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THE CONTENTS AND TERMINATION OF THE STATUS OF AUTHORISED USER OF INDICATIONS OF GEOGRAPHIC ORIGIN OF GOODS AND SERVICES

Božin Vlašković¹, Zoran Miladinović², Siniša Varga³

Summary

Indication of geographic origin is a specific intellectual property (IP). Specificity of that IP is mirrored to its legal protection. The IP legal protection of indications of geographic origin is, at the one side, wider than of the other intellectual properties because IP legal protection of registered indication of geographic indication is essentially featured by certain public law element. But at the other side, it is notably narrower because more than one legal entity can be authorised for commercial use of the same indication of geographic origin. Furthermore, an authorised user can not obtain a right in the application nor assign registered indication of geographic origin, since these are not a subject of commerce that is one of the most important powers comprised in all others intellectual property rights, except in collective trademarks and certification marks rights. Authors in this paper deal with legal aspects of indication of geographic origin use.

Key words: *indication of geographic origin, authorised user, contents of right, terminations of right.*

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Introduction

Indication of geographic origin (in further text: IGO) is a "form of intellectual property rooted in agricultural policy and designed to highlight a link between the natural geographical advantages or the reputation associated with a place and the foodstuffs produced in that place" (McQueen et al., 2008, p. 692). It is a sign of distinctiveness used to denominate both territory and goods and services that originate from that territory (Miladinovic, Varga, 2011, p. 334/335). Although IGOs are multifunctional, they are principally considered as an important tool for rural development. They have helped maintain agricultural profitability even in such zones that can be deemed difficult or

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marginal (Barham, 2003, p. 134). Indication of geographic origin can be protected either as designation of origin or geographical indication (Colston, Galloway, 2010, p. 620).⁴

The essential feature of legal nature of authority to use an indication of geographic origin is its similarity to collective trademarks and certification mark rights. Namely, a status of IGO authorised user can be granted to any legal entity which applies for it to a competent body and fulfills all formal and substantial conditions for the status grant. It means that in practice it could be find more legal entities authorised to use the same registered IGO, either it is a designation of origin or a geographical indication.⁵ The effect of that is a limit of one's exclusive right by the same right of another authorised user (Markovic, 2007, p. 167). It means that in this part of intellectual property (IP) law there is one subject of legal protection (registered IGO) and more persons (legal as well as natural) in title. It is not only one kind of intellectual property rights with one subject of legal protection and more persons in title. Actually this situation may arise in many other IP law areas either originally (when intellectual property is created by inventive cooperation of two or more persons) or derivatively when an IP right is transferred to two or more people. Shares of co-owners above intellectual property are determined in pursuance of contribution each of them or in accordance with contract. But in the law regarding IGO authorised users of the same IGO appointed by Intellectual Property Office (in further text: IPO) do not form a co-ownership. In contrast, all authorised users of the same IGO are legally and in fact completely autonomous in exploitation of powers they are entitled pursuant legal acts, in full scope but not in an aliquot portion (Varga, 2010, p. 361). All mentioned indicates that authority of IGO authorised user shows many peculiarities which will be the subject of discussion below.

We considered that review of the powers, their contents, scope, limitation and endurance, regarding the use of IGO can be interesting for scientific magazine that is not of a legal character in order to inform its readers about rights relating the use of IGO which are laid down by national and international legal sources. Due to interpretation of legal acts, a normative method will be applied.

⁴ Designations of origin mean that product must originate from a particular area, be fully produced, processed and prepared in that area and have qualities or characteristics which are exclusively due to a particular geographical environment. The criteria for geographical indications are less demanding since the geographical link must occur in at least on of the stages of production, processing or preparation.

⁵ In conformity in Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of October 31, 1958, as revised at Stockholm on July 14, 1967 and as amended on September 28, 1979, Sluzbeni list SRJ - Medjunarodni ugovori No. 6/98, in Zakon o oznakama geografskog porekla (Indications of Geographic Origin Act), Sluzbeni glasnik Republike Srbije, No. 18/2010; in further text: ZOGP) is regulated legal protection of designations of origin and geographical indications, cumulative named as indications of geographical origin (in further text: IGO).

The Contents of the Authorised User of IGO Power

The contents of authorised user of IGO power are regulated by legal acts and as for them in legal theory there are not relevant disagreements. This is result of the fact that IGO is the subject of the absolute property right that arises from its purpose - pointing to origin of goods and services and their special connection with place they come from (Roubier, 1954, p. 771). In general, authorised user of IGO is entitled with two principal powers: positive, to use IGO in commerce and negative, to oppose to everyone who is not granted by the status of IGO authorised user to use IGO in commerce (Sordelli, 1991, p. 160). Within the scope of the authorised user of IGO authority there is a whole list of exclusive powers which comprise its contents. So, according to Art 56(1) of ZOGP, authorised user of both designation of origin and geographic indication is authorised to:

1. To use designation of origin and geographic indication for labelling of products i.e. goods and services named in IGO. Marking of goods and services can be done by physical placing of registered IGO directly to goods or onto packaging, catalogues, leaflets, advertisements, manuals, invoices and other types of business papers. If IGO is issued to label services then use of it is done in order to identify the provider, and that depends on their nature. Beside mentioned powers, in scientific literature known as a core of positive powers (Verona, 1978, p. 202), authorised user of *designation of origin* is authorised (we would add - obliged too) by virtue of ZOGP Art. 56(3) to label its product with expression: "controlled designation of origin". By virtue of ZOGP Art 56(4) authorised users of *geographical indication* label their products with expression: "controlled geographical indication".

2. To place goods and services labelled with IGO to trading. Only person with the status of authorised user of IGO is allowed to place goods and services labelled with IGO to trading. Within the sense of Intellectual property law as well as law regarding IGO, trading is doing business on market including selling, tenancy etc. (Markovic, 2007, p. 159). In IP law, the conception of trading encompasses offering of products to place them to trading (i.e. supply). Supply understands all actions by which a third person can expect delivery of products labelled with IGO such as sending bids, exposure of products on fair or exhibition, advertising by media for public communication and the like (Miladinovic, 2007, p. 179).

3. To export or import products labelled with IGO. Authorised user of IGO enjoys an exclusive power to export or import products labelled with IGO. Export and import do not necessary encompass placing goods to circulation. It means that power to export or import of goods labelled with IGO is infringed if unauthorised user exported or imported them with intention to put goods to circulation but without trading of them in real. In practice counterfeit goods is produced in one and sold in another country. Commercial means to convey counterfeit goods from one country to another are export and import. That is why export and import are subject matter of Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods of April 14, 1891 as revised at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934 and at

Lisbon on October 31, 1958,⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights-TRIPS Agreement⁷ and Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights.⁸ These legal solutions are incorporated into our legal acts⁹ and our customs bodies successfully prevent import, export and transit of goods found to have infringed IP rights, including products labelled by false IGOs.

Viewed from the angle of so called negative authorities, authorised user of IGO according ZOGP Art 57 is allowed to prevent unauthorised user of the same IGO to:

1. Use registered designation of origin or geographic indication for labelling products that are *similar* to products named in IGO if such use can undermine reputation of protected IGO;
2. Copy or imitate registered IGO or use translation, transcription or transliteration of registered IGO, even with words "style", "type", "mode", "imitation" attached to IGO and expression of true origin of so labelled product;
3. Label packaging, commercial material or other documents with false or deceptive signs regarding geographical origin, nature and quality of product and this way create confusion relating to real geographical origin of the product;
4. Undertake any other action to create confusion relating to real geographical origin of the product.

These prohibitions apply to IGOs registered in EU by virtue of EU prescriptions. Anyone who is not authorised user of IGO can't use trademark composed of or which contain appellation that is the same or similar to IGO registered in EU by virtue of EU prescriptions, intended to label similar products as for which conditions for use of IGO are not fulfilled.

The scope of IGO legal protection and authorised users' of IGO powers limits

The scope of IGO legal protection

Since business function of IGOs is analogous to business function of trademarks, the scope of IGO legal protection is determined by the principle of speciality. It means that by

⁶ Sluzbeni list SRJ - Medjunarodni ugovori No. 1/99.

⁷ Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on April 15, 1994.

⁸ OJL, 196 of 2. 8. 2003, pp 7-14. From January 1, 2014 it will enter into force Regulation (EU) No 608/2013 of the European Parliament and the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation No 1383/2003. OJL 181 of 29.6.2013, pp 15-33.

⁹ Based on mentioned international documents, pursuant Customs Act, Sluzbeni glasnik Republike Srbije, No. 18/2010 and Ordinance on Conditions and Managing of Measures for Protection of Intellectual Property Rights on Border, Sluzbeni glasnik Republike Srbije, No. 89/2010 customs officers are authorised either officially or upon request to undertake measures in order to prevent placement into circulation goods found to have infringed IP rights.

IGO can be labelled only that sort of goods or services it is established for. For which sorts of goods or services IGO will be established must be revealed in the application.¹⁰ However, authorised user of IGO is entitled to oppose to anyone to use registered IGO for labelling not only those sorts of goods and services IGO is established for, but to use *similar* sign to label the same or *similar* goods and services. It means that, like in trademark law or industrial design law, the scope of legal protection exceeds the immediate subject of legal protection (Vlaskovic, 1996, p. 782). Obviously this power is much wider than unauthorised use of the same IGO prohibition. It spreads to use of translation, transcription or transliteration written by any font, with any colour or made on any other way, for labelling of products even if IGO is accompanied by an expression such as "style", "type", "method", "as produced in", "imitation" or something similar and the true origin of product is indicated (Bently, Sherman, 2004, p. 982/983) and covers all practices that refer in any way to an indication of geographical origin in such a way as to take unjustified advantage of its reputation. Furthermore the usage of IGO products as ingredients is encompassed by the prohibition.¹¹

Authorised user's of IGO powers limits

Powers of IGO authorised user is not unlimited. They are limited by exhaustion of right. When authorised users place into circulation a sample of goods labelled by registered IGO their powers regarding further trading of the sample of goods placed into circulation is exhausted, i.e. terminated. It means that any person that acquired it legally is authorised to forward it to circulation without infringement of the IGO authorised user powers (Miladinovic, 2009, p. 149).

Powers of authorised users of IGO do not have any effect towards a subject of trademark right for the same or similar sign for labelling the same or similar goods or services, under condition that, before IGO was registered, trademark was registered in good faith or trademark right was acquired by faithful use of the sign in trading. Also, powers of authorised user of IGO do not have any effect in connection to use of trademark which is the same or similar to IGO that is registered in EU by virtue of EU law, if, before IGO was registered in EU by virtue of EU law, trademark was registered in good faith or trademark rights were obtained through faithful use in trading (ZOGP, Art. 58). Besides, powers of authorised user of IGO do not produce any legal effect towards persons which in trading use their own personal name or name of their successors in title as commercial names, if those names are the same or similar to the registered IGO, under condition that the commercial name is chosen or used faithfully. In this situation, even if condition is fulfilled, exception will not apply if use of the commercial name causes a possibility to mislead customers.

¹⁰ In compliance with ZOGP Art 20(1), pt. 3, request for registration of designation of origin and geographic indication of origin has to contain clear indication of the sort of goods or services applicants intend to use IGO for labelling. The same data must be filled in the application for the IGO authorised user status (ZOGP Art. 35(1), pt. 3).

¹¹ Regulation (EU) No 1151/2012 of the European Parliament and the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs (OJL 343 of 14.12.2012, pp. 1-29), Art. 13(1)a.

Authorised user of IGO powers can not be transferred by legal transactions *inter vivos*. It means that those powers can not be an object of licence, security, franchising agreements. If registered designation of origin or geographic indication is the object of pending or registered trademark, that trademark can not be assigned, ceded, used as a security or so (ZOGP Art. 60).

Termination of registered IGO and the status of IGO authorised user

Peculiarities of IGO can be seen regarding the termination of the IGO authorised user status. As for termination of IGO authorised user status it is important to make difference between termination of IGO and termination of the status of authorised user of IGO. Naturally, if IGO is terminated a status of authorised user of that IGO can not survive any more. It is because a status of authorised user of IGO can not exist in absence of IGO which should be used. That is why we have to talk about termination of registered IGO first and then explain termination of a status of IGO authorised user.

Termination of registered IGO

Endurance of registered IGO legally is not limited. Registered IGO can last as long as natural, material and objective conditions for production, processing or finishing of goods or service rendering exist on territory for which IGO is registered (Varga 2010, p. 363). Registered IGO can exist in the absence of authorised users, irrespective if they ever existed (Radivojevic, 1996, p. 797). However, there are three grounds for IGO termination laid down by ZOGP (Art. 61-69).

Firstly, registered IGO can be terminated if decision on registration of it is revoked. Decision on registration can be revoked if conditions for registration of IGO were not fulfilled at the time of decision making. The procedure for revocation of decision on IGO registration can begin only by proposal of interested person (legal or natural). If proposer during the procedure gives the proposal up, Intellectual Property Office (IPO) is authorised to continue procedure officially. Towards 1995 ZOGP (Art. 43),¹² revocation could be done by IPO officially and proposal could be submitted by the prosecutor. It is not completely clear why those solutions were not retained in actual ZOGP.

If the proposal can be preceded, IPO delivers it to the opponent of the proposer asking for answer to be remitted not later than 30 days after proposal receipt. If IPO considers to be needful it shall appoint a day for hearing where parties which participate in the procedure can expose their standpoints *pro at contra* revocation. Revocation of the decision on IGO registration does not produce any effect towards judgements on infringement of (revoked) IGO which were irrevocable and under condition that plaintiff was faithful (ZOGP Art. 66).

Secondly, registered IGO terminates if protection of it is terminated in the country of origin. IPO shall make decision on termination of that registered IGO if such request is submitted by an interested person. An acknowledgement issued by a competent body of country of registered IGO origin as a proof the IGO is terminated there has to be enclosed to the

¹² Official Journal of SRJ, No. 15/95.

request for termination. As can be seen, this ground for IGO termination is laid down only for those registered IGOs that previously were registered abroad i.e. in the country of origin.

Thirdly, registered IGO, but only IGO that is registered as a geographic indication, can be abolished by court judgement. In accordance with ZOGP Act 68, anyone can launch a court procedure for determination that geographic indication has become a generic, i.e. customary name for a whole sort, *genus* of products.¹³ Generic or descriptive geographic indications are in most those that used to really point to geographic origin of the goods losing that capacity through process of vulgarization (Vlaskovic, 1996, p. 782). If court accepts a claim, registered geographic indication will terminate when judgement becomes irrevocable.

IGO that in the country of origin is registered as a *designation of origin* can not be acclaimed as a generic one as long as such protection endures in the country of origin (ZOGP Art. 68). It means that no one can sue for abolishment of designation of origin.

Termination of the status of IGO authorised user

Duration of the status of IGO authorised user is limited to three years. The term can be extended in unlimited number of times if request for extending is submitted timely and if conditions to grant the status are fulfilled (Besarovic, 2005, p. 182). However, several reasons for the status of IGO authorised user termination are laid down by law. In conformity in ZOGP Art 48 and Art 62-70, status of the authorised user of IGO terminates if:

a/ Renewal of the status is omitted. In order to reconstitute the status, authorised user of IGO has to submit request, pay fee for renewal of the status and prove that conditions for grant the status are still fulfilled.¹⁴ If request for renewal of the status is not filed timely or fee is not paid, status shall quit next day after term for renewal of the status expired. There is an exception of the rule contented in the Art 5 *buc* of 1883 Paris Convention for Protection of Industrial Property (PC). In compliance with that PC Article, member states of PC are obliged to envisage additional term (period of tolerance), not longer than six months, for request filing and exceeding the term of legal protection, if additional fee is paid. This exception is not explicitly prescribed by ZOGP but doubtless it can be applied for renewal of the status of authorised user of IGO.

b/ Decision on the grant the status is revoked. Decision on the grant of the status of IGO authorised user can be revoked if conditions for grant the status were not fulfilled at the time when the decision on the status grant is made and if written proposition for revocation is submitted to IPO by interested person. IPO is not authorised to initiate the procedure for revocation officially, but if proposer gives up, IPO is authorised to continue

¹³ Generic or descriptive indications of geographic origin are those which by long utilisation on market, in the customers' consciousness have become name for the whole genus of a product or rarely indication of quality or some other feature of goods, but without inseparable linking of quality and other traits of the goods with the geographic name. For example Bayrisch Bier, Shopska salad and similar.

¹⁴ ZGOP, Art 48-51.

the procedure officially. In compliance with 1995 ZOGP, IPO and public prosecutor were authorised to launch the procedure for revocation of the decision on grant the status. It is not clear why this solution is not retained in running norms. If proposal submitted, whether originally or after correcting subsequently, in appropriate form, IPO delivers the proposal to opponent of proposer asking for answer to be remitted no longer than 30 days after proposal is delivered. If IPO considers it would be needfully, it shall appoint the day for hearing where parties are allowed to communicate their standpoints regarding the decision revocation. Revocation of the decision on the status of IGO authorised user grant does not produce any effect towards judgements on infringement of (revoked) IGO which are irrevocable and under condition that plaintiff was faithful (ZOGP Art. 66).

c/ IGO authorised user status is abandoned by holder of the status. IGO authorised user is authorised to abandon the status at all times submitting a written statement on the subject. The status will be deemed terminated since next day after the statement of abandon is submitted to the IPO. The question is if the statement can be countermanded, i.e. repealed. There is not any provision on the subject in effect. Anyway, the abandonment of the status statement can be repealed if statement on repeal is received by IPO at the same time or before statement on the abandon the status.

d/ IGO ceased to exist. If IGO is terminated the status of the terminated IGO authorised user can not survive. In dependence of the IGO termination ground, the status of the IGO authorised user terminates on day determine by IPO decision or court judgement.

e/ IGO authorised user ceased to exist. IGO authorised user can be legal or natural person. If IGO authorised user was a legal person then the status of the authorised user of IGO is terminated by termination of the legal person (liquidation, bankruptcy). The status of IGO authorised user terminates on the same day when status of legal person terminated (Art. 69(3) ZOGP). However if there are successors in title (like in the case of status changes), the status of IGO authorised user will not cease to exist if successor in title takes over the status. It would be envisaged by contract on status change (in the case of merger or affiliation) or by shareholders assembly decision (in the case of division of the company). If the status of IGO authorised user belonged to the natural person, the status terminates along with the death of the individual. The status of IGO can not be assigned to heirs analogously to the cases of legal person as an IGO authorised user termination because "by the act of a universal succession, i.e. by pursuing of heir into portion of every right that is a part of hereditary property as a property unit, can not be accomplished the aim regularly realized in the administrative procedure of granting the status of authorized user of indication of geographical origin - that is connection of indication of geographical origin authorised users and territory and control of quality or other characteristics of designated goods and services" (Zivojinovic, Varga, 2012, p. 256).

f/ Decision on the status grant is abolished. The status of IGO authorised user is deemed terminated if decision on the status of IGO authorised user grant is abolished. Decision on the status of IGO authorised user shall be abolished if conditions for grant the status ceased to exist. Decision on the status abolishment is made by IPO upon the request of interested person, i.e. competent body. IPO is not allowed to initiate the abolishment

procedure officially. Such possibility was envisaged by 1995 ZOGP (Art. 46) but was not retained. So after request for abolition of the status is filed, IPO conducts the procedure for determination if conditions for grant the status still exist (ZOGP Art. 4).¹⁵ Burden of proof is on the IGO authorised users. They have to prove that conditions to grant the status have not ceased to exist, i.e. that conditions for the IGO authorised user grant status are still fulfilled. If IPO adopts the request for abolishment of decision on the grant of the status, the status terminates next day after irrevocability of the decision on the status abolishment. Although such provision is not contained into ZOGP, by analogous application of the rules on annulment of decision on IGO establishment, data regarding termination of the status will be recorded at the authorised users' Register and published in IPO Official gazette.

At the first sight it may seem this ground for termination of the status is the same as the one mentioned under b). It is not so and a clarification is needed. The grounds are different because the status will be revoked if conditions for the status grant were not fulfilled at the time when the status was granted, but in the case of the status abolition, the conditions for the status grant were fulfilled at the time when the status was granted but ceased to exist afterwards. For example it is the case when the quality of a product labelled with registered IGO is lower than at the time when the status of IGO authorised user is granted or authorised user of IGO cease to do business at the location the product originates from.

Conclusion

In general, IGO can not be established if the quality or reputation of products or services is not better than quality or reputation of the same goods or services produced or rendered at the other location. If so, all legal entities which do business on the location where special natural and/or human factors influencing better quality or reputation of the goods and services they produce/render exist should use a legal possibility and apply for the status of the IGO authorised user. This way they obtain an authority to label their product with the registered IGO and place so labelled products into circulation and at the same time, to oppose to everyone who is not entitled to use IGO on the market to continue to do that.

Powers arising from the IGO authorised user status are the strongest legal powers regarding labelling the goods and services on the market because the holder of them is authorised to oppose the use not only the same but similar registered signs for the same or similar goods or services. Since the part of the IGO is almost always the name of the region or other geographic location, advantage of the IGO as a subject matter of Intellectual Property Law is that public prosecutor is authorised to file the action to the court for the IGO infringement. Also, unauthorised use of the IGO is in the competence of customs officers and inspectorates that is rather wide legal protection "fan".

Goods and services that could be labelled by IGOs, for the most part produced by more legal entities at the same locations. It would be very recommendable if they establish a business association, register IGO and apply for the grant of the IGO authorised user status

¹⁵ In that case pursuant ZOGP Art. 70(4), procedure the same as in the case of processing of application for the grant of status of authorised user of IGO (ZOGP, Art. 41 and 42).

as a business association. This way they may achieve time rate saving (only one legal procedure is launched instead of so procedures relating to the number of producers or services' renders) and saving in expenses as for the administrative procedure, grant and triennial extending of the status.

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SADRŽINA I PRESTANAK STATUSA OVLAŠĆENOG KORISNIKA OZNAKE GEOGRAFSKOG POREKLA ROBA I USLUGA

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Rezime

Subjektivno pravo oznake geografskog porekla je specifično pravo intelektualne svojine. Sadržina ovog subjektivnog prava je s jedne strane šire u odnosu na druga subjektivna prava intelektualne svojine (patent, žig, pravo na industrijski dizajn, biljnu sortu, topografiju integrisanih kola, autorsko i srodna prava), jer registrovana oznaka geografskog porekla kao predmet zaštite sadrži i određeni javnopravni element, a s druge strane je znatno uže, jer može postojati više lica sa statusom ovlašćenog korisnika iste registrovane oznake geografskog porekla. Ovlašćeni korisnik nema pravo iz prijave niti stečenim pravom može raspolagati, tj. ovo pravo nije podložno prometu, što je jedno od najbitnijih ovlašćenja sadržanog u svim drugim subjektivnim pravima intelektualne svojine, osim kolektivnog žiga i žiga garancije.

Autori se u ovom radu bave upravo tim pitanjima, tj. pravnim aspektima statusa ovlašćenog korisnika oznake geografskog porekla, fokusirajući se na konkretna ovlašćenja, obim prava, razloge iz kojih jednom stečeno pravo, tj. status može prestati i posledicama prestanka registrovane oznake geografskog porekla i pravnog statusa ovlašćenog korisnika oznake geografskog porekla.

Ključne reči: *oznaka geografskog porekla, ovlašćeni korisnik, sadržina prava, prestanak prava.*

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