



Exploring the Use of Intellectual Property Tools to Promote Tourism Industry in Sri Lanka: A Legal Perspective

Nishantha Sampath Punchihewa

Department of Commercial Law, Faculty of Law, University of Colombo.

Article Information

© 2020 Faculty of Management, Uva Wellassa University. All rights reserved.

To Cite This Article:

Punchihewa N.S., (2020) Exploring the Use of Intellectual Property Tools to Promote Tourism Industry in Sri Lanka: A Legal Perspective, *Journal of Management and Tourism Research*, Vol III Issue II, pp.26-34, http://www.uwu.ac.lk/wp-content/uploads/2020/JMTR_V3I2_cH3.PDF

Keywords:

Tourism industry
Intellectual property tools
Competitive advantage
Economic growth

Printed: ISSN 2630-788X

Online : ISSN 2714-1691

Abstract

Tourism is one of the fastest-growing industries around the world and is a dynamic field. In Sri Lanka, the tourism sector remains a valuable source of income, through foreign exchange, and is a leader for economic growth. Sri Lanka is a country which has a glorious historical and cultural heritage that spans millennia; an island like no other, blessed with an abundance of natural beauty and attractions. In a knowledge-based economy where knowledge is used to generate wealth, intellectual property is considered as a tool for technological and socio-economic development of a country. Although Sri Lanka is one of the fastest growing tourism markets in the world and a top tourist destination, it has only just begun to develop its true potential for tourism promotion by reaping the benefits of the intellectual creations and innovations of its people. Using the intellectual property system for tourism promotion is part of a new business model for the tourism industry. In view of the above, this paper explores whether and to what extent intellectual property rights can be used to promote the tourism sector in Sri Lanka. Most importantly, the research finds that the intellectual property rights are powerful tools for strengthening the competitiveness of the businesses operating within the tourism industry. Therefore, there is an urgent need for the Sri Lankan tourism industry to effectively use different intellectual property tools in the tourism business. Undoubtedly, marring the intellectual system and tourism industry will go a long way towards creating new jobs, reducing poverty and achieving long-lasting economic growth in Sri Lanka.

Introduction*

“Endless beaches, timeless ruins, welcoming people, oodles of elephants, rolling surf, cheap prices, fun trains, famous tea and flavourful food make Sri Lanka irresistible.”

(Lonely Planet, 2018)

As succinctly illustrated by the Lonely Planet travel publication, from time immemorial, the island has fascinated travellers from all over the world. Tourism is one of the fastest-growing industries around the world and is a dynamic field. In Sri Lanka, the tourism sector remains a valuable source of income, through foreign exchange, and is a leader for economic growth. Sri Lanka is a country, which has a glorious historical and cultural heritage that spans millennia; an island like no other, blessed with an abundance of natural beauty and attractions. In a knowledge-based economy where knowledge is used to generate wealth, intellectual property is considered as a tool for technological and socio-economic development of a country. Although Sri Lanka was named as the best country in the world to visit in 2019 by Lonely Planet (Wilson, 2018), it has only just begun to develop its true potential for tourism promotion by reaping the benefits of the intellectual creations and innovations of its people. As well known, intellectual assets are the drivers of the knowledge-economy of the 21st century. From a business perspective, intellectual property (hereinafter referred to as ‘IP’) assets are the ‘crown-jewels’ of an innovation-driven business. Among the repertoire of intangible assets that businesses, regardless of stage or size, could own include, copyright, patents, designs, trademarks, geographical indications, trade secrets, protection against unfair competition, etc. In this sense, IP rights afford enormous economic opportunities for business owners in the tourism industry.

As part of their national development strategies, many countries in the world are increasingly developing tourism as an effective driver of economic growth and inclusive development, creating jobs and welfare for communities. Using IP rights tools for tourism and cultural promotion is part of a new business model for the tourism industry – a model which could generate benefits for the country through the creation of new jobs and the reduction of poverty, thus achieving long lasting economic growth (Punchihewa, 2017). More widely, IP rights can be useful for many different tourism stakeholders, including hotels, restaurants, transport, travel agents, tour operators and travel guides. From a business perspective, it is necessary to enhance competitiveness through the distinctiveness of the touristic offer. For this, the most important IP tools in the ‘smart marketing strategy’ are found in the distinctive signs system, which comprises trademarks, collective and certification marks, and geographical indications. Other IP rights such as patents, designs and copyright may also benefit other stakeholders in the thriving tourism market in the country. Overall, the IP system can support promoting competitiveness, innovation and growth in the tourism sector. In view of the above, this paper explores whether and to what extent intellectual property rights can be used to promote the tourism sector in Sri Lanka.

Objective of the Study

The potential use of IP tools in the tourism industry largely remains an unexplored territory of legal and tourism landscape in Sri Lanka and limited academic attention has been paid to examine the said scenario. Thus, this research was motivated by a clear lack of relevant legal and academic scholarship on the subject when Sri Lanka is deliberating on promoting the tourism sector to generate US\$ 10 billion in foreign exchange and increase the annual tourist arrivals to seven million by 2025. Thus, the main objective of this paper is to analyse, from an IP law perspective, the importance of using the IP system for competitive advantage in the fiercely competitive tourism

* Corresponding Author- sampath@law.cmb.ac.lk

Submitted: Nov 08, 2020; Revised: Nov 23, 2020; Accepted: Nov 23, 2020

sector in Sri Lanka. It further aims to shed light on different IP tools that can be effectively used to promote tourism products and services. This paper also intends to provide practical insights for tourism stakeholders as to how best the IP system can be effectively used to promote the tourism industry as a thrust sector for economic development in Sri Lanka.

Research Problem

Although Sri Lanka is one of the fastest growing tourism markets in the world and a top tourist destination, it is yet to reach its true potential in tourism promotion by reaping the benefits of the intellectual creations and innovations of its people. Consequently, Sri Lankan business owners in the tourism sector have inadequately explored the effective use of the IP system for competitive advantage in the fiercely competitive tourism marketplace, in spite of the growing importance of IP assets in the globalized economy. Arguably, IP rights are powerful tools for strengthening the competitiveness of the businesses operating within the tourism industry. Against this backdrop, there is an urgent and critical need for the Sri Lankan tourism industry to effectively use different IP tools in the tourism business in order to create new jobs, reduce poverty and achieve long-lasting economic growth in Sri Lanka.

Methodology

This research was conducted primarily as a library-based critical review of literature. In so doing, primary and secondary legal sources were used extensively. Desk research was conducted by consulting multiple sources of information on the use of IP tools for the tourism industry, including legal literature, case law, specialized articles and previous studies. Moreover, legal research and analysis concerning the domestic legal framework was carried out with the support of empirical evidence. In addition to the above, key-informant interviews with legal experts and tourism stakeholders Sri Lanka were conducted to ascertain expert views on the existing legal environment. The study employed the 'black letter' approach as the dominant form of methodology in this study (Qureshi, 2015). The paper also followed the qualitative research paradigm and relied heavily on 'revelational epistemology' as the philosophical basis (Conry & Beck-Dudley, 1996). In reality, legal researchers rely heavily on revelational epistemology as most legal scholars know what the law is by referring to an authority such as a legislature, a Supreme Court, or a Constitution.

Literature Review

Even though Intellectual property rights are recognized as the "invisible gold" at the heart of most successful businesses in the 21st century (Llewelyn, 2010), limited academic attention has been paid to examine the importance of using IP rights to promote the tourism industry both from a Sri Lankan and international perspective. In the field of IP law there has been little scholarly literature published pertaining to the use of IP tools in the tourism sector; hence it is hard, if not impossible, to find legal texts and journal articles comprehensively and directly dealing with the issue at hand. Of the literature available, the following have been selected as sources for this paper. In this regard, a research article by Nanayakkara (2011) posits that the intellectual property system provides very powerful tools for strengthening the competitiveness of those operating within the tourism industry. Moreover, Hirimuthugodage (2017) demonstrates how IP rights can be used as a tool for enhancing ecotourism in Sri Lanka. The author argues and emphasises the need for a well-established national policy on tourism focusing on ecotourism as one of the main subsets of the tourism sector. Most notably are two pilot studies recently conducted by the World Intellectual Property Organization (WIPO) which are available, namely; the Role of Intellectual Property in Sustainable Tourism Development: Two case Studies from Namibia (2019) and Intellectual Property in Tourism and Culture in Sri Lanka (2017). These studies have offered new insights into the use of IP rights in tourism and culture, but they are limited to specific case studies. Therefore, based on the above, it is clear that there is a dearth of relevant and helpful scholarly investigations on the topic in the Sri Lankan and international context. Therefore, this paper attempts to fill this information gap by contributing to the above discourse and explore the potential use of the IP tools in the tourism industry in Sri Lanka.

Findings and Discussion

Sri Lanka, or the "Pearl of the Indian Ocean" as it was once known, is a country endowed with a glorious historical and cultural heritage that spans millennia. From time immemorial, the island has fascinated travellers from all

over the world. Fa Hsien, a Chinese Buddhist Monk, visited in the fourth century; Alexander the Great is reputed to have visited in 330 B.C.; Marco Polo in the thirteenth century; and Mark Twain in the nineteenth century (Murray, 2009). Marco Polo described Sri Lanka in his accounts of his travels as "the best island of its size in all the world." The depth and diversity of its natural beauty, ranging from the blue ocean and the golden sands to the emerald green mountains and its fauna and flora have enthralled travellers. This legacy has made the country a prime tourist destination in the world. However, Sri Lanka has yet to meaningfully realize the full potential for strategic tourism promotion.

In a market-oriented and globalized world, IP is considered a tool for technological and economic development. The term 'IP' refers to types of property that result from creations of the human mind, the intellect. As IP assets play a very important role in today's knowledge-based economy, their protection should be a top priority for business success. IP is traditionally divided into two main branches, namely: 'industrial property' and 'copyright' (WIPO, 2008). The category industrial property (the term "industrial" was used to cover technology-based subject areas) includes patents, trademarks, industrial designs, geographical indications (GIs), undisclosed information and protection against unfair competition etc. The areas mentioned as literary, artistic and scientific works belong to the copyright branch of IP. The areas mentioned as performances of performing artists, producers of phonograms in their recordings and those of broadcasters in their radio and television programs are usually called 'related rights or neighbouring rights,' that is, rights related to copyright (WIPO, 2008). IP-related international documents including the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPs) have categorized IP rights under the following main headings:

- Trademarks, service marks and commercial names and designations e.g. logos or names for a product with unique geographical origin, such as Ceylon Tea. (through trademark, collective & certification marks);
- Innovative products and processes (through patents and utility models);
- Cultural, artistic and literary works including, in most countries, also for computer software and compilation of data (through copyright);
- Performances of performing artists, phonograms and broadcasts (through related or neighbouring rights protection);
- Creative designs, including textile designs (through industrial design rights);
- Microchips (through protection of layout-designs or topographies of integrated circuits);
- Origin-linked products with given quality or reputation attributable to the geographical origin (through protection of geographical indications);
- Trade secrets (through protection of undisclosed information of commercial value);
- Dishonest commercial practices, e.g. false claims against a competitor or imitating a competitor with a view to deceiving the customer (through protection against unfair competition); and
- Protection for the 'breeder' of new varieties of plants (through plant breeder's rights).

There are several compelling reasons for granting IP rights. First, the progress and well-being of humanity rests on its capacity to create and invent new works in areas of technology and culture (WIPO, 2003). Second, the legal protection of new creations encourages the commitment of additional resources for further innovation. Third, the promotion and protection of intellectual property stimulates economic growth, creates new jobs and industries, and enhances the quality and enjoyment of life (WIPO, 2003). Perhaps, more interestingly, IP has some common characteristics as in the case of other property rights. For instance, IP rights are, naturally, proprietary in nature. They can be bought and sold, mortgaged and licensed just like any other type of property. An IP right is an exclusive territorial right (Territorial means any intellectual property issued should be resolved by national laws) which excludes others from undertaking a number of commercial activities which include; making, selling, marketing, importing or using an article which embodies an IP right, without the authorization of the IP right holder. It should also be pointed out that IP laws also seek to balance the moral and economic

rights of creators and inventors with the wider interests and needs of the society.

In terms of the rationale for granting IP rights, various justifications have been put forward for the existence of such rights (Bainbridge, 2012). Although IP is not rooted in conventional property rights, it does not lack philosophical support. Several theories have been advanced to explain why society needs to grant IP rights. Most prominently, the “prospect theory” and “incentive theory” can be cited in support of granting IP rights to creators and inventors. The prospect theory advanced by Kitch (1977) argues that the IP system offers an array of prospects for commercialization of technological innovation. Another important thesis that speaks in favour of granting IP rights is the incentive theory which holds that economic actors will not tend to engage in economically valuable creativity and innovation without external rewards (Johnson, 2011). All in all, the philosophical richness of the justification of IP rights can be viewed through economic, moral, cultural and political dimensions.

In dealing with the legal environment pertaining to IP rights, historically, all societies have had to devise norms for regulating the ownership and use of inventions and creations of different kinds. Sri Lanka is no exception to this reality. The IP system in Sri Lanka originated during the British colonial period. From 1860 onwards, a number of British Acts were applied to Sri Lanka and continued to be applied even after Sri Lanka gained independence. However, after the introduction of a new policy for a free market economy in 1977, the Sri Lankan Government introduced its own IP regime by means of the *Code of Intellectual Property Act, No. 52 of 1979*, that marked a turning point in the evolution of the IP system in Sri Lanka. With the advent of new technologies and globalization, Sri Lanka has tried to keep up with development and adopted its IP regime to suit the new innovation climate. It has modernized its IP regime in line with TRIPS obligation with the introduction of the new IP Act which came into force in 2003. Therefore, the Code of Intellectual Property Act was replaced by *Intellectual Property Act, No.36 of 2003* (IP Act) to ensure that the Sri Lankan IP regime met obligations arising from the TRIPS Agreement (Karunaratna, 2010). As established in the parliamentary debate on the corresponding Bill, the aim of the new Act was to promote national creativity, protect creative efforts, enhance the integration of the national economy into the knowledge-driven global economy, attract more investment and protect consumer interests. The IP Act protects the main IP rights recognized by multilateral IP treaties, including copyright and related rights, inventions, industrial designs, trademarks, geographical indications (GIs), undisclosed information (including trade secrets), protection against unfair competition and layout designs of integrated circuits.

Viewed through the lens of travel industry, tourism is all about experience and the concept of ‘tourism’ embraces a social, cultural and economic phenomenon. From a business standpoint, tourism is, undoubtedly, the industry that has the greatest inter—and intra-link with all other industries and, as such, it is treated as an ‘umbrella concept’. More broadly, a tourist is a person who travels to destinations for leisure, business and/or pleasure. According to the World Tourism Organization (UNWTO) definition, “Tourism comprises the activities of persons travelling to and staying in places outside their usual environment for not more than one consecutive year for leisure, business and other purposes not related to the exercise of an activity remunerated from within the place visited” (UNWTO, 2012). Linking IP tools with tourism, can enhance the experiential dimension of the touristic offers by creating unique high-end experiences to attract big-spending tourists to the country.

In today’s globalized society, economic value is captured through the IP system, and the rights it confers which transform intangibles into tradable economic assets (WIPO, 2016). On the other hand, tourism is a highly important economic sector, making a significant contribution to the economies in the developing countries. Many countries in the world are increasingly using tourism in their national development strategies as an effective driver of economic growth and inclusive development, creating jobs and ensuring the welfare of communities. Therefore, a number of IP rights could play a crucial role in fostering tourism and culture in Sri Lanka. In this regard, exclusive rights attached to copyright, patents, trademarks, collective and certification marks, industrial designs, trade secrets, geographical indications and protection against unfair competition may be effectively used to add value and leverage the products and services offered in the tourism industry. In that sense, the IP system provides powerful tools for increasing the competitiveness of enterprises operating within the tourism industry.

More precisely, the most important IP tool for business success in the tourism sector is an appropriate distinctive sign to identify a product or service. Therefore, a trademark helps identify and develop tourist offers based on distinctive products or services which in turn can offer the discerning tourist a unique experience. In this context, a trademark is a badge of origin that enables a tourist to recognize a product of a particular business. Viewed through the lens of practical use, the luxury Ayurveda Spa Ceylon brand has been registered by NIPO under the trademark regime of Sri Lanka (under Class 44 of the Nice Classification for health Spa Services, Reg. No. 150430) since 2009. Significantly, a logo can be protected as a trademark, collective or certification mark and it can be used to differentiate products and services marketed by accommodation providers, restaurants, tour operators, travel agents etc. In fact, goodwill and reputation attached to such marks have much value in the tourism business. For example, a trademark used in a tourist transport system or certification mark used in spas or collective mark used to distinguish authentic handcraft made according to certain tradition create value in the market. As such, the use of a trademark helps the owner of the business to leverage the value of the enterprise’s products and services in the competitive tourism marketplace. Therefore, it is submitted that the trademark system (including collective and certification marks) can effectively be used to brand Sri Lanka as a tourist destination and guarantee the quality of tourism products and services.

Copyright protects literary and artistic creations, such as literature guide books, leaflets and promotional materials used in the tourism industry, while the rights of the performers in traditional dances associated with cultural festivals such as the Kandy *Esala Perahera* are covered by neighboring rights, and the dance itself may be considered as a traditional cultural expression. In view of the current challenges faced by the tourism industry, personal protective equipment that can be used during public health emergencies such as the Covid-19 pandemic are critical to the sustainability of the tourism industry. Therefore, such technological solutions, when necessary conditions are met, may be protected by the patent system and new products can be successfully used in the tourism sector. Traditional knowledge-inspired innovation and traditional food recipes and processes could be protected by patents, designs and trade secrets. The industrial designs which are new and original that meet the conditions for protection can be accorded industrial design protection. Even innovative designs of Ayurvedic spas in tourist hotels could be protected by design rights, if the necessary conditions for protection of such designs are fulfilled. Hotels could capitalize on the branding and trademark regime, including certification and collective marks, to distinguish their goods and services and gain a competitive edge. Ceylon tea, Ceylon cinnamon, black pepper, gem stones and other goods could be protected by virtue of their origin under the geographical indications (GI) and certification mark systems. The Sri Lankan Tea Board registered “Ceylon Tea” together with the lion logo as a certification mark in January 2011 (Reg. No. 153931). The lion logo is therefore used by authorized tea producers as a symbol of quality. Last but not least, protection against unfair competition could shield the tourism industry from unfair and dishonest trade practices.

Significantly, the afore-mentioned IP tools can be of great importance for achieving ‘sustainable tourism-development’ which satisfies the present needs without jeopardizing the ability of future generations to satisfy their own needs (United Nations, 2012). Also, from an economic point of view, the role of intangible assets in value capture is highlighted in recent studies. Value capture at each stage of the tourism value chain (which involves product design, manufacturing, assembly, marketing, distribution and sales) would certainly benefit the Sri Lankan tourism industry (WIPO, 2017). Intangible capital – in the form of technology, design and branding helps business firms to create and capture high value on high-quality and appealing consumer products and services in the tourism sector. Moreover, IP tools such as GIs, collective and certification marks can certainly create value for local communities through products that are deeply rooted in tradition, culture and geography. The use of IP tools in tourism also facilitates local community involvement in the tourism value chain via the supply of goods and tourism services. Therefore, now is the time for the Sri Lankan tourism sector to adopt a new business model and promote tourism using IP tools.

Conclusion and Recommendations

From an economist’s perspective, the IP system is viewed as a catalyst for economic development, job creation and improvement in the quality of life and standard of living. As analyzed earlier, IP is a generic term that is used to introduce the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields. Tourism is all about experience

and the concept of 'tourism' embraces a social, cultural and economic phenomenon. Arguably, linking IP, tourism and culture creates immense potential for local the tourism sector. As innovative and creative ideas are at the heart of most successful tourism businesses, IP system enhances the value of those creations and innovations. From a legal standpoint, IP rights are private legal rights. IP right owners/holders can exclude others from using the protected IP assets.

When looking at the Sri Lankan context, the tourism industry which is a demand-driven, consumer-defined activity may also be able to use IP rights to leverage tourism products and services. This is a new business model to use the IP system to make touristic offers more attractive and competitive in the tourism market. It is, therefore, imperative that the country explores new means of economic development through the use of IP in the tourism industry. As tourism has a profound impact on the formal and informal sectors of the economy in Sri Lanka, it is a challenge to ensure that the economic benefits of tourism trickle down and create opportunities not merely for multinational and large entities, but also for micro, small and medium-sized enterprises, all the way down to the grass roots level. To this end, the innovative use of IP tools would certainly add value to the tourism industry and further expand its global footprint. Undoubtedly, marring the intellectual system and tourism industry will go a long way towards creating new jobs, reducing poverty and achieving long-lasting economic growth in Sri Lanka.

References

- Bainbridge, D. (2012). *Intellectual Property* (9th ed.). Essex, England: Pearson Education Limited, 18.
- Berkmoes, R.V., Mahapatra, A., Mayhew, B., & Stewart, I. (2018). *Longley Planet Sri Lanka*. Melbourne, Australia: Lonely Planet, 4.
- Conry, E.J., & CL Beck-Dudley, C.L. (1996). Meta-Jurisprudence: The Epistemology of Law. *American Business Law Journal* (33), pp 373-450.
- Idris, K. (2003). *Intellectual Property - A Power Tool for Economic Growth*. Geneva, Switzerland: World Intellectual Property Organization, 8.
- Hirimuthugodage, D. (2016). Intellectual property rights as a tool for enhancing ecotourism in Sri Lanka. *Institute of Policy Studies of Sri Lanka*. Retrieved from http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=154851. Accessed on 20 February 2020.
- Johnson, E.E. (2011). Intellectual Property and the Incentive Fallacy. *Florida State University Law Review* 39, pp 662-671.
- Karunaratna, D.M. (2010). *Elements of the Law of Intellectual Property in Sri Lanka*. Nugegoda, Sri Lanka: Sarasavi Publishers, pp 17-20.
- Kitch, E.W. (1977). The Nature and Function of the Patent System. *Journal of Law and Economics* 20(2), pp 265-290.
- Murray, M.A. (2009). *Island Paradise: The Myth: An Examination of Contemporary Caribbean and Sri Lankan Writing*. New York: United States: Editions Rodopi, 15.
- Nanayakkara, T. (2011). Role of Intellectual Property in Enhancing the Competitiveness of the Tourism Industry. Retrieved from http://www.wipo.int/export/sites/www/sme/en/documents/pdf/tourism_ip.pdf. Accessed on 20 July 2020.
- Punchihewa, N.S. (2017). *Intellectual Property in Tourism and Culture in Sri Lanka*. Geneva, Switzerland: World Intellectual Property Organization, 6.
- Qureshi, S. (2015). Research Methodology in Law and Its Application to Women's Human Rights Law. *Journal of Political Studies* 22(2), pp 629-643.
- United Nations, (2012). Rio+20: The Future We Want. *United Nations Conference on Sustainable Development*. Retrieved from <https://sustainabledevelopment.un.org/content/documents/733FutureWeWant.pdf>. Accessed on 10 July 2020.
- Wilson, A. (2018, October 23). Sri Lanka ranked top country for travel in 2019 by Lonely Planet. *The Guardian*. Retrieved from <https://www.theguardian.com/travel/2018/oct/23/sri-lanka-ranked-top-country-for-travel-in-2019-by-lonely-planet>. Accessed on 20 October 2020.
- World Intellectual Property Organization, (2016). Intellectual property, finance and economic development. *WIPO Magazine*. Retrieved from http://www.wipo.int/wipo_magazine/en/2016/01/article_0002.html. Accessed on 10 May 2020.
- World Tourism Organization (UNWTO), (2012). *Understanding Tourism: Basic Glossary*. Retrieved from <http://cf.cdn.unwto.org/sites/all/files/docpdf/glossaryenrev.pdf>. Accessed on 20 May 2020.
- World Intellectual Property Organization, (2003). *What is Intellectual Property?* Geneva, Switzerland: World Intellectual Property Organization, 3.
- World Intellectual Property Organization, (2008). *WIPO Intellectual Property Handbook* (2nd ed.). Geneva, Switzerland: World Intellectual Property Organization, 3-4.
- World Intellectual Property Organization, (2017). *World Intellectual Property Report 2017*. Geneva, Switzerland: World Intellectual Property Organization, 104.