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Protecting Culturally Identifiable Fashion: What Role for GIs?

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PROTECTING CULTURALLY IDENTIFIABLE FASHION: WHAT ROLE FOR GIS?

*J. Janewa Osei-Tutu**

ABSTRACT

Geographical indications are a type of intellectual property right that can be used to protect a source indicator when some quality, characteristic, or reputation of a good is attributable to its geographic origin. To the extent that geographic location and culture overlap, geographical indications could be described as a form of cultural protection. Italy, which is known for both its food and fashion, has geographical indications for a range of items, such as extra virgin olive oils, pastas, and wines. Can geographical indications protect other aspects of culture, such as fashion? For example, the famous Italian designer, Valentino, received both praise and criticism for footwear modeled on royal sandals from Ghana. This essay explores the potential to use geographical indications as a form of cultural protection that extends beyond food and wines to protect culturally identifiable fashion items.

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I. INTRODUCTION

Food and drink are important aspects of any culture. The same is true of our clothing. These cultural products are sometimes protected through intellectual property laws, but often they are not protected because they are seen as the common heritage of mankind. The idea that something is

* Associate Professor of Law, FIU College of Law. My thanks to Prof. Jorge Esquirol for inviting me to participate in this superb symposium. I am grateful to Sherece Moora, Kaitlyn Philpott, and Shakeyla Flores for their able research assistance.

“common heritage” suggests that it is free for all humanity to use for commercial or non-commercial purposes.¹ For example, your favorite chicken or dessert recipe, as well as the shape and cut of a pencil skirt, are treated as freely available for all to use or replicate.

International intellectual property agreements protect intangible goods that would otherwise be free for all to use.² Without copyrights, or patents, for example, works of art would be freely reproducible, and the latest inventions could be made by anyone and widely distributed. Without intellectual property laws, these ideas, as expressed, would be freely available for everyone. A major justification for intellectual property, such as patents, copyrights, and trademarks, is the need to prevent the “free-rider” problem.³ To state it simply, if copycats are allowed to benefit from the works of others, there will be a disincentive to innovate and create.⁴ What about culturally specific clothing or food items for a particular region of the world? This same incentive rationale is not applied to intangible cultural heritage, which is generally not protected by intellectual property laws. Questions relating to intangible rights in cultural heritage, such as clothing and songs, challenge the boundaries of legal protection for intangibles and the notion that certain types of cultural materials are the common heritage of mankind and free for all to use.⁵

¹ Chidi Oguamanam, *Localizing Intellectual Property in the Globalization Epoch: The Integration of Indigenous Knowledge*, 11 IND. J. GLOB. LEGAL STUD. 135, 143 (2004) (“Indeed, it is said to be in the public domain as common heritage of mankind and ought to be freely available to all people who may require them at any point in time. Being in the public domain as a common heritage, the argument goes, indigenous knowledge forms do not qualify for IP protection.”).

² See, e.g., Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

³ Michael E. Kenneally, *Misappropriation and the Morality of Free-Riding*, 18 STAN. TECH. L. REV. 289, 291 (2015) (“This notion that free-riding is unethical has done much to influence the shape of modern intellectual property law. The AP and other news companies have used INS to sue those who try to profit from their news. Beyond the news, the INS misappropriation doctrine has generated novel rights in a variety of subject matter. Beyond the misappropriation doctrine in particular, still other expansions in intellectual property rights may be traced to an instinctual disapproval of free-riding.”).

⁴ Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1031–32 (2005) (“The absolute protection or full-value view draws significant intellectual support from the idea that intellectual property is simply a species of real property rather than a unique form of legal protection designed to deal with public goods problems. Protectionists rely on the economic theory of real property, with its focus on the creation of strong rights in order to prevent congestion and overuse and to internalize externalities. They rely on the law of real property, with its strong right of exclusion. And they rely on the rhetoric of real property, with its condemnation of ‘free-riding’ by those who imitate or compete with intellectual property owners.”).

⁵ Chidi Oguamanam, *supra* note 1.

Intellectual property laws are pertinent to the creation and protection of cultural products, including intangible cultural heritage.⁶ Cultural products, meaning those products that are connected to a particular cultural identity, are an important aspect of international trade.⁷ International intellectual property (IP) laws arguably protect cultural products in different ways. For instance, copyright law protects literary and artistic works,⁸ such as novels and songs, which are important expressions of culture. Another type of IP that provides a strong link to cultural origins is GIs. GIs are a form of cultural protection that are recognized under international law. Importantly, they are protected under the World Trade Organization (WTO) Agreement on IP along with several more familiar classic forms of IP, such as patents, trademarks, and copyrights.⁹

This brief article offers a preliminary discussion of GIs for cultural fashion items. It begins by introducing the reader to geographical indications before discussing the connection between this type of IP and culture. The article concludes with a discussion of GIs as a form of cultural protection, not unlike the type of protection being sought for intangible cultural heritage or culturally identifiable fashion items.

II. WHAT ARE GEOGRAPHICAL INDICATIONS?

GIs enjoy cross-border protection through the WTO agreements. GIs are defined and protected internationally under the WTO agreement on intellectual property, the Agreement on Trade-Related Intellectual Property Rights (TRIPS Agreement).¹⁰ The protection of GIs in the TRIPS Agreement was the first time this type of intangible right achieved global rather than regional protection.

In the United States, GIs are protected through a combination of trademark laws and labeling regulations, but other countries may have

⁶ UNESCO INSTITUTE FOR STATISTICS, 2009 UNESCO FRAMEWORK FOR CULTURAL STATISTICS HANDBOOK NO. 2: MEASURING CULTURAL PARTICIPATION 7, 13 (2009), <http://uis.unesco.org/sites/default/files/documents/measuring-cultural-participation-2009-unesco-framework-for-cultural-statistics-handbook-2-2012-en.pdf>.

⁷ *Id.* at 8, 70.

⁸ Copyright Act (1976), amended by 17 U.S.C. § 102(a) (2017) [hereinafter Copyright Act], which states that “copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression” and includes literary, musical, and dramatic works as well as pictorial works and sculptures.

⁹ TRIPS Agreement, *supra* note 2, arts. 22–24; *see also* Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration, Oct. 31, 1958, as revised at Stockholm, July 14, 1967, 923 U.N.T.S. 205.

¹⁰ TRIPS Agreement, *supra* note 2, arts. 22–24.

specific registries for their GIs.¹¹ The TRIPS Agreement protects geographic names where some quality, reputation, or other characteristic is attributable to the geographic origin.¹² More precisely, GIs are defined as:

indications which identify a good as originating in the territory of a Member 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.¹³

An example of a food GI is Basmati Rice or Florida Oranges.¹⁴

GIs are similar to trademarks, which are symbols that distinguish the goods or services of one enterprise from those of another. GIs differ from trademarks insofar as GIs indicate some quality or characteristic of the good that relates to the geographic location. In addition, the GI is not used by a particular enterprise but is controlled by an authorizing entity that allows producers who meet the GI requirements to use the GI. For example, one may be required to make a product according to certain standards in a particular region in order to use the protected mark.

There are two levels of GI protection. There are GIs that are available for all products. These are protected under Article 22 of the TRIPS Agreement. This GI receives a level of protection similar to that available for trademarks. For these GIs, WTO member states must:

provide the legal means for interested parties to prevent: (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good.¹⁵

This level of protection creates a clear connection between geography and the use of the GI, but only to the extent that the public may be misled.

There is also a higher level of GI protection that is only available for wines and spirits. It does not require confusion with respect to geographic origin but creates an absolute bar to the use of certain names.¹⁶ This higher level of GI protection requires every WTO member state to:

¹¹ See, e.g., 15 U.S.C. § 1054.

¹² TRIPS Agreement, *supra* note 2, art. 22.

¹³ *Id.*

¹⁴ See *Geographical Indications*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/ip-policy/trademark-policy/geographical-indications> (last modified Aug. 11, 2020, 1:44 PM).

¹⁵ TRIPS Agreement, *supra* note 2, art. 22.

¹⁶ *Id.* art. 23.

provide the legal means for interested parties to prevent the use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question, *even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as “kind,” “type,” “style,” “imitation” or the like.*¹⁷

With this higher level of protection for the wines and spirits, the GI serves to protect the authenticity of the product. This is because the GI cannot be used, even if the true origin of the good is clearly indicated or if the name of the product makes it clear that it is only an imitation product. These wine and spirit GIs signal strong cultural protection since the protection goes beyond consumer confusion about the source and prohibits the use of the GI even where the true origin of the goods is indicated.

GI protection offers many benefits. For instance, a recognized GI can enable the user to charge premium prices in the marketplace. GIs also contribute to cultural export and exchange through trade. A recent study found that products protected by GIs averaged double the sales value of regular products.¹⁸ According to a statement by the European Commissioner for Agriculture:

Producers’ benefits are clear. They can sell products at a higher value to consumers looking for authentic regional products. GIs are a key aspect of our trade agreements. By protecting products across the globe, we prevent fraudulent use of product names and we preserve the good reputation of European agri-food and drink products. Geographical Indications protect local value at the global level.¹⁹

A European Commission study valued GI protected goods to be worth nearly eighty billion euros in 2017.²⁰ Wines, which account for more than half of the value of European GIs, enjoy a higher level of protection, where

¹⁷ *Id.* (emphasis added).

¹⁸ European Commission Press Release IP/20/683, Geographical Indications—A European Treasure Worth €75 Billion (Apr. 20, 2020, 2:54 PM), https://ec.europa.eu/commission/presscorner/detail/en/IP_20_683.

¹⁹ *Id.*

²⁰ *Study on Economic Value of EU Quality Schemes, Geographical Indications (GIs) and Traditional Specialties Guaranteed (TSGs): Final Report*, at 2 (Apr. 8, 2020), <https://op.europa.eu/en/publication-detail/-/publication/a7281794-7ebe-11ea-aea8-01aa75ed71a1> [hereinafter *Study on Economic Value*].

the GI cannot be used even if there is no confusion as to the true origin.²¹ In terms of the value of wine GIs, France led the way, followed by Italy.²² The economic benefits of GI protection are significant. Since consumer confusion as to origin is not an issue for wine GIs, the GI effectively serves to allow the producers to charge a premium for their product because of its cultural value. The question is whether other geographically related cultural products should be able to have the same type of protection.²³ Cultural products like intangible cultural heritage are not able to receive IP protection under international law.

III. INTANGIBLE CULTURAL HERITAGE

Any discussion of culture or cultural products immediately raises questions about what one means by “culture.” The term culture can mean many different things to different people. For the purposes of this article, which takes an international approach, the work of the United Nations Educational, Scientific, and Cultural Organization (UNESCO) is instructive.²⁴ UNESCO’s Universal Declaration on Cultural Diversity (“Declaration on Cultural Diversity”) explains culture as “the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.”²⁵

This broad definition of culture includes things such as food, clothing, and other fashion items. Food and clothing can also be part of a nation’s intangible cultural heritage. Intangible cultural heritage (ICH) is intergenerational, meaning that it is shared from one generation to the next.²⁶ The *Convention for the Safeguarding of Intangible Cultural Heritage* has defined ICH to include “the practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural spaces associated therewith—that communities, groups, and, in some cases, individuals recognize as part of their cultural heritage.”²⁷ While it makes no

²¹ *Id.*

²² *Id.*

²³ See TRIPS Agreement, *supra* note 2, art. 24 (negotiations on further protections for GIs).

²⁴ See *UNESCO in brief – Mission and Mandate*, UNESCO, <https://en.unesco.org/about-us/introducing-unesco> (last visited Nov. 15, 2020).

²⁵ *UNESCO Universal Declaration on Cultural Diversity*, UNESCO (Nov. 2, 2001), http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html.

²⁶ *Convention for the Safeguarding of Intangible Cultural Heritage*, Oct. 17, 2003, 2368 U.N.T.S. 42671 [hereinafter ICH Convention].

²⁷ *Id.* art. 2.

specific reference to food or clothing, this definition of ICH is flexible enough to encompass various aspects of one's cultural heritage.

Recognizing the connection between ICH and intellectual property, the World Intellectual Property Organization (WIPO) has been engaged in efforts to create an international agreement to provide legal protection for certain types of ICH, such as traditional knowledge.²⁸ In its work, WIPO refers to “traditional knowledge” and “traditional cultural expressions” rather than ICH.²⁹ Traditional cultural expressions, also called expressions of folklore, are explained by WIPO as including “music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions.”³⁰ Clothing and other fashion items are cultural goods that can also be types of ICH.

Discussions regarding ICH inevitably lead to the claim that no one can own culture.³¹ But recognizing and protecting ICH is not about owning culture. As the United Nations points out, protecting ICH is an important tool in maintaining a diversity of cultures.³² The *Declaration on Cultural Diversity* recognizes that cultural goods and services are “vectors of identity, values and meaning” and must not be treated as mere commodities.³³ Respect for cultural diversity ensures that we maintain a range of cultures that we can share, and cultural exchange goes hand in hand with having a rich cultural heritage for all to enjoy. As such, there is a delicate balance between the exchange of ideas and cultural works and the protection of cultural goods through intellectual property laws.

²⁸ See, e.g., World Intellectual Property Organization [WIPO], *Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore —An Overview*, ¶ 30, WIPO Doc. WIPO/GRTKF/IC/1/3 (Mar. 16, 2001).

²⁹ See, e.g., WIPO Secretariat, *The Protection of Traditional Cultural Expressions: Draft Articles*, WIPO/GRTKF/IC/37/5 (June 27, 2018), for a working definition of Traditional Cultural Expressions; *Traditional Cultural Expressions*, WIPO, <https://www.wipo.int/tk/en/folklore/> (last visited Nov. 6, 2020).

³⁰ See, e.g., *Traditional Cultural Expressions*, WIPO, <https://www.wipo.int/tk/en/folklore/> (last visited Nov. 6, 2020).

³¹ See MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 7–8 (2003).

³² *What is Cultural Heritage?*, UNESCO, <https://ich.unesco.org/en/what-is-intangible-heritage-00003> (last visited Nov. 6, 2020) (“While fragile, intangible cultural heritage is an important factor in maintaining cultural diversity in the face of growing globalization. An understanding of the intangible cultural heritage of different communities helps with intercultural dialogue, and encourages mutual respect for other ways of life.”).

³³ *UNESCO Declaration on Cultural Diversity*, art. 8, UNESCO Doc. 31C/Res. 25 (Nov. 2, 2001), http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html.

IV. THE LIMITATIONS OF CLASSIC IP LAW

The protection of intangible rights, such as copyrights, trademarks, and patents, is well established in international agreements dating back to the nineteenth century. These include the Berne Convention for the Protection of Literary and Artistic Works³⁴ and the Paris Convention for the Protection of Industrial Property.³⁵ Global protection for ICH, by comparison, remains a hotly debated twenty-first-century topic.

WIPO is negotiating an international instrument to protect Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs) because they are not readily protected under classic IP law. Scholars have pointed out the ways that IP and ICH overlap and intersect, but there are several reasons why IP laws do not offer an adequate solution. For instance, there are limitations with respect to the duration of protection, and originality requirements in copyright law, and novelty requirements in patent law. Trademarks must be used in commerce as indications of source.³⁶

Patents protect innovations that are new, useful, and non-obvious. The novelty requirement is a high standard and can only be met by innovations that are completely new. Novelty can be destroyed, for example, if an invention is disclosed to the public before the patent application is filed.³⁷ Because ICH is, by definition, intergenerational, it has been shared with others and is not likely to be considered novel in the sense required for patent law.³⁸ Finally, the term of protection for patents is twenty years from the date of filing.³⁹ This will not cover one lifespan, and certainly would not extend to intergenerational innovations, such as traditional medicinal knowledge.

Copyright law protects literary and artistic works.⁴⁰ Copyright could, therefore, protect intangible cultural heritage, including stories, paintings, or sculptures. However, oral traditions that are not recorded in some form will

³⁴ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986) [hereinafter Berne Convention].

³⁵ Paris Convention for the Protection of Industrial Property, as last revised at the Stockholm Revision Conference, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention].

³⁶ 15 U.S.C. § 1127 (2006); *Aycock Eng'g, Inc. v. Airflite, Inc.*, 560 F.3d 1350, 1356 (Fed. Cir. 2009).

³⁷ 35 U.S.C. § 102. Some countries, such as the US, have a one-year grace period for applicants to file after public disclosure. However, many countries require absolute novelty, and public disclosure will bar the inventor from obtaining a patent.

³⁸ 35 U.S.C. § 101 (2020).

³⁹ *Id.* § 154.

⁴⁰ Copyright Act, *supra* note 8, § 102.

not be protectable by copyright,⁴¹ nor will artistic works that are not original. Unlike the novelty requirement in patent law, the threshold for originality in copyright law is fairly low. However, copyright requires independent creation by an identifiable author or group of authors. It does not easily extend to cover cultural heritage that belongs to groups rather than to identifiable creators.⁴² As is the case with patents, the intergenerational nature of ICH militates against copyright protection that, although it extends beyond the life of the author, also has a finite term.⁴³

Finally, trademark law could be used to protect certain cultural symbols. The limitation is that for the cultural symbol to be protected, it must be used in commerce as an identifier for goods or services.⁴⁴ Often the symbols are not used by the cultural group in this manner because they are cultural rather than commercial symbols. Consider, for instance, the use and registration of the Hawaiian phrase Aloha Poke by a Chicago restaurant. Some Hawaiian residents were upset and offended that this common greeting was registered for exclusive use by the trademark owner and that local Hawaiian restaurants would not be able to use the Hawaiian greeting “Aloha” in their businesses.⁴⁵ As a local greeting, Hawaiian’s did not see the word “Aloha” as something that should be controlled by private companies.

Trademarks are typically used to distinguish individual businesses. As such, they are not generally used to identify and protect ICH. The collective nature of GIs, however, makes them a potential option for protecting ICH, which, by definition, pertains to a group rather than to an individual. GIs, which can be protected in various ways under different legal systems, are protected as certification marks under US law.⁴⁶ Additionally, as discussed below, the geographic nature of GIs creates a strong connection to particular cultures and identities.

⁴¹ According to 17 U.S.C. § 102(a), “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression” This is the fixation requirement under US law.

⁴² See Janewa Osei Tutu, *A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law*, 15 MARQ. INTELL. PROP. L. REV. 147, 167–68 (2011).

⁴³ The general term is the life of the author plus 50 years. See Berne Convention, *supra* note 34, art. 7; see also TRIPS Agreement, *supra* note 2, art. 12. Some countries, including the US, have extended the copyright term to the life of the author plus 70 years. See 17 U.S.C. § 302 (2020).

⁴⁴ 15 U.S.C. § 1127 (2020).

⁴⁵ Nick Kindelsperger, *Hawaiian Activists call for Boycott of Aloha Poke*, CHI. TRIB. (July 30, 2018), <https://www.chicagotribune.com/dining/ct-food-aloha-poke-boycott-trademark-issues-petition-20180730-story.html>; ALOHA POKE CO., Registration No. 5123102.

⁴⁶ US protection of GIs involves a combination of certification marks and labeling regulations. See *Geographical Indications*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/ip-policy/trademark-policy/geographical-indications> (last modified Aug. 11, 2020, 01:44 PM).

V. GEOGRAPHIC INDICATIONS & CULTURE

IP laws, such as copyrights and trademarks, can be used to protect aspects of culture. Most importantly, for the purposes of this paper, GIs underscore the connection between products and cultural identities. Culture and geography are intimately related. Italian food, wine, and clothing, for instance, have a connection to the physical location that is Italy. Cultural identities may be tied to national or regional geographic locations. As such, there are certain aspects of culture that people identify as pertaining to a particular country or to a particular region of a country. Consider, for instance, the United States of America, which is broad and diverse but embodies certain values, such as capitalism and free enterprise. Florida, a US state, is known as the “Sunshine State” and the home of Florida oranges.⁴⁷ Italy, by comparison, is known for its food, wine, and fashion. For instance, Italian extra virgin olive oil is known for its high quality.⁴⁸ GIs signal a particular quality, and the use of a GI may require the production of balsamic vinegar by a certain process or in the Province of Reggio Emilia to use the GI “Reggio Emilia” vinegar.⁴⁹

GIs pertain to the geographic location, which is why they are an effective way to protect a variety of cultural items, including some aspects of intangible cultural heritage. While GIs are not a completely effective vehicle for protecting intangible cultural heritage and traditional knowledge, they open the door for IP law to protect cultural products that are also intangible cultural heritage.

VI. FASHION & INTANGIBLE CULTURAL HERITAGE

As discussed, cultural products, such as traditional clothing and other fashion items, may also be intangible cultural heritage. While GIs have traditionally been used to protect food and drink, there is no legal barrier to using GIs to protect textiles or other items. GIs can protect ICH if there is some quality, reputation, or characteristic that is attributable to the geographic origin. Fashion items could be similar to wine or food GIs, which are protected cultural goods. The higher level of protection that is available

⁴⁷ *Id.*

⁴⁸ *Olive Oil*, THE EXTRAORDINARY ITALIAN TASTE, <https://www.italianmade.com/usa/olive-oil/> (last visited Nov. 15, 2020) (“Italy is considered the world leader in quality of extra-virgin olive oil and is also number one in the product’s consumption.”).

⁴⁹ *See Aceto Balsamico Tradizionale di Reggio Emilia PDO*, THE EXTRAORDINARY ITALIAN TASTE, <https://www.italianmade.com/usa/product/aceto-balsamico-tradizionale-di-reggio-emilia-pdo/> (last visited Nov. 15, 2020).

for wines and spirits is not currently available for fashion items, but the TRIPS Article 22 GI protection is available to “goods” and is not limited to food items.⁵⁰

Food and clothing are functional and essential to our daily lives insofar as they can be described as part of our basic needs. Even though food is essential, both food and drink items are able to receive GI protection. When it comes to clothing and fashion items, the concerns relating to protection may be different. Unlike food, clothing may be seen as part of our personal expression, so attempts to regulate the use of clothing from different cultures may be seen as a limit on freedom of expression. While closely connected to our cultural lives, GIs for food do not raise the same issues relating to freedom of expression that arises in the fashion context. Fashion and clothing items are closely related to our personal identities as well as cultural identities. Traditional clothing items, for instance, are an expression of one’s personal preferences as well as one’s culture and cultural identity. But GIs do not prevent anyone from wearing a specific outfit, just as they do not prevent anyone from eating or drinking a specific food or drink.

Because culture is not static, it is common for people to engage in the exchange of cultural products. Still, there are instances where identifiable cultural groups seek to regulate the unauthorized use of their cultural works. There are several examples in the fashion industry. Italian fashion designer Valentino designed shoes that were essentially replicas of Ghanaian royal slippers, called *Ahenema*, from the Akan group.⁵¹ The Valentino *Ahenema* shoe was presented as modern fashion, based on traditional African culture. It may even have been an attempt to be inclusive.⁵² However, some Ghanaians found the presentation of the royal slippers as part of Valentino’s fashion line offensive and reacted negatively on social media.⁵³

In another more well-known example, the famous French fashion brand, Louis Vuitton, used the Maasai name and cultural wear as inspiration for one of its fashion lines. The Maasai are an indigenous group based in Kenya and

⁵⁰ TRIPS Agreement, *supra* note 2, art. 22–23.

⁵¹ Bernice Owusuwaa, *The Worth of “Ahenema” in Today’s Fashion*, GHANAWEB (Apr. 22, 2015), <https://www.ghanaweb.com/GhanaHomePage/entertainment/The-worth-of-Ahenema-in-today-s-fashion-355545>.

⁵² Danielle Renda, *Valentino’s African-inspired Collection Makes a Statement*, WAG MAG. (Mar. 28, 2016), <https://www.wagmag.com/valentinos-african-inspired-collection-makes-a-statement/> (“But the clothing isn’t just making a fashion statement. Creative directors Pierpaolo Piccoli and Maria Grazia Chiuri are using the spring-summer line to spread a message about humanity. ‘The message is tolerance,’ Piccoli has said, ‘and the beauty that comes out of cross-cultural acceptance.’”).

⁵³ *Petition: Stop Valentino from Selling Ahenema, Ghana’s Pride*, CHANGE.ORG (June 1, 2016), <https://www.change.org/p/president-of-the-united-states-enjoin-valentino-from-selling-aheneba>. This was not a successful petition, garnering less than 500 signatures as of the time of writing.

Tanzania.⁵⁴ The Maasai wear certain distinctive, identifiable traditional clothing and colors.⁵⁵ Louis Vuitton launched a “Masai” clothing line that used colors, designs, and styles based on the clothing traditionally worn by the Maasai.⁵⁶ Because they had not claimed and used their cultural identity as a trademark, the Maasai were left without a remedy.⁵⁷

Such issues can also arise in the advertising context. In the fall of 2019, the luxury French fashion brand, Christian Dior, created an advertisement that used Native American culture to promote its “Sauvage” perfume. The perfume name, *Sauvage*, is a French word that translates to English as “savage.” The advertisement was a one-minute film titled “We Are the Land” that featured American actor Johnny Depp.⁵⁸ In the advertisement, a Native man, dressed in full regalia appears to be doing a traditional Native American dance, while Mr. Depp plays the guitar and gazes at the landscape. No particular native group was identified. Dior eventually pulled the advertisement in response to public criticism.

Cultural heritage typically refers to things such as archeological sites, monuments, and other physical structures.⁵⁹ However, other aspects of culture, such as food and clothing, can be an expression not only of individual identity but also group cultural identity. This is why some handicrafts, including fashion items, such as necklaces, bracelets, and other fashion items, could be considered ICH.⁶⁰ It can, therefore, cause offense when traditional

⁵⁴ For more information about the Maasai, see generally MAASAI ASS’N, <http://www.maasai-association.org/maasai.html>.

⁵⁵ During my time in Tanzania, it was quite evident when someone was dressed in traditional Maasai clothing. The clothing is distinctive not only from Western clothing but also from other traditional African outfits.

⁵⁶ Tania Phipps Rufus, *Companies Accused of Exploiting Cultural Identity of Kenya’s Maasai*, THE GUARDIAN (Aug. 8, 2013, 5:00 PM), <https://www.theguardian.com/sustainable-business/ethical-exploit-cultural-brands-masai>.

⁵⁷ Some indigenous cultural groups have been partially successful in managing the use of their cultural identity in the fashion area by relying on trademark law. See, e.g., *Navajo Nation v. Urb. Outfitters, Inc.*, 935 F. Supp. 2d 1147 (D.N.M. 2013).

⁵⁸ Maanvi Singh, *Dior Perfume Ad Featuring Johnny Depp Criticized Over Native American Tropes*, THE GUARDIAN (Aug. 30, 2019, 11:23 PM), <https://www.theguardian.com/fashion/2019/aug/30/diors-fragrance-ad-draws-criticism-for-featuring-native-american-tropes>.

⁵⁹ Erin K. Slattery, *Preserving the United States’ Intangible Cultural Heritage: An Evaluation of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage as a Means to Overcome the Problems Posed by Intellectual Property Law*, 16 DEPAUL J. ART, TECH. & INTELL. PROP. L. 201, 216–219 (2006) (“UNESCO’s strict devotion to tangible cultural heritage continued for many years. Indeed, it was not until 1989 that UNESCO adopted an official policy toward aspects of culture that were intangible.”).

⁶⁰ Felicia Caponigri, *The Ethics of the International Display of Fashion in the Museum*, 49 CASE W. RES. J. INT’L L. 135, 140–41 (2017) (“Instead of entertaining whether fashion should be considered art, which would therefore make it cultural heritage, is it not more appropriate to determine how fashion

cultural wear is used in ways that may be demeaning to the group. Not only are these fashion items ICH, if they have some quality, reputation, or characteristic that can be attributed to the geographic origin, they could be protected by GIs.

VII. QUALITY CONNECTION TO THE LAND

There must be a connection to the geographic origin, but it can be quality, reputation, or characteristic that is essentially attributable to the geographic origin. The connection between the quality or characteristic and a geographic location can be based on some characteristic of the soil or the climate that affects the product. The soil or climate could affect the taste of coffee or wine, for instance.⁶¹

With respect to textiles, there may be some quality or characteristic that is also connected to the land. Thailand, for instance, has several registered GIs, including food items, as well as handicrafts and textiles.⁶² To take just a couple of examples, the Thai fabric called Mae Jaem Teen Jok is a registered GI that comes from the northern region of Thailand.⁶³ Similarly, the Chonnabot Mudmee Thai Silk is registered as a GI that is made in the Chonnabot District in northeastern Thailand. In addition to being made in that specific region, the GI registration describes the link between the product and territory as the intergenerational knowledge of the villagers about

in itself is cultural heritage? Is fashion, as the ICOM Code defines it, '[a] thing or concept considered of aesthetic, historical, scientific or spiritual significance'? The International Council of Museums (ICOM) seems to consider that it is. . . . Moreover, the International Committee for Museums and Collections of Costume (ICOSTUME) emphasizes that ICOM considers fashion to be part of the 'heritage'—whether tangible or intangible—that museums and museum professionals manage.”)

⁶¹ See Amy P. Cotton, *123 Years at the Negotiating Table and Still No Dessert? The Case in Support of TRIPS Geographical Indication Protections*, 82 CHI.-KENT L. REV. 1295, 1295 (2007) (“It follows that if the indication actually ‘identifies a good’ (and not merely a place) to consumers, then there must have been an investment by producers to exploit the terrain and produce the goods. That investment (production, marketing, and sales), experienced by consuming the goods or by reputation, creates the association between the place and the goods in the minds of consumers.”).

⁶² See generally Pajchima Tanasanti, Dir. Gen., Dep’t of Intell. Prop. Thai., Presentation to WIPO, *Geographical Indications Today: Where Do We Stand?*, https://www.wipo.int/edocs/mdocs/geoind/en/wipo_geo_bkk_13/wipo_geo_bkk_13_5.pdf (last accessed Aug. 25, 2020).

⁶³ *Mae Jaem Teen Jok Fabric*, ECAP III (Oct. 24, 2007), <http://asean-gidatabase.org/gidatabase/sites/default/files/gidocs/THGI0000048100008-en.pdf>. The fabric is described as having been handwoven in a traditional way for many generations. The link to the territory is both methods of production and the inherited art of weaving Jean Tok fabrics. The registration states, “Production knowledge is local wisdom inherited within the province, where all production of Mae Jaem teen jok fabric takes place, resulting in the creation of high-quality teen jok fabric of unique local design.” *Id.*

weaving this particular silk product.⁶⁴ This type of GI protects fabrics that are made as part of the ICH and the related traditional knowledge of the local people.

Authentic woven Ghanaian kente cloth, for example, if made in a specific region or using a particular intergenerational method, could be registered as a GI by the Ghanaian government. Currently, it is protected as part of Ghana's cultural heritage under the Ghanaian Copyright Act.⁶⁵ The challenge with kente cloth is that the pattern has been widely used and distributed, sometimes as handwoven cloth and other times as a print reproduction. Kente cloth is a well-recognized symbol of the Ghanaian culture, and, for many in North America, it is a symbol of African pride.⁶⁶ It has a reputation as a symbol of African identity, which is the reason that kente has value outside of Ghana. A kente stole is now frequently worn during graduation ceremonies by students at Historically Black Colleges and Universities. It was recently worn by Democratic politicians when they unveiled proposed legislation and kneeled in a moment of silence for George Floyd, who was killed by a police officer.⁶⁷ The Democrats were given the kente stoles by the Congressional Black Caucus.⁶⁸ While Ghana's kente is protected under Ghana's law as folklore, it enjoys no protection under US law. This is a fashion item for which the only connection to the land may be a reputational connection rather than a quality-based connection to the land.

VIII. REPUTATION

As discussed, GIs for clothing items are protectable when there is some quality connection to the land. This can include methods of manufacture based on intergenerational traditional knowledge and know-how. The challenge arises if the link to the fashion item is purely *reputational* without

⁶⁴ Chonnabot *Mudmee Thai Silk*, ECAP III (Apr. 30, 2010), <http://www.asean-gidatabase.org/gidatabase/sites/default/files/gidocs/THGI0000052100058-en.pdf> (“The intricate traditional geometric and zoomorphic motifs of mudmee Thai silk have been passed down through the generations. The designs and patterns produced in Khon Kaen are created primarily by using [colors] in the weft of the fabric. . . . The main link between product and territory is the human factor—the knowledge of the local villagers that has been passed down from generation to generation.”).

⁶⁵ Ghana Copyright Act, 2005 (Act 690) §§ 4, 17 (“The rights vested in the President on behalf of and in trust for the people of in the Republic in respect of folklore under section 4 exist in perpetuity.”).

⁶⁶ Isabella Gomez Sarmiento, *Kente Cloth: From Royals to Graduation Ceremonies . . . To Congress*, NPR (June 11, 2020, 5:09 PM), <https://www.npr.org/sections/goatsandsoda/2020/06/11/875054683/kente-cloth-from-royals-to-graduation-ceremonies-to-congress>.

⁶⁷ *Why Were US Democrats Wearing Ghana's Kente Cloth?*, BBC NEWS (June 9, 2020), <https://www.bbc.com/news/world-africa-52978780>.

⁶⁸ Gomez Sarmiento, *supra* note 66.

a *quality connection* to the land, as in the case of kente or the Ahenema shoes that became an Italian fashion item.

According to the TRIPS Agreement definition, a GI can be based on a reputational connection to a geographic location.⁶⁹ This movement from the notion of “terroir” to “reputation” opens the door to non-food products and to products for which the connection to the land is minimal. Consider Ghanaian kente cloth print or the Ghanaian Ahenema shoe that is manufactured in China. Can the GI be based on the *reputation* as originating from Ghana, even if there is no longer a quality connection to the land? The language of the TRIPS Agreement seems to indicate that this is possible. But if the GI is based on reputation, it raises the question of reputation where?⁷⁰

Can it be reputation in the location where the GI originates? Or should reputational GIs be treated like famous marks? Famous marks are protected under the Paris Convention from confusing uses,⁷¹ even if they have not been registered as trademarks in the particular territory. The TRIPS Agreement extends this protection to including dissimilar goods and services.⁷² Under US law, famous marks must be well-known in the US before one can prevent others from using the mark in the marketplace in a way that might dilute the brand.⁷³ The problem with using reputation in the location where the GI is being used, rather than reputation in the place where the GI originates, is that it could lead to inconsistent treatment of a registered GI in different geographic locations. It also seems that it would create lower-level protection for reputational GIs as compared to GIs that have a quality connection to the land. This makes the use of a reputation-based GI potentially complicated for fashion.

Furthermore, fashion lines that are merely inspired by traditions rather than replicas from other cultures would not necessarily be protected from use. The cultural appropriation controversies that have arisen in the fashion industry are often about fashion lines that are inspired by other cultures, which makes it less clear that GIs would be helpful. Consider, for instance, the Louis Vuitton “Masai” line. This fashion line contained Maasai inspired designs, with the theme, arguably, valuable partly because of the Maasai warrior reputation. Would a reputational GI for the Maasai colors and Maasai blankets prevent Louis Vuitton from having Maasai inspired designs? TRIPS

⁶⁹ TRIPS Agreement, *supra* note 2, art. 22.

⁷⁰ See generally DS Gangjee, *From Geography to History, Geographical Indications and the Reputational Link*, in GEOGRAPHICAL INDICATIONS AT THE CROSSROADS OF TRADE, DEVELOPMENT, AND CULTURE: FOCUS ON ASIA-PACIFIC 36 (Irene Calboli & Wee Loon Ng-Loy eds., 2017).

⁷¹ Paris Convention, *supra* note 35, art. 6bis.

⁷² TRIPS Agreement, *supra* note 2, art. 16.

⁷³ 15 U.S.C. § 1125(c)(1) (2020).

Article 22 GIs prevent the use of GIs that mislead the public as to the geographic origin of the goods.⁷⁴ It is possible but unlikely that the public would be confused about the origin of the goods. More specifically, it is not likely that the public will confuse the Louis Vuitton clothing with authentic Maasai clothing.

Even if one were to use the high-level GIs, such as the wine and spirit GIs, it might only provide a partial solution. The higher level of protection for GIs does not require the public to be confused, and so it offers broader protection. However, this does not automatically prevent anyone from making wines that are protected by GIs, but only from using the GI name or symbol as a source indicator. Importantly, the GI would prevent the use of certain names, but it is doubtful that GIs can prevent one from replicating the product itself.⁷⁵ If, however, the item is a shoe or a piece of clothing that has a specific culturally identifiable look, it is possible that the symbol that constitutes the GI is the appearance of that clothing item.

Concerns about tying up culture would be unwarranted because not all fashion would be covered—just those traditional outfits where there is a reputation that is attributable to the geographical origin and the public would be otherwise misled. If GIs were more extensively used to protect fashion items, there is no reason to think that this would lead to every item being protected, just as not all food items are protected. Cultural mixing and inspiration are not unique to fashion. It is common in the food industry as well. For example, the “Chinese” food one orders in an American city may not resemble the food eaten in different regions of China.⁷⁶ Other times, it is

⁷⁴ Article 22.2 states:

In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:

(a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;

(b) any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967).

TRIPS Agreement, *supra* note 2, art. 22.2.

⁷⁵ There may be other national laws that affect whether one can make a product that is protected through a GI. However, this article is only addressing what is required by the WTO TRIPS Agreement standards.

⁷⁶ Janaki Jitchotvisut, *11 Popular American Chinese Foods That You Won't Actually Find in China*, INSIDER (Oct. 20, 2019, 3:58 PM), <https://www.insider.com/chinese-american-food-isnt-from-china-2018-12#kung-pao-chicken-as-an-american-chinese-food-exists-in-part-because-a-key-ingredient-needed-for-the-original-recipe-was-illegal-in-the-us-until-2005-3>.

clear that the food is a mix of cultures or is inspired by various cultures, and so the food may be described as “fusion.”⁷⁷

A standard GI would not necessarily prevent fashion inspired by different cultures but only the sale of items that do not meet the standards for that fashion GI. That said, GIs are a form of IP with a strong cultural aspect, and they offer some possibility of protecting traditional cultural fashion items.

IX. CONCLUSION

This brief article has contemplated the possibility of geographical indications as a tool for protecting cultural fashion items. Geographical indications for European food and wines are well established. The possibility of expanding this kind of IP protection to other areas has not yet fully been explored. It may only offer a partial solution for groups seeking to ensure cultural appreciation of their traditional fashions, but it is certainly worth considering.

⁷⁷ Gordon Hamilton, *What is Fusion Cooking and Cuisine? An Explanation and Recipe Examples*, DELISHABLY (Mar. 3, 2020), <https://delishably.com/food-industry/what-is-fusion-cooking>.