

‘Malihabadi Dashehari’ Mango Geographical Indication – a Case Study

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Abstract

Intellectual property is all about monopoly in the market place and harnessing the maximum economic benefits by exercising the monopoly. Monopoly in the shape of goodwill, reputation and demand becomes the most formidable under the banner of Geographical Indication (GI) as GI is a monopoly of a guild unlike a private monopoly. Uttar Pradesh is a sacred land as the birth place of Lord Ram and Lord Krishna and has been blessed by so many unique crops and fertile land. Mango, the king of fruits, has a huge diversity in the Uttar Pradesh. Among the different mango cultivars, ‘Malihabadi Dashehari’ is one of the most popular mango cultivars for which GI has been secured almost three years back. Still the economic benefit of using GI is a distant dream for the entire range of people from farmers to the sellers. Monopoly is not just a Geographical Indication registration certificate secured from the Intellectual Property Office but a well-conceived business strategy to be applied in the open market place to reap rich dividends. Virtually no clue of using ‘Dashehari’ mango’s Geographical Indication as a wealth generation tool shows lack of vision. The paper investigates into the possible reasons for non-use of ‘Malihabadi Dusseheri’ mango for the purpose it was registered as a GI.

INTRODUCTION

Wealth has allured mankind since time immortal and it has remained a tough puzzle to solve for most of people. During the voyage of development, progress and destruction of human civilization human ingenuity toiled hard to develop a system wherein the fruits of the intellect could be commercialized while retaining the monopoly in it. It gradually developed as intellectual property rights (IPR). All tools of IPR to the exclusion of Geographical Indication (GI) are private monopolistic rights. Since GI is a property of a guild, it is a common property of a defined group engaged in the production to commercialization of the GI endorsed products and produces.

India enacted the Geographical Indication Act, 1999 in September 2003. It was a new law that came into existence due to the fulfilment of the international commitment signed under the TRIPS Agreement. Though the GI law is a new one, the reluctance of producers and manufacturers to know about this wonderful wealth creation tool is really discouraging. India has 151 registered GIs by April 2011 but less than 4% GIs are functional. Rest of the GIs adore the walls of the Part ‘A’ Registered Owners. It is just like a public notice about the existence of a gold mine in the vicinity and no one is interested to dig gold even for ‘free’. The free bite’s habit has on one side the plundered the wealth of the nation and on the other side ensured the existence of poverty and subsidy based useless public policies to meet with no results. The same is with the GI registration. Under the push of the Government, most of the applications have been filed by public money using public institutions as the applicants. The drafting of the GI applications has been taken for granted as the work of every Tom, Dick and Harry. In some total the practice adopted in the eight years of existence of the GI Act a lot of mess has been created. We will dig into the GI issues at a micro level through biopsy of the ‘Malihabad Dashehari’ mango GI the registration for which was secured in the year 2009. The objective of this paper is to spill over the mistakes committed in the GI registration application that will have long term repercussions, to learn a lesson to use this tool with a little more wisdom.

BASICS OF GEOGRAPHICAL INDICATION

To the exclusion to the rest of the IP tools, GI is a community monopoly that is cultivated, secured and exploited collectively by the respective community. This is basically goodwill of a particular community or guild for making or producing a particular or a class of goods or produce.

The GI registration is completed in two parts. In the first part the Community or the Guild makes an application for securing GI registration. Once the GI is secured the applicant community or guild becomes registered proprietor of the GI. This is known as Part 'A' registration of GI. After that the members of the community or the guild file applications individually to secure the rights as GI's registered user. Once the applications are accepted and the certificate in this respect is issued, they become the registered users. This part is known as Part 'B' registration. The registered proprietor does not use the GI. It is only the registered users who use the GI. The GI rights are exploited exclusively by the registered users but the breach of the GI rights granted to the registered users is actionable by both the GI proprietor and the registered users.

In India, the legal system for Geographical Indication protection has very recently been developed. The 'Geographical Indications of Goods (Registration and Protection) Act' was enacted in 1999 and has come into force in September 2003 (hereafter called 'GI Act'). Before this Act, there was no separate legislation for GIs specifically. In this case, application was made by the National Horticulture Board located at 85, Institutional Area, Sector - 18, Gurgaon - 122015 (Haryana) for registration in Part 'A' of the GI Register under Application No 125 for mango 'Malihabadi Dashehari' in respect of mango falling in Class 31. The application was accepted under sub-section (1) of section 13 of Geographical Indications of Goods (Registration and Protection) Act, 1999 in the year 2009. But since then it has failed to be successfully utilized on commercial scale.

THE 'MALIHABADI DASHEHARI' MANGO

Mango (*Mangifera indica* L.), the king of fruits, is well adapted to tropical and sub-tropical climates. It thrives well in almost all the regions of the country but cannot be grown commercially in areas above 600 m. It constitutes an important horticultural asset of Uttar Pradesh (UP). UP contributes a major share in the production of mango and with rich varietal wealth and vast acreage has an immense potential to improve mango production. Uttar Pradesh is the main mango growing state of India sharing about 34% of total mango production in the country. Indian mangoes are world famous and have great potential for export as compared to other fruits of the country. Being a potential crop state UP has taken lead in declaration of concentrated mango pockets as 'Fruit Belts' in eleven districts. Thirteen such 'Mango fruit Belts' in 11 districts have already notified. The details of notified 'Mango Fruit Belts' are given in Figure 1.

In UP, Maliabadi-Mal-Kakori is the biggest Mango Fruit Belt, the region comprising of Malihabad, Mal and Kakori tehsils of Lucknow district of Uttar Pradesh on the banks of Gomati River occupying an area of about 11,500 ha under mango plantation is famous for 'Malihabadi Dashehari' mango. 'Malihabadi Dashehari' mango (alternatively spelt "Dussehari" and "Dasher") is a variety of mango with fibreless flesh and with pleasant flavour and taste. 'Malihabadi Dashehari' mango has a small to medium sized fruit with elongated shape, which is yellow in colour, with fibreless flesh, rich characteristic flavour and good keeping quality. It is reported in the UP district Gazetteer that in 1955 56,2480 acres in Lucknow district were under mango cultivation and the town of Malihabad was famous for the 'Dashehari' cultivar of mangoes and nurseries from this area supplied planting material to all over the state.

HISTORICAL RECORD

Based upon the historical and general evidence available in the book "The Mango" authored by Gangolly et al. (1957), 'Dashehari' mango serves its name from a village called by name *Dusher* between Lucknow and Malihabad owned by the Nawab of Lucknow (Presently the village Dusher is called as Dusseheri). It owes its superior

chance-seedling in the garden of the Nawab. A few grafts of the cultivar are reported to have been presented by the Nawab to Alamgir Khan of Malihabad who planted these in his garden, which formed the chief source of its spread in later years.

It is reported in the UP State Gazetteer that as per census 1951, 900 acres out of the total 1200 acres in Malihabad tehsil were under mango cultivation and the town of Malihabad is famous for the 'Dashehari' cultivar of mangoes.

THE UNIQUENESS

According to the traditional mango growers of the region, the 'Dashehari' mangoes grown in other areas are different from 'Dashehari' grown in Malihabad region as 'Dashehari' mangoes grown in other regions have un-uniform ripening and a marked difference in shape, colour and taste. The climatic and geological conditions prevailing in Malihabad and its adjoining regions has given unique characteristic to 'Malihabadi Dashehari' mango, which has given firm sustainability to characteristics of 'Malihabadi Dashehari' mango for more than 300 years. The traditional growers attribute the unique soil of Malihabad region for the characteristics pleasant flavour, rich sweet taste when fully ripened, rich orange yellow colour, fibreless flesh and good keeping quality. According to the book "The Mango" authored by Gangolly, the 'Dashehari' cultivar cultivated in south India failed to develop the rich orange yellow colour that it acquires in northern India when fully ripe. Beta carotene is the main factor responsible for development of yellow colour. The average values are 12,150 µg/100 g pulp.

THE APPLICANT

The GI application process starts with an association or guild of producers or manufactures or people engaged in the production-sell chain of the produce agreeing for filing an application. The local association is considered to be the best applicant. In case of number of such associations, to avoid conflict of interest, it is better to include all such associations. The section 11 (a) also states that an authority established by or under any law representing the interest of the producers of the concerned goods could also be an applicant. Further, it is also important to notice that the ownership in GI is not transferable. Hence selection of the right applicant(s) is a must.

Here in relation to the authority it is essential to establish the relationship between the authority and representation of interest of the producers of the concerned goods. In the present case the National Horticulture Board having office at Sector 18, Gurgaon was the applicant. When GI registration became the GI proprietor, the only visible relationship between the National Horticulture Board and the 'Dashehari' mango of Malihabad is the fact that mango is a horticulture product. Else there cannot be any relationship between the National Horticulture Board and the mango growers/producers of the Malihabad area. Hence, the choice of the applicant was wrong. The ownership/proprietorship in the registered GI is non-transferable. Hence the defect in this GI will bleed during the tough course of Part 'B' Register of the users and the use of the GI during the course of trade of the GI endorsed 'Dashehari' mangos.

THE NAME: 'MANGO MALIHABADI DASHEHARI'

The name itself is a problem. The popular name for 'Malihabadi Dashehari' is 'Dusseheri Mango'. With 'Mango Malihabadi Dusseheri' name registered as GI, will it be enforceable by the legal means to restrict the most popular name 'Dashahari Mango' as a deceptively similar infringing name for the 'Dashahari' produced in the adjoining districts like Hardoi, Sitapur, Barabanki and Unnao. The reply to this question is obviously NO. The application and thus the registered 'Mango Malihabadi Dashehari' has no logo. In the absence of a unique registered GI logo, practically it would be a very difficult task to put the registered name, i.e. 'Mango Malihabadi Dashehari', on each fruit. In absence of such a mention, the buyers would not be able to select the GI endorsed mango originating from the registered 'Mango Malihabadi Dashehari' production area; and with the inability of the buyers to find the GI endorsed produce, the very objective of registering the

‘Dashehari’ mango under GI fails.

GI ENDORSED AREA OF PRODUCTION

The area for ‘Dashehari’ mango has been limited to Malihabad, Mall, Kakori and Bakshi Ka Talab tehsils of Lucknow District under GI. Are these four tahsils of Lucknow district producing ‘Malihabad Dashehari’ mango only? The details provided in the published application itself says that UP Gazetteer of the year 1955-56 says that Malihabad was supplying the clonally propagated sapling of the ‘Dashehari’ mangos to the entire State of UP. It means the same cultivar is grown over half a century in the State of Uttar Pradesh. The soil and environmental conditions in the Ganga-Jamuna basin is almost the same making the differentiation between the mango produced in the mentioned four Tehsils of Lucknow and in the rest of the districts lying in between the Ganga-Jamuna basin is difficult. The question of selection of the area of production is very important from three major factors: making differentiation between the original and the spurious produce; balancing the demand and supply economic equation; and establishing the uniqueness of the produce for prosecuting the spurious producers.

Here it is apt to mention that Indian legislature has very smartly extended the definition of GI by including the manufactured items that opened the vista of entry of handicraft items for GI endorsement. The majority of the registered GIs in India are handicraft items. The mention of out of the defined geographical area production as spurious production can be understood but the same shall not be applicable in the agriculture and horticulture produce where plants, seeds, soil, temperature and environmental conditions play their respective roles in the production of a crop or a fruit. Alleging a naturally produced crop or fruit ‘as spurious’ would invite strong protest in a country like India. A ‘Dashehari’ mango grown in an adjoining district of Hardoi would obviously be called ‘Dashahari’ mango. The producers of those areas have kept on calling ‘Dashehari’ mango by this name only.

INSPECTION BODY

It is a statutory requirement of the registered proprietor to ensure the quality and standards of the GI endorsed products. The mere statement that an independent neutral body that would look into the quality control and standards is a mere trick to bypass the inspection stricture. Without fulfilment of the inspection body condition, instead of integrating collective goodwill, the reverse may take place.

ESTABLISHING THE UNIQUENESS

It is an essential element of the GI registration to establish the uniqueness of the produce without which it is difficult to make a difference between the ‘original’ and the ‘spurious’ produce. There is nothing spurious in my knowledge as far as the agriculture produce is concerned. An agriculture crop is as original as a child is born from a single mother. This natural justice is reflected in the section 9(a) of the GI Act. The area shown to have exclusive monopoly of being the place where from ‘Malihabadi Dashehari’ mango originated creates confusion and deception for the honest use of the same by the ‘Dashehari’ mango producers of the other areas in the vicinity. The ‘Dashehari’ mango orchards are in almost all the mango belts of Uttar Pradesh. It is next to impossible to select the ‘genuine’ ‘Malihabadi Dashehari’ mango out of the lot collected from various orchards within the depicted area and outside the depicted area. Hence, in the light of the section 9(a), the grant of ‘Dashehari’ mango as GI registration is illegal and amounts to be declared null and void.

Names like ‘Dashehari’, ‘Dusseheri Mango’ or ‘Malihabadi Dusseheri’ are a few generic names used for defining the ‘Malihabadi Dashehari’ mango. In the light of the registration of ‘Mango Malihabadi Dashehari’ as GI word mark for the ‘Dashehari’ produce original Geographical Indication originating from the tehsils of Lucknow districts marked as the producing range geographical area, the use of the names like ‘Dashehari’, ‘Dusseheri Mango’ or ‘Malihabadi Dusseheri’ for the mango originating

from the geographical location mentioned in the concerned GI would dilute GI word mark 'Mango Malihabadi Dusseheri'. Further, the commonly used names 'Dashehari', 'Dusseheri Mango' or 'Malihabadi Dusseheri' coming from the adjoining orchard out of concerned GI area would create confusion in the minds of the 'new customers' and the popularity of these names would come within the range of the infringement of the registered GI. Furthermore, as per section 9 (f) the existence of mango orchard outside the concerned GI area for the same 'Dashehari' mango and the produce of the same before the same mango lovers for a long time and confinement of the same to a few tehsils of a district amounts to the prohibition of the registration of a generic name. In fact this may be reason for selecting the alien looking 'Mango Malihabadi Dusseheri' name for securing GI registration. It would miserably fail in reality in the absence of a registered logo mark.

Further the very crude means to uniquely define the 'Dusseheri' mango have been used to secure GI monopoly in 'Dusseheri' mangos. The 'Dusseheri' produce of the area covered in the GI has not been compared with the 'Dusseheri' produce of the out of the geographical area shown in the application. Further size, colour, dimensions, etc. are of no help when the agro climate is almost the same and 'Dusseheri' saplings have been sent from the 'Malihabad' range only. Still after mango orchards, the mango saplings nurseries are doing the brisk business.

The uniqueness defining purpose for the agriculture produce should ideally be done using DNA fingerprinting technology. But, the DNA fingerprinting seems to be not a fool proof solution to establish the uniqueness of the 'Malihabadi Dusseheri' mangos. The reason lies in Darwin's theory of selection of the fittest. The 'Dusseheri' saplings are prepared using the grafting technique. So the grafted portion is always of some superior branches. This differs the DNA fingerprint of the fruit. So a range of DNA finger prints rather than a DNA finger print should be the better solution to figure out the uniqueness.

The DNA finger prints of the 'Malihabad Dusseheri' should have been taken in numerous samples and a comparative study should have been done to find out the characteristics of the 'Malihabadi Dusseheri'. Further, a second comparative study should have been done of the 'Dusseheri' produced in other areas too; this comparative study should have been used as the tool for selecting the geographical area of the 'Malihabadi Dusseheri' mangos. Further the comparative study of DNA fingerprints would have helped in defining the unique characteristics of the 'Malihabadi Dusseheri'. Unfortunately, it has not been done. Let us discuss the implications of the poorly drafted GI specification.

The DNA has no role to play in respect of soil, water, temperature and other nature conditions. It was also required to conduct comparative studies within and outside the 'Malihabadi Dusseheri Mango' production belt defined in the GI. In absence of these purely scientific studies, one thing is for sure that in absence of tightly drafted unique characteristics of the registered 'Mango Malihabadi Dusseheri', it would be equally difficult to bring it into practice and to restrict the infringement of the GI.

RIGHTS CONFERRED BY GI REGISTRATION

The GI provides rights to the registered proprietor and users of GI to obtain relief for the infringement. The GI provides exclusive rights to the registered users to use the GI. Therefore there are two kinds of rights conferred by the GI Registration:

- a positive right to utilize GEOGRAPHICAL INDICATION exclusively by the registered users; and
- a negative right to take action against the use of the GI by the non-registered users.

The exclusive exploitation of a commercial right is always easier to exploit when the right is clearly defined. The right and the obligation are the opposite sides of the same coin. When the rights could not be defined in a proper manner, it would be equally difficult to exploit it exclusively and for third parties to respect it in the most idealistic situation. This is a typical case of poor drafting of an application that matured in the form of GI rights after securing the registration.

INFRINGEMENT OF A REGISTERED GI

The word infringement has not been defined in the GI Act. However, 'infringement of registered GI' has been defined in subsections (1) and (3) of the section 22. Here it would be apt to state a fact that Malihabad has been enmeshing the goodwill earned for the best quality of 'Dashehari' mango. The mango orchardists also have side business of selling 'Malihabadi Dashehari' mango saplings. There are plenty of nurseries in the registered GI region selling the 'Dashehari' mango saplings for decades, if not centuries. Therefore, it is obvious the saplings brought and cultivated in the areas outside the GI registered area, are also 'Malihabadi Dashehari' mango having similar genetic background. Can flavour, colour and fragrance may vary with varying environment when clonally propagated plants of 'Dashehari' mango are grown? The answer to this question was also required in this GI to further clarify the domain of the rights created in the form of registered GI. In absence of such data, there is a blur at the border of rights and obligations that invites disputes and infringement claims.

PRODUCE VS. PRODUCT

There are few remarkable distinctions between a naturally produced product and a manufactured products with reference to GI. Most of the generic and branded products come to the market with the name of the manufacturer inscribed on the container. Further the products carry trademarks to ensure the same source of origin. They may also carry further identification and quality symbols like GI, ISI/ISO marks and bar code. Excluding the GI, rest of the symbols of identification of source are found missing. Even if a genuine produce is having the GI tag, it is next to impossible to establish that it is a genuine produce except accepting it on its face value.

In the light of the above paragraph, if some registered user complains about GI endorsed mango not originally coming from the registered GI area in the open market place, what could establish the infringement? It is interesting to note that a produce or a product does not infringe. It is a person who without having rights, uses such tools and infringes the GI rights. It is difficult to establish who is truthfully endorsing GI right and who is not.

THE FLAW

The flaw in the GI Act is that despite the defining rights and infringement of GI rights, it is difficult to control the 'counterfeiting'. GI as an IP tool is very powerful and it is a community right. For a community right, particularly for agriculture produce it requires support of a few more tools to distinguish original source of the produce. There is no such provision in the Act to deal with. The GI Act provides no space to make some amendments or to add a logo. The registered GI is final till it is not renewed by the registered proprietor and the registered users respectively.

CONCLUSIONS

'Malihabad Dashehari' was registered in 2009. However, it remained out of use. The registered proprietor is a government institution situated over 500 km away from the geographical origin belt of the 'Dashehari' mango. The choice of ambiguous name 'Mango Malihabadi Dashehari' is another example of the apathy of the proprietor in selecting a proper name mark for the GI. Due to poor drafting of the specification, the rights generated thereupon are of weak foundation and with blurred domain. Mango is the main crop of UP, occupying nearly 85% of fruits area in the state. The state is also the leading producer of mango in the country. The total area under mango cultivation is about 2.5 lakh ha with a total production of almost 4 million mt (2002-03). The average yield of mango crops was about 15.8 mt/ha which is nearly double to the national average of 7.8 mt/ha. Therefore, the establishment of infringement would be a tough job to undertake and thus the process of commercialization of GI by adding registered users also may create chaos in the supply chain to sour the taste of otherwise mouth-watering 'Dashehari' mango.

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Figures

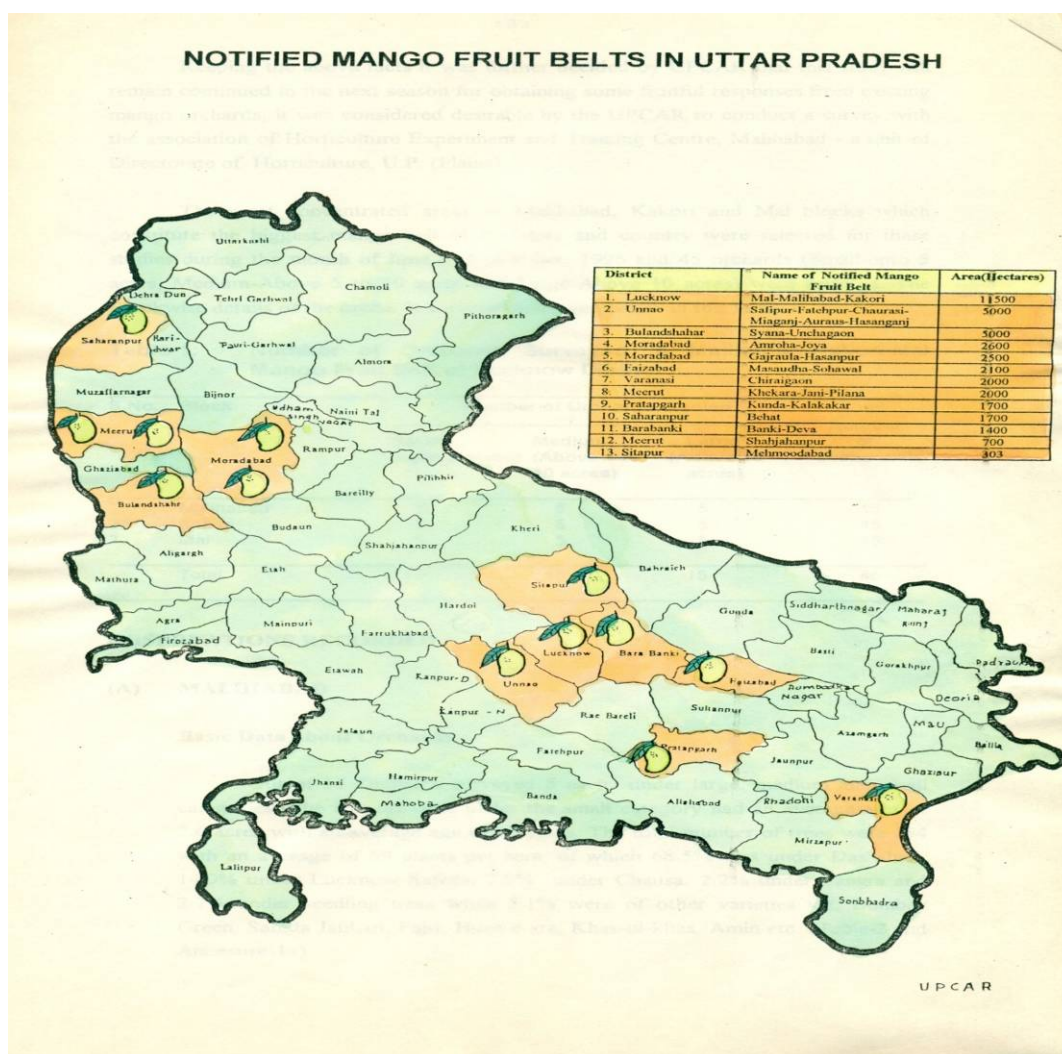


Fig. 1. Mango acreage and production estimation in different mango belts of Uttar Pradesh using satellite data by remote sensing applications centre, UP, Lucknow.

Appendix

Section 11: Application for Registration: (1) Any association of persons or producers or any organization or authority established by or under any law for the time being in force representing the interest of the producers of the concerned goods, who are desirous of registering a geographical Indication in relation to such goods shall apply in writing to the Registrar Geographical Indications in such form and in such manner and accompanied by such fees as may be prescribed for the registration of the geographical indication.

¹ Section 9: Prohibition of registration of certain Geographical Indications: (a) the geographical indication the use of which would like to deceive or cause confusion shall not be registered as a geographical indication.

¹ Section 9: Prohibition of registration of certain Geographical Indications: (f) the geographical indication which are determined to be generic names or indications of goods and are, therefore, not or ceased to be produced in their country of original, or which have fallen into disuse in that country shall not be registered as a geographical indication.

¹ Section 21: (1) Subject to the other provisions of this Act, the registration of a geographical indication, shall if valid, give:

- (a) To the registered proprietor of the geographical indication and the authorized users or users thereof to obtain relief in respect of infringement of the geographical indication in the manner provided by this Act;
- (b) To the authorized users thereof the exclusive right to the use of the geographical indication in relation to the goods in respect of which the geographical indication is registered.

¹ Section 22: Infringement of registered GIs: (1) A registered geographical indication is infringed by a person who, not being an authorized user thereof:

- (a) Uses such geographical indication by any means in the designations or presentation of goods that indicates or suggests that such goods originate in a geographical area other than the true place of origin of such goods in a manner which misleads the persons as to the geographical origin of such goods; or
- (b) Uses any geographical indication in such manner which constitutes an act of unfair competition including passing off in respect of registered geographical indication.

(3) Any person who is not an authorized user of a geographical indication registered under this Act in respect of the goods or any class or classes of goods notified under sub-section (2), uses any other geographical indication to such goods or class or classes of goods not originating in the place indicated by such other geographical indication or uses such other geographical indication to such goods or class or classes of goods even indicating the true origin of such goods or uses such other geographical indication to such goods or class or classes of goods in translation of the true place of origin or accompanied by expression such as 'kind', 'style', 'imitation' or the like expression, shall infringe such registered geographical indication.