



Ludmila Štěrbová

BUSINESS DECISIONS and INTELLECTUAL PROPERTY

E-LEADER CONFERENCE PRAGUE

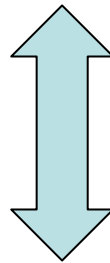
June 11- 13, 2007

Czech Republic

IPRs

trade promoter or trade barrier?

- Different points of view (IPR holder, IPR infringer, business, society, users)
- IPRs protection/non-protection could play both roles



where is the „balanced“ protection?

Business decisions

- Based on status quo situation at a concrete target market
 - in IPRs legal protection and enforcement
 - in IPRs authority and practices
- Based on supposed development at a concrete target market

Presumption: to know why IPRs have trade related aspects

- IPR is a right **to prevent** others from using inventions, designs or other creations, which belong to right owner,
- IPR is a right to negotiate **payment** in return for using the IPR by others
- IPR guarantees exclusivity at the target market - **competition**

IPRs relation to the international marketing

- **Market entry**
 - form of market entry (high level of IPR protection and enforcement allows more intensive presence at the market – joint ventures, FDI, etc.)
- **Promotion, communication, positioning**
 - Namely through trademarks, but also other IPR categories as geographical indication, design (IPR as a marketing tool)
- **Consumers preferences**

Analyses

Entry into market (forms of entry):

- **PEST** (Political, Economical, Socio-cultural and Technical factors)

Business potential (of an enterprise):

- **SWOT** (Strengths, Weakness, Opportunities, Threats)

IPR and PEST analysis

Level

of the IPRs protection and
enforcement

should be considered as

POLITICAL

&

SOCIOCULTURAL

factors

Why a **POLITICAL** factor?

The legal environment is an important part of the political arena, which has a huge influence upon the **regulation** of businesses, and the **spending power** of consumers and businesses.

The IPRs environment supports creativity and innovations (conditions for cooperation, staff qualification) and creates certainty for any foreign investment and its technology.

IPRs questions to be considered:

- **Is the country member to the WTO (and in this case bound by the TRIPS minimum IPRs standards)?**
- **What is the level of IPRs protection and enforcement (TRIPS- or TRIPS+?)**
- **Did the government implement the IPR enforcement provisions in an effective way?**
- **Is the country (government) involved in other IPR agreements (WIPO, bilateral)?**

Other IPR related Qs

- How stable is the political environment (could the achieved level of IPRs protection be changed easily)?
- What is the government's position towards the protection and enforcement of IPRs?
- Will government policy in any area influence laws that regulate IPRs protection and enforcement?
- Does exist a lobbyist group which influence the government on IPRs protection and enforcement?
- What is the government's policy on the economy (does the trade policy comply with WTO agreements)?
- Does the government have a view on culture, religion and ethics?

Why a **SOCIO-CULTURAL** factor?

- Consumers preferences
 - preferences for branded goods
 - preferences for traditional products
 - preferences for high technology
 - preferences for quality, modern design
- Level of education and access to information technology
 - how the society perceives the IPR
 - demand for new information (publications)
 - demand for new computers programs, etc.
- Declination degree in the society to the IPR infringement (consumption of counterfeited products)

Other IPR related Qs

- What is the dominant religion (does the religion support a „fair“ consumption)?
- What are attitudes to foreign products and services (acceptance of foreign TM and foreign inventions)?
- Does language impact upon the diffusion of products onto markets (better to use global or local signs/TM)?
- How much time do consumers have for leisure?
- What are the roles of men and women within society?
- How long are the population living? Are the older generations wealthy?
- Do the population have a strong/weak opinion on criminality related to the infringement of IPRs?

Could IPRs be also ECONOMICAL & TECHNICAL factors?

- Readiness of the economy and society to accept and enforce IPRs (does the business environment support the IPR protection and enforcement?)
- Size of the market with counterfeited and pirated goods
- Unemployment (are people massively employed in the production of counterfeited and pirated products?)
- Price level of branded goods and new technologies in relation to the average remuneration and to the average level and structure of expenses (demand curve of IPR goods)
- Using of IPRs depends on the level of new technologies, new ways of communication, etc.

Other related Qs

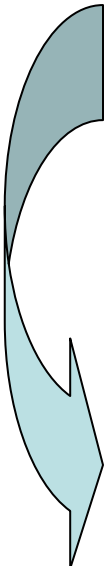
- Interest rates
- The level of inflation
- Employment level per capita
- Long-term prospects for the economy Gross Domestic Product (GDP) per capita
- Does technology allow for products and services to be made more cheaply and to a better standard of quality?
- Do the technologies offer consumers and businesses more innovative products and services such as Internet banking, new generation mobile telephones, etc?
- How is distribution changed by new technologies e.g. books via the Internet, flight tickets, auctions, etc?
- Does technology offer companies a new way to communicate with consumers e.g. banners, Customer Relationship Management (CRM), etc?

Business potential of an enterprise in using a concrete IPR category

(from the microeconomic perspective)

S W O T analysis

IPRs and SWOT – why?

- 
- **IPR categories used/not used in business relations have always impacts on effectiveness of trade**
 - **Better understanding of separate parts of SWOT analysis could help industry in its decisions on using/non using the IPR category**

Impacts of IPR on trade

- **IPR level of protection and enforcement at target markets influences trade and marketing decisions of private sector, namely in considering forms of a market entry and promotion of a market presence**
- **Each and every IPR category has its strengths and weakness:**
 - **due to its nature and**
 - **due to the level of protection and enforcement (different in several markets).**
- **Using IPR category represents certain opportunities to be taken from competitive advantage and threats to be faced**
- **Protection of IPRs has its opponents, whose trade interests (and force) should be analyzed in order to prevent and avoid economical losses**

SWOT of Geographical Indications (example of an IPR category)

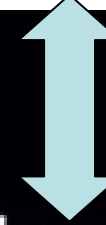
- Assumptions: characteristics of the IPR category
- Points of view (industry, free-riders, consumers, society)
- Strengths, weakness, opportunities, threats
- Conclusions

Assumptions (1): definition, specificities

- Definition of geographical indications: signs used on goods or services that have a specific geographical origin and possess qualities, reputation or other characteristics that are due and essentially attributable to that place of origin (distinct from indications of source and different from trademarks)
- The same GI name is shared by producers of the same product from the same region - no GI producer has any exclusivity

Budweiser Budvar, Budweiser Beer: The Czech Geographical Indications

Czech Water. Czech Malt.
Czech Hops. Czech glass.



Česká voda. Český slad.
Český chmel. České sklo.



Different from: Budweiser, TM of Anheuser Busch, USA



© Ludmila Sterbova 2007

Assumptions (2): international agreements on protection

- Minimum worldwide level of protection (within 150 WTO Members):
 - TRIPS Art.22, for wines and spirits TRIPS Art. 23 (different legal means of national implementation)
 - TRIPS Art. 24 exceptions
- Higher level of protection for all GIs products in national legislation of certain countries than it is provided by TRIPS Art. 22
- International Lisbon agreement on protection of geographical indications (26 countries)
- Protection of GIs as a part of regional trade agreements or subject to bilateral agreements

Points of view

- **Industry (which enterprises?)**
 - enterprises are mostly SME
 - their production potential overreaches local perimeter
 - they decide between using geographical indication and using trademark in their marketing strategy (branding policy)
 - they decide also about producing no-name products or products for supply to retail chains (private marks)
- Free riders, Society, Consumers points of view (outlined further)

S for STRENGTHS (1)

- GI is a IPR category which helps to distinguish products with specific characteristics from others
- GI is a marketing tool (quality label) facilitating promotion of product – it does not demand high investment for convincing a consumer of a quality or characteristics of product
- The investment into reputation is shared among all producer of the same GI

S for STRENGTHS (2)

- Products achieve higher prices (consumer is willing to pay for quality, its guarantee and traditional methods of production)
- Lower costs of protection (to compare to the TM protection; in most countries GIs are protected „forever“ - the registration should not be renewed)
- Reputation and consequently export potential are strengthened due to globalization (tourism, internet) and through country promotion (international fairs, exhibitions)

W for WEAKNESS (1)

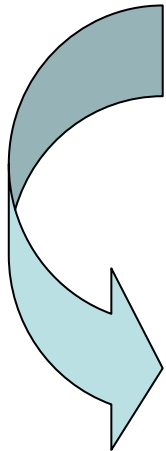
- GI usurpation by free riders is easier than TM usurpation (the protection based on consumer's misleading according to TRIPS Art. 22 for products other than wines and spirits is not sufficient) – consequently a danger that GI becomes generic is very high
- GI could have already become generic at certain markets (protection in favor of genuine producer is not more possible – TRIPS Art. 24)

W for WEAKNESS (2)

- GI could be registered as TM for non genuine producer at certain markets (entry into the market with this GI could be impossible, positive decision on coexistence is uncertain and mostly subject to court judgment)
- The distinction among the genuine GIs producers is not always clear (however: unclarity could be eliminated by additional signs – name of factory, TM, etc.)
- Using TM of the same wording as the GI could result in a conflict with other legitimate GIs holders

W for WEAKNESS (3)

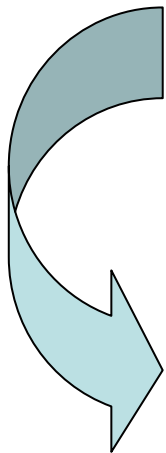
GI could not be subject to a license
(exception: any producer from the same
region)



it results into a limited production
capacity and scope and limited
export potential

W for WEAKNESS (4)

GI products could not be produced or completed abroad



consequently transport increases production costs, export of GI goods could not benefit from WTO rules of origin, from preferential tariffs among third countries under RTAs, from supplies and labor costs differences

O for Opportunities (1)

- To differentiate marketing and brand policy according to the level of GIs protection provided by the given country (information on bilateral agreements, regional trade agreements and international registration is necessary)
- To use additional signs (TM) for which higher protection is available
- Higher protection of GIs for other products than wines and spirits as a result of WTO (future) negotiations, consequently lower enforcement costs of protection (no need to undertake consumers surveys)

O for Opportunities (2)


To cooperate with other GIs producer and NGOs (for example OriGIn) in order to

- prevent free riding and counterfeiting
- involve governments into international negotiations on high GIs protection
- help governments to establish an effective system of GIs protection and enforcement

T for THREATS (1)

- The possible lower quality and different characteristics of non genuine production (free riders) undermines the reputation of GIs products, consequently consumers lose their trust in the guarantee represented by GIs
- Number of free riders increases along with increasing reputation and export expansion of the GI product

T for THREATS (2)

- Using the GI name as a word expressing methodology of production in markets without genuine GI products presence
 the GI becomes generic
- Conflicts with free riders or TM holder at third markets (certain market could be forbidden for original GI product; disputes require costs)

SWOT of GIs by free-riders?

YES

Free-riders and producers of counterfeited goods (branded by TM or GIs) consider also their business potential in using an IPR category which does not belong to them !

Free rider's SWOT of GIs: Strengths

- GIs reputation (usurped)
- No investment into building consumer confidence or into promoting products - marketing for free
- Weak GIs protection based on TRIPS Art. 22 (it is difficult to prove that consumer is mislead, consumer survey and disputes require costs which the genuine producer are not able to pay)

Free rider's SWOT of GIs: Weakness

- High level of GIs protection in several countries
- GI could become generic expression due to the weak protection in the most markets (if it becomes an expression of methodology, it is against interests of free riders, who rely on usurped GI reputation)

Free rider's SWOT of GIs: Opportunities

- GIs producers will invest more into the reputation and promotion of their products
- The WTO negotiations on extension of the higher GIs protection will never happen
- Number of members of Lisbon agreement remains limited
- Governments will not implement strong legislation on GIs protection for different reasons

Free rider's SWOT of GIs:

Threats

- Worldwide high level of GIs protection (as a result of WTO negotiations, the protection of TRIPS Art. 23 will be extended to all products)
- Increasing number of bilateral agreements on GIs protection or RTA with GIs protection aspect
- Informed consumers will insist on the guarantee of true origin of products
- Increasing number of producers using GIs as an expression for methodology (price decreases)

Is society involved in the branding use of GIs?

**Governments' interest in economic and social
development,
in expanding trade and
in preserving national patrimony**

Governments could use SWOT analysis in the
consideration process of implementation of
different level of IPRs protection

Simulation of SWOT for society

STRENGTHS (1)

- GIs production facilitates development of rural communities and small and medium size enterprises (knowledge and traditional methods of production are at place and **should** be exploited, consequently a need of investment into new methodologies and human skills is limited)
- Governmental support of GI export aimed at strengthening GI protection is fully compatible with WTO rules (for example through bilateral, regional or multilateral agreements)

Simulation of SWOT for society

STRENGTHS (2)

- Effectiveness of support for development of rural communities and SMEs utilizing GIs names is higher than in other cases (marketing costs of enterprise are lower)
- GIs help to promote country image and to attract tourists
- GIs producers cannot control national market due to natural limits in production potential (see W for industry)

Simulation of SWOT for society

WEAKNESS

Insufficient governmental capacity

- to establish a legal GIs protection and enforcement system and
- to enter into bilateral and multilateral negotiations on GIs protection

Simulation of SWOT for society

OPPORTUNITIES

- International registration based on Lisbon agreement (it allows enterprises to protect their GI within 30 countries)
- High level of protection for specific GIs could be provided by regional trade agreements
- Engagement into WTO negotiations could not only have as a result higher protection for GI and consequently better conditions for development of SMEs and rural communities, but at the current stage promotes also the awareness of GIs originating from proponent country

Simulation of SWOT for society

THREATS

- Pressure from foreign governments whose producers are exporting or want to export to the national market products using GIs not originating in their territory
- Lobbying from free riders and importers of non genuine GIs products
- But: low GIs protection could result into relinquishing of GIs production - part of valuable patrimony is lost for ever

What about consumers?

intuitive SWOT

- **S:** guarantee of quality, characteristics and origin of good
- **W:** higher price (but still willing to pay it)
- **O:** extended higher GIs protection – more comfortable shopping – no need „to study“ the true origin
- **T:** free riding, GI becomes generic – no guarantee of the quality of goods or services

Conclusions (1)

- The **nature of GIs** and its features, which are distinct from TM, represent **GI strengths**.
- However, GIs in branding **limit manufacture capacity** of genuine producers; it is a **strengths** if the exclusivity of the GI product should be prevailed, and a **weakness** if the producer intend a worldwide expansion .
- The current worldwide **level of GIs protection** is a **weakness** of this IPR category (with exceptions). In some markets GIs producers should rely on TM protection exclusively.

Conclusions (2)

- Consequences of the **low level of protection** represent a **threat**, nevertheless it could be partially managed and prevented by well targeted marketing and brand policy.
- Another **treath** for the GIs category is an **easy free riding** and an opposition to its stronger protection from free riders and those who intend to benefit from weak protection in the future.

Conclusions (3)

- GIs represent many **opportunities** in marketing and export **strategies**.
- The future extension of higher level of GIs protection would extend also export potential of genuine producers and would contribute to the development of the poorest communities and SMEs worldwide.
- Among **opportunities** belongs also a **consumer's interest in higher quality and origin guarantee** of products, which increases in dependence on his economical power and level of education.

Thank you for your attention

sterbovl@vse.cz