of collective marks plays a vital role. The law also recognizes the concept of certification marks.⁵¹ Trade names can also be protected under the trademark regime by virtue of Section 144 of the IP Act.

⁴³ See Section 121(1) of the IP Act.

⁴⁴ World Intellectual Property Organization (WIPO), *Protect and Promote Your Culture: A Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities* (WIPO publication, Geneva, 2017) 42.

⁴⁵ See definitions in Section 101 and detailed provisions under Sections 138-142 of the IP Act.

⁴⁶ E. Smith, "Certification and collective marks- Paper prepared by the United Kingdom for the SCT". Available at: <http://www.wipo.int/export/sites/www/sct/en/comments/pdf/sct21/cert_uk.pdf>, accessed on February 21, 2017.

⁴⁷ World Intellectual Property Organization (WIPO), *Protect and Promote Your Culture: A Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities* (WIPO publication, Geneva, 2017) 42.

⁴⁸ *Ibid.*

⁴⁹ E. Smith, "Certification and collective marks – Paper prepared by the United Kingdom for the SCT". Available at: <http://www.wipo.int/export/sites/www/sct/en/comments/pdf/sct21/cert_uk.pdf>, accessed on February 21, 2017.

⁵⁰ *Ibid.*

⁵¹ See Section 101 of the IP Act.

2.3.4 Geographical Indications (GIs)

As defined in the IP Act, “a geographical indication means an indication which identifies any good as originating in the territory of a country, 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.”⁵² When compared with a trademark, the uniqueness of a GI is the link between the product and the geographical origin (territory or region). For this reason, a GI derives its characteristics from the unique environment, namely, natural (climate, conditions of soil, etc.) and human factors such as historical context, intergenerational skills and know-how. GIs are one of the main features of IP law. The protection of GI products has attracted increasing attention among policymakers and scholars, both at the international and the domestic levels. GIs convey an assurance of quality and distinctiveness which are essentially attributed to the fact of their origin. Therefore, a GI is an important IP tool to protect GI products from cheap imitations and to help preserve their quality. “Ceylon Tea”, “Indian Basmati”, “French Champagne”, “Greek Feta Cheese”, “Cuban Havana Tobacco”, “Italian Parma Ham” and “Colombian Coffee” are a few prominent examples of internationally recognized GIs.

Sri Lanka is well-known for “Pure Ceylon Tea” and its pristine quality and reputation which remain in the minds of global consumers. It is undeniable that GI protection in the IP Act has been greatly motivated by the tea industry, one of the major earners of foreign exchange in the country. Under the IP Act, geographical indications (GIs) can be protected under several areas of law: (i) *sui generis* protection accorded under Section 161 of the Act; (ii) law of marks under Section 103 of the Act; (iii) unfair competition law; and (iv) collective and certification marks.⁵³ Section 161 of the IP Act shows that the Act does not restrict special protection for wines and spirits, but rather extends such protection to all other GI products. Thus, Ceylon Tea enjoys a higher level of protection under the IP Act.

2.3.5 Unfair competition and undisclosed information

Section 160 of the IP Act also accords protection against unfair competition, which the Act defines as “any act or practice carried out or engaged in, in the course of industrial or commercial activities, that is contrary to honest practices”. The Act also contains specific provisions on protection against unfair competition. At first glance, the statutory scheme in Section 160 first deals with the general clause followed by a list of non-exhaustive specific acts. Protection against unfair competition is intended to prevent dishonest trade practices and safeguard the ethics of the business

⁵² See Section 101 of the IP Act.

⁵³ D.M. Karunaratna, *Elements of the Law of Intellectual Property in Sri Lanka, Op Cit.*, pp. 300-301.

community.⁵⁴ The basic elements of unfair competition under Sri Lankan law are: (1) any act or practice; (2) contrary to honest practices; and (3) carried out or engaged in, in the course of industrial or commercial activities.

The meaning of “contrary to honest practices” has been provided in the relevant rulings by Sri Lankan courts. In the case of *Sumeet Research and Holdings Ltd v. Elite Radio & Engineering Co. Ltd*⁵⁵ it was held that Section 160 (Section 142 of the previous Act) called for a higher standard of conduct – some norms of business ethics – and did not merely restate existing legal obligations. It may well be a broad and flexible doctrine that could be developed to meet the changing ethical needs of society, especially by preventing commercial unfairness resulting from the appropriation by one person of the benefit which equitably belongs to another. In deciding what can be construed as “dishonest”, one should not forget that the criterion of wrongfulness is based on the legal convictions of the community and underpins the requirement that competition between enterprises should be fair and exercised in accordance with the public interest.⁵⁶ Moreover, Section 160 embraces a wide spectrum of specific acts with more detailed examples of unfair competition. These include: acts which cause confusion or are likely to cause confusion with respect to competitors’ goods or services;⁵⁷ acts which cause damage to goodwill or reputation, including acts of dilution;⁵⁸ misleading acts such as advertisements; any false or unjustifiable allegations; discrediting or denigration of competitors, etc.⁵⁹

Although the protection of trade secrets is a relatively late addition to the field of IP protection, it has become crucial to the creation of an enabling business environment in any country. Trade secrets are often considered to be the “crown jewels” of a firm’s intellectual assets.⁶⁰ In the eyes of the law, any information that is kept confidential in order to preserve competitive gains is considered a trade secret. Indeed, defining a trade secret is no easy task as the concept includes customer lists, formulas, practices, business strategies, software programs, advertising strategies,

⁵⁴ K Kanag-Isvaran, “Unfair Competition-An Antidote to Dishonest Trade Practices” (1997) VII/1 The Bar Association Law Journal 144-160.

⁵⁵ (1997) 2 Sri LR 393.

⁵⁶ K. Kanag-Isvaran, “Unfair Competition-An Antidote to Dishonest Trade Practices” (1997) VII/1 The Bar Association Law Journal 144-160, 147. See also case law dealing with the protection against unfair competition such as *Sumeet Research and Holdings Ltd. v. Elite Radio & Engineering Co., Ltd* [1997] 2 Sri LR 393-409, *Société des Produits Nestlé SA v. Multitech Lanka (PVT) Limited* [1999] 2 Sri LR.298-308, *Arpico Finance Company PLC v. Richard Pieris Arpico Finance Limited*, (SC [CHC] Appeal No. 41/2014 decided on September 29, 2014).

⁵⁷ See Section 160(2); this sub-section in particular deals with the confusion caused by look-alike products and the appearance of a product (get-up/trade dress).

⁵⁸ See Section 160(3); significantly, anti-dilution protection has been introduced via this provision. Dilution can lessen the distinctive character of a trademark by blurring or tarnishment

⁵⁹ See Section 160(4) and (5).

⁶⁰ See N.S. Punchihewa “Protection of Confidentiality of Trade Secrets in the Course of Legal Proceedings: A Sri Lankan Perspective”, the Proceedings of the Annual Research Symposium of the University of Colombo, 2015.

marketing plans, manufacturing processes and information about R&D activities, etc. The TRIPS Agreement recognizes trade secrets as an IP right. As a State party to the TRIPS Agreement, Sri Lanka has brought its IP laws into compliance with TRIPS obligations. More specifically, Section 160 of the IP Act and the common-law action for breach of confidence are the foremost legal instruments that protect trade secrets in Sri Lanka. Pursuant to Section 160(6) of the IP Act, Sri Lankan law specifies the conditions that should be fulfilled to secure protection for trade secrets, namely: (i) the information must be confidential; (ii) the information must have commercial value predicated on its confidentiality; and (iii) the holder of the trade secret should have made reasonable efforts to keep it confidential. Analysis of the provision shows that “confidentiality” functions as the gateway to protection of a trade secret.

2.4 Commercialization of IP rights

“Commercialization” means the exploitation of IP assets for commercial or financial gain by the IP rightholder through licensing, franchising or merchandising. IP rights transactions often involve an “assignment” or a “license”. “Assignment” is the technical term for transfer of ownership. Whereas a license only grants the right to perform an act which would be unlawful in the absence of the license, an assignment transfers the total interest in the IP right to another party.⁶¹ Licensing is the most common procedure for commercializing IP rights when they are exploited by someone other than the rightholder. An assignment involves the sale and transfer of ownership of an IP right by the assignor to the assignee.⁶²

Today, trademark licensing is a widely used procedure for commercializing IP in Sri Lanka. The various ways of licensing trademarks include franchising and merchandising. Franchising involves a specialized license through which a franchisee is allowed by the franchisor, in return for a fee, to use a particular business model. In this case, the franchisee is licensed to use a bundle of IP rights, notably trademarks and is supported through training, technical support and mentoring. Merchandising involves the licensing of trademarks, designs, artworks as well as fictional characters (protected by such rights) and real personalities.⁶³ When manufacturers of ordinary consumer goods, such as plates, mugs, towels, caps or clothes, are permitted to affix a trademark belonging to another rightholder to their products, this immediately adds

⁶¹ WIPO, *Creative Expression: An Introduction to Copyright and Related Rights for Small and Medium-sized Enterprises* (WIPO publication No. 918, Geneva, 2006) 37.

⁶² P Mendes, “To License a Patent or to Assign it: Factors Influencing the Choice”. Available at: <http://www.wipo.int/sme/en/documents/license_assign_patent_fulltext.html>, accessed on January 2, 2017.

⁶³ See generally, WIPO, “Trademark Licensing”. Available at: <http://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip_panorama_12_learning_points.pdf> assessed on January 14, 2017.

appeal to otherwise commonplace items and lends them a distinctive characteristic in the marketplace.⁶⁴

2.5 Enforcement

A comprehensive mechanism has been established for IP rights enforcement that embraces civil remedies, criminal sanctions and Customs control. Moreover, a copyright and related rights dispute resolution system is also available.⁶⁵ The courts are also empowered to issue a variety of orders in respect of infringement and related actions, including: disposal of infringing goods, materials or implements used to commit the acts of infringement; identification of persons involved in the production and distribution of infringing goods; interim orders such as an Anton Pillar order; and prevention of the continuation of the acts of infringement.⁶⁶

Sri Lankan courts generally grant injunctions and award damages in case of infringement of IP rights. The active use of the judiciary for IP litigation is a crucial aspect of IP rights enforcement. Moreover, the current IP enforcement mechanism in Sri Lanka has also been strengthened with criminal sanctions which permit the imposition of fines, imprisonment or both. A special court with first-instance jurisdiction in IP matters has been established under the High Court of the Provinces by Act No. 10 of 1996 (Special Provisions). Commonly called the Commercial High Court, it now has exclusive jurisdiction over all proceedings that fall under the IP Act, arising within its declared jurisdiction of indicial.⁶⁷

3. Existing and Potential Use of IP in Tourism and Culture in Sri Lanka

3.1 A glimpse of IP rights in relation to tourism

Inventions and creations are no doubt the drivers of national economic growth and development. Consequently, IP rights are increasingly becoming the bedrock of innovation and economic growth in the twenty-first century.⁶⁸ The notion of “IP rights” embraces a set of legally enforceable rights that emanate from the sublime creations of the human mind. Accordingly, the IP regime provides the structure and

⁶⁴ See generally, WIPO, “Trademark Licensing”, *Op. Cit.*

⁶⁵ See generally, D.M. Karunaratna, *Elements of the Law of Intellectual Property in Sri Lanka Op. Cit.*, pp. 394-396.

⁶⁶ Section 170(6) read with (7) shows that the provisions are structured on the basis of the Anton Pillar order. The section states that “the Court shall have power to order interim measures relating to protection, *ex-parte*, where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder or where there is a demonstrable risk of evidence being destroyed”. Furthermore, Section 170(7) stipulates: “where interim measures have been ordered *ex-parte* the parties affected shall be given notice and shall on receipt of such notice be entitled to be heard as to whether the interim measures ordered should be modified or revoked”.

⁶⁷ K. Kanag-Isvaran, “Unfair Competition-An Antidote to Dishonest Trade Practices” (1997) VII/1 The Bar Association Law Journal 144-160.

⁶⁸ Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* (London 2002) 11-12.

the tools for protecting, managing, exploiting and enforcing such rights. Furthermore, the use of IP rights in tourism would generate powerful tools for boosting the competitiveness of tourism industry stakeholders.⁶⁹ The aim of this chapter is to explore, whether and to what extent, IP rights can add value to and differentiate the various products and services offered in the tourism sector. As some scholars have stated, IP rights can be used to boost tourism development through the creation and protection of ideas, knowledge and innovations in the sector.⁷⁰ Indeed, a mapping of the current and potential uses of IP tools in tourism could be of practical relevance to entrepreneurs/businesses operating in the national tourism sector.

In this regard, the main aspects of IP rights that can be used in the tourism sector include: trademarks, collective marks, certification marks, GIs, industrial designs, utility models, patents, copyrights and related rights, trade secrets and protection against unfair competition, commercialization and enforcement. IP Act is the legal instrument that provides for a comprehensive regime for protecting IP rights in accordance with global standards embraced by WTO Agreements. From the economic standpoint, an IP right gives the rightholder a “psychological advantage” over competitors by creating the (illusory) effect that imitation by competitors will be delayed, thanks to the exclusive rights.⁷¹ Moreover, viewed through the lens of “prospect theory” securing an IP right for a tourism-related product or service enhances the prospects of commercial exploitation of the same in the competitive tourism market.⁷²

3.2 Branding of tourism-related products and services, including those identified through their origin

Invariably, branding is a tool used to market tourism-related products and services. It is something that resides in the mind of the consumer. A brand can be defined as “a name, term, sign, symbol, design or a combination of these, that identifies the products or services of one seller or group of sellers and differentiates them from those of competitors”.⁷³ Branding has been around for centuries as a procedure for

⁶⁹ A. Speriusi-Vlad, “Intellectual Property and the Tourism Industry: From ACTA Protests towards a Restrictive Interpretation of Innovation Regulations” (2014) SHS Web of Conferences. Available at: http://www.shs-conferences.org/articles/shsconf/pdf/2014/09/shsconf_4ictr2014_01089.pdf, accessed on January 5, 2017.

⁷⁰ D. Hirimuthugodage, “Intellectual property rights as a tool for enhancing ecotourism in Sri Lanka” (2016) Institute of Policy Studies of Sri Lanka. Available at: http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=154851, accessed on February 20, 2017.

⁷¹ See U. Suthersanen, G Dutfield and KB Chow (eds), *Innovation Without Patents* (Edward Elgar 2007) 42.

⁷² E.W. Kitch, “The Nature and Function of the Patent System” (1977) 20/2 *Journal of Law and Economics*, 265, 266.

⁷³ P. Kotler and G. Armstrong, “Principles of Marketing” (14th edn., Pearson Education, 2011) 231.

distinguish the goods of one producer from those of another.⁷⁴ In fact, the word “brand” is derived from the old Norse word *brandr*, which means “to burn”, as branding was and still is the means by which livestock owners mark their animals to identify them.⁷⁵ In fact, many practicing managers refer to a brand as more than something that has actually created a certain amount of awareness, reputation, prominence and other aspects in the marketplace.⁷⁶ Branding is characterized by keywords like “differentiation”, “innovation”, “creativity”, “uniqueness”, and “interest/attraction”.⁷⁷ A strong brand in consumers’ minds will create added value, mostly manifested as a non-functional and emotional form.⁷⁸ Consumers view a brand as an important part of a product. They attach meanings to brands and develop brand relationships. Brands have meaning well beyond a product’s physical attributes.⁷⁹ The different components of a brand that identify and differentiate it are called brand elements or brand identities. These are those trademarkable aspects that serve to identify and differentiate the brand. The main ones are brand names, URLs, logos, symbols, characters, spokespeople, slogans, jingles, packages and signage.⁸⁰ In general, there are six criteria for brand elements (each having more specific sub-choices). Brand elements must be: (1) memorable; (2) meaningful; (3) likable; (4) transferable; (5) adaptable; and (6) protectable.⁸¹ When IP aspects are combined with branding, it is safe to conclude that the legally protectable aspects of a brand such as signs, names, words, logos, slogans and symbols and other characteristics can be legally protected by a trademark right under IP law.

In tourism, various branding strategies can be adopted that would result in the branding of countries, places/cities/destinations, and products (including services).⁸² There is a growing inclination among tourism authorities to brand countries in order to enhance their appeal to tourists. Some recent success stories include Spain’s use of

⁷⁴ K.L.Keller, *Strategic Brand Management building, measuring, and managing brand equity* (Pearson Education Limited, Essex, England 2013) 30.

⁷⁵ Moreover, according to the American Marketing Association (AMA), a brand is a “name, term, sign, symbol, or design, or a combination of them, intended to identify the goods and services of one seller or group of sellers and to differentiate them from those of competition”.

⁷⁶ K.L. Keller, *Strategic Brand Management building, measuring, and managing brand equity* (Pearson Education Limited, Essex, England 2013) 30.

⁷⁷ A.M. Zetiu and P. Berteau, “How a Tourist Destination may become a Brand by means of Events – A Case Study on Iasi as a Candidate for European Cultural capital 2021” 2015 Centre for European Studies 388-403, 389.

⁷⁸ A.M. Zetiu and P. Berteau, “How a Tourist Destination may become a Brand by means of Events – A Case Study on Iasi as a Candidate for European Cultural capital 2021” 2015 Centre for European Studies 388-403, 392.

⁷⁹ P. Kotler and G. Armstrong, “Principles of Marketing” (14th edn., Pearson Education, 2011), 231.

⁸⁰ K.L. Keller, *Strategic Brand Management building, measuring, and managing brand equity* (Pearson Education Limited, Essex, England 2013) 142.

⁸¹ *Ibid.*

⁸² In marketing, the term “product” is broadly interpreted to include anything that can be offered to a market for attention, acquisition, use, or consumption that might satisfy a want or need. Products include more than just tangible objects, such as cars, computers, or cell phones. Broadly defined, it also includes services, events, persons, places, organizations, ideas, or a mixture of these.

a logo designed by Spanish artist Joan Miró, the “Incredible India” campaign, and the marketing of New Zealand based on the *Lord of the Rings* movie franchise. Some other tourist slogans include “No Artificial Ingredients” for Costa Rica and “Mother Nature’s Best-Kept Secret” for Belize.⁸³ Moreover, leading tourist destinations use innovative country branding such as: Greece – “A Masterpiece You Can Afford”; Canada – “Keep Exploring”; Malaysia – “Truly Asia”; Bulgaria – “A Discovery to Share”; Vietnam – “The Hidden Charm and Timeless Charm”; Maldives – “Always Natural”, to name but a few. Presented below are some of the slogans and logos used in country branding by the tourism authorities in some of the aforementioned Asian and South Asian countries to transform their countries into exceptional tourist destinations.⁸⁴



⁸³ K. L. Keller, *Strategic Brand Management building, measuring, and managing brand equity* (Pearson Education Limited, Essex, England 2013), 142.

⁸⁴ Image courtesy of Vietnam National Administration of Tourism. Available at: <http://www.vietnamtourism.com/>, accessed on August 30, 2017. Tourism Malaysia, Official website by Malaysian Tourism Promotion Board. Available at: <http://www.tourism.gov.my/>, accessed on August 30, 2017. Ministry of Tourism, Government of India. Available at: <http://www.tourism.gov.in/>, accessed on August 30, 2017. The “Incredible India” logo has been registered under the Trademark Act 1999. Ministry of Tourism, Republic of Maldives. Available at: <http://www.tourism.gov.mv/visit-maldives-year-logo/>, accessed on August 30, 2017.

Incredible India
atithi devo bhava

Maldives
always natural



Sri Lanka Tourism is currently gearing up for an aggressive promotional drive. In 2016, it identified the [tourism branding plan as one of its main strategies](#). Sri Lanka has used several taglines such as “Paradise Island”, “Land like no other” and currently, “Sri Lanka: Wonder of Asia” to brand itself.⁸⁵ Since branding countries to enhance their appeal to tourists is the prevailing phenomenon, Sri Lanka Tourism needs to adopt an effective tourism promotional strategy in “country branding” in order to attract more tourists. Accordingly, it needs to carefully choose and blend brand elements/brand identities in order to create a more appealing aura. A combination of different brand elements such as brand names, logos, symbols, characters, spokespeople, slogans, jingles, packages and signage can be explored.⁸⁶ A unique brand for Sri Lanka can be a vital tool which would be protected by the trademark regime across leading markets in the world. The SLTDA has promoted the following taglines in recent years.⁸⁷



Sri Lanka
A land like no other

sri lanka
W O N D E R O F A S I A

However, experts have questioned the wisdom behind the choice of branding currently promoted by Sri Lanka Tourism, relative to the emerging experience from other leading tourist attractions in the world. Critics charge that “to match the slogan ‘Wonder of Asia’, what are the wonders that Sri Lanka possesses? Two noteworthy

⁸⁵ D. Hirimuthugodage, “Intellectual property rights as a tool for enhancing ecotourism in Sri Lanka” (2016) Institute of Policy Studies of Sri Lanka. Available at: http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=154851 accessed on 20 February 2017.

⁸⁶ K.L. Keller, *Strategic Brand Management building, measuring, and managing brand equity* (Pearson Education Limited, Essex, England 2013) 48.

⁸⁷ Image courtesy of Sri Lanka Tourism-The Official Website of Sri Lanka Tourism. Available at: <http://www.tourism.gov.mv/>, accessed on August 30, 2017.

items are ‘Sigiriya’ and the gathering of elephants in ‘Minneriya’. Apart from these two, one cannot think of any other wonder in Sri Lanka. Therefore, it is questionable whether the branding of the destination is correctly placed”.⁸⁸ If Sri Lanka Tourism is considering an innovative “rebranding” drive, it should consider making the best possible blend of features unique to Sri Lankan identity, in order to highlight its strengths as a destination. In terms of IP protection, country branding can earn trademark protection under the trademark provisions of the IP Act of Sri Lanka. Likewise, the same protection can be obtained in other jurisdictions of the world.

The increased mobility of people and businesses as well as the expansion of the tourism industry have contributed to the rise of place marketing. More interestingly, many cities, regions and countries are realizing the importance of differentiating themselves from the rest, thus creating a niche market and individual appeal that will translate into more tourist arrivals.⁸⁹ They are currently and actively promoted through advertising, direct mail and other communication tools.⁹⁰ The branding of tourist destinations and places would certainly add value to the national tourism industry. Given the changes in the tourism sector, competition for tourist products and the changing demands and behavior of tourists, tourist destinations need to be branded and managed strategically.⁹¹ Hence, a brand image plays a key role in the success of a tourist destination. It is perceived as the destination image, a mental image formed by a set of attributes that defines the place and its size, having a strong influence on consumer behavior.⁹² In this regard, leading tourist destinations (cities and places) have the potential to be developed as unique tourist attractions through a distinctive brand identity.

Experts have suggested places (tourist destinations) that can benefit from a branding process just like consumer goods or services. According to T. Nanayakkara, recent “destination branding” efforts are essentially geared toward developing a trademark, which may be a registered logo or tagline. A few examples of successful destination

⁸⁸ S. Kelegama, “Key Challenges Facing the Tourism Sector in Sri Lanka” *Daily FT* (7 June 2014) available at: <<http://www.mfa.gov.lk/index.php/en/news-from-other-media/4841-key-challenges-facing-the-tourism-sector-in-sri-lanka>>, accessed on October 3, 2016. See also D. Hirimuthugodage, “Intellectual property rights as a tool for enhancing ecotourism in Sri Lanka” (2016) Institute of Policy Studies of Sri Lanka. Available at: <http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=154851>, accessed on February 20, 2017.

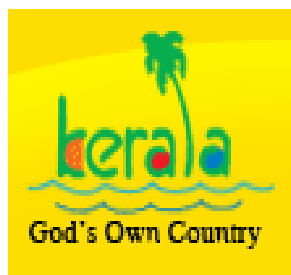
⁸⁹ T. Nanayakkara, “Role of Intellectual Property in Enhancing the Competitiveness of the Tourism Industry”. Available at: http://www.wipo.int/export/sites/www/sme/en/documents/pdf/tourism_ip.pdf, accessed on January 20, 2017.

⁹⁰ K.L. Keller, *Strategic Brand Management building, measuring, and managing brand equity* (Pearson Education Limited, Essex, England 2013) 48.

⁹¹ A.M. Zetiu and P. Berteau, “How a Tourist Destination may become a Brand by means of Events – A Case Study on Iasi as a Candidate for European Cultural capital 2021” 2015 Centre for European Studies 388-403, 390.

⁹² *Ibid.*

brands registered as trademarks and cited by the author based on international experience are presented below.⁹³



Moreover, slogans such as “Surf Arugam Bay”, “Whale-Watching Mirissa”, “Dolpin-Watching Kalpitiya”, “Elephant-Watching Minneriya”, “Yala Safari”, “Wilpattu Safari”, “Visit Ancient World in Anruadpura” “Ancient Glory of Medieval City of Pulathisipura”, “North Trails”, “Visit Nilaweli”, “Visit Tourist Paradise in Hikkaduwa” “Nuwara Eliya Vacations” may be used innovatively as protectable brand elements. In this regard, the concept of the collective mark referred to in Section 101 can be invoked successfully.⁹⁴ Furthermore, under Section 102(3) a mark may consist of geographical names and slogans for the purpose of admissibility. In the event that the mark is characterized as descriptive and consequently devoid of distinctiveness, then its “secondary meaning” (as in the US) or “acquired distinctiveness” (as used in Europe) would be established via extensive advertising campaigns and use. Trademarks can also be used to brand various items including T-shirts, postcards, bags, souvenirs, handicraft etc. in a bid to evoke and materialize the experience of the tourist. Moreover, the registered trademark owner could license the trademark to those who fulfill the requisite criteria. In the instant case, such owner may be the SLTDA or a business association. Nevertheless, place branding via a collective mark system has not yet been explored in the tourism landscape of Sri Lanka.

In fact, the trademark law may be able to protect not only the traditional origin function (source indicator) but also the guarantee of quality, advertising, investment and communication functions of trademarks.⁹⁵ Hence, the registration of trademarks

⁹³ T. Nanayakkara, “Role of Intellectual Property in Enhancing the Competitiveness of the Tourism Industry”. Available at: http://www.wipo.int/export/sites/www/sme/en/documents/pdf/tourism_ip.pdf, accessed on January 20, 2017. Image courtesy of Yahoo.com.

⁹⁴ Section 101 of the IP Act states a “collective mark” means any visible sign designated as such and serving to distinguish the origin or any other common characteristic of goods or services of different enterprises which use the mark under the control of the registered owner.

⁹⁵ As per the ruling of the European Court of Justice in *L'Oréal SA v. Bellure NV*, (C-487/07) handed down on June 18, 2009.

or service marks by hoteliers and entrepreneurs would certainly afford them an advantage in the tourism industry because brand names and logos constitute the most distinctive point of difference between the various products and service suppliers in the market. In addition to destination branding, events are the primary drivers of tourism, and feature prominently in the development and marketing plans of most destinations.⁹⁶ The role and impact of planned events in the tourism sector have been well documented, and are becoming increasingly relevant to destination competitiveness. Event tourism is an important and rapidly growing segment of international tourism.⁹⁷ Events have proven to be catalytic in promoting of tourist destinations in a competitive market.⁹⁸..They are a marketing tool used to position the tourist destination as well as specific products and services (events and portfolio of activities) that can be tailored to satisfy target market needs. Events evolve from being the cultural expression of a region to becoming a major marketing tool used to establish the image and enhance the position of a tourist destination among its competitors.⁹⁹ Festivals like “Kandy Dalada Perahera-The grand pageant of Asia”, “Nallur Kandaswami-Kovil-Festival”, Bellanwila Esala Perahera, Kataragama Esala Festival, Devinuvara Esala Festival can be featured in tourism promotion activities in Sri Lanka. Even though religious events may not be granted IP protection on public policy grounds, they can be used as a tool to promote cultural tourism. Nevertheless, certain aspects of such events – obviously the original music, talent and skill displayed through the specific instance of traditional dance or playing of musical instruments – can be accorded copyright and related rights protection respectively, should the conditions for such protection exist.

Given its rich biodiversity, culture and natural beauty, Sri Lanka has great potential to develop ecotourism compared to many other tourist destinations in the world.¹⁰⁰ Considering its abundant natural resources, which further enrich its highly diverse ecosystem, Sri Lanka ranks among the top 24 biodiversity hotspots in the world. Hence, there are several avenues for promoting ecotourism in the country.¹⁰¹ If Sri Lankan Tourism focuses on developing specialized areas of tourism, such as

⁹⁶ D. Getz, “Event tourism: Definition, evolution, and research”, (2008) 29 *Tourism Management* 403-428, 403. See also R. Prentice and V. Andersen, “Festival as Creative Destination” (2003) 30/1 *Annals of Tourism* 7-30.

⁹⁷ D Getz, “Event tourism: Definition, evolution, and research”, *Op Cit.*, p. 405.

⁹⁸ A.M. Zetiu and P. Berteau, “How a Tourist Destination may become a Brand by means of Events - A Case Study on Iasi as a Candidate for European Cultural capital 2021” 2015 *Centre for European Studies* 388-403, 389

⁹⁹ A.M. Zetiu and P. Berteau, “How a Tourist Destination may become a Brand by means of Events - A Case Study on Iasi as a Candidate for European Cultural capital 2021” *Op Cit.*, p., 393.

¹⁰⁰ Dilani Hirimuthugodage, “Intellectual Property Rights as a Tool for Enhancing Ecotourism in Sri Lanka”, Institute of Policy Studies of Sri Lanka. Available at <<http://www.ips.lk/talkingeconomics/2016/10/31/intellectual-property-rights-as-a-tool-for-enhancing-ecotourism-in-sri-lanka/>>, accessed on December 30, 2016.

¹⁰¹ *Ibid.*

ecotourism¹⁰² and agro-tourism,¹⁰³ the trademark regime, in particular, as well as the collective mark regime can be effectively utilized. In this regard, the Sri Lankan Department of Agriculture has designed and introduced an innovative agro-tourism initiative through the agriculture technology park at Gannoruwa,¹⁰⁴ Moreover, Anuradhapura, Hambantota Bata-atha and other selected locations in the country have been selected to offer a unique experience to both local and international tourists. As revealed during the field research, agro-tourism themes were added to the agriculture technology park at Gannoruwa. These include: live tropical crop demonstrations, agricultural museums, heritage crops, biodiversity parks, wild crop relatives, folk songs and dances relating to agriculture, all found or executed within an esthetically pleasing landscape and environment. In terms of IP rights protection, such an agriculture technology park can be protected by a number of IP rights relating to various aspects of agro-tourism, including a system of collective and certification marks, industrial designs and copyright, as well as related rights. Even though it is not clear whether the Sri Lankan trademark regime accords trade dress protection, the term “trade dress”¹⁰⁵ (visual effect of marketing) refers to the overall image, get-up or recognizable distinguishing features of a product or service that can be protected if the specific requirement of distinctiveness is met. Hence, the unique layout of the Agriculture Technology Park in its entirety may be afforded trade dress protection under trademark law and industrial design protection under the IP Act.

A GI is a source identifier that has great economic potential, especially for a developing economy like Sri Lanka. As defined in the IP Act, a GI is a sign used on goods that have a specific geographical origin and possess qualities, characteristics or a reputation tying them to their place of origin. When compared with a trademark, the uniqueness of a GI resides in the link between the product and the geographical origin (territory or region) it reflects. For this reason, a GI derives its characteristics from the region’s unique environment: namely, the natural (climate, conditions of soil etc.) and human (historical context, intergenerational skills and know-how) factors.

Sri Lanka is well-known for “Pure Ceylon Tea” as well as its pristine quality and reputation which remain in the minds of global consumers. Ceylon cinnamon, black pepper, blue sapphire from the city of gems, Rathnapura, *Panang Kaddi* (palmyrah jiggery), *Parithithurai Vadai* (Point Pedro spicy flat vades), *Malwana Rambutan*, and

¹⁰² The concept of ecotourism underlies “responsible travel to natural areas that conserves the environment and improves the well-being of local people”.

¹⁰³ The concept of agro-tourism is the first explosion of eco-tourism, which encourages visitors to experience agriculture life first hand and it demonstrates the agriculture heritage of the country.

¹⁰⁴ Lakshman Jayasinghe, “Promoting Agro-Tourism through Agriculture Technology Park, Gannoruwa, Peradeniya”, the “Policy Document” provided by the Director General of the Department of Agriculture, Sri Lanka.

¹⁰⁵ In this regard the US Supreme Court judgment, in *Two Pesos, Inc. v. Taco Cabana*, 505 U.S. 763 (1992), regarding the appearance and décor of a chain of Mexican-style restaurants can serve a reference point for Sri Lanka.

Buffalo curd of Ruhuna, are some of the items that can be added to this list of origin-linked products. The use of GI tags would certainly add value to what tourists purchase. The survey evidence confirms that the Sri Lankan Tea Board registered “Ceylon Tea” and its lion logo as a certification mark in January 2011 (Reg. No. 153931).¹⁰⁶ Moreover, Ceylon cinnamon has also been registered as a certification mark at NIPO. However, as revealed by Tea Board Officials, attempts at international registration of Ceylon Tea on the basis of a certification mark have not been successful.¹⁰⁷ Accordingly, the findings of this research highlight the need for a proper mechanism for registration of GIs in Sri Lanka, in addition to the existing legal framework.

In this regard, the Indian experience on the use of the GI Registry offers valuable insight and guidance to Sri Lanka. The Indian Registry has already registered agricultural products, handicrafts, manufactured products and foodstuff in its registration system. From the tourism promotion perspective, when GI protection is granted to a product, this clearly guarantees its quality and value and ensures the satisfaction of customer (i.e., the tourist) expectations. Hence, the GI tags on a product create greater potential for widespread commercialization. A GI symbol offers Sri Lankan producers an opportunity to recognize and market a premium product under their exclusive control. From a broader perspective, GIs can also help promote agro-tourism initiatives, tea estates and spice gardens; for instance, offering tourists memorable visits to various plantations in Sri Lanka. Moreover, GI protection will benefit farmers, artisans and craft makers, who possess the knowledge and skills to produce the GI’s distinctive products, and ensure that they harness the attendant and significant commercial benefits.¹⁰⁸

3.3 Tourism-related innovation and design

In a technology-driven world, innovation and invention play a major role in all types of industries, including the tourism industry whose competitive strategy depends heavily on innovative products and processes. Hence, patents and industrial designs are relevant in the tourism industry. Under the law, a patent is a legal title that protects an invention. A patent grants its owner certain exclusive rights over an invention (a product or process that is new, involves an inventive step and is

¹⁰⁶ This was revealed at the interviews conducted with the officials of the Ceylon Tea Board.

¹⁰⁷ In the absence of a GI registration system in Sri Lanka, the protection of Sri Lankan GI in foreign markets becomes challenging, if not impossible. This scenario has been created by the Article 24 (9) of the TRIPs Agreement which requires that a GI be registered and protected in the country of origin in order to protect it at the international level.

¹⁰⁸ G. Bocedi, F. Desimoni and R. Mendelson, *Protecting Geographical Indications in Emerging Economies (Brazil, Russia, India and China – BRICs Countries): A Practical Manual for Producers* (The Organization for an International Geographical Indications Network-Origin, Geneva, 2012) 28-39.

susceptible of industrial application) as defined by the “claims”. Patents are granted in Sri Lanka for inventions. An invention is a solution to a specific problem in the field of technology, and there are a number of long-standing tourism sector needs that may need innovative solutions. Such solutions include: inventions that enhance accessibility and cater to the needs of the ever-growing population of the elderly tourists and persons with disabilities; environmentally friendly technology (clean energy); garbage disposal; mosquito and insect repellent; effective cures for insect bites; boat manufacturing; surfing equipment; water purification devices; telecommunication equipment; software-implemented inventions; and energy-efficiency improvements. A range of new products used in the tourism sector can be protected by the patent regime of Sri Lanka. However, the industrial sector in general and tourism sector in particular have hardly used the national patent system. Consequently, it may be necessary for Sri Lankan policymakers to foresee the introduction of a utility model or petty patent system in the country, in addition to the current patent system. Such a system can cater to the needs of the SME (small and medium-sized enterprises) sector which is engaged in tourism-related product development. Alarmingly, as revealed by the patent examiners of NIPO, a large number of patent protection applications are rejected by NIPO, as they are new, albeit obvious, inventions.

An industrial design is another IP tool that could benefit the tourism sector in Sri Lanka. A design may consist of three-dimensional features, such as the shape or surface of an article, or of two-dimensional features, such as patterns, lines or colors. In a nutshell, a design is the appearance of a product: its shape, patterns and colors. Design protection is wide enough to cover designs of three-dimensional patterns such as toys, shoes, perfume bottles, cutlery, domestic furniture, reed-based utensils, pottery, expertly-crafted batik, woodwork, masks, brassware, exquisite gold and silver jewelry, inlaid with stones and leather goods, on the one hand; and two-dimensional patterns such as beautifully hand-woven textiles and wallpaper, on the other had.¹⁰⁹ It was observed during the field research conducted under this study that there is high demand for new designs in the apparel, jewelry, batik, masks and traditional handicraft sector. Moreover, even an innovative design for an Ayurvedic spa used in tourist hotels could be entitled to industrial design protection, if the prerequisite of novelty is satisfied. Interestingly, a number of tourist hotels have outlets and shops for the sale of design items in their properties. Therefore, such creative and innovative designs can be commercialized and promoted by granting exclusive design protection under the existing IP regime. Nevertheless, empirical evidence gathered from *Laksala* (Sri Lanka’s largest state-owned gift, souvenir and handicraft shop), *Lakmedura*, *Lakpahana*, (Sri Lanka’s largest privately-owned gift, souvenir and

¹⁰⁹ See generally, D.M. Karunaratna, *Elements of the Law of Intellectual Property in Sri Lanka Op Cit.*, pp. 114-135.

handicraft shops) and the National Design Center suggests that designers are not familiar with the use of the IP system to protect their innovative design, even though there is widespread copying of new designs as soon as they are put on the market.

3.4 National and/or local knowledge, traditions and culture

Under this section, the study investigates whether, and to what extent, creations in the literary, artistic and scientific fields, as well as traditional knowledge including traditional medicine can be used in tourism-related products and services sectors. Undoubtedly, creative works used in the tourism sector may be protected and promoted by using different types of IP tools. In this regard, copyright and related rights regimes, trade secret protection and protection against unfair competition will be explored. Additionally, the desirability of other alternative regimes is worth considering, including the adoption of a *sui generis* regime and compulsory liability system for the protection of traditional knowledge-based creations and inventions.

3.4.1. Copyright and related rights for tradition and culture

The concept of copyright embraces the protection of original intellectual creations in the literary, artistic and scientific domains. Copyright regulates the creation and use of a range of cultural goods such as books, songs, films and computer programs. The subject matter of protection includes: literary works; musical works; dramatic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; architectural work etc. Furthermore, exclusive rights attached to copyright can be effectively harnessed for the improvement of the tourism industry. More specifically, promotional materials, literature, guide books, surfing training modules, original music played at hotel properties, songs, creative content in tourist websites, specific social documentaries or videos devoted to the cultural and religious environment of Sri Lanka, tourist databases, and leaflets used in the tourism industry can all be given copyright protection under the existing IP regime.

Furthermore, the Sri Lankan IP Act also protects three categories of related rights; namely: the rights of performing artists; the rights of the producers of sound recordings; and the rights of broadcasting organizations. Significantly, the term “performers” has been given a broad definition to include singers, musicians and other persons who sing, deliver, declaim, play in or otherwise perform, literary or artistic works or expressions of folklore. Hence, skills and talents performed in traditional dances in cultural festivals, such as the Kandy *perahera*, could be protected by neighboring rights. The artists who perform at traditional cultural festivals should, arguably, be given exclusive rights to “fix and control” the specific instance of performance using the related rights regime, provided necessary authorization is obtained from the Director General of NIPO (the competent authority), even if the traditional dance concerned is based on a work that is already in the public domain. Granting an IP right would contribute to the promotion and exploitation of intellectual

creation. Accordingly, in agro-tourism, tea dance, paddy dance and other dances related to the traditional methods of harvesting used in cultural shows that target tourist audiences, can be accorded IP rights and be better promoted, such that benefits accrue to the artists involved in such activities.

As mentioned before, Sri Lanka enjoys a rich cultural heritage. The relationship between folklore and tourism can be used positively to benefit both the holders of traditional cultural expressions and the tourism industry in the country. In this regard, the use of folk dances, folk songs, folk music and folk stories as an entertainment performance can be introduced in tourist hotels and other venues that are tourist attractions. It would help traditional knowledge holders and performers of traditional cultural expression to gain from new uses, functions and values, while preserving the cultures and traditional practices. In this regard, for the protection and preservation of the country's tradition and culture, Section 24 of the IP Act provides that expressions of folklore are to be protected against reproduction, communication to the public, broadcasting, distribution by cable or other means as well as adaptation, translation and other transformation when such expressions are made either for commercial purposes or outside the traditional or customary context.¹¹⁰ Most strikingly, the IP Act has given an overarching definition to the "expression of folklore" which encapsulates "a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means, including: (a) folk tales, folk poetry, and folk riddles; (b) folk songs and instrumental folk music; (c) folk dances and folk plays; (d) productions of folk art in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, handicrafts, costumes and indigenous textiles".

3.4.2 Other IP options available and fallback protection

As revealed during the interviews with the stakeholders, the major tourism sector players (i.e., the hotel industry, gem industry, tea industry, as well as the traditional knowledge-based medicine and cosmetic industry) use trade secrets and confidential information. Consequently, the protection of trade secrets offers a competitive advantage to the tourism industry and other related sectors. As in some other jurisdictions, comprehensive protection is accorded to trade secrets under the IP Act. Trade secrets are referred to as confidential information under Sri Lankan law. Pursuant to Section 160(6) of the IP Act, Sri Lankan law specifies conditions that must be met to secure trade secret protection for an asset, namely, (i) the information must be confidential; (ii) the information should have commercial value predicated

¹¹⁰ See generally I. Abeysekere, "Copyright and practice in Sri Lanka" (1998) 28, *International Review of Industrial Property and Copyright* 29-30.

on its confidentiality; and (iii) the holder of the trade secret should have made reasonable efforts to keep it confidential. An analysis of the provision shows that “confidentiality” serves as the gateway to trade secret protection. Such protection covers customer lists, formulas, practices, business strategies, software programs, advertising strategies, marketing plans and manufacturing processes of the tourism industry in Sri Lanka.

The Sri Lankan IP regime also provides protection against unfair competition under Section 160 of the IP Act. As defined in the Act, “any act or practice carried out in the course of industrial or commercial activities contrary to honest practices constitutes an act of unfair competition”. Protection against unfair competition can be used as an effective tool to combat infringements and abuses relating to hotel classification regulations.¹¹¹ Empirical evidence supports the view that the misappropriation of hotel classification has become a major issue in the industry. As was revealed through the field research, there were instances of misuse of the star classification and grading system used for tourist hotels, other types of tourist accommodation and restaurants. For example, some hotels have engaged in promotional campaigns advertising themselves as having a star rating higher than the one awarded to them (a two-star hotel posing as a four-star hotel or a “B” grade guest house passing for an “A” grade one). Any tourist hotel which is not classified under the above regulations cannot use or display or cause to be used or displayed the words “star class hotel” or any other words to that effect. If a classified tourist hotel uses or displays, or causes to be used or displayed, any fraudulent symbol or an imitation of such symbol, as referred to in the regulation, such an act is construed as dishonest practice under the unfair competition law of Sri Lanka.

3.4.3 Traditional knowledge and indigenous medicine

From time immemorial, Sri Lanka has been renowned for the sheer abundance of its medicinal plants and its a rich endowment of traditional knowledge (TK). It is often argued that Sri Lanka should reap greater benefits from its rich TK base. Currently, that knowledge is not properly utilized and its potential remains untapped, although it has huge market potential. The WIPO has come up with a general and a narrow definition of TK. In a general sense, it embraces the content of knowledge itself, as well as [traditional cultural expressions](#), including distinctive signs and symbols associated with TK.¹¹² In a narrow sense, TK refers to knowledge as such, in

¹¹¹ See Section 15-20 of the Tourism (Classification of Tourist Hotels) Regulations No. 01 of 2016, Regulations made by the Minister of Tourism, Development and Christian Religious Affairs under Section 69 of the Tourism Act, No. 38 of 2005. These regulations came into operation with effect from 20 May 2016. Also see the Guidelines and Standards for boutique hotels issued by Sri Lanka Tourism Development Authority.

¹¹² WIPO, *Document of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*. Available at:

particular the knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills and innovations. As defined in the draft text entitled “A Legal Framework for the Protection of Traditional Knowledge in Sri Lanka”, “traditional knowledge” (TK) means “the content or substance of knowledge that is a result of intellectual activity and insight in a traditional context and includes the know-how, skills, innovations, practices and learning that form part of TK systems and knowledge that is embodied in the traditional lifestyle of a community or people, or is contained in written or codified knowledge systems passed between generations and “traditional knowledge” is not limited to any specific technical field, and may include agricultural, environmental, health care and medicinal knowledge, associated with genetic resources or other components of biological diversity, and know-how of traditional architecture and construction technologies”.¹¹³

From a tourism perspective, Ayurveda and other traditional healing services (ancient healing systems) in Sri Lanka have great potential to develop in the health and wellness tourism industry. Ayurveda and traditional medicine have been practiced in Sri Lanka for more than 3,000 years. Ayurveda, as defined in the Ayurveda Act, encompasses all medical systems indigenous to Asia, including *Siddha* and *Unani* in Sri Lanka.¹¹⁴ The Ayurveda and traditional medical systems mainly use plants, minerals, animal preparations and treatment modalities which include, for example, instrumental *rakta mokshana* (bloodletting treatment), *agni karma* (thermal cauterization), *kshara karma* (chemical cauterization) and *yantra karma* (use of blunt instruments) for the treatment of various diseases. There is a deep reservoir of TK associated with Sri Lanka’s unique non-formalized traditional medical system known as “*Deshiya Chikitsa*”. Sometimes, this TK is mixed with other forms of traditional medical systems in the country.¹¹⁵ The community relies on this system for multiple treatments, including the treatment of eye diseases, fractures and dislocations, burns and scalds, boils and carbuncles, fertility diseases, toxic diseases, immunity system disorders, digestive system diseases, urinary system diseases, pediatric diseases, physiological, *yakka*- or demon- caused diseases and tumors. Some of the practitioners specializing in fractures and dislocations are of such high reputation that they are often the first choice of treatment even for sections of the community accustomed to allopathic (western) medicine.

<http://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_mandate_1617.pdf>, accessed on October 3, 2016.

¹¹³ National Intellectual Property Office of Sri Lanka, *A Legal Framework for the Protection of Traditional Knowledge in Sri Lanka* - Working document dated January 2009 available at: <<http://www.wipo.int/edocs/lexdocs/laws/en/lk/lk011en.pdf>>, accessed on October 3, 2016.

¹¹⁴ See Section 89 of the Ayurveda Act, No. 31 of 1963 (as amended). It states that Ayurveda includes the *Siddha* and *Unani* and *Desiya Chikitsa* system of medicine and surgery and any other system of medicine in the Asian countries. See also Ministry of Indigenous Medicine Sri Lanka, Available at: <<http://www.indigenousmedimini.gov.lk/>>, accessed on October 2, 2016.

¹¹⁵ P.K. Perera “Current Scenario of Herbal Medicine in Sri Lanka” (ASSOCHAM, 4th Annual Herbal International Summit, NSIC, New Delhi, 14-15 April, 2012).

The TK involved has been protected in the form of family secrets passed from one generation to another due to IP rights-related issues. There is even more TK recorded on ola-leaf manuscripts and in ancient books on traditional medical systems. Yet, these texts which harbor TK have not been publicized to foster the development of public health. The Government Department of Ayurveda, Sri Lanka, has documented the national formalized medicinal system in three volumes, constituting Part I of the Ayurveda Pharmacopoeia¹¹⁶. The Pharmacopoeia identifies the raw materials employed by physicians using the indigenous system; the drugs prescribed for various diseases; and the preparation methods for the various drugs. Although the Pharmacopoeia claims to deal with all three formalized systems, its focus is principally on Ayurveda.

With regard to the rich TK and traditional medical system in Sri Lanka, the tourism promotion opportunities can be summarized as follows.

- Ayurveda and traditional medicine services – this includes treatments for diseases and wellness through Ayurveda hospitals, medical centers, Ayurvedic spa treatment modalities and Ayurvedic beauty care centers.
- Herbal drugs and related products can be marketed, while ensuring safety and quality through an appropriate IP protection regime.
- Marketing of traditional spices, foods and beverages (This could include herbal gardens, traditional food courts/restaurants etc.).
- Developing quality education related to traditional medicines (including dissemination of knowledge pertaining to Ayurveda and traditional medical systems) for foreigners.
- Collaborative research between foreign and local universities with effective memoranda of understanding.

Furthermore, as revealed during the interviews with experts, the traditional medicine sector has great potential to make a positive contribution to the development of the national tourism industry. Wellness tourism¹¹⁷ is an untapped niche market in which new tourism products can be developed and promoted by using IP tools for their protection. For example, “new concept hotels” can be developed, based on the Ayurveda’s concept of the “Tridoshas” (the three fundamental energies are known as *vata*, *pitta* and *kapha*). An innovation-led Ayurvedic sector may be able to offer high quality innovative Ayurvedic external treatment for curative and health promotional treatment through various measures like Ayurvedic spa treatment, steam treatment,

¹¹⁶ Department of Ayurveda, Sri Lanka, *Ayurveda Pharmacopoeia* (1976) Vol. 1, Part I:1–376, *Ayurveda Pharmacopoeia* (1980) Vol. 1, Part II:1–304 and *Ayurveda Pharmacopoeia* (1985) Vol. 1, Part III:1-456.

¹¹⁷ Wellness tourism refers to authentic or location-based experiences/therapies such as yoga, Ayurveda, use of local medicines, etc.

oilation treatment, massage treatment and beauty improvement treatment which can be introduced to make tourists feel refreshed and rejuvenated. Furthermore, very common and complicated diseases can be successfully treated by Ayurveda through time-tested, unique and specific internal treatment such as decoctions, tonics, powders, jam, oil and ghee preparation. Furthermore, surgical treatment such as *agnikarma*, *kshara karma*, *rakta moksha* etc. can be used for treating diseases. A very specific treatment of Ayurveda such as *panchakarma* is also popularly used in the prevention and cure disease. Interestingly, sound therapy is also used for curative purposes. The concepts of music therapy and color therapy are gaining popularity among foreigners visiting Sri Lanka. As per the current practice, the Balinese spa and body massage practiced in a number of Sri Lankan hotels has taken away the core-value of Ayurveda; namely, relaxation of the mind, body and soul. Ayurveda wellness products can be developed to suit modern needs such as in the production of fat burner herbal tablets/capsules, non-diabetic biscuits, Ayurvedic chocolate from insoluble pulp, appetizers, toffees, herbal chewing gum, herbal soft drinks, toothpaste and mouth wash, cosmetics, health preservation (for certain skin diseases) and beauty soaps, herbal wine from “*kashaya*” (decoction) and herbal tea. Innovation, therefore, is integral to the development of new tourism products and their presentation in a more attractive and palatable form. In fact, the value of Ayurvedic spa treatment and wellness products can be increased through IP protection which protects, rewards and incentivizes such innovation. Above all, a certification mark system such as “Sri Lankan Ayurvedic Products” or “Sri Lankan Ayurvedic Spa” (in Ayurveda the term “SPA” can be used as “SPO”- an abbreviation of Sanitary Per Oil) with the quality assurance and accreditation from the Department of Ayurveda and SLTDA can be registered under the trademark regime. The use of IP such as certification marks, design rights, trade secrets, protection against unfair competition, and even patent rights would undoubtedly offer some form of quality signaling and value addition which would be useful to attract more tourists to the country and encourage them to spend more during their stay.

Apart from the granting of IP rights protection, Sri Lankan policymakers are currently deliberating on the draft policy framework on traditional knowledge (TK), traditional cultural expressions (TCE) and genetic resources (GR).¹¹⁸ The draft policy recommends adopting a *sui generis* regime for the protection of TK, TCE and GR in Sri Lanka. As discussed, creation of any IP right over TK should be based on best practices followed in other jurisdictions such as disclosure of origin (DO), recognition (communal moral rights) of the custodians, prior informed consent based on mutually agreed terms, and the fair and equitable sharing of benefits. The main element of

¹¹⁸ To this end, Sri Lankan government, with the expert assistance of WIPO, is currently working on the policy document on TK, TCE and Genetic Resources. The National Workshop on Traditional Knowledge (TK) was held on April 27-28, where a draft national policy on TK and TCEs was discussed among national stakeholders with the contribution of WIPO experts.

such a regime should include: the policy objective of the protection; scope of the subject to be protected; conditions of protection; the beneficiaries of the protection; the nature of rights to be granted; the method of acquiring the rights; and the mechanism to administer and enforce the rights. Moreover, the concept of compensatory liability regime (CLR) can be appropriately embedded into the design of the *sui generis* legislation. A CLR system is built on “take and pay” principle; i.e., the second comers can access and use the protected subjected matter for specific purposes without permission, but they must compensate the first comer for the uses in one way or another.¹¹⁹

3.5 Cultural heritage, IP rights and tourism

Owing to its historical and cultural heritage, spanning more than 2500 years, Sri Lanka was known as the “resplendent land” in the ancient world. Sri Lanka undeniably has exceptional natural and cultural endowments. Its cultural heritage has been recognized by UNESCO, which has declared six cultural and two natural World Heritage Sites in the country, namely the sacred city of Anuradhapura, the ancient city of Polonnaruwa, the golden temple of Dambulla, the ancient city of Sigiriya, the sacred city of Kandy, the old town of Galle and its fortifications, the Sinharaja Forest Reserve and the central highlands of Sri Lanka.¹²⁰ These cultural and natural heritage sites attract thousands of tourists every year from all over the world. The rich cultural heritage of the country therefore holds an untapped potential for tourism promotion, but according to a recent report the murals at the cave temple in Dambulla are peeling off; paintings have faded and are exposed to the mercy of Mother Nature, due to the lack of a proper protection program; the layer between the stones and plaster has become wet and is on the verge of collapse; the increased level of hydrogen and uncontrolled gathering of pilgrims inside the temple and high humidity have aggravated the situation; plaster on the walls is falling; and high-voltage camera lights have endangered the paintings.¹²¹ This situation calls to mind the significant threat that unsustainable tourism poses to the country’s cultural heritage. Cultural heritage sites must therefore be used sustainably and respectfully for tourism if national endangered treasures are to be preserved.

In this regard, the IP system can be utilized successfully to generate funds to preserve, conserve and restore imperiled monuments. Heritage-site branding through the

¹¹⁹ T. Cottier and M. Panizzon, “Legal Perspectives on Traditional Knowledge: The case for Intellectual Property Protection” in K.E. Maskus and J.H. Reichman (eds.), *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime* (Cambridge University Press 2005) 564, 567.

¹²⁰ UNESCO, “Properties inscribed on the World Heritage List” Available at: <<http://whc.unesco.org/en/statesparties/lk>>, accessed on May 10, 2017.

¹²¹ Gagani Weerakoon, “Dambulla’s Golden Temple Faces Global Disgrace” *Ceylon Today* (Colombo, 2 July 2017). Available at: <<http://www.ceylontoday.lk/print20170401CT20170630.php?id=24566>>, accessed on July 3, 2017.

trademark system can contribute to commercial exploitation of the cultural heritage. The trademark may be owned by the Central Cultural Fund or the Archeological Department, on behalf of the people of the country, as the custodian of the property. The exclusive trademark rights may then be licensed out for use on merchandise such as souvenirs and miniature models. Although IP system-specific limitations may be placed on the exploitation of the cultural heritage, technological inventions for the preservation of ancient buildings, paintings and statues and for stone treatment, for example, may be protected under the country's patent system (or petty patent system). Inculcation of moral respect for cultural heritage among visitors, regulation of access to the sites and the regulation of the use of images for commercial purposes are of the essence if these places are to be used sustainably for tourism. To quote Bonnie Burnham, President of the World Monuments Fund (WMF), "Tourism carries a tremendous potential that must be acknowledged as essential for the future of world heritage, but without proper management we can easily get out of control".¹²²

3.6 Empirical evidence

- As observed earlier, the value of IP rights lies in their ability to exclude others from using an IP right that has been legally protected. The exclusive rights of exploitation and of preventing unauthorized third parties from benefitting from IP rights are vital for the promotion of tourism in the country.¹²³ The use of IP rights in tourism would undoubtedly enhance the competitiveness of the industry, even though tourism falls mainly within the service sector in Sri Lanka.¹²⁴ A snapshot of some key interview and field research findings on the use of IP rights in tourism and culture is provided below and complements the empirical evidence given in other sections of the study. Branding of tourist destinations/sites of tourist attractions, such as "Wonderful Nelaveli", and registration of marks under the trademark system in order to protect brands have not been adequately explored in the tourism industry in Sri Lanka. The investment much required for tourism development can be secured if exclusive IP rights (collective or certification marks) are attached to the branding strategy. For example, the Surf Arugam Bay brand could be registered as a collective mark and be licensed to persons who can meet the strict requirements set in the licensing agreement. As this tourist attraction is in a remote area, a land and air taxi service (facilitating air

¹²² Newsweek Staff, "Vanishing Acts" *Newsweek* (New York, 9 April 2006). Available at : <http://www.newsweek.com/vanishing-acts-107597>, accessed on June 12, 2017.

¹²³ T. Nanayakkara, "Role of Intellectual Property in Enhancing the Competitiveness of the Tourism Industry". Available at: http://www.wipo.int/export/sites/www/sme/en/documents/pdf/tourism_ip.pdf, accessed on January 20, 2017.

¹²⁴ *Ibid.*

connections with the east coast), Ambulift (for emergency medical services), and boat services bearing the registered brand could be introduced for use by tourists traveling to the eastern part of the country. This would rationalize prohibitively expensive air travel taxes and fares and would facilitate access to air travel by tourists with disabilities.

- The field survey has revealed that cybersquatting and similar domain name problems¹²⁵ are rife in the tourism services sector. For example, misleading or potentially misleading information on tourist hotels and resorts may be posted on websites by unscrupulous agents taking undue advantage of reputation gained from decades of successful operation. Such dishonest online behavior by competitors is actionable. Infringement by tourist websites of trademark and other IP rights on the Internet is a common occurrence and can be remedied by enforcing trademark law (in the case of a registered hotel trademark) and unfair competition law (in the case of an unregistered trademark).
- Character merchandising¹²⁶ is another IP tool that has not been explored in the promotion of tourism in Sri Lanka. Famous sport figures such as Kumar Sangakkara, performing artists such as Bhatiya and Santhush and fictional characters may be enlisted for that purpose. A leading Sri Lankan tea brand recently drew on the concept of character merchandising in establishing a strong case against another tea trademark. The owner of the “Rosa” character and jingle proved in court that the brand had become distinctive because the “Rosa” character and jingle had been used successfully in advertising the tea.¹²⁷

¹²⁵ A domain name is a computer address through which a company or an individual can be located by any other user with Internet access. The problem arises when a company chooses a name that has already been registered as a trademark by another company, or when two or more companies, each with legitimate claims to the name, want to use the name in their domain names.

¹²⁶ The notion of character merchandising refers to creating a merchantable product around a famous character, fictional or otherwise. Given the enormous popularity of many fictional and real life characters, businesses today are increasingly associating their new as well as existing products and services with famous characters, to leverage on their popularity.

¹²⁷ See *Unilever Lipton Ceylon Ltd. v. George Steuart Teas Pvt Ltd.* (Case No. H.C.(Civil) 30/2014(IP)). This case is still pending at the Commercial High Court of Sri Lanka. Action had been initiated against George Steuart by Unilever Lipton Ceylon Ltd., alleging among other things that George Steuart was engaging in an unfair trade practice with regards to the usage of the brand name “Rosa Kahata”. The plaintiff had, *inter alia*, contended that they are entitled to claim exclusivity with regard to an advertising campaign centered on a character named “Rosa” and that they had developed a jingle accordingly.

- Sri Lanka is known as the “island of gems” (Ratnadeepa) because of the spectacular range of jewels found in its gravelly soil. It is most famous for its lovely blue sapphires now branded and marketed as “Ceylon Sapphires”. Rambuka blue, the most precious blue sapphire in the world, is found in the Rakwana area in Ratnapura district, while Padmaraga (or Padparadscha), which is very rare and more valuable than blue sapphire, is famous worldwide because the original Padmaraga is found only in Sri Lanka. “Ceylon Sapphires” must therefore be recognized as a GI under a certification mark and accreditation by the gemologist at the Sri Lanka Gem and Jewellery Authority. As malpractices, such as cheating and defrauding tourists who buy precious stones, abound, GI rights and a certification mark system would boost tourism promotion.
- The Ambalangoda traditional mask industry in southern Sri Lanka would promote tourism if it were granted IP protection through GI registration or certification mark registration. At present, sub-standard products are offered for sale on the market, and fraud and malpractices are prevalent. IP protection would therefore certainly add value to the products in the drive to promote and exploit the tourism potential of the industry.
- Yalpanam or Jaffna, the capital city of Northern Province, is an area untouched by tourism promotion and it can contribute substantially to the development of tourism in Sri Lanka. Several products have been identified for possible GI protection. Moreover, certification and the collective marks system could be used to promote “Yaal Food”, Karutha Colomban mango, Itaharai banana, Odial kool, nelli cordial and grape wine for example, while *Siddha* (traditional medicine in Northern Province) could be promoted as a wellness tourism product.
- Key informant interviews with leading IP experts have shown that Ceylon Coconut, Ceylon Pineapple and Ceylon Cashew could be afforded additional IP protection, leading to enhanced commercial value in the tourism industry. Sri Lanka’s Export Development Board and Industrial Technology Institute (ITI) should work together to achieve those goals. ITI has contributed to the branding of Ceylon Cinnamon by upholding its scientific authentication as *Cinnamomum zeylanicum*, the true Ceylon Cinnamon, thereby supporting Sri Lankan efforts in branding Ceylon Cinnamon on the international market. IP experts consider that, until such time as the GI registration system is established in the country, consideration could be given at least to

certification, if not a collective mark system, on the basis of the earned reputation that has been by the of the above-mentioned products.

- Traditional industries in Sri Lanka could promote tourism in Sri Lanka substantially, but talented craftsmen currently do not generally register any of their valuable contributions, for they do not understand that they need IP protection. The same holds true for designers at the National Design Center.
- Artworks, original music and live performance of music and dance often feature in practically all hotels in the country, but rightholders do not enforce their rights and no royalties are paid. This scenario has become the norm because IP rights are not effectively enforced.
- There are no effective and efficient collective rights societies in Sri Lanka. Even though there are three CMOs, namely the Outstanding Song Creators’ Association, the Sri Lanka Performing Rights Society and the Author Composers and Performers Organization of Sri Lanka, problems arise in the protection and exploitation, in the tourism industry, of the works of authors, composers, music publishers, directors, producers and performers. A clear CMO structure, appropriate rules and regulations and an enforcement mechanism must therefore be put in place.
- The role of SMEs in tourism has not been adequately identified and promoted under the country’s tourism development agenda. SMEs in Sri Lanka account for more than 75 per cent of the total number of enterprises, 45 per cent of employment and 52 per cent of GDP.¹²⁸ If the SME sector is not developed, it may be difficult, if not impossible, to unleash the real potential of the tourism sector in Sri Lanka. This certainly holds true when the informal sector has a great impact and involves jeep drivers in safari parks or owners of small and medium-sized hotels and accommodation, including rural homestays, *chena* huts, tree houses or eco-lodges.

¹²⁸ Ministry of Traditional Industries and Small Enterprise Development & Department of Development Finance of the Ministry of Finance and Planning, *National Policy Framework for Small Medium Enterprise (SME) Development* (Draft SME Policy Framework 2014). According to the definition adopted by the Draft SME Policy Framework 2014, the category of small and medium-sized enterprises is made up of enterprises which employ less than 300 employees and which have an annual turnover not exceeding 900 million Sri Lankan rupees.

3.7. Case studies

In this section, case studies are outlined comprehensively along agreed thematic lines, on the basis of evidence gathered from field visits and key informant interviews. The cases studies illuminate the extent to which IP rights are used in businesses to extract value from tourism sector products and services in Sri Lanka, for IP rights in tourism and cultural promotion constitute a new business model for the tourism industry.

3.7.1. Current use of the IP system

Pure Ceylon Tea is well-known for its pristine quality and reputation, which continue to impress global consumers. The protection of GIs under Sri Lanka's IP Act has been undeniably driven by the tea industry, one of the country's major earners of foreign exchange. From a business perspective, the tourism industry could benefit from the IP rights vested in Sri Lanka's "Black Gold" or "Green Gold" Ceylon Tea. The Sri Lankan Tea Board registered "Ceylon Tea" together with the lion logo as a certification mark in January 2011 (Reg. No. 153931). The lion logo is therefore used by authorized tea producers as a symbol of quality. From a business perspective, the certification mark may be used in combination with individual trademarks. Any tourist who buys pure Ceylon Tea purchases a quality-guaranteed product. The protection afforded by the certification mark system to a potential GI improves leverage in the tourism market. In addition to marketing tea, the Ceylon Tea certification mark can be exploited in other ways. Even though GI protection does not apply to the services sector, it can be extended through Ceylon Tea Trails,¹²⁹ Ceylon Tea Bungalows,¹³⁰ and Tea Factory Hotels¹³¹. The value of the Ceylon Tea brand can be further exploited commercially by being linked to the tourism industry. During a Tea Trails tour, the visitor is given a unique experience of a guided tour through beautiful tea gardens that produce certified Ceylon Tea, while enjoying the fragrance of tea bushes, and visits a tea factory for a gentle initiation in the art of tea making. Original tea is served during Tea Trails.

The Ceylon Tea Trails concept contributes, moreover, to the promotion of a tea culture and, by extension, to a cultural heritage that has developed for more than 200 years, after the Scottish planter James Taylor planted the first tea sapling on Sri Lankan soil. Furthermore, the guided tours of Ceylon Tea Estates may feature various cultural activities, such as traditional songs and dances, and artworks, which could be promoted under other IP rights such as copyright, related rights, trademark

¹²⁹ Ceylon Tea Trails is a tea bungalow resort in which the bungalows are connected by walking trails through scenic Ceylon tea gardens.

¹³⁰ A luxury boutique hotel is one which offers an authentic tea bungalow experience.

¹³¹ A luxury hotel, which has been built into and around an old tea factory, blurring the line between museum and luxury hotel, and much of the factory machinery is still *in situ* and has been incorporated into the design.

and design rights. A snapshot of NIPO-registered Pure Ceylon Tea logo is shown below.¹³²



Table 1. A snapshot of tourism, IP tools, commercialization and use

Type of tourism	Tourism-related product or service	Types of intellectual property rights	Current use	Commercialization strategy/marketing tools	Stakeholders/Beneficiaries
Agro-tourism/ecotourism	Ceylon Tea	Certification mark, (Potential) GI	Yes No	Coexistence of a certification mark with individual trademarks	Tea estate owners Tea estate employees Ceylon Tea centers
Agro-tourism/ecotourism	Guided tour through tea gardens that produce certified Ceylon Tea	Trademark (for Tour operators) Trademark (for Ceylon Tea Trails)	Yes Yes	Licensing	Tour operators, Tea estate owners and employees
Agro-tourism/ecotourism	Ceylon Tea Trails Ceylon Tea Bungalows Tea Factory Hotels in tea estates that produce certified Ceylon Tea	Trademark (for luxury tourist accommodation)	Yes	Licensing	Owners of hotels and other tourist accommodation Producers of certified Ceylon Tea
Agro-tourism/eco-tourism/ cultural tourism	Guided tour may feature various cultural activities such as traditional songs and tea dances, and artworks	Copyright and related rights	Yes	Licensing	Artists Performers Dancers Musicians

¹³² Image courtesy <<http://www.pureceylontea.com/>>, accessed on September 20, 2017.

The Ceylon Cinnamon logo (shown above)¹³³ has been registered by the Sri Lanka Export Development Board (SLEDB) as a certification mark (Reg. No. 163008) since 2011. As with Ceylon Tea, the added value of registration can be extracted in the tourism products and services market. According to the guidelines issued by SLEDB, the Pure Ceylon Cinnamon certification mark may be used only on consumer cinnamon packs and value-added products (cinnamon in packets, bags, cartons, canisters tablets, pills, oils, oleoresins, extracts, fractionates, powder, paste or any other form of value-added retail packs and packages) containing Pure Ceylon Cinnamon manufactured in Sri Lanka. The original “best in the world” quality cinnamon can, therefore, be purchased by tourists, on inspecting the logo depicted on the product. Furthermore, the reputation of the Ceylon Cinnamon brand can be exploited through Spice Safari to Ceylon Cinnamon Gardens. Moreover, the Cinnamon Trail, the guided tour to Ceylon Cinnamon Gardens, can offer a glimpse of the art of feeling cinnamon, and the traditional methods and know-how used to produce Ceylon cinnamon.

Table 2. A snapshot of tourism, IP tools, commercialization and use

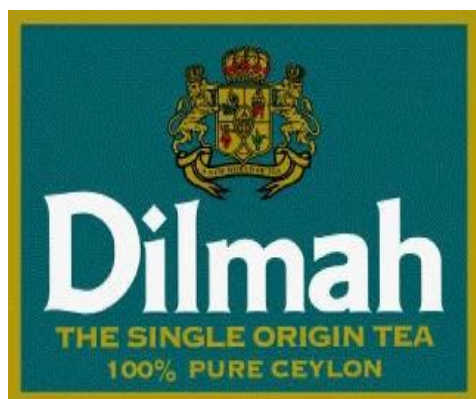
Type of tourism	Tourism-related product or service	Types of intellectual property rights	Current use	Commercialization strategy/marketing tools	Stakeholders/Beneficiaries
Agro-tourism/ecotourism	Ceylon Cinnamon	Certification mark (Potential) GI	Yes No	Coexistence of a certification mark with individual trademarks	Cinnamon growers Producers
Agro-tourism/ecotourism	Spice safari/guided tour through cinnamon gardens that produce certified Ceylon Cinnamon	Trademark (for Tour operators)	Yes	Licensing	Tour operators Cinnamon grower sand producers Herbal oil producers

Dilmah is a yet another successful example of the use of the existing IP system by a leading Sri Lankan tea company. The brand is well protected by trademark rights. In Sri Lanka, the Dilmah trademark has been registered under Class 30 of the Nice classification¹³⁴ since 1985 (Reg. No. 49009). Dilmah offers an unmatched collection of the finest Ceylon tea and is as popular among tourists visiting Sri Lanka as it is on

¹³³ Image courtesy <http://pureceyloncinnamon.srilankabusiness.com/contact.html>, accessed on September 20, 2017.

¹³⁴ Class 30 includes, in particular: beverages with coffee, cocoa, chocolate or a tea base. The Nice Classification (NCL), established by the Nice Agreement of 1957, is an international classification of goods and services applied for the registration of marks.

the export market. The Dilmah brand has been pioneered in the Ceylon Tea Trails concept.



Owing to the strategy of providing fresh, ethically produced, high quality tea, Dilmah is one of the most popular tea brands in the world.¹³⁵ It is sold in more than 100 countries, it is the second most popular tea brand in Australia and it is one of the most recognized international tea brands. In terms of capturing the value of the brand, the Dilmah name with the stylized *t* is used in the name of Dilmah t-Bars in many countries.¹³⁶ It has protected the company’s philosophy—*Single Origin Ceylon Tea*—through trademark registration in a number of countries.¹³⁷ The preservation of TK concerning the production of Dilmah tea has been crucial to its success.¹³⁸ Dilmah is therefore a success story in the exploitation of trademark rights in order to improve leverage in the tea market and associated service sectors, including tourism.

Table 3. A snapshot of tourism and IP tools, commercialization and use

Type of tourism	Tourism-related product or service	Types of intellectual property rights	Current use	Commercialization strategy/marketing tools	Stakeholders/ Beneficiaries
Agro-tourism/ ecotourism	Dilmah Tea as a tourist souvenir	Trademarks	Yes	Licensing	Tea estate owners Tea producers Retail sale for tourism souvenirs Restaurants

¹³⁵ WIPO, “Taking on the World with a Cup of Tea”. Available at: <<http://www.wipo.int/ipadvantage/en/details.jsp?id=2766>>, accessed on May 20, 2017.

¹³⁶ A unique commercialization effort that was launched in the early 2000s was the development of the *Dilmah t-Bar*, which provides consumers with an unprecedented variety of tea to enjoy in a modern, relaxing environment. “The Dilmah t-Bar is the first genuinely ground-breaking concept in on-premise tea service.” Image courtesy <<http://www.dilmahtea.com/>>, accessed on September 30, 2017.

¹³⁷ WIPO, “Taking on the World with a Cup of Tea”. Available at: <<http://www.wipo.int/ipadvantage/en/details.jsp?id=2766>>, accessed on 20 May 2017.

¹³⁸ *Ibid.*

“Siddhalepa”, a well-known Sri Lankan brand, has pioneered medical tourism in Sri Lanka. Hettigoda Industries (Pvt) Ltd. has registered its trademark for medicine (under Class 5 of the Nice classification, Reg. No. 53993) since 1987. In 2007, it secured a trademark (under Class 44 of the Nice Classification, Reg. No. 139357) for its Ayurveda resorts and spas (shown below). Siddhalepa (the balm), is the flagship brand of the Hettigoda Group which manufactures more than 150 Ayurveda medicines and health care, beauty, skin, oral care, wellness and spa products. Siddhalepa has become a household name in Sri Lanka. The company has used the concept of the *Vedamahathmaya*, or village doctor, to create strong brand recognition.¹³⁹



From a business perspective, Siddhalepa has successfully blended an indigenous heritage with modern technology and business practices to create a unique Sri Lankan brand. It has entered into commercial agreements with various business entities. For example, its spa in the Sri Lankan Airlines business-class lounge at the Bandaranaike International Airport is unique in the world. The Siddhalepa Company now has a global presence, with three spas in Germany, one in the Czech Republic and another in Slovakia. It can, therefore, be seen as a successful business that has used IP tools (trademark and trade secrets) to leverage its products and services. Ancient Ayurveda formulas and know-how embedded in Ayurvedic products and spa treatment have been kept as trade secrets. The Siddhalepa brand has added value to Sri Lankan Ayurveda products and services used in the tourism industry. The Siddhalepa Ayurveda Hospital and Ayurveda Resorts and Spas use more than 30 own-brand products, including Ayurvedic tonics, oils, teas, capsules, soaps and creams in their business operations.

¹³⁹ Image courtesy <http://siddhalepa.com/>, accessed on September 20, 2017

Table 4. A snapshot of tourism and IP tools, commercialization and use

Type of tourism	Tourism-related product or service	Types of intellectual property rights	Current use	Commercialization strategy/marketing tools	Stakeholders/Beneficiaries
Ayurveda Tourism/ Wellness Tourism	Ayurveda resorts and spas	Trademarks Trade secrets	Yes Yes	Licensing, Franchising (Ayurveda services in spas to guarantee similar look and feel)	Ayurvedic practitioners Herbal garden growers Manufacturers of herbal products Franchised Ayurveda Spa centers Licensed spas
Medical tourism	Siddhalepa balm and other Ayurveda products (medicines, health care, beauty, skin, oral care, etc.)	Trademarks Trade secrets	Yes Yes	Licensing	Ayurveda practitioners Herbal garden growers Retail sale for tourists

ODEL, a leading brand in world fashion, has registered its trademark (shown below)¹⁴⁰ for ready-made garments (under Class 25 of the Nice classification, Reg. No. 63444) since 1992. As one of the island’s largest fashion retail outlets, it attracts more than 1.4 million customers per year. It has become a strong competitor on the tourism marketplace, with more than 3,200 suppliers, including 1,500 local small-scale entrepreneurs. There are 33,250 individual items bearing the ODEL trademark in the store at the heart of its marketing drive. Most significantly, ODEL offers a range of home-grown products in the fashion, accessories, souvenirs and household section of its department stores for sale, targeting the high-end market segment. Practically every foreigner who visits Sri Lanka makes a purchase at ODEL. Through its trademark-protected brand, ODEL has captured value for its products on the market.

¹⁴⁰ Image courtesy <http://www.odel.lk/>, accessed on September 20, 2017.



Table 5. A snapshot of tourism and IP tools, commercialization and use

Type of tourism	Tourism-related product or service	Types of intellectual property rights	Current use	Commercialization strategy/marketing tools	Stakeholders/Beneficiaries
Leisure/holiday tourism Business tourism Cultural tourism MICE	Ready-made garments Souvenirs Household and gift items	Trademarks	Yes	Licensing Merchandising	Small-scale entrepreneurs Souvenir manufacturers Local artisans

Laksala, the only state-owned gift and souvenir boutique, was established under Sri Lanka's 1982 National Crafts Council and Allied Institutions Act, No. 35. The famous Laksala brand¹⁴¹ has been registered under the trademark regime of Sri Lanka (under Class 35 for buying and selling of handcrafts, Reg. No. 65221) since 1992. There are currently 13 branches islandwide, offering the widest variety of Sri Lankan products. Most importantly, it promotes the tourism industry by showcasing more than 30,000 items supplied by craftspeople throughout the island. Arts and crafts bearing the trademark-protected Laksala brand are marketed more competitively for tourists. Trademarks guarantee the quality and added value of handicrafts sold on the world market, while vitally sustaining many cottage industries. Perhaps even more importantly, Laksala products epitomize the culture, tradition and authenticity of Sri Lanka. The Laksala brand has been franchised in foreign countries such as Italy.

Table 6. A snapshot of tourism and IP tools, commercialization and use

Type of tourism	Tourism-related product or service	Types of intellectual property rights	Current use	Commercialization strategy/marketing tools	Stakeholders/Beneficiaries
Leisure/holiday tourism Business tourism Cultural tourism MICE	Handcrafts Souvenirs Artworks	Trademarks	Yes	Licensing Franchising	Craftspeople SME sector Cottage industry Traditional handicraft makers

¹⁴¹ Image courtesy <http://www.laksala.gov.lk/>, accessed on September 20, 2017.



The luxury Ayurveda Spa Ceylon brand shown above¹⁴² is one of the biggest success stories in the use of the country's IP system to foster competition in the tourism products and services market. This well-known luxury Ayurveda brand has been registered by NIPO under the trademark regime of Sri Lanka (under Class 44 of the Nice Classification for health Spa Services, Reg. No. 150430) since 2009. Spa Ceylon offers extensive spa menus consisting of more than 25 carefully designed Spa Ceylon signature treatments that draw on Sri Lanka's rich Ayurveda heritage and the Ceylonese royal health and wellbeing rituals that had been used for centuries in the grand palaces of ancient Ceylon. Moreover, it manufactures and markets a wide variety of all-natural, high-performance skin, hair, body and wellness products based on natural formulas enriched with local herbs and essential oils, thus preserving their genuinely Sri Lankan identity. Most encouragingly, Sri Lanka's Spa Ceylon brand has become extremely popular outside Sri Lanka and has been tremendously successful in more than 30 signature boutiques and spas in many countries worldwide, including Europe.

Table 7. A snapshot of tourism and IP tools, commercialization and use

Type of tourism	Tourism-related product or service	Types of intellectual property rights	Current use	Commercialization strategy/marketing tools	Stakeholders/Beneficiaries
Wellness tourism Leisure/holiday tourism	Luxury Ayurveda products Spas	Trademarks	Yes	Licensing Franchising	Herbal garden growers Manufacturers of Ayurveda cosmetics Holders of TK s Licensed spas

¹⁴² Image courtesy <http://lk.spaceylon.com/>, accessed on September 20, 2017.

3.7.2. Mapping of potential use

The ways in which the IP system could be used for improved leverage in tourism products and services will be mapped in this section. Field research and key informant interviews have shown that IP rights are not being asserted in the tourism-related activities covered below, although various IP tools could be used to add value to particular tourism products and services and make them more competitive. In fact, IP rights protection can effectively capture the value of such products and services through the market. The below description of Sri untapped potential, as identified during the study, is non-exhaustive, for there are undoubtedly many other potential candidates in the tourism landscape of Sri Lanka.

Agro- and ecotourism in the Gannoruwa Agriculture Technology Park could be promoted as a tourist attraction in the country for both local and foreign tourists, as proposed by the Ministry of Agriculture.¹⁴³ The features conducive to agro-tourism and ecotourism in the park comprise: accommodation at Gannoruwa beside the Mahaweli River; residential facilities (cabana and camping) under the *Makehelwala* guided paddy-based farm tour scheme; guided tours of agriculturally important villages and fields, with open vistas of the beauty of the Sri Lankan countryside; a food court to promote Sri Lankan traditional food; sales centers to provide self-employment opportunities for villagers selling traditional food, fruits, fruit drinks, handlooms and handicrafts; live demonstration of traditional food preparation enabling visitors to experience an authentic culinary experience of Sri Lankan food preparation (*undu wel, polos and konda kawum* for example); hands-on experience of the agricultural practices of farmers at work (plowing, transplanting, harvesting and threshing, for example); cultural shows showcasing traditional dance traditions; and action to enhance creative awareness and appreciation of the history of the Kingdom of Kandy.

All of these in-built tourism-promoting features can be protected by IP tools, such as design rights for new designs of cabanas, camping and restaurants using local natural materials, and patent rights for inventions involving environmentally friendly green technology solutions such as bioenergy and solar energy for tourist accommodation, waste disposal and the prevention of mosquito-borne diseases such as dengue, as dengue fever has become a major tourism disincentive, especially for visitors traveling with children. Moreover, trademark law can protect the brand, logo and motto. The logo can be further protected under licensing arrangement with tour operators who organize guided tours of farmers' fields and herbal gardens, and conduct spice safaris and nature trails in Gannoruwa forest. It may also be licensed

¹⁴³ Lakshman Jayasinghe, "Promoting Agro-Tourism through Agriculture Technology Park, Gannoruwa, Peradeniya", the "Policy Document" provided by the Director General of the Department of Agriculture, Sri Lanka.

for use on merchandise such as souvenirs and key tags, thus enhancing the visibility and reputation as a tourist attraction.

Cultural shows, performed in the evening on an open lakeside (*wewa*) stage featuring the Sri Lankan agricultural heritage and history of the Kingdom of Kandy, can be protected by copyright and related rights. While original expressions of work can be protected by copyright (exclusive rights associated with the right to copy and communicate), the talents and skills of the performing artists can be protected by related rights under the IP Act of Sri Lanka. As tourists are keenly interested in cultural expressions, the performance of cultural works contributes considerably to tourism promotion. Lastly, the logo of the Sri Lankan Food Court/Sri Lankan Kitchen can be franchised by the Department of Agriculture, which is the owner/custodian of the registered trademark

Table 8. A snapshot of tourism and IP tools, commercialization and use

Type of tourism	Tourism-related product or service	Types of intellectual property rights	Current use	Commercialization strategy/marketing tools	Stakeholders/Beneficiaries
Agro-tourism and ecotourism	Cabana and camping	Trademarks Design rights	No No	Licensing Franchising	Architects Designers Farming community Tour operators
Agro-tourism and ecotourism	Guided paddy-based farm tours	Trademarks	No	Licensing	Tours guides and operators Farming community
Agro-tourism and ecotourism	Spice safari in Agro-/ecotourism park	Trademarks	No	Licensing	Spice growers Tours guides
Agro-tourism	Food court/ Restaurants of traditional Sri Lankan foods/ Live demonstration of traditional food preparation in Sri Lankan Kitchen	Trademarks	No	Licensing, Franchising	Farming community SME sector Owners of restaurants and food courts
Agro-tourism Cultural tourism	Cultural shows	Copyright and related rights	No	Licensing	Artists Performers Dancers Musicians
Ecotourism Adventure Tourism	Nature trails to Gannoruwa forest	Trademarks	No	Licensing	Tour operators Tour guides Forest rangers

Branding and promotion of Sri Lankan “Liquid Gold”, a unique Sri Lankan herbal product, is another example. Kithul treacle or syrup (*Kithul peni*) is made from the sap extracted by tapping the flower of the solitary-trunked palm tree known as the fish-tail tree or by its botanical name, *Caryota urens*.¹⁴⁴ Sri Lankan syrup/treacle and jaggery are world-renowned sweeteners. On account of its golden color and money-making capability, it is also known as Liquid Gold on the market.¹⁴⁵ If it is properly branded and marketed, it can put Sri Lanka on the world map, as maple syrup has done for. The Kithul tree is grown throughout South and South-East Asia but is tapped for its sap only in Sri Lanka. In order to market Kithul treacle and jaggery for export and for the tourism industry, both must be produced in accordance with accepted standards of health and hygiene, and Kithul Syrup must not be adulterated by adding sugar or fruit juices. Quality assurance in the production and marketing of original Kithul *peni* as a tourism product must therefore be ensured by the Industries and Small Enterprise Development Ministry; furthermore, it is desirable for the Kithul Producers Association to register “Sri Lankan Kithul Syrup” under trademark law as a certification mark and to assure quality after testing by the Sri Lankan ITI, as in the case of Ceylon Cinnamon (outlined above). The certification mark will improve the reputation of the product, and producers who comply with this strict standard will capture the added market value. This herbal product can be further protected as a GI in the long run, for export market purposes. The IP system can therefore add value and enhance the quality of a product.

Moreover, technology improvements in the traditional tapping techniques used by local tappers can increase the yield per tree, and new sap collection methods can reduce contamination risks. Quality- and output-enhancing new technology can be protected by the patent regime in Sri Lanka, and all new attractive designs for the packaging and presentation (get-up) of products for marketing can be protected by design rights under the IP Act. The value captured through IP protection of Kithul Syrup will be very beneficial to the villagers who live in and around the Sinharaja rainforest, Kothmale and other Kithul Syrup-producing districts in the county. Even though GI protection is not extended to the services sector, GI protection through the commercialization of IP rights can be extended to the tourism services sector, for raw materials, traditional knowledge and know-how and production methods that are linked to the GI can be shown to tourists. A guided tour of villages in and around the Sinharaja rainforest, featuring the preparation of Kithul treacle and jaggery, can be organized and branded. Tourists could, thus, see how Kithul treacle and jaggery are made, and this will ultimately benefit traditional Kithul tappers and their families.

¹⁴⁴ W.A. Wijewardena, “Kithul syrup can be Sri Lanka’s maple syrup to the world,” *Colombo Telegraph* (Colombo, 27 April 2015). Available at <<https://www.colombotelegraph.com/index.php/kithul-syrup-can-be-sri-lankas-maple-syrup-to-the-world/>>, accessed on June 12, 2017.

¹⁴⁵ *Ibid.*

Table 9. A snapshot of tourism and IP tools, commercialization and use

Type of tourism	Tourism-related product or service	Types of intellectual property rights	Current use	Commercialization strategy/marketing tools	Stakeholders/Beneficiaries
Agro-tourism and ecotourism	Kithul treacle or Kithul Syrup Jaggery	Certification marks (Potential) GIs	No No	Coexistence of a certification mark with individual trademarks	Kithul producers Traditional Kithul tappers Tour operators Cottage industry Tour guides
Agro-tourism and ecotourism	Guided tours	Trademark (for Tour operators)	No	Licensing	Tour operators Owners of Kithul stands, Kithul Syrup producers

Sri Lankan Ayurveda and the traditional medical system is a goldmine to be properly utilized in the tourism sector.¹⁴⁶ Drawing on Ayurveda and excellent hospitality, Sri Lanka can become one of the key health tourism destinations, with a competitive edge over well-known Ayurvedic destinations such as Kerala. Sri Lankan Ayurvedic practitioners can completely cure illnesses for which Western medicine does not have any effective remedies. To achieve this goal, Sri Lanka must brand and market its Ayurvedic products and services, such as Ayurveda health resorts, Spas, Ayurveda hospitals/clinics, herbal cosmetics, educational institutions, beauty care products and spa equipment, because IP tools can effectively capture Ayurveda value by standardizing, monitoring and controlling the quality of products and services used in tourism. To that end, the Sri Lankan Ayurvedic Department may register its brand/logo as a certification mark and issue guidelines for using the Certified Sri Lankan Ayurveda/Sri Lankan Traditional Medicine brand on every product and service that conforms to the set standard, which will not exclude others who practice Ayurveda and traditional medicine in the country. Use of the logo is a guarantee of a better quality product or service, while use of the certification mark system can effectively prevent dubious practices that are passed off as Ayurveda. Every village practitioner using the protected logo/brand can capture the value of traditional know-how for the tourism market by complying with strict quality standards. IP protection

146 Shanika Sriyananda, "Ayurveda – A battle between quacks, spas and fake formulas" Daily FT (Colombo, December 10, 2015). Available at: < <http://www.ft.lk/article/506221/Ayurveda-%E2%80%93-A-battle-between-quacks-spas-and-fake-formulas>>, accessed on May 10, 2017.

is, therefore, a necessary step in enhancing the sector by preventing misuse and by making Sri Lanka a reliable Ayurveda destination in the world.

Table 10. A snapshot of tourism and IP tools, commercialization and use

Type of tourism	Tourism-related product or service	Types of intellectual property rights	Current use	Commercialization strategy/marketing tools	Stakeholders/ Beneficiaries
Medical tourism/ Ayurveda Tourism	Ayurveda and Sri Lankan Traditional medicines	Trademarks Certification marks	Yes No	Licensing Coexistence of a certification mark with individual trademarks	Ayurveda doctors Traditional medicine practitioners Herbal growers Ayurvedic drug manufacturers Village communities
Medical tourism/ Ayurveda Tourism	Ayurveda Hospitals/ Clinics, etc.	Trademarks Certification Marks	Yes No	Licensing Franchising Coexistence of a certification mark with individual trademarks	Ayurvedic doctors Traditional medicine practitioners Herbal growers Ayurvedic drug manufacturers
Wellness Tourism	Herbal cosmetics Beauty care products Spa equipment	Trademarks Certification Marks	Yes No	Licensing Franchising (Ayurveda services in spas to guarantee similar look and feel) Coexistence of a certification mark with individual trademarks	Herbal growers Ayurvedic product manufacturers
Wellness Tourism	Ayurveda health resorts and spas	Trademarks Certification Marks	Yes No	Licensing Coexistence of a certification mark with individual trademarks	Ayurvedic practitioners Manufacturers of herbal products Franchised Ayurveda spa centers Licensed spas
Agro-tourism/ ecotourism	Guided tour of certified herbal gardens	Trademark (for tour operators)	Yes	Licensing	Tour operators Owners of herbal gardens

Tourism-driven promotion of Sri Lankan gem and jewelry industry affords yet another opportunity to tap the potential and use the IP system for improved leverage in the tourism sector. Sri Lanka has a unique and unparalleled opportunity to become the world capital of precious gems. The city of Ratnapura is a leading destination for

valuable gems. *Rambuka* blue, the most precious blue sapphire of the world, is found in the Rakwana area of the Ratnapura district, where *Padmaraga* (or *Padparadscha*), which is very rare and even more valuable than blue sapphire, is also found. It is known worldwide that original *Padmaraga* is found only in Sri Lanka. Rubies, cat's eyes and emeralds, too, are found in Sri Lanka, but those unique gem varieties are not properly branded and protected as potential GIs, hence the need to protect and preserve the quality standards of the Sri Lankan gem and jewelry industry.

As Ceylon Sapphires is a well-known GI in Sri Lanka and on leading markets, certification mark protection (as there is no GI Registry) and accreditation by the gemologist at the Sri Lanka Gem and Jewellery Authority must be introduced. As malpractices, such as cheating and defrauding tourists who buy precious stones, abound, a certification mark system would contribute to the promotion of tourism. The quality of original gems would thus be assured, and the value and reputation of Ceylon gems would be captured through the tourism market. In addition to trademark protection, the IP tools that can promote the gem industry include patent law rights for new heat-treatment technology, the law of trade secrets and competition law to preserve particular gem-cutting know-how, individual trademarks combined with certification marks depicted on products and places of business in cases of co-branding strategy, and copyright and design law in the case of new jewelry designs.

Promotion of the Sri Lankan gem and jewelry industry for tourism is yet another opportunity for untapped potential in Sri Lanka, and the IP system can be used to improve leverage in the tourism sector in relation to Sri Lankan gems and jewelry. Sri Lanka has a unique and unparalleled opportunity to become the world capital of precious gems. The city of Ratnapura is a leading destination for valuable gems. Moreover, the most precious blue sapphire of the world is found in the area of Rakwana in the Ratnapura district, and it is called *Rambuka* blue. *Padmaraga* (or *Padparadscha*) which is very rare and even more valuable than blue sapphire is also found in Ratnapura. It is a known fact throughout the world that original *Padmaraga* is only available in Sri Lanka. The other various gems found in Sri Lanka include rubies, cat's eyes, emeralds etc. Nevertheless, unique gem varieties of Sri Lanka are not properly branded and protected as potential GIs. It is, therefore, necessary to protect and preserve the quality standards of the Sri Lankan gem and jewelry industry.

Since Ceylon Sapphires are a well-known GI in Sri Lanka as well as in other leading markets, certification-mark protection (in the absence of a GI Registry) with the accreditation of the gemologist in the Sri Lanka Gem and Jewellery Authority should be implemented. Since there are many malpractices, whereby tourists can be subjected to cheating and fraud when buying precious stones, a certification-mark system would be of benefit to tourism promotion. Such a system assures the quality of the original gems and the value of the reputation that Ceylon gems have earned can be captured through the tourism market. Apart from trademark protection, a number

of other IP tools can be used to promote the gem industry: for example, new technology relating to heat-treatment methods can be protected by patent rights and a certain know-how related to the experience of gem-cutting can be protected by trade secrets and protected against unfair competition. A co-branding strategy can be implemented by using individual trademarks, along with certification marks depicted on products and places of business. Moreover, new designs for jewelry can also be protected by copyright and design regimes.

Table 11. A snapshot of tourism and IP tools, commercialization and use

Type of tourism	Tourism-related product or service	Types of intellectual property rights	Current use	Commercialization strategy/marketing tools	Stakeholders/Beneficiaries
Leisure/holiday tourism, Business tourism	Ceylon Sapphires and other precious gems	Trademarks, Certification marks, (Potential) GI, Patent rights for any new technology relating to heat-treatment methods	Yes No No No	Licensing, Coexistence of certification mark together with individual trademarks	Gem miners, SME sector, Gem & Jewelry shops, Tour operators Village communities
Leisure/holiday tourism, Business tourism, Cultural tourism	Jewelry	Trademarks, Design rights	Yes No	Licensing, Franchising	Jewelry manufacturers/suppliers, Gem & Jewelry shops, SME sector involved in jewelry industry

Wildlife safaris is yet another area where IP rights can be fostered by stakeholders. The wealth of wildlife has become one of its main tourist attractions. Wildlife parks including Yala, Udawalawa, Minneriya and Wilpattu could be branded by using IP rights such as trademarks and collective marks. The branding strategy could make tourism services more attractive and competitive, creating the best experience. Wildlife safaris are mainly run by SMEs, whose involvement is key to developing the tourism landscape in Sri Lanka. If adequate awareness on the use of the IP system is raised among jeep drivers and other service providers, quality standards could be enhanced considerably. Since Sri Lanka is one of the few places in the world to observe elephants in their natural habitat the country has great potential to improve its service sector through IP rights. Branding could be extended to “Leopard-Spotting Safaris” (Sri Lankan Leopard Trails could offer an unparalleled opportunity as Sri Lanka has more leopards per square mile in Yala than anywhere else in the world) and SMEs involvement could be enhanced.

Table 12. A snapshot of tourism and IP tools, commercialization and use

Type of tourism	Tourism-related product or service	Types of intellectual property rights	Current use	Commercialization strategy/marketing tools	Stakeholders/Beneficiaries
Leisure/Holiday tourism, Ecotourism, Adventure tourism	Wildlife Safari	Trademarks, Collective marks	Yes No	Licensing, Merchandising, Coexistence of collective mark together with individual trademarks	Jeep drivers, Forest Rangers, SMEs, Tour operators, Village communities, Tour guides

The following section offers suggestions for potential tourism products and services. Historical cultural heritage may be branded with slogans such as “Visit the Golden Temple in Dambulla”, “Wonder at the Medieval City of Polonnaruwa”, “See Pyramid-like Dagebas and Archeological Wonders of the Ancient World in Anuradhapura” and “Visit the Yapahuwa Lion”. Although the IP system has certain limitations when affording protection to historical cultural heritage, it does protect the use of branding, logos and slogans, as well as technology for treating stone surfaces on ancient monuments; and statues and for preserving wooden objects and other antique items. Undoubtedly, the use of the IP system adds value to the tourism sector.

Sailing in the sea and lagoons, sport fishing, water sports (whitewater rafting in Kitulgala), and aqua tourism in marine sanctuaries could be promoted around the country. These products are very attractive for tourists and could be branded and marketed to offer an extraordinary experience. In this regard, national research and development institutions should be encouraged to develop new products to cater to the needs of the tourism sector using the appropriate IP protection.

Spice and herbal garden safaris, which are mainly run by SMEs, could be branded and marketed more appropriately by using IP rights. That is to say, SMEs that register their trade names, brands and logos will benefit through promoting their services.

The Sri Lankan Food Court could be branded as a “Taste of Sri Lanka” in order to present Sri Lanka’s authentic dishes through culinary talent, skills and signature delicacies. The Taste of Sri Lanka Food Court could also teach tourists how to cook Sri Lankan dishes since appreciation of food is understood worldwide. SMEs could involve themselves in this initiative, along with Ceylon Tea Boutiques licensed out by the Ceylon Tea Board.

Nature trails to Sinharaja could also be branded and protected by the trademark regime and licensed out to tour operators. The same model could be followed by

branding “Ella Adventure” for trekking and hiking. Branding strategies could also be extended to Scenic Bike Trails (offering bike rental on-site to explore the region).

As a unique Sri Lankan GI food, the delicious Sri Lankan dessert, “Ruhunu Curds” (Buffalo milk yogurt served with original Kithul Syrup) could be protected by a certification-mark system. Since the majority of curd producers are SMEs, the certification mark could add value and maintain standards of hygiene to enhance the reputation of high quality associated with the product.

Sigiriya and its world-famous frescoes could be branded and protected by a trademark or collective mark regime under the Central Cultural Fund or Ministry of Cultural Affairs. Although IP rights cannot protect the actual ancient expression in frescoes, the patent regime could protect technological inventions that preserve the expression.

Sri Lanka is one of the few places in the world where tourists can see the world’s largest marine mammal, the blue whale. Whale and dolphin lookouts Mirissa and Kalpitiya, respectively, could be properly branded and the logo could be protected under the trademark regime (registered through the Ceylon Fisheries Harbor Corporation, which will be the custodian of IP rights) and licensed out to boat operators, restaurant owners and souvenir shops.

Tree houses, eco-lodges and rural homestays are becoming increasingly popular in Sri Lanka and could therefore be branded and protected by the trademark system. SME entrepreneurs may also be able to leverage their services using trademark rights while agro and ecotourism initiatives could ensure sufficient involvement of local communities and enhance their relationship with tourists. Rural homestays could be certified by provincial tourism authorities, adopting a co-branding strategy.

Last but not the least, Ceylon tea trails through Sri Lanka’s picturesque tea fields could be branded and commercialized through licensing agreements along with festivals and cultural events. Arugam Bay also lends itself to being promoted as one of the top surfing destinations in the world (with large breaks for seasoned surfers and a gentle break off Baby Point for learners). These could be branded and protected by trademark rights to add value and foster competition.

Table 13. A snapshot of tourism and IP tools, commercialization and use

Type of tourism	Tourism-related product or service	Types of intellectual property rights	Current use	Commercialization strategy/marketing tools	Stakeholders/ Beneficiaries
Cultural tourism	Places of historical cultural heritage including Dambulla, Anuradhapura	Trademarks and collective marks, patents for technologies on stone treatment and material preservation of cultural heritage	No No	Licensing, merchandizing	Tourist hotels and other types of tourist accommodation, SMEs providing tourism-related

	and Pollonnaruwa				services, tour operators, tour guides
Sport/ adventure tourism, aqua tourism	Sea and lagoon sailing, sport fishing, water sports	Trademarks	Yes	Licensing	SMEs providing tourism-related services, tour operators, tour guides
Agro- tourism/ ecotourism	Spice garden/ herbal garden	Trademark (for tour operators)	Yes	Licensing	Spice/spice garden cultivators, tour operators, tour guides
Agro- tourism	Sri Lankan Food Court	Trademarks	No	licensing	Farming community, SMEs providing tourism- related services tour operators
Ecotouris m/ adventure tourism	Nature trails to Sinharaja, Ella Adventure	Trademarks	Yes	Licensing	Tour operators, tour guides, forest rangers
Agro- tourism	Ruhunu curds	Certification marks, (potential) geographical indication	No No	Coexistence of certification mark together with individual trademarks	Producers of original Ruhunu curds, livestock farmers, pottery makers
Cultural tourism	Tours to Sigiriya fortress and its world-famous frescoes	Trademarks, collective marks	No	Licensing, merchandising	Tourist hotels and other types of tourist accommodation, SMEs providing tourism-related services, tour operators, Tour guides
Leisure/ holiday tourism	Whale watching, Mirissa, dolphin watching, Kalpitiya	Trademarks, collective marks	No	Licensing	Tourist hotels and other types of tourist accommodation,, SMEs providing tourism-related services, boat operators, Tour operators
Ecotouris m	Tree Houses, eco-lodges, rural homestays	Trademarks	Yes	Licensing, merchandising	Tourist hotels and other types of tourist accommodation, SMEs providing tourism-related services

Sport tourism	Surf-related services to Arugam Bay and other surfing destinations	Trademark	No	Licensing	Tourist hotels and other types of tourist accommodation, SMEs providing tourism-related services, surfing equipment manufacturers
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4. Major Challenges Associated With the Use of IP Tools and Strategies in Tourism and Cultural Promotion

4.1 Level of IP awareness

The efficacy of IP protection is not merely dependent on the extent to which IP law can provide protection, but is also contingent on public perception of the benefits acquired from protection.¹⁴⁷ For an IP system to work successfully in the long run, it is crucial to ensure that the public has a high level of IP awareness.¹⁴⁸ A society that has a high level of IP awareness tends to display greater respect for works, whereas one with limited IP awareness is more prone to show works disregard, which leads to the infringement of IP rights. A survey found that respondents had very little knowledge of IP rights and were unfamiliar with their use in the hotel industry and other tourism-related sectors. This is particularly troubling when it comes to members of the younger generation who are involved in the tourism sector. Empirical evidence states that only nine out of 30 hotels surveyed demonstrated some knowledge of IP rights.¹⁴⁹ It is also disappointing that the use of the IP system has been, and continues to be, very limited in Sri Lanka. This is probably due a lack of awareness among domestic industries and the general public.¹⁵⁰ Hence, the use of the Sri Lankan IP system in tourism and cultural promotion remains under-appreciated and under-utilized.

It is important for the public to be informed of the benefits, importance and the functions of the IP system to enable its effective use. IP awareness consists of the public having a basic understanding of the key requirements for obtaining IP rights

¹⁴⁷ SAB Sahlan, NBA Rahman, and SBM Amin, “Intellectual Property Awareness among Public: Comparative Study between Malaysia and United Kingdom” (2014), *International Journal of Technical Research and Applications* 84-88, 85.

¹⁴⁸ *Ibid.*

¹⁴⁹ The methodology employed to gather information was to conduct field visits and face-to-face interviews with management-level officials of the hotel industry. 30 hotels were selected based on the Tourist Hotel Classification adopted by the SLTDA that represents large, medium and small-size hotels, whose contact details were obtained from the SLTDA. These field visits and interviews were carried out in December 2016 and January 2017.

¹⁵⁰ NS Punchihewage, *Promoting a Second-Tier Protection Regime for Innovation of Small and Medium-Sized Enterprises in South Asia: The Case of Sri Lanka* (published by Nomos, Baden-Baden, Germany 2015) 26 MIPLC Studies, 276.

and the different uses of the various types of these rights.¹⁵¹ Thus, the Government should carry out the important task of educating and cultivating IP awareness among the public.¹⁵² As a developing country, Sri Lanka should design and launch a national IP education program for stakeholders and the general public including a learning module on IP rights and related issues such as ownership, authorship, originality, licensing, confidentiality, trade secrets and branding. This could be offered by the SLITHM. Although IP education cannot be provided as a stand-alone subject, a comprehensive IP education program could be included within the current curricula of SLITHM and one or several subjects could include IP and IP-related themes as a cross-curricular subject in different diploma programs of the Institute.¹⁵³

4.2 Technological development and the innovation landscape of Sri Lanka

As observed by commentators, there is an apparent shortage of home-grown creativity in Sri Lanka.¹⁵⁴ When interpreted through the lens of global innovation indicators, the country's performance is not encouraging. Sri Lanka stands in ninetieth position out of 141 in the Global Innovation Index, 2017 and its economy ranked 64 out of 144 countries in the Global Competitiveness Index 2016-2017, thus, lagging behind in both and failing to fulfill its innovation potential.¹⁵⁵ Another striking feature of the Sri Lankan innovation landscape is the large presence of SMEs. The country is still in the initial stages of technological development and for years the industrial sector, in general, and SMEs, in particular, have suffered due to this. Although Sri Lanka is a country endowed with natural resources and impressive human potential, its literacy rate is 92 per cent, the country exports only low-quality products and raw materials. According to recent statistics, Sri Lankan exports consist of only two per cent high-tech products, evidenced by the percentage of non-technological products including 43 per cent export of garments, 16 per cent tea, 5 per cent rubber products and 3 per cent food and beverages. From the analysis of industrial geography it can be seen that the country has, by and large, remained at the value-adding rather than value-creation

¹⁵¹ SAB Sahlan, NBA Rahman, and SBM Amin, "Intellectual Property Awareness among Public: Comparative Study between Malaysia and United Kingdom" (2014), *International Journal of Technical Research and Applications* 84-88, 85.

¹⁵² *Ibid.*

¹⁵³ See also the Office for Harmonization in the Internal Market (OHIM), *Intellectual Property and Education in Europe: Study on IP Education in School Curricula in the EU Member States with additional International Comparisons* (OHIM Publication 2015) 11-15. See also the definition of "IP education" adopted in the Study. It states that "IP education should include references to skills and competencies that young people can be expected to acquire in the classroom that enable them to become familiar with intellectual property, understand its potential to generate income and economic growth and lead them to respect intellectual property rights, whether their own or those of others. It is a process that supports pupils in becoming future IP creators".

¹⁵⁴ D Llewelyn, *Invisible Gold in Asia: Creating Wealth through Intellectual Property* (Marshall Cavendish 2010) 241.

¹⁵⁵ Ns Punchihewage, *Promoting a Second-Tier Protection Regime for Innovation of Small and Medium-Sized Enterprises in South Asia: The Case of Sri Lanka* (published by Nomos, Baden-Baden, Germany 2015) 26 *MIPLC Studies* 34-36.

stage, heavily importing high-tech products, unlike countries in East Asia such as Japan, South Korea, China and Malaysia. Nevertheless, it must be noted that the country has been significantly transformed from an agrarian economy to a low-level industry based economy and traditional knowledge-based and grassroots innovation also occupy a significant place.

4.3 Policy objectives of Government

The national tourism policy (NTP) and strategy determines the direction, prospects and potential of tourism development in any country. NTP plays a vital role in making Sri Lanka “a competitive and attractive tourist destination.” Sri Lanka should draft a coherent policy document addressing the needs of the tourism sector alone, with a specific policy strategy to achieve the key objectives for developing the sector in the country. The new Sri Lankan Government Tourism Strategic Plan (TSP) 2017-2020 defines a framework and a transformation agenda intended to include underused natural, cultural, geographic and human resources to enhance the contribution of tourism to the economy.¹⁵⁶ The Sri Lankan tourism authorities had previously formulated a broad Strategic Marketing Plan for 2016, in which private and public sector stakeholders participated, addressing the long-standing needs of the sector and the expectations of the country as a tourist destination.¹⁵⁷ The key strategic objectives underpinning the “Tourism Promotional Plan for 2016” are: attracting 2.2 million visitors with 26 per cent annual growth, increasing tourists’ average daily expenditure to 200 United States dollars, lengthening the average stay (at present, 10.1 days) and generating revenue through tourism of up to 2.75 billion United States dollars. These objectives will also act as key performance measures. The overall goal of the promotional strategy devised for 2016 will be to increase Sri Lanka’s brand value to 80 million United States dollars through tactical marketing campaigns, which focus on the key products.¹⁵⁸ Under the previous Government, the Tourism Development Strategy for 2011-2016, which was prepared by the Ministry of Economic Development, identified an urgent need for “the Sri Lankan tourism industry to think beyond traditional boundaries and be actually involved in product development to make visits exciting for the tourist and to position Sri Lanka as unique”.¹⁵⁹ The Strategy aimed to attract 2.5 million “high-spending tourists” by 2016 (compared to 650,000 in 2010). The five-year plan, implemented under the

¹⁵⁶ Ministry of Tourism Development and Christian Religious Affairs, *Sri Lanka Tourism Strategic Plan 2017-2020*. Available at: <<http://www.sltda.lk/sites/default/files/tourism-strategic-plan-2017-to-2020.pdf>>, accessed on June 20, 2017.

¹⁵⁷ Sri Lankan Tourism Development Authority, “Tourism Promotional Plan of Year 2016”. Available at <<http://www.news.lk/features/item/11559-sri-lanka-tourism-strategy-2016>>, accessed on January 20, 2017.

¹⁵⁸ Sri Lankan Tourism Development Authority, “Tourism Promotional Plan of Year 2016” available at <<http://www.news.lk/features/item/11559-sri-lanka-tourism-strategy-2016>>, accessed on January 20, 2017.

¹⁵⁹ See Gloria Pasadilla, “Medical and Wellness Tourism: Lessons from Asia” (2014), International Trade Centre (ITC) 20-23.

Tourism Development Strategy 2011-2016, also outlined the key objectives of tourism development in Sri Lanka.

The new Government came into power on January 8, 2015 and its vision of tourism promotion was outlined by the Prime Minister in Parliament. He stated that “The tourists who visit Sri Lanka today only spend around US\$ 40-50 daily. Sri Lanka needs to build a strategy that will seek to bring tourists who have the capacity to spend around US\$100-150 daily. The country also needs to focus on encouraging tourists to stay longer on the island. We have to market Sri Lanka as an attractive tourist hotspot. Sri Lanka needs to put in place specific guidelines and interventions for the tourism sector”. He also outlined the promotion of tourism through zonal development, attracting visits from, among others, cultural, religious and environmental tourists. The Government will also focus on developing small tourist-inns and encourage provincial businesses to make better use of opportunities presented by tourism in their areas. Currently, the Southern Development Ministry is engaged in a program that offers such guidance. It is imperative for Sri Lanka to formulate an NTP, rather than resort to a piecemeal approach, with a clear set of goals and priority sectors. The NTP should include a long-term strategy for the planning, development and marketing of the tourism industry in Sri Lanka. Policy alone would not help achieve the objectives unless it were supported by an action plan for tourism development, backed by legislative initiatives. The traditional focus of tourism development should be redirected toward new products, such as ecotourism, agro-tourism, meetings and exhibitions and wellness tourism, which includes traditional medicines such as Ayurvedic treatments. Hence, new efforts need to be made to move from a value-adding stage into a sustainable business stage.¹⁶⁰ In order to achieve this, successful experiences and best practices from East Asian countries could be emulated.

4.4 Domestic IP infrastructure

Mere legislative and regulatory instruments cannot constitute a domestic IP infrastructure, stakeholders must also have proper awareness, access and ease when using the system coupled with a robust enforcement instrument. The IP system should be used as a trade and industrial policy tool. One major issues that Sri Lanka must address is the lack of expertise in the area of IP law. In Sri Lanka, like in other developing countries, there is a severe dearth of experts able to handle IP-related responsibilities such as the drafting of patent applications or IP attorneys skilful in drafting claims. Thus, Sri Lanka needs to consider creating a strong patent attorney profession involving science and technology graduates from the country’s universities. Our survey evidence also supports this proposition but only a handful of

¹⁶⁰ G Pasadilla, “Medical and Wellness Tourism: Lessons from Asia” (2014), International Trade Centre (ITC) ix.

law firms are equipped with the necessary skills to handle IP cases. With regard to the IP registration process, NIPO does not have a sufficient number of qualified officials to handle the volume of applications and unlike in Singapore or Malaysian IP offices, NIPO suffers from a lack of human and physical resources. In light of an increase in applications, NIPO should be provided adequate resources and capacity-building should be facilitated through training programs.

4.5 Familiarity with IP issues in the tourism industry (IP culture) and other facts

Of the other relevant factors, it is also important to consider familiarity with IP issues (IP culture) in the tourism sector including good governance, rule of law, legal certainty and other facts.¹⁶¹ These considerations play an important role in the functioning of any IP system in the country. At present, even if an enterprise is aware, willing and engaged in obtaining protection through IP rights (mostly trademarks), they are unwilling to go through the entire lengthy process of trademark and patent registration unless it is extremely necessary. As in other countries, IP right registration involves a number of cumbersome and complex registration procedures.¹⁶² Moreover, there is hardly any rigorous enforcement of IP rights in courts: only a handful of cases have been decided on over a period of more than a century and a half, with the exception of trademark infringement cases. Cost is another reason that the IP system has become unattractive to the tourism sector. The enormous costs associated with acquisition, maintenance and enforcement of IP rights is a significant deterrent for applicants, and field research revealed that the majority of hoteliers do not consider IP rights to be vital to their businesses. It was also revealed that there was no in-house IP counsel or expert in any of the leading tourist hotels in Sri Lanka.

¹⁶¹ HG Ruse-Khan, "Utility Model Protection in Pakistan – A Feasible Option for Incentivising Incremental Innovation?" (2012), Study conducted for WIPO, 74 (copy on file with author).

¹⁶² A recent study by Verité Research has found that Sri Lanka's ability to benefit from the Madrid Protocol, a centralized global system that simplifies the process Sri Lankan businesses go through when registering trademarks abroad, is impeded by the delays in local trademark registration. Verité Research found that NIPO takes around 3-5 years to process trademark applications. Sri Lanka fares poorly compared to other middle-income countries like the Philippines, Bulgaria and Vietnam. D Jayasuria, "Sri Lanka's ability to benefit from Madrid Protocol hobbled by local delays", Daily News (Colombo, February 1, 2017): Available at: <<http://www.dailynews.lk/2017/02/01/business/106353/sl%E2%80%99s-ability-benefit-madrid-protocol-hobbled-local-delays>>, accessed on February 5, 2017.

5. Recommendations and Way Forward

5.1 Policy considerations

The aim of this section is to make practical recommendations for the use of IP tools and strategies to foster competitiveness in the local tourism industry for its stakeholders. The study needs to take cognizance of the Sri Lankan Government's 2017-2020 TSP, which has been drafted in line with the 2025 long-term vision for tourism.¹⁶³ TSP defines a framework and a transformation agenda intended to include underused natural, cultural, geographic and human resources to enhance the contribution of tourism to the economy. It envisages "a transformation of the tourism industry to make Sri Lanka competitive in the global travel marketplace".¹⁶⁴ Through this policy document, the Government has recognized the importance of developing tourism and the potential it has to create jobs. From a business perspective, TSP is geared toward creating and adding value to tourism products and services to make Sri Lanka a highly popular destination offering extraordinary experiences. TSP's vision is that Sri Lanka be recognized as the world's finest island for memorable, authentic and diverse experiences under the "Made in Sri Lanka" slogan. The high level national economic objectives envisaged in the four-year TSP are listed below:

- The tourism sector should account for the third largest net foreign exchange earner, targeting an income of 7 billion United States dollars in 2020.
- Tourism and its supporting industries should employ 600,000 Sri Lankans, with women accounting for 10 per cent.¹⁶⁵
- There should be an increase in daily spending per visitor from the 2015 figure of 164 US dollars to 210 US dollars.

To achieve these high-level objectives of the Government, the potential of the Sri Lankan tourism sector should be tapped and the Sri Lankan IP system aligned with the tourism strategy. Undeniably, the role of IP tools is to improve, leverage, facilitate and make tourism products and services more competitive and attractive. It is therefore imperative that Sri Lanka adopt a new business model for the use of IP rights in tourism. IP assets are the drivers of the knowledge-based economy of the twenty-first century and the IP system serves the important policy objective of promoting innovative and creative activities, on one hand, and essentially contributes to fair trade and commerce, on the other, which would eventually result in an

¹⁶³ Ministry of Tourism Development and Christian Religious Affairs, *Sri Lanka Tourism Strategic Plan 2017-2020*. Available at: <<http://www.slttda.lk/sites/default/files/tourism-strategic-plan-2017-to-2020.pdf>>, accessed on June 20, 2017.

¹⁶⁴ The *Sri Lanka Tourism Strategic Plan 2017-2020*, 3.

¹⁶⁵ The tourism industry directly employed 135,930 people and indirectly employed 183,506 in 2015. According to the available figures, women represent a mere 6 per cent of the workforce of the tourism industry.

economic benefit. The current IP law could be amended or revised to afford better protection to inventions and creations in the tourism-related products and services sector.¹⁶⁶ However, as stated by R.A. Macdonald, “in law reform, as in life, the perfect is the enemy of the good, and the quest for the perfect often undermines the good already accomplished”.¹⁶⁷ Therefore, law reform in the area of IP could take place in an incremental manner (suggestions for law reform in the Sri Lankan IP landscape are provided in the appendix to this report).

5.2 General recommendations and observations

Many countries in the world are increasingly using tourism in their national development strategies as an effective driver of economic growth and inclusive development, creating jobs and ensuring the welfare of communities. Therefore, the Sri Lankan Government should design its NTP with a clear set of goals and priority sectors. Policy alone would not help achieve the desired objectives unless such policy is supported by an action plan for tourism development backed by legislative initiatives. In this regard, successful experience and “best practices” emerging from East Asian countries can be emulated.¹⁶⁸ Sri Lanka, as an emerging economy in Asia, may be able to realize the true potential of its tourism industry if a tourism strategy is coupled with the right IP tools.

The tourism sector could potentially contribute 25 per cent to GDP, if the Lanka were to pay adequate attention to marketing as opposed to just selling its products and services.¹⁶⁹ In this regard, the sale of products would be less successful in the future if effective marketing was not implemented, given 17 per cent of the decisions the world makes on a daily basis are emotion based.¹⁷⁰ “It is for emotions that people pay a premium price and that comes with creativity. It is all about giving an unparalleled feeling to tourists. We use our heads, we use all the intelligence we have; but finally it is the heart that tells you what to buy. That is why emotions are very relevant to the development of the tourism industry”¹⁷¹ Nevertheless, Sri Lanka has so far not been

¹⁶⁶ In this regard, it is important to consider “an evidence-based approach” as advocated by F. Machlup in the famous review of the US patent system: “unless evidence suggests that introducing such a system of protection actually does more benefit than harm, one is better off retaining the status quo”. See F. Machlup, *An Economic Review of the Patent System* (1958) Study No. 15 of the Subcommittee on Patent, Trademarks and Copyrights of the Senate Committee on the Judiciary, 20.

¹⁶⁷ R. A. Macdonald, “A Model Law on Secured Transactions. A Representation of Structure? An Object of Idealized Imitation? A Type, Template or Design?”(2010) 15 *Current Law Journal* 419-446, 446.

¹⁶⁸ For example, tourism has been determined by the Royal Government of Cambodia as the “Green Gold” which is an important element of the green economy. The Tourism Development Strategic Plan 2012-2020 showcases a clear long-term vision for tourism development in Cambodia, based mainly on the potential of “Cultural and Natural” resources.

¹⁶⁹ Charumini de Silva, “Tourism under par on potential” *Daily FT* (Colombo, 4 July 2017). Available at: <<http://www.ft.lk/article/625876/Tourism-under-par-on-potential>>, accessed on 4 July 2017.

¹⁷⁰ *Ibid.*

¹⁷¹ Kishu Gomes, Sri Lanka’s top private sector professional made the above remarks while delivering the keynote address at the 38th Graduation Ceremony of the Sri Lanka Institute of Tourism and Hotel

able to make significant progress in branding to curb the negative trend in the tourism sector. According to the Travel and Tourism Competitiveness Index (TTCI) 2017, Sri Lanka was ranked sixty-fourth out of 136 economies, which is not encouraging.¹⁷² The following practical recommendations are made to increase the use of the country's IP system, thus leveraging tourism products and services.

- Since branding destinations to enhance appeal among tourists is a growing phenomenon, Sri Lanka Tourism needs to adopt an effective tourism promotional strategy for destination branding. Sri Lanka needs to carefully choose and blend brand elements/brand identities to create a more appealing aura. A combination of different brand elements, brand names, URLs, logos, symbols, characters, spokespeople, slogans, jingles, packages and signage can be explored.¹⁷³ Furthermore, destination branding involves several types of IP rights, mainly trademarks, copyright and design rights. Sri Lanka has, so far, used several taglines such as “Paradise Island”, “Small Miracle”, “Land like no other” and presently, “Wonder of Asia” in branding. However, experts have questioned whether branding and rebranding have been correctly placed.¹⁷⁴ Branding strategies used in other jurisdictions like Singapore (Uniquely Singapore), India (Incredible India), and Malaysia (Truly Asia) constitute best practices that could be emulated by Sri Lanka. Moreover, events and cities could also be promoted by adopting branding strategies that are protected by the trademark law of Sri Lanka.
- The United Nations General Assembly declared 2017 as the “International Year of Sustainable Tourism for Development”. No growth strategy can succeed without commitment to equal opportunities affording all a fair chance to benefit from growth. As such, the concept of inclusive growth should be an integral part of relevant strategies of sustainable tourism development. In this

Management (SLITHM). See Charumini de Silva, “Tourism under par on potential” *Daily FT* (Colombo, 4 July 2017). Available at: <<http://www.ft.lk/article/625876/Tourism-under-par-on-potential>>, accessed on July 4, 2017.

¹⁷² World Economic Forum, *The Travel and Tourism Competitiveness Report 2017: Paving the way for a more sustainable and inclusive future*. Available at: <http://ev.am/sites/default/files/WEF_TTCR_2017.pdf>, accessed on September 30, 2017. The Travel and Tourism Competitiveness Index (TTCI) benchmarks the Travel and Tourism competitiveness of 136 economies in the world. The TTCI measures “the set of factors and policies that enable the sustainable development of the Travel & Tourism (T&T) sector, which in turn, contributes to the development and competitiveness of a country”.

¹⁷³ K.L. Keller, *Strategic Brand Management building, measuring, and managing brand equity* (Pearson Education Limited, Essex, England 2013) 48.

¹⁷⁴ See S. Kelegama, “Key Challenges Facing the Tourism Sector in Sri Lanka” *Daily FT* (June 7, 2014) available at: <<http://www.mfa.gov.lk/index.php/en/news-from-other-media/4841-key-challenges-facing-the-tourism-sector-in-sri-lanka>>, accessed on October 3, 2016. See also D. Hirimuthugodage, “Intellectual property rights as a tool for enhancing ecotourism in Sri Lanka” (2016) Institute of Policy Studies of Sri Lanka. Available at: <http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=154851>, accessed on February 20, 2017.

regard, tourism policies and practices should be designed to address the ever-growing number of elderly tourists and people with disabilities, giving rise to equitable and accessible tourism for all.¹⁷⁵ Sri Lankan policymakers should concentrate on promoting research on new inventions and designs for the aforementioned segment of tourists. As was revealed in the field survey, at present, the infrastructure at many hotels does not cater adequately to the needs of people with disabilities, children and the elderly, excluding them from visiting numerous destinations in Sri Lanka. The country's technology institutions, in collaboration with the private sector, should encourage innovation and inventions protected by patent and design laws. IP rights such as patents, utility models and industrial designs could incentivize such inventions, increasing accessibility for the disabled, elderly and child tourists so they can visit places including the beach, swimming pools, the spa and religious and cultural sites.

- Sri Lanka has a rich natural, cultural and archeological heritage. The untapped potential of these attractive tourist sites and museums may be realized by using IP tools, while offering an extraordinary experience to international travelers and culture lovers. Branding of cultural heritage sites by using an appropriate trademark or collective mark regime would add value to cultural goods and services used in the tourism sector. Sustainable commercial exploitation of the natural, cultural and historical heritage would help conservation activities, in particular, by providing necessary funds for restoration work. Nevertheless, deriving value from IP rights and enhancing economic opportunities should not undermine the concept of sustainable and respectful use of cultural heritage sites in tourism. In fact, unsustainable tourism poses the main threat to cultural heritage sites in Sri Lanka.
- Sri Lanka could become an Ayurvedic hub in order to facilitate medical and wellness tourism. In fact, health and medical tourism is one of the fastest-growing segments in the global tourism landscape and the Ayurvedic sector has tremendous potential. From a business perspective, Ayurveda tourism could be a gold mine if properly exploited. Nevertheless, Ayurvedic and traditional medical systems need standardization to make them more competitive and attractive and compete with more well-known Ayurvedic destinations such as Kerala. Currently, insurance companies are reluctant to cover expenses involving Ayurvedic treatment in their insurance policies. This can be achieved by establishing proper standards, quality control and proper supervision following strict guidelines. Branding of Ayurveda through trademark law, in particular, the certification mark regime, will add value and

¹⁷⁵ Recommendations on Accessible Tourism. Adopted by UNWTO General Assembly Resolution A/RES/637(XX) of August 2013, updating the 2005 UNWTO Recommendations.

give much needed credibility by conforming to international standards. Ayurvedic and indigenous medicine practitioners (*Veda Mahattayas*) who adhere to the strict standards will be able to benefit from the tourism market. Perhaps the use of IP tools could increase a visitor's length of stay, which at present is an average of 10.1 days, which would also contribute toward introducing all-season hotels. Branding Ayurveda could become the most important project since Ayurveda is one of the key drivers of tourism in the country.

- The Sri Lankan tourism industry needs to think innovatively about creating new products and services using its water and the sea surrounding the country as a resource. The country should explore a viable mechanism to use its lagoons, rivers, waterways and islands to create unparalleled experiences for tourists visiting Sri Lanka. To enhance the experience of sea sailing, recreational marinas should be built and managed by tourism associations at the tourist destinations/cities. Ferry transport, using rivers and waterways in many parts of the country could also be analyzed and the creation of island resorts on small islands in places like the Jaffna peninsula would undoubtedly offer a unique experience for tourists and holidaymakers. Branding these new tourism products and services by using the trademark system would certainly add value to the tourism sector and help maintain the standard and quality of such products and services. Activities including sailing, water sports and boat excursions enrich tourists' experiences and make tourists stay longer, encouraging them to spend more in the country.
- The role and contribution of microenterprises and SMEs in tourism should be properly identified. There is, consequently, a need to bring SMEs into the formal system through their registration. As tourism is a private sector-led economic activity in Sri Lanka, policymakers should create an enabling environment for SMEs to forge a stronghold. IP tools could be used effectively to create competitive SMEs, e.g., by registering the trade name of the hotel/restaurant which would add value to SMEs. A new design for a small hotel, home-stay, tree house, eco-lodge or rest-stop using natural and local materials and know-how could be protected by design rights and the IP system could therefore promote local competition in the tourism sector. Moreover, the handicraft sector is mainly operated by SMEs and branded through the trademark system or the GI system (indicating origin "MADE in Sri Lanka") could add value to handicraft items.
- Traditional knowledge-based innovation, e.g., standard mosquito and insect repellents, could be promoted to cater to the needs of the tourism industry utilizing the necessary R&D facilities and technology transferred from technology institutes, such as the ITI of Sri Lanka. Such innovation and

inventions could probably be protected by IP tools such as a patents or the utility model system.

- The role of provincial tourist bureaus should be expanded in line with national tourism strategies. Branding of provincial tourism and protection of such brands/logos using trademark law would add value to tourism products and services offered by the bureaus.
- Ecotourism/nature tourism, community-based tourism and agro-tourism initiatives should be promoted to achieve the goal of sustainable tourism. Therefore, a number of IP tools such trademark, certification and collective marks, copyright and design rights could be adopted by relevant stakeholders.
- Sri Lankan tourism should create a yearly events calendar for local and foreign visitors and encourage branding of these events by registering trademark rights which could be licensed out by event organizers.
- The role and the scope of the National Design Center (NDC) should be expanded to develop designs other than those in the handicraft sector. Innovative designs of the NDC should be incentivized by acquiring IP rights such as design rights. The enhanced role of the NDC would promote local designs created using natural materials that could be sold as “MADE in Sri Lanka” products. The use of certification or collective mark systems registered at NIPO could be affixed on items to guarantee the quality standard, making them more attractive for tourists.
- IP rights could be used as collaterals and IP-backed loan schemes could be implemented for the benefit of cash-strapped, tourism-oriented SMEs. In fact, this may be worth considering in view of the fact that SMEs in the hotel sector are expanding and the number of boutique hotels, villas and homestays is on the rise in Sri Lanka.
- An institutional capacity-building program in IP, tourism and cultural institutions should be implemented. Well-designed training programs including workshops and seminars to support institutional capacity-building (with key institutions such as NIPO, NSF, the Inventor’s commission and cultural centers) could ensure that the institute is protecting, promoting and enforcing IP rights in a more efficient and effective manner.
- Awareness of IP law and regulations should be promoted among tourism stakeholders, including the hotel industry. To this end, tourism stakeholders would be made aware of the system of IP protection and learn how it functions. Brochures and flyers should thus be designed to highlight the purpose and main features of the system, indicating the ways that SMEs could

exploit it and listing its benefits in marketing and/or licensing of the protected products.¹⁷⁶ Industry associations and local chambers of commerce should also be utilized as platform to raise awareness of the system among SMEs and other stakeholders.

- Awareness on IP should be raised among the general public to instill a culture of respect for rights in Sri Lanka. In this regard, education on IP matters is vital for a change in attitudes. Relevant activities could include awareness-raising campaigns, public education, publicity materials, TV and radio programs, which would target the general public.
- Training should be designed and offered to officials of the enforcement agencies (especially the officials of the Police Department and Sri Lanka Customs) for the effective protection of IP rights.
- IP law courses and training modules should be included in the diploma courses currently offered by the SLITHM, the country's leading hospitality education provider.
- Last, but not least, a dedicated unit/center or help desk should be established at the IP office or at the SLTDA to promote and monitor the use of IP rights in tourism and culture for products and services. This center should be able to provide financial and other advisory support to prospective investors and entrepreneurs who are engaged in the tourism sector.¹⁷⁷

5.3 Conclusion

A number of IP rights could play a crucial role in fostering tourism and culture in Sri Lanka. In addition, exclusive rights attached to copyright, patents, trademarks, designs and GIs may be effectively harnessed for the improvement of the tourism industry. Furthermore, trade secret protection (for traditional knowledge-based innovation) and protection against unfair competition (as fallback protection, since it does not entail exclusive rights) may be used as effective tools against free-riding. In that sense, the IP rights regime is a powerful mechanism for increasing the competitiveness of enterprises operating within the tourism industry.

¹⁷⁶ See D. Hirimuthugodage, "Intellectual property rights as a tool for enhancing ecotourism in Sri Lanka" (2016), Institute of Policy Studies of Sri Lanka. Available at: <http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=154851>, accessed on February 20, 2017.

¹⁷⁷ See D. Hirimuthugodage, "Intellectual property rights as a tool for enhancing ecotourism in Sri Lanka" (2016), Institute of Policy Studies of Sri Lanka. Available at: <http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=154851>, accessed on February 20, 2017.

Promotional materials, literature, guide books and leaflets used in the tourism industry could be protected by copyright, while traditional dances associated with cultural festivals such as the *Kandy Esala Perahera* could be protected by neighboring rights. The same may be true of traditional cultural performances of the *Vedda* indigenous community. Traditional knowledge-inspired innovation and traditional food recipes and processes could be protected by patents, designs and trade secrets. The industrial design regime could be leveraged to protect modern designs in the apparel industry, wood carvings and masks, gems, jewelry and a broad range of traditional handicrafts, including pottery, paintings, lacework, wood sculptures, cane work, bamboo work, handloom items and masks. Even innovative designs of Ayurvedic spas in tourist hotels could be protected by design rights provided the novelty condition were met. Hotels could capitalize on the branding and trademark regime, including certification and collective marks, to distinguish their goods and services and gain a competitive edge.

Ceylon tea, cinnamon, black pepper, gem stones and other goods could be protected by virtue of their origin under the GI and certification mark systems. GI rights could thus promote agro-tourism. Last but not least, protection against unfair competition could shield the tourism industry from unfair and dishonest trade practices. The relationship between IP and the tourism industry could be truly symbiotic, with the rich creativity of the latter expanding the frontiers of the former and the apparatus of the former helping to realize the potential of the latter. Ultimately, Sri Lanka must implement forward-looking policies that draw on the range of existing IP tools to pave the way for innovation, creation and added value. Now is the time for the Sri Lankan tourism sector to adopt a new business model and promote tourism and culture using IP tools. In so doing, it would create new jobs, reduce poverty and stimulate robust economic growth.

5.4 Outlook

This study is intended to encourage policymakers in Sri Lanka to adopt IP tools and strategies as part of a fresh approach to tourism development. It provides guidance to the legislature on how to devise appropriate tourism development strategies viewed through the lens of IP rights, innovation and creativity. It could also serve as a basis for further research. At any rate, the recommendations made herein should be expanded upon with the help of all stakeholders in the tourism industry and related sectors. As a base document, this study could provide impetus for follow-up activities to be implemented in phases.

As the second pillar of this project, two waves of seminars and workshops will be organized. A general awareness-raising and capacity-building program for tourism stakeholders, including the SME sector, and a tailor-made program for policymakers in the tourism industry will be held in the latter part of 2017.

As the third pillar, institutionalized training programs will be developed and introduced for the SLITHM – the country’s leading hospitality education provider. As part of the third phase of activities under this project, Sri Lanka looks forward to contributing to the development of teaching materials on IP-related tourism and promoting the inclusion of specialized curricula in tourism management schools and national IP academies. Areas such as Ayurveda, ecotourism and agro-tourism may be considered for extension projects (follow-up special projects) to facilitate further cooperation.

Bibliography

Abeysekere I., “Copyright Law and Practice in Sri Lanka” (1998) 29/1, *International Review of Intellectual Property and Competition Law* 27.

Alikhan S. and Mashelker R.A., *Intellectual Property and Competitive Strategies in the twenty-first century* (Kluwer law, The Netherlands 2004).

Athukorala R.N:A., “Paradise threatened; 11.1 per cent GDP Contribution by Tourism” Available at: <<http://www.ft.lk/article/615361/Paradise-threatened--11-1--GDP-contribution-by-tourism> - See more at: <http://www.ft.lk/article/615361/Paradise-threatened--11-1--GDP-contribution-by-tourism#sthash.A0cnFaAg.dpuf>> accessed on May 20, 2017.

Bainbridge D.I., *Intellectual Property* (9th edn., Person Education, UK 2016).

Bocedi G., Desimoni F. and Mendelson R., *Protecting Geographical Indications in Emerging Economies (Brazil, Russia, India and China – BRICs Countries): A Practical Manual for Producers* (The Organization for an International Geographical Indications Network – origin, Geneva, 2012).

Bone R.G., “A New Look at Trade Secret Law: Doctrine in Search of Justification” (1998), 86/2 *California Law Review* 241.

Booth W.C., Colomb G.G. and Williams J.M., *The Craft of Research* (3rd edn., University of Chicago Press, Chicago 2008).

Bryman A., *Social Research Methods* (5th edn., Oxford University Press, 2016).

Cornish W.R., *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights*(7th edn., Sweet and Maxwell, London, UK 2010).

Correa C.M., “Protection and Promotion of Traditional Medicine: Implications for Public Health in Developing Countries” (2002 WHO), available at: <<http://>

apps.who.int/medicinedocs/pdf/s4917e/s4917e.pdf> accessed 3 October 2016.

Dutfield G., *Intellectual Property, Biogenetic resources and Traditional Knowledge* (Earthscan, UK 2004).

Fink C. and Maskus K.E.(eds.), *Intellectual Property and Development: Lessons from Recent Economic Research* (World Bank and Oxford University Press, Oxford, UK, 2005).

Getz D., “Event tourism: Definition, evolution, and research”, (2008) 29 *Tourism Management* 403-428.

Department of Government Information, “*Vision2025*”-A Country Enriched. Available at:< https://news.lk/images/pdf/2017/sep/Vision_2025_English_final.pdf>, accessed on 5 September 2017.

Hirimuthugodage D., “Intellectual property rights as a tool for enhancing ecotourism in Sri Lanka” (2016), Institute of Policy Studies of Sri Lanka. Available at: <http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=154851>, accessed on February 20, 2017.

Kanag-Isvaran K. ”Unfair Competition – An Antidote to Dishonest Trade Practices” (1997), VII/1 *The Bar Association Law Journal* 144-160.

Karunaratna D.M., *A Guide to the Law of Trade Marks and Service Marks in Sri Lanka*(2nd edn., Vishva Lekha Publishers, Ratmalana, Sri Lanka 2007).

Karunaratna D.M., *Elements of the Law of Intellectual Property in Sri Lanka* (SarasaviPublishers, Nugegoda, Sri Lanka 2010).

Kelegama S., “Key Challenges Facing the Tourism Sector in Sri Lanka” *Daily FT* (7 June 2014), available at: <<http://www.mfa.gov.lk/index.php/en/news-from-other-media/4841-key-challenges-facing-the-tourism-sector-in-sri-lanka>>, accessed on October 3, 2016.

Keller K.L., *Strategic Brand Management building, measuring, and managing brand equity* (Pearson Education Limited, Essex, England 2013).

Kotler P. and Armstrong G., *Principles of Marketing* (Pearson Education, USA 2012) 231.

Koler P. and Keller K.L., *Marketing Management* (Pearson Education, 2012).

Lemley M. “The Surprising Virtues of Treating Trade Secrets as IP Rights” (2008) 61/2 *Stanford Law Review* 311.

Llewelyn D., *Invisible Gold in Asia: Creating Wealth Through Intellectual Property*

(Marshall Cavendish, Singapore 2010).

McConville M. and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press, 2007).

Machlup F., *An Economic Review of the Patent System* (1958) Study No. 15 of the Subcommittee on Patent, Trademarks and Copyrights of the Senate Committee on the Judiciary 20.

Ministry of Tourism Development and Christian Religious Affairs, *Sri Lanka Tourism Strategic Plan 2017-2020*. Available at:

<<http://www.slttda.lk/sites/default/files/tourism-strategic-plan-2017-to-2020.pdf>>, accessed on June 20, 2017.

Murray M.A., *Island Paradise: The Myth: An Examination of Contemporary Caribbean and Sri Lankan Writing* (Editions Rodopi, Amsterdam-New York, 2009)15.

Nanayakkara T., “Role of Intellectual Property in Enhancing the Competitiveness of the Tourism Industry”. Available at:

http://www.wipo.int/export/sites/www/sme/en/documents/pdf/tourism_ip.pdf, accessed on January 20, 2017.

Pasadilla G., “Medical and Wellness Tourism: Lessons from Asia” (2014), International Trade Centre (ITC)

Perera P.K., “Current Scenario of Herbal Medicine in Sri Lanka” (ASSOCHAM, 4th Annual Herbal International Summit, NSIC, New Delhi, 14-15 April 2012).

Perera S.K., “Legal and Institutional Framework Established for Organized Development of Tourism” in *Golden Jubilee of Sri Lanka Tourism Commemorative Volume* (Sri Lanka Tourist Board, Colombo, 2016) 28-30, 28

Prentice P. and Andersen V., “Festival as Creative Destination” (2003) 30/1 *Annals of Tourism* 7–30.

Punchihewage N.S., *Promoting a Second-Tier Protection Regime for Innovation of Small and Medium-Sized Enterprises in South Asia: The Case of Sri Lanka* (published by Nomos, Baden-Baden, Germany 2015) 26 MIPLC Studies.

Reichman J.H. and Lewis T., “Using Liability Rules to Stimulate Local Innovation in Developing Countries: Application to Traditional Knowledge” in Maskus K.E. and Reichman J.H. (eds) *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime* (Cambridge University Press, Cambridge, UK 2005).

Sahlan S.A.B., Rahman N.B.A., and Amin S.B.M., “Intellectual Property Awareness among Public: Comparative Study between Malaysia and United Kingdom” (2014) *International Journal of Technical Research and Applications* 84-88.

Salter M. and Mason J., *Writing Law Dissertation: An Introduction and Guide to the conduct of Legal Research* (Pearson Education Ltd, Essex, England 2007).

Samaranayake H.M.S., *A Lifetime in Tourism: A Memoir of My Association in Sri Lanka and Abroad* (Vijitha Yapa Bookshop, Colombo 2012).

Srinivas K.R., “Traditional Knowledge and Intellectual Property Rights. A Note on Issues, Some Solutions and Some Suggestions”, available at: <SSRN: <http://ssrn.com/abstract=1140623>> (accessed 3 October 2016).

Watkins D. and Burton M. (eds), *Research methods in law* (Routledge, 2013),
World Tourism Organization (UNWTO) *Annual Report 2015*(UNWTO, Madrid, Spain 2016).

Zetiu A.M. and P. Berteau, “How a Tourist Destination may become a Brand by Means of Events - A Case Study on Iasi as a Candidate for European Cultural Capital 2021” (2015), *Centre for European Studies* 388-403.

World Economic Forum, *The Travel and Tourism Competitiveness Report 2017*:
Available at: <http://ev.am/sites/default/files/WEF_TTCR_2017.pdf>, accessed on September 30, 2017.

WIPO, *Creative Expression: An Introduction to Copyright and Related Rights for Small and Medium-sized Enterprises* (WIPO publication No. 918, Geneva, 2006).

WIPO, *Protect and Promote Your Culture: A Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities* (WIPO publication, Geneva, 2017).

APPENDIX

Detailed overview of the legal framework governing IP rights in Sri Lanka

International obligations

The internationalization of IP law, regulation and policy began in the eighteenth and nineteenth centuries.¹⁷⁸ The multilateralization of international IP quickly followed in the latter part of the nineteenth century through the negotiation and adoption of two important treaties: the Berne Convention on Literary and Artistic Works of 1886 (Berne Convention) and the Paris Convention on the Protection of Industrial Property of 1883 (Paris Convention).¹⁷⁹ Later, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961 was adopted. In 1994 the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the TRIPS Agreement) created another milestone in the history of IP law by establishing universal minimum standards of IP protection. Many consider the TRIPS Agreement a sea change in international IP law. International IP treaties cover a range of IP rights to different extents. The obligations of the parties to those treaties thus vary accordingly.¹⁸⁰ Sri Lanka ratified the Marrakesh Agreement establishing the WTO in June 1994 and is bound by the legal obligations imposed under the TRIPS Agreement.¹⁸¹ Such obligations concern the protection of copyrights and related rights, trademarks, industrial designs, geographical indications (GIs), patents, semiconductors and undisclosed information and include the core obligations of the two main pre-existing substantive treaties on IP, namely the Paris and Berne Conventions, by reference.¹⁸²

Current intellectual property regime

The IP system in Sri Lanka originated during the British colonial period. From 1860 onwards, a number of British Acts were applied to Sri Lanka and continued to apply even after Sri Lanka gained independence. However, after the introduction of a new policy for a free market economy in 1977, the Sri Lankan Government introduced its own IP regime by means of the Code of Intellectual Property Act, No. 52 of 1979. That law marked a turning point in the evolution of the IP system in Sri Lanka. The

¹⁷⁸ B Mercurio, "Reconceptualizing the Debate on Intellectual Property Rights and Economic Development" (2010) 3/1 *The Law and Development Review* 65, 71.

¹⁷⁹ *Ibid.*

¹⁸⁰ HG Ruse-Khan, "Utility Model Protection in Pakistan-A Feasible Option for Incentivizing Incremental Innovation?" (2012), Study conducted for the World Intellectual Property Organization, 7. (copy on file with author).

¹⁸¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments-Results of the Uruguay Round, 33 I.L.M. 1197 (1994) (TRIPS Agreement).

¹⁸² See also HG Ruse-Khan, "Utility Model Protection in Pakistan-A Feasible Option for Incentivizing Incremental Innovation?" (2012), Study conducted for the World Intellectual Property Organization 7.

Code of Intellectual Property Act was replaced by Intellectual Property Act No. 36 of 2003 (IP Act) to ensure that the Sri Lankan IP regime met obligations arising from the TRIPS Agreement. As established in the parliamentary debate on the corresponding bill, the aim of the new Act was to promote national creativity, protect creative efforts, enhance the integration of the national economy into the knowledge-driven global economy, attract more investment and protect consumer interests.¹⁸³

Main IP rights of concern

The IP Act protects the main IP rights recognized by multilateral IP treaties, including copyright and related rights, inventions, industrial designs, trademarks, GIs, undisclosed information (including trade secrets), protection against unfair competition and layout designs of integrated circuits. However, this section of the report will focus on the main IP rights that have an actual or potential impact on tourism and cultural promotion.

Copyright and related rights

Nowadays, IP and especially copyright plays a significant role in the knowledge economy. This is just as true in Sri Lanka as in any other part of the world. The term copyright refers to the area of IP law that deals with rights of the owners of literary, dramatic, musical and artistic works, cinematographic films and sound recordings. Sri Lankan copyright law, enshrined in the IP Act, concerns the rights of the authors of protected works and provides for the management and enforcement thereof. Undoubtedly, copyright protection has the potential to positively contribute to the social, economic and cultural development of the country. In Sri Lanka, the IP rights of authors have been protected since 1911. Indeed, the Intellectual Property Act of 2003 provides a comprehensive legal framework for the protection of copyright and related rights (neighboring rights) in compliance with international standards.

At the very outset, it is important to understand that the Sri Lankan copyright regime is based on the common-law copyright tradition, as opposed to the European authors' rights regime.¹⁸⁴ Pursuant to Section 6 of the Act, "works" in the literary, artistic or scientific domain are protected under copyright law. These works are protected by the sole fact of their creation and, irrespective of their creative elements, quality or value, do not need to have any literary or artistic merit.¹⁸⁵ However, in order to

¹⁸³ See R. Karunanayake - the former Minister of Commerce and Consumer Affairs (2003), *Hansard Report-23 July 2003* (The Parliament of Sri Lanka 2003) 1048, 1049-1050. The Minister made this statement during the second reading of the Code of Intellectual Property Law Bill in Parliament.

¹⁸⁴ The Continental European authors' rights regime is based on the tradition of the French *droit d'auteur*, which sees intellectual creations as an embodiment of the spirit or soul of the creator. In contrast, the Common Law tradition regards copyright and related rights as property rights.

¹⁸⁵ In this regard, the approach of the Sri Lankan judiciary is similar to the approach adopted by English Courts. See *Wijesinghe Mahanamahewa And Another v. Austin Canter* (1986 1 Sri LR 620,

qualify for copyright protection, works must be “original intellectual creations”. A work is “original” in the copyright sense if it owes its origin to the author and was not copied from some pre-existing work. In other words, an original work is one that “originates” in its expression from the author. The term “intellectual” denotes the communication of thoughts or feelings and output of the mind, while the term “creation” should be understood as the “shaping of form of expression”. Copyright protection relates only to the form of expression and not to the underlying idea. However, while several Berne Union countries have established voluntary national registration systems for copyright and related rights, Sri Lanka does not have a copyright registration system: copyright protection in Sri Lanka is afforded without any such formalities.

Under section 6(1) of the IP Act, “protected works” covers all writings, including: computer programs; oral works such as speeches and lectures; dramatic and dramatic-musical works; pantomimes; choreographic works and other works created for stage production; stage productions of such works; musical works; audiovisual works; works of architecture; works of drawing, painting, sculpture, engraving, lithography, tapestry and other works of fine arts; photographic works; works of applied arts; illustrations; maps; plans; sketches; and three-dimensional works relative to geography, topography, architecture or science. Moreover, Section 7 of the IP Act protects derivative works such as translations, adaptations, arrangements and other transformations or modifications of works and collections of works and databases,¹⁸⁶ whether in machine-readable or other form, provided that they are original by reason of the selection, coordination or arrangement of their contents.

Copyright protection in Sri Lanka does not extend to any idea; procedure; system; method of operation; concept; principle; discovery or mere data; any official texts of a legislative, administrative or legal nature; or published news of the day.¹⁸⁷ As in many other jurisdictions, in Sri Lanka exclusive rights granted by copyright law are subject to certain limitations such as “fair use” or “fair dealing”.¹⁸⁸ Further, the exclusive rights conferred under copyright law entail economic as well as moral rights. Economic rights cover rights relating to reproduction; translation; adaptation or transformation; public distribution, including sale, rental, export; rental of the original or a copy of an audiovisual work, a work embodied in a sound recording, a computer program, a database or a musical work in the form of notation, irrespective of the owner of the copy or the original concerned; and importation of copies of a work, public display, public performance, broadcasting or other communication to the

Vasantha Obeysekera v. A.C. Alles CA 730/92 (F) (unreported), *Chandraguptha Amerasinghe v Associated Newspapers of Ceylon Ltd* (SC decided in 2012).

¹⁸⁶ A database is a collection of information that has been systematically organized for easy access and analysis.

¹⁸⁷ Section 8 of the IP Act clearly sets out works not protected.

¹⁸⁸ Section 11 and 12 provide specific instances of fair use.

public.¹⁸⁹ Moral rights mainly cover the right to be named as the author of the work (“authorship right” or “paternity right”) and the right to protect the integrity of the work such as the right to object to any distortion or mutilation and so on.¹⁹⁰

Related rights, also referred to as neighboring rights, are protected under Sections 17 to 20 of the IP Act. The Act recognizes the rights of performers, producers of sound recordings and broadcasting organizations. These rights safeguard the interests of persons who contribute to making the copyright material available to the public or make productions that express some kind of creativity, creative talent or technical or organizational skill.¹⁹¹ Under Section 5 of the IP Act, the term “performers” means singers, musicians and other persons such as actors and dancers who sing, deliver, declaim, play in or otherwise perform literary or artistic works or expressions of folklore. Performers have the exclusive right to authorize or prohibit the fixation (recording), in any medium, communication to the public or broadcast or transmission by cable of their live performance or any substantial part of it, as well as the reproduction of recordings of their live performances.¹⁹²

Section 24 of the Act provides protection for expressions of Sri Lankan folklore. The Act recognizes the importance of folklore as an ingredient of cultural identity. Section 5 defines the term “expression of folklore” as “a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means”.¹⁹³ As stipulated in Section 24(1) of the Act, expressions of folklore are protected against: reproduction; communication to the public by performance, broadcasting or distribution by cable or other means; and adaptation, translation and other transformation, where such

¹⁸⁹ Section 9 of the IP Act stipulates the exclusive economic rights enjoyed by the author of the work.

¹⁹⁰ See Section 10 of the IP Act. Unlike economic rights, moral rights cannot be transferred to someone else, as they are personal to the creator. Even when the economic rights in a work are assigned to someone else as per Section 16 of the IP Act, the moral rights in the work remain with the creator. However, in some countries, an author or creator may waive his/her moral rights by a written agreement, whereby he/she agrees not to exercise some or all of his/her moral rights. See generally, World Intellectual Property Organization (WIPO), *Creative Expression: An Introduction to Copyright and Related Rights for Small and Medium-sized Enterprises* (WIPO publication No. 918, Geneva, 2006).

¹⁹¹ D.M. Karunaratna, *Elements of the Law of Intellectual Property in Sri Lanka Op Cit.*, p. 98.

¹⁹² See World Intellectual Property Organization (WIPO), *Creative Expression: An Introduction to Copyright and Related Rights for Small and Medium-sized Enterprises* (WIPO publication No. 918, Geneva, 2006).

¹⁹³ Definition of folklore as adopted in the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore: “Folklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a 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”. See the General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from 17 October to 16 November 1989 at its twenty-fifth session.

expressions are made either for commercial purposes or outside their traditional and customary context. Section 24 (6) prohibits and criminalizes the unauthorized commission of any of the acts referred to under the protected rights. The right to authorize these acts has been vested in a competent authority to be appointed by the responsible Minister. IP Regulation No. 4(1) dated October 19, 2005 designates the Director General of IP as the competent authority.¹⁹⁴

The Sri Lankan copyright regime also provides for the collective management of copyright and related rights. The collective management system enables rights owners to authorize CMOs of which they are members to manage their rights on their behalf.¹⁹⁵ Section 25 of the Act provides for the establishment of CMOs in Sri Lanka. All such organizations must be registered with the Intellectual Property Office before they can grant licenses. CMOs monitor the use of works on behalf of creators of certain categories of work and are in charge of negotiating licenses and collecting payment.¹⁹⁶

Patents

As evidenced by its world-famous irrigation systems and architecture, Sri Lanka has been a place of great creativity and innovation since the reign of the ancient kings. To this day, one wonders how Sri Lankans of that era built such vast reservoirs as the *Parakrama Samudraya*.¹⁹⁷ Invention and innovation doubtless drive economic growth and development and underpin the global competitiveness of many countries. The protection of inventions lies at the heart of IP, which is born out of the need to reward innovation and creativity.

A patent is a legal title protecting an invention.¹⁹⁸ Patents grant their owners a set of rights to exclusivity over an invention (a product or process that is new, involves an inventive step and is capable of industrial application) as defined in the corresponding claims.¹⁹⁹ The legal protection conferred by a patent gives its owner the right to exclude others from making, using, selling, offering for sale or importing the patented invention for the term of the patent, which is usually 20 years from the filing date, in the country or countries concerned by the protection.²⁰⁰ The aim of the patent system

¹⁹⁴ D.M. Karunaratna, *Elements of the Law of Intellectual Property in Sri Lanka Op Cit.*, p. 105.

¹⁹⁵ *Ibid.* 107.

¹⁹⁶ World Intellectual Property Organization (WIPO), *Creative Expression: An Introduction to Copyright and Related Rights for Small and Medium-sized Enterprises* (WIPO publication No. 918, Geneva, 2006).

¹⁹⁷ S. Fernando, "Lanka Engineers Globally Recognized" *Sunday Observer* (Colombo 6 July 2014).

¹⁹⁸ See Article 28 of the Trade-Related Intellectual Property Rights (TRIPS) Agreement.

¹⁹⁹ A claim forms part of the specification. The specification is essentially a description of the invention and the best method of performing it.

²⁰⁰ Organisation for Economic Co-operation and Development (OECD), *Patent Statistics Manual* (OECD 2009) 18, 18.

is to encourage invention and technical progress by providing a temporary period of exclusivity over the invention in exchange for its disclosure.²⁰¹

Like any other IP right, a patent is a territorial right. The concept of patents, and consequently of IP rights, emerged in Sri Lanka during the British colonial period, when the British Inventors’ Ordinance of 1859 became applicable to Sri Lanka (then Ceylon).²⁰² In fact, the first Sri Lankan patent was granted to a British engineer in January 1861 for the invention of a coffee pulping machine.²⁰³ The current patent regime is governed by the IP Act and its regulations. As mentioned above, the new Act was introduced to ensure the compliance of the Sri Lankan IP regime with the obligations arising from the TRIPS Agreement and to promote national creativity, protect creative efforts, enhance the integration of the national economy into the knowledge-driven global economy, attract more investment and protect consumer interests.²⁰⁴ However, the Sri Lankan patent regime has come under heavy criticism from users for being less attractive to domestic industries. Moreover, despite its long history, Sri Lankan patent law has been invoked in relatively few cases, hardly any of which deal with substantive patent law issues such as treatment of novelty and inventive step.

Patents are granted in relation to inventions. An invention is defined by the IP Act as an idea that provides a practical solution to a specific problem in the field of technology.²⁰⁵ In other words, Sri Lankan patent law is based on the “problem-solution” definition of an invention. The IP Act provides protection for inventions relating to products as well as processes.²⁰⁶ The following are not regarded as inventions within the meaning of the Act and are thus not patentable:²⁰⁷

- discoveries, scientific theories and mathematical methods;
- plants, animals and other microorganisms other than transgenic microorganisms and essentially biological processes for the production of plants and animals other than non-biological and microbiological processes;²⁰⁸

²⁰¹ *Ibid.*, 21.

²⁰² R.M.W. Amaradasa, M.A.T. de Silva and R.P. Pathirage, “Patents in a Small Developing Economy: A Case Study of Sri Lanka” (2002) 17 *Journal of Intellectual Property Rights* 395.

²⁰³ *Ibid.*

²⁰⁴ D.M. Karunaratna, “Issues Related to the Enforcement of IP Rights: National Efforts to Improve Awareness of Decision Makers and Education of Consumers” (WIPO Advisory Committee on Enforcement, Third Session, Geneva, May 2006).

²⁰⁵ See Section 62 (1) of the IP Act. The “word” technology may be understood as the systematic knowledge essentially required for the manufacture of a product.

²⁰⁶ See Section 62 (2) the IP Act; the process patents are those patents which are for inventions which perform a function.

²⁰⁷ See Section 62 (3) of the IP Act

²⁰⁸ The clause in the IP Bill was scrutinized by the Supreme Court and the words “*other micro-organism other than transgenic micro organism*” were added after the word animal. See SC Special determination Nos. 14/2003 and 16/2003-the Supreme Court of Sri Lanka.

- schemes, rules or methods for doing business, performing purely mental acts or playing games;
- methods for the treatment of the human or animal body by surgery or therapy and diagnostic methods practiced on the human or animal body (note, however, that any product used in such methods is patentable);
- an invention which is useful in the utilization of special nuclear material or atomic energy in an atomic weapon;
- any invention whose commercial exploitation must be prevented in Sri Lanka to protect public order and morality, including the protection of human, animal or plant life or health and the prevention of serious prejudice to the environment.

The patentability criteria provided for under Sri Lankan IP law are similar to those set out in Article 27(1) of the TRIPS Agreement, which stipulates that “patents shall be available for any invention that is new, involves an inventive step and is capable of industrial application”. But while the TRIPS Agreement requires WTO members to implement and enforce a comprehensive set of minimum standards for the protection of IP rights, it does not define the term “invention”, nor does it specify how the three criteria for patentability are to be treated.²⁰⁹ Under Sri Lankan law, an invention is patentable if it is new, involves an inventive step and is industrially applicable.²¹⁰

In Sri Lanka, the statutory life of a patent is 20 years from the date of application for its registration.²¹¹ From a legal perspective, a patent is not a right to practice, but a right to exclude.²¹² In that sense, a patent is a negative right, as opposed to an affirmative right. Under Section 84 of the IP Act, a patent confers on its owner a bundle of exclusive rights to exploit the invention in question. Such rights include preventing third parties from making, using, importing, offering for sale, selling and exporting the patented invention without the consent. Patent owners are also entitled to assign or transfer the rights conferred by the patent or conclude licensing contracts in respect of those rights. However, the exclusive legal rights granted to patent owners are not without limitation.²¹³

Design protection

An industrial design may be defined as the (outward) appearance of a product or part of a product resulting from its lines, contours, colors, shape, texture, materials and

²⁰⁹ See also, CM Correa, *A Guide to Pharmaceutical Patents* (vol I, South Centre 2008) 26-27.

²¹⁰ See Section 63 of the Act which deals with protectable inventions.

²¹¹ See Section 83 of the IP Act.

²¹² Kinney and P.A. Lange, *Intellectual Property Law for Business Lawyers* (2010-2011edn., West Publishers 2010) para 2:1.

²¹³ The possibility of granting compulsory licenses is provided for in the IP Act of Sri Lanka No 36, 2003 under Section 86 and it may operate as a limitation of the owner’s right. Another possible exception to the rights of the owner of a patent is the prior user right recognized under Section 87 of the IP Act.

ornamentation.²¹⁴ While a patent protects the technical solution or the inventive technical improvement in a product or process, the new and original shape and external appearance of a useful object is protected by an industrial design right.²¹⁵ The more appealing such products are, the more likely they are to be bought by consumers.²¹⁶ Designs make products attractive and appealing and may thus significantly increase their commercial value and marketability. Design protection has developed internationally and is sufficiently broad to encapsulate designs of three-dimensional patterns such as toys, shoes, perfume bottles, cutlery and even domestic furniture on the one hand, and two-dimensional patterns such as textiles and wallpapers on the other.

The current legal protection of industrial designs in Sri Lanka is governed by Part III of the IP Act. However, the provisions therein could be taken to mean that industrial designs are also protected under copyright, trademark and unfair competition rules.²¹⁷ Thus, as in other jurisdictions such as Europe and the United States, cumulative protection of design rights is possible in Sri Lanka. For example, works of applied art²¹⁸ – that is, artistic works used for industrial purposes by virtue of their incorporation into everyday products, such as jewelry, lamps and furniture – have a dual nature: they may be regarded as either artistic works or general-purpose products.²¹⁹

According to the Act, “any composition of lines or colors or any three-dimensional form, whether or not associated with lines or colors, that gives a special appearance to a product of industry or handicraft and is capable of serving as a pattern for a product of industry or handicraft, shall be deemed to be an industrial design”.²²⁰ However, pursuant to Section 30 of the Act, anything in an industrial design which serves solely to obtain a technical result is not protected as an industrial design. From the perspective of IP law, a product’s functional features are excluded from design protection since they are already the subject of patent and utility models. While the term “product” is not explicitly defined, it could be interpreted as an industrial or handicraft item based on the wording of Section 30.

²¹⁴ See Article 3 of the Council Regulation (EC) No. 6/2002 of December 12, 2001 on Community Designs (Community Designs Regulation-CDR).

²¹⁵ S. Alikhan and R.A. Masshelkar, *Intellectual Property and Competitive Strategies in the 21st Century* (Kluwer Law 2004) 8-9.

²¹⁶ Y Takagi and others (eds.), *Teaching of Intellectual property* (WIPO and CUP 2008) 85.

²¹⁷ See Section 28 of the IP Act; “The protection of industrial designs provided under this Part shall be in addition to and not in derogation of any other protection provided under any other written law”.

²¹⁸ See Section 6(1)(k) of the IP Act regarding copyright protection of works of applied art.

²¹⁹ See World Intellectual Property Organization (WIPO), *Creative Expression: An Introduction to Copyright and Related Rights for Small and Medium-sized Enterprises* (WIPO publication No. 918, Geneva, 2006) 14.

²²⁰ See Section 30 of the IP Act.

To be eligible for protection under Sri Lankan law, any registrable design must be new and must not be anti-social – that is, it must not consist of any design that is scandalous or contrary to morality, public order or public interest or likely to offend the religious or racial sensibilities of any community.²²¹ While “public order or morality” is not defined in the Act, it should be understood in the light of the moral, social and cultural climate of the country. As stipulated in the Act, “an industrial design is new when it has not been made available to the public anywhere in the world and at any time whatsoever through description, use or in any other manner before the date of an application for registration of such industrial design or before the priority date validly claimed in respect thereof”.²²²

Under Sri Lankan law, the owner of a registered industrial design has the exclusive right to exploit it, since third parties are prevented from making, selling, importing or using any product protected by design law.²²³ Registrations of industrial designs are valid for five years from the date of application and may be renewed for two consecutive periods of five years. Thus, the statutory life of a design registration is 15 years from the date of application.²²⁴ To further strengthen the position and rights of design owners, under Sri Lankan law the person who makes the first application for a design is presumed to be its owner. In principle, design protection should be of particular interest to industries such as textiles and garments, toys, cottage industries (e.g. handicrafts) and gem and jewelry production. However, the relatively high novelty standard and non-protection of technical features prevent most incremental and minor innovations from receiving protection under this mechanism.

Trademarks, certification marks and collective marks

In the eyes of IP law, trademarks protect brands and the goodwill associated with them. Trademarks are a means of protecting the characteristics specified in trademark law, such as signs, words, logos, slogans and other features. As valuable advertising tools, they play a vital role in the marketing and commercialization of goods and services to any business, big or small. Therefore, an effective and efficient trademark regime is vital for competitiveness as it encourages the production and distribution of quality products. In Sri Lanka, three main categories of mark are recognized under the IP Act: trademarks and service marks, certification marks and collective marks. As stipulated in Section 101 of the Act, a trademark is a visible sign serving to distinguish the goods of one enterprise from those of another. The exclusive right to a

²²¹ See Section 29 of the IP Act of Sri Lanka No 36, 2003. See also D.M. Karunaratna, *Elements of the Law of IP in Sri Lanka, Op Cit.*, p. 116.

²²² See Section 31, and as per this Section 31(2): a restrictive grace period of 6 months is provided, if the design was displayed at an official or officially recognized, international exhibition. Moreover, according to Section 31 (3) an industrial design shall not be considered a new industrial design solely by reason of the fact that *it differs from an earlier industrial design in minor respects or that it concerns a type of product different from a product (emphasis added)*.

²²³ See Section 47 of the IP Act.

²²⁴ See Sections 45 and 46 of the IP Act.

mark under the Act is acquired by registration. Since only visible signs can be registered under the IP Act, non-traditional forms of trademark such as single colors, three-dimensional signs (shapes of products or packaging), audible signs (sound marks), olfactory signs (smell marks), motion marks and any other non-visual signs do not qualify for registration under Sri Lankan law.

Pursuant to Section 102(3), a mark may consist, in particular, of arbitrary or fanciful designations, names, pseudonyms, geographical names, slogans, devices, reliefs, letters, numbers, labels, envelopes, emblems, prints, stamps, seals, vignettes, selvages, borders and edgings, combinations or arrangements of colors and shapes of goods or containers.²²⁵ Marks are admissible for registration provided they are not deemed inadmissible on any of the grounds cited in Sections 103 and 104 of the Act. Section 103 establishes objective grounds for inadmissibility, namely shapes or forms imposed by the inherent nature or industrial functions of the goods or services; descriptiveness; generic designations; signs incapable of distinguishing the goods or services of different enterprises; scandalous signs; signs contrary to morality or public order or likely to offend the religious or racial sensibilities of a community; misleading signs; geographical names or surnames in their ordinary signification; signs that imitate or reproduce State emblems, flags and the like; and marks for which registration has been sought in respect of goods or services that may not be traded in Sri Lanka.²²⁶

Section 104 establishes grounds for inadmissibility on the basis of third party rights, including marks misleadingly similar to marks already registered or validly applied, and marks misleadingly similar to unregistered marks previously used in Sri Lanka. As per Section 118, mark registration is valid for a period of 10 years from the date of application and can be renewed for consecutive periods of 10 years. In that sense, trademark rights can apply indefinitely provided they are renewed in accordance with law. The registered owner of a mark has the exclusive right to use it, to assign or transmit the registration to a third party and to conclude licensing contracts in relation to the mark.²²⁷

Sri Lankan law recognizes the concept of certification marks.²²⁸ A certification can be defined as a mark indicating that the goods and services in connection with which it is used are certified by the mark owner in respect of their origin, material, mode of manufacture (for goods) or performance (for services), quality, accuracy or other

²²⁵ D.M. Karunaratna, *Elements of the Law of IP in Sri Lanka* (Sarasavi Publisher, Colombo, 2010) 185.

²²⁶ *Ibid.*, 187.

²²⁷ See Section 121 (1) of the IP Act.

²²⁸ See Section 101 of the IP Act.

characteristics.²²⁹ The main feature of a certification mark is that it is used not by the mark owner but by his authorized users for the purpose of guaranteeing to the relevant public that goods or services possess a particular characteristic.²³⁰

The use of collective marks – which are protected under the IP Act²³¹ – can play a vital role in the development of joint marketing campaigns for products. A collective mark is defined as a mark distinguishing the goods or services provided by members of the association that owns the mark from those of other undertakings. The main feature of a collective mark is its use as an indication to the relevant public that goods or services originate from a member of a particular association. It is therefore a sign of membership.²³²

Geographical indications

GIs and appellations of origin are an important component of IP law. The IP Act defines GIs as “an indication which identifies any good as originating in the territory of a country, 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”.²³³ In other words, GIs provide assurance of the quality and distinctiveness essentially attributable to the stated origin owing to its natural environment (climate, conditions of soil, etc.) and human factors such as historical context, intergenerational skills and know-how. As such, they protect GI products from cheap imitations and help to preserve their quality. Examples of well-known GIs include Ceylon tea, Indian basmati rice, Champagne, Greek feta cheese, Havana tobacco, Parma ham and Colombian coffee.

The protection of GI products has been the subject of increasing attention from policymakers and scholars both domestically and internationally. The reason for such protection is to prevent consumers from being misled as to the true origin of a product and to protect the legitimate interests of GI rights holders. Sri Lanka is well-known for Ceylon tea, the purity, quality and reputation of which are recognized by consumers around the world. Indeed, the protection of GIs under Sri Lankan IP law has been motivated to a large extent by the tea industry, which accounts for a large share of the country’s foreign currency income. The IP Act protects GIs on a *sui*

²²⁹ E. Smith, “Certification and collective marks – Paper prepared by the United Kingdom for the SCT”. Available at: <http://www.wipo.int/export/sites/www/sct/en/comments/pdf/sct21/cert_uk.pdf>, accessed on February 21, 2017.

²³⁰ *Ibid.*

²³¹ See Section 101 of the IP Act.

²³² E. Smith, “Certification and collective marks- Paper prepared by the United Kingdom for the SCT”. Available at: <http://www.wipo.int/export/sites/www/sct/en/comments/pdf/sct21/cert_uk.pdf>, accessed on February 21, 2017.

²³³ See Section 101 of the IP Act.

generis basis (Section 161), under the law of marks (Section 103), under unfair competition law and as collective and certification marks.²³⁴

While Sri Lankan GI products such as Ceylon tea are afforded domestic protection under the Act, they are much more difficult to protect on foreign markets. This is because Sri Lanka has no domestic legal framework for the registration of GIs, whereas Article 24(9) of the TRIPS Agreement requires that a GI be registered and protected in the country of origin in order to obtain protection at the international level. As a result, the Sri Lankan Government has taken steps to amend the IP Act accordingly.

Unfair competition and undisclosed information

The concept of unfair competition emerged in France in around 1850.²³⁵ Over the years, unfair competition law has developed to bridge the gaps between other rights. It provides an alternative remedy where protection, especially of the interests associated with new ideas, is warranted but not afforded under existing IP rights.²³⁶

The aims of protection against unfair competition are to prevent dishonest trade practices and safeguard the ethics of the business community.²³⁷ Strictly speaking, protection against unfair competition does not fall within the realms of IP law; rather, it serves as a safety net where no specific IP rights are granted. However, a strong case could be made for developing a misappropriation-based unfair competition regime as a third IP paradigm for the protection of products that fall through the cracks between patent right and copyright.²³⁸

Section 160 of the IP Act provides protection against unfair competition, which it defines as “any act or practice carried out in the course of industrial or commercial activities contrary to honest practices”. This broad definition is comparable with the basic principle set forth in Article 10*bis*(2) of the Paris Convention. According to commentators, the word “practices” is used in addition to the word “acts” to avoid misinterpretation of “acts” which is often used in tandem with “omissions”.²³⁹

The meaning of “contrary to honest practices” has been dealt with in the Sri Lankan courts. In the case of *Sumeet Research and Holdings Ltd v. Elite Radio &*

²³⁴ D.M. Karunaratna, *Elements of the Law of IP in Sri Lanka Op Cit.*, pp. 300-301.

²³⁵ G. Schriker, “Unfair Competition and Consumer Protection in Western Europe” (1970) 1 *International Review of Intellectual Property and Competition Law* 415, 415.

²³⁶ C. Colston and K. Middleton, *Modern Intellectual Property* (2nd edn., Cavendish Publishing 2005) 37-38.

²³⁷ K. Kanag-Isvaran, “Unfair Competition-An Antidote to Dishonest Trade Practices” (1997) VII/1 *The Bar Association Law Journal* 144-160.

²³⁸ See D.S. Karjala, “Misappropriation as a Third Intellectual Property Paradigm” (1994) 94 *Columbia Law Review* 2594, 2604-2605.

²³⁹ D.M. Karunaratna, *Elements of the Law of Intellectual Property in Sri Lanka (Op Cit.)*, p. 324.

*Engineering Co. Ltd.*²⁴⁰ it was held that Section 160 (Section 142 of the previous Act) prescribed a higher standard of conduct, or business ethics, rather than merely restating existing legal obligations. The term is deliberately broad and flexible to meet the changing ethical needs of society for the prevention of commercial unfairness, that is, the appropriation by one person of benefits rightfully belonging to another. What is considered “dishonest” is necessarily dictated by the legal convictions of the community and serves to determine whether competition is fair and in the public interest.²⁴¹ Section 160 contains a wide-ranging but non-exhaustive list of specific acts and detailed examples of unfair competition. These include causing confusion or being likely to cause confusion with respect to competitors’ goods or services²⁴² and causing damage to goodwill or reputation, including acts of dilution,²⁴³ misleading advertisements and other acts, false or unjustifiable allegations and the discrediting or denigration of competitors.²⁴⁴ Any unfair advantage gained on the basis of competitors’ achievements (free-riding or coat-tailing); comparative advertising; violation of legal provisions not directly concerning competition to gain unfair advantage over competitors; slavish copying of goods, services, publicity or other features of the trade of a competitor, or touting of such as bonuses; and many other acts besides would be considered unfair competition. On the face of it, then, Sri Lankan law provides comprehensive protection against unfair competition in compliance with international obligations.

While trade secrets protection is a relative newcomer to the IP family, it contributes in no small part to the creation of favorable business environments in a number of countries. Trade secrets are often considered the crown jewels of a firm’s intellectual assets.²⁴⁵ In the eyes of the law, any information that is kept confidential in order to preserve competitive gains is considered a trade secret. Trade secrets are not easy to define but can include customer lists, formulas, practices, business strategies, software programs, advertising strategies, marketing plans, manufacturing processes and information on R&D activities. The TRIPS Agreement treats trade secrets as an IP right. Sri Lanka, being a State party to that agreement, has adapted its IP laws

²⁴⁰ (1997) 2 Sri LR 393.

²⁴¹ K. Kanag-Isvaran, “Unfair Competition-An Antidote to Dishonest Trade Practices” (1997) VII/1 The Bar Association Law Journal 144-160, 147. See also case law dealing with the protection against unfair competition such as *Sumeet Research and Holdings Ltd. v. Elite Radio & Engineering Co., Ltd.* [1997] 2 Sri LR 393-409, *Société des Produits Nestlé SA v. Multitech Lanka (PVT) Limited* [1999] 2 Sri LR.298-308, *Arpico Finance Company PLC v. Richard Pieris Arpico Finance Limited*, (SC [CHC] Appeal No. 41/2014 decided on 29 September 2014).

²⁴² See Section 160(2); this sub-section in particular deals with the confusion caused by look-alike products and appearance of a product (get-up/trade dress).

²⁴³ See Section 160(3); significantly, anti-dilution protection has been introduced via this provision. Dilution can lessen the distinctive character of a trademark by blurring or tarnishment

²⁴⁴ See Section 160(4) and (5).

²⁴⁵ See N.S. Punchihewa “Protection of Confidentiality of Trade Secrets in the Course of Legal Proceedings: A Sri Lankan Perspective”, the Proceedings of the Annual Research Symposium of the University of Colombo, 2015.

accordingly. Section 160 of the IP Act and the common-law action for breach of confidence are the main legal instruments for protecting trade secrets in Sri Lanka.

As in other jurisdictions, in Sri Lanka, trade secrets are also referred to as confidential information. Trade secrets protection in Sri Lanka is afforded not as a stand-alone right but under the umbrella of protection against unfair competition. Under Section 160(6) of the IP Act, in order to be protected as a trade secret, information must be both confidential and commercially valuable by virtue of that confidentiality. The holder of the information must also have made reasonable efforts to keep it confidential. Thus, confidentiality is a prerequisite for trade secrets protection.

Assignment, transfer and licenses

Transactions pertaining to IP rights often involve either an assignment or a license. Licenses merely grant the right to do something which would be otherwise unlawful, whereas assignments transfer the total interest in an IP right.²⁴⁶ Licensing is the most common way of commercializing IP rights for exploitation by someone other than the rights holder. Assignment involves the sale and transfer of ownership of an IP right by the assignor to the assignee.²⁴⁷ An assignment amounts to the outright conveyance, sale and transfer of the property interest and title in the specific IP rights.²⁴⁸ Most of the IP rights recognized under the Intellectual Property Act can be assigned, transferred and licensed.²⁴⁹

Today, trademark licensing is a widely used IP instrument in Sri Lanka. The various ways to license trademarks include, inter alia, franchising and merchandising. Franchising is a specialized license under which a franchisee is permitted by the franchisor, for a fee, to use a particular business model; endowed with a bundle of IP rights, notably trademarks; and provided with training, technical support and mentoring. Merchandising involves the licensing of trademarks, designs, artworks, fictional characters (protected by these rights) and real personalities.²⁵⁰ Allowing manufacturers of ordinary consumer goods – such as plates, mugs, towels, caps and clothes – to apply third-party trademarks to their products immediately adds appeal to

²⁴⁶ World Intellectual Property Organization (WIPO), *Creative Expression: An Introduction to Copyright and Related Rights for Small and Medium-sized Enterprises* (WIPO publication No. 918, Geneva, 2006) 37.

²⁴⁷ P. Mendes, “To License a Patent-or, to Assign it: Factors Influencing the Choice”. Available at: <http://www.wipo.int/sme/en/documents/license_assign_patent_fulltext.html>, accessed on January 2, 2017.

²⁴⁸ *Ibid.*.

²⁴⁹ See generally, D.M. Karunaratna, *Elements of the Law of Intellectual Property in Sri Lanka Op Cit.*, pp. 345-355.

²⁵⁰ See generally, WIPO, “Trademark Licensing”. Available at: <http://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip_panorama_12_learning_points.pdf>, accessed on January 14, 2017.

otherwise commonplace objects and allows them to distinguish themselves in the marketplace.²⁵¹

Enforcement

In the Sri Lankan IP landscape, a comprehensive mechanism has been put in place to enable the enforcement of IP rights via civil remedies, criminal sanctions and Customs control. A system for resolving disputes in relation to copyright and related rights is also available.²⁵² The court is empowered to issue a variety of orders in respect of infringement actions, including disposal of the goods, materials or implements used to commit the acts of infringement; orders in respect of the identity of the persons involved in the production and distribution of infringing goods; interim orders such as Anton Piller orders; and orders for the prevention of continuing infringement.²⁵³

Broadly speaking, where IP rights are violated, Sri Lankan courts grant injunctions and award damages. The active use of the judiciary for IP litigation is an important aspect of IP rights enforcement. The IP rights enforcement mechanism in Sri Lanka also provides for criminal sanctions, allowing courts to hand down fines and prison sentences or both. Under the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, a special court has been established with first-instance jurisdiction over IP matters. Commonly referred to as the Commercial High Court, it has sole competence in respect of all proceedings arising from the IP Act within its declared jurisdiction.²⁵⁴

²⁵¹ See generally, WIPO, “Trademark Licensing”. Available at: http://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip_panorama_12_learning_points.pdf, accessed on January 14, 2017.

²⁵² See generally, D.M. Karunaratna, *Elements of the Law of Intellectual Property in Sri Lanka Op Cit.*, pp. 394-396.

²⁵³ Section 170(6), read with 170(7), shows that the provisions are structured on the basis of the Anton Piller order. The section states that “the Court shall have power to order interim measures relating to protection, *ex-parte*, where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder or where there is a demonstrable risk of evidence being destroyed”. Furthermore, Section 170(7) stipulates that “where interim measures have been ordered *ex-parte* the parties affected shall be given notice and shall on receipt of such notice be entitled to be heard as to whether the interim measures ordered should be modified or revoked”.

²⁵⁴ K. Kanag-Isvaran, “Unfair Competition-An Antidote to Dishonest Trade Practices” (1997) VII/1 The Bar Association Law Journal 144-160.