IP ENSIGHT

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Brexit, and the importance of being (GI) earnest

by Ilse du Plessis

Many South Africans, I suspect, find Brexit both boring and incomprehensible. All that endless talk of customs unions, free trade agreements, hard borders, borders in the Irish Sea..!

But one really interesting thing that has emerged from the endless news stories is just how important intellectual property ("**IP**") is in all of this. For starters, considerable work has already been done on the issue of how EU-wide rights, such as European Union Trademark ("**EUTM**") registrations, will be handled after the divorce. that topic is not what this article is about, but it does look as though companies that have EUTM registrations (that obviously cover the UK) will be able to maintain their protection in the UK after Brexit in one way or another, even in the case of a no-deal.

The issue I want to concentrate on is a different one. Just recently, there have been reports that the EU's chief negotiator, Michel Barnier, wants guarantees from Britain in regard to the continued protection of Geographical Indications ("**GIs**"). "We must protect the entire stock of geographical indications" said Barnier. This was the not very subtle response from the UK's main negotiator, Dominic Raab, a response that suggests that this might be an area where the British think they have some leverage: "We do understand the importance for many European countries of resolving this... and of course we empathise particularly on this issue because we are very keen to make sure we resolve the broader trading relationship."

Let's start with some background. As we discussed in a recent article regarding the Scotch Whisky Association, there is a lot more to trade mark law than simply commercial brand names. One of the forms of protection that exists is the GI. This is very much a European creation, as the Europeans have always been very concerned to ensure that names associated with their wines and foodstuffs: names like Champagne and Roquefort can only be used by producers operating in particular areas. For many years, issues like these were dealt with simply through bilateral agreements. As far back as the 1930s, the French persuaded the South African authorities to put measures in place that make sure that no South African wine producer can use the name Champagne. Which is, of course, why we simply have sparkling wine when we have something to celebrate!

Things have moved on a long way since then. There is now a well-established formal European registration system for GIs. There are different types, with the most important ones being Protected Geographical Indications ("**PGIs**") and Protected Designations of Origin ("**PDOs**"). The differences are a bit obscure. PGIs identify products whose quality or reputation is linked to the place or region where it is produced, processed or prepared, although the ingredients don't necessarily have to come from that geographical area. In the case of PDOs, on the other hand, all stages of the production process must be carried out in the area concerned.

So, what sorts of name are we talking about here? There are apparently in excess of 3 000 names, but famous ones include Champagne, Brie, Camembert, Roquefort, Gorgonzola, Prosciutto, Parma, Feta, Ouzo and Kalamata. In some cases, the protected names are in fact geographical areas, such as Champagne, but in other cases they're not, such as Feta. There are British names on the list too, including Stilton, Newcastle Brown Ale and Cornish Pasties.

It's not only European names that can enjoy EU protection. There's an EU website that lists all the non-European names that have been granted EU protection. Australia has certainly made sure that a lot of its names are protected, but in some cases, you really have to wonder why the producers even bothered, like the Albanian producers who made sure that no-one else can use Pukë! PGIs and PDOs are now integrated into the EU trade mark system, in the sense that ordinary trade mark applications can be opposed on the basis of these other registrations.

So, how does this affect us here in South Africa? Well, apart from the fact that names like Champagne, Port and Sherry have long been off limits as a result of bilateral agreements, there is still no specific protection for GIs in South Africa. This despite the fact this form of protection is now available in a number of other African countries.

When it comes to the issue of GIs in South Africa, the first name that comes to mind is Rooibos. At one stage, there was talk of having this name declared a prohibited mark in South Africa under the Merchandise Marks Act, 1941. What has in fact happened, is that a large number of EU names have been declared prohibited marks in South Africa. In return, a large number of South African names now appear on the list of non-EU names that enjoy EU protection. This list does, of course, include Rooibos. Other names that appear are Western Cape, Stellenbosch, Franschoek, Swartland, Robertson, Klein Karoo and Karoo Meat of Origin.

Let's end with another look at those Brexit negotiations. Would it be overly-cynical to conclude that perhaps the British are a little less fussed about GIs than some of their continental partners? Is the prospect of French Cornish Pasties less troubling to the British than the prospect of English Champagne is to the French? Does that explain why the British might see this as an area where they may have some leverage?

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