

10-1-2008

Protection of Trademarks and Geographical Indications

Inessa Shalevich

University at Buffalo School of Law (Student)

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffaloipjournal>



Part of the [Intellectual Property Law Commons](#), and the [International Trade Law Commons](#)

Recommended Citation

Inessa Shalevich, *Protection of Trademarks and Geographical Indications*, 6 Buff. Intell. Prop. L.J. 67 (2008).

Available at: <https://digitalcommons.law.buffalo.edu/buffaloipjournal/vol6/iss1/4>

This Essay is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Intellectual Property Law Journal by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

ESSAY

Protection of Trademarks and Geographical Indications

INESSA SHALEVICH†

INTRODUCTION

The regulation of terms that indicated—or once indicated—the geographic origin of goods or services, such as champagne, burgundy, or parmesan, has become increasingly controversial with globalization and advances in manufacturing technology. These terms, known as geographical indications (GIs), are more commonly known as labels of origin. International treaties and the different regulatory approaches taken by various countries have broad cultural implications in this controversy. Many multinational corporations, artisans, and industrialists argue that international trade poses a threat to maintaining national culture.

GIs are used extensively with wine, spirits, cheeses, meat products, and other foods. The European Union (EU) endorses the creation of a global registry¹ to protect unique GIs for the labeling of “agro-food products, such as Roquefort cheese.”² Under such a registry, the GI “Roquefort,” for instance, could only be used as a label if the cheese actually originates in Roquefort, France.³ The United States opposes such a move. This Essay will focus on the advantages of the U.S. system of

† J.D. Candidate, Class of 2009, University at Buffalo Law School, The State University of New York; George Washington University Law School 2007, Summer Intellectual Property Law Program at The Max Plank Institute in Munich, Germany; B.A. in Computer Science, 2004, Pace University, School of Computer Science and Information Systems, New York, NY. The author would like to thank the Executive Editors for their dedication and hard work on this publication and Dariush Keyhani for his encouragement and valuable guidance.

¹ Valérie Boisvert, Int’l Food Policy Research Inst., From the Conservation of Genetic Diversity to the Promotion of Quality Foodstuff 21 (CAPRI Working Paper No. 49, 2006), available at <http://www.capri.cgiar.org/pdf/capriwp49.pdf>.

² Elizabeth Barham, *Translating Terroir: The Global Challenge of French AOC Labelling*, 19 J. RURAL STUD. 127, 128 (2003).

³ Marion Demossier & Hugh Clout, *Rural France in Europe: New Challenges*, 11 MODERN & CONTEMP. FR. 265, 274-75 (2003).

trademarks and GIs over the European system by discussing the benefits gained by protecting GIs through a trademark system.

I. CONTEXT FOR THE GEOGRAPHICAL INDICATIONS CONTROVERSY

The United States protects GIs as trademarks, collective marks, or certification marks by employing the existing trademark regime. “Trademarks” basically include “any word, name, symbol, or device, or any combination thereof,” used by a person to identify and distinguish her goods from those produced and sold by others.⁴ Collective marks are those marks used by associations, unions, cooperatives, fraternal organizations, or other organized collective groups.⁵ “A certification mark is any word, name, symbol, or device used by a party or parties other than the owner of the mark to certify some aspect of the third parties’ goods and services.”⁶ The U.S. regime is already familiar to businesses—both foreign and domestic. The system easily accommodates GIs that are not merely place names as Europe demands, but also signs such as designs, colors, sounds, scents, words, slogans, and three-dimensional marks.⁷ The European system does not protect such geographic indications because they are too subjective.

The Agreement of Trade-Related Aspects of Intellectual Property Rights of April 15, 1994 (TRIPS Agreement) is the first multilateral agreement dealing with GI subject matter. Article 22 of the TRIPS Agreement states: “Geographical indications are, for the purposes of this Agreement, 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.”⁸

Under the TRIPS Agreement, GIs can be applied to any type of products because a GI designates a particular country, region, or locality. It may be a geographical name like “Napa Valley” wine from California State’s Napa Valley, “Blue Mountain” coffee from Jamaica, or it may not necessarily even be a geographic name—“Basmati” rice comes from the sub-Himalayan region of the Indian sub-continent. Furthermore, a GI can

⁴ See Lanham Trademark Act § 45, 15 U.S.C. § 1127 (2006).

⁵ U.S. Patent & Trademark Office, Geographical Indication Protection in the United States 4, http://www.uspto.gov/web/offices/dcom/olia/globalip/pdf/gi_system.pdf (last visited Dec. 15, 2008).

⁶ *Id.* at 2.

⁷ *Id.*

⁸ Agreement of Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round art. 22, 33 I.L.M. 1125, 1197 (1994).

also be a symbol or an emblem—such as the “Taj-Mahal” to designate Indian products of that region.

Adopting a global standardized system for GIs is troublesome for many U.S. corporations⁹ and underlies the argument for U.S. opposition to GIs in World Trade Organization (WTO) negotiations. Problems arise in particular for U.S. producers who already use the names of European places for their products.¹⁰ This practice is often found in countries that have experienced heavy European immigration, such as Canada and many Latin American countries.¹¹ Immigrant European business owners use geographic names associated with quality products from their home countries to promote their own products in their new homes.¹² Alternatively, the United States and some other countries have treated these place names as generic names for certain types of products to the chagrin of countries where the actual regions are located, such as Champagne in France.¹³

One notable example of this involves the production of beer under the mark “Budweiser.” While “Budweiser” is produced by Anheuser-Busch Companies, Inc., of the United States, “Budweiser” is also produced in the Czech Republic by Budweiser Budvar, which claims to be the “original” producer of Budweiser beer.¹⁴ Nevertheless, Anheuser-Busch was the leading U.S. brewer in 1957, and following years of extensive advertising, it retains this position as “The Leading U.S. Brewer and Producer of the World’s Largest-Selling Beer Brands.”¹⁵ Despite the similarity to the European product’s name, it is highly unlikely that Anheuser-Busch would relinquish use of their beer’s name without a struggle. The same holds true for numerous corporations worldwide that find themselves in similar situations where conflicting interests make compromise extremely difficult, but not impossible if a world trade system is set up through the WTO.

There are two Agreements which address the important issue of indications of source: the Madrid Agreement of April 1891 for the Repression of False or Deceptive Indications of Source on Goods and the Paris Convention of March 1883 for the Protection of Industrial Property.

⁹ Aaron C. Lang, *On the Need to Expand Article 23 of the TRIPS Agreement*, 16 DUKE J. COMP. & INT’L L. 487, 497 (2006).

¹⁰ Barham, *supra* note 2, at 128.

¹¹ *Id.*

¹² *Id.*

¹³ See Tomer Brode, *Taking “Trade and Culture” Seriously: Geographical Indications and Cultural Protections in WTO Law*, 26 U. PA. J. INT’L ECON. L. 623, 674 n.156 (2005).

¹⁴ Budweiser Budvar, Trademarks, <http://www.budvar.cz/en/o-nas/znacka-budweiser-budvar.html> (last visited Dec. 15, 2008).

¹⁵ Anheuser-Busch, A Brief History of Anheuser Busch, <http://www.anheuser-busch.com/briefHistory.html> (last visited Jan. 15, 2009); Anheuser-Busch, Anheuser-Busch, Inc., <http://www.anheuser-busch.com/ABInc.html> (“In 2007, Anheuser-Busch, Inc. celebrated 50 years as the U.S. industry leader.”).

Article 1.1 of the Madrid Agreement contains elements that clarify what is meant by the term “indication of source”: “All goods bearing a false or deceptive indication by which one of the countries to which this Agreement applies, or a place situated therein, is directly or indirectly indicated as being the country or place of origin shall be seized on importation into any of the said countries.”¹⁶

Indications of source identify the geographic region where the product originates and not the originating product manufacturer, as is the case for trademarks.¹⁷ The definition of “indications of source” does not imply any special quality, characteristic, or reputation of the identified product attributed to its place of origin, distinguishing them from GIs. Indications of source may be words that directly indicate the origin of the product, such as the names of countries, regions, or cities. They may also be symbols or emblems that indirectly evoke the geographic origin of the product, such as the image of the Statue of Liberty to identify products from the United States.

Products that have unique qualities resulting from the geographical environment of a specific region fall under the “appellation of origin” classification. The Lisbon Agreement of October 1958 for the Protection of Appellations of Origin and Their International Registration is the international reference for the phrase “appellations of origin.” Article 2.1 of the Lisbon Agreement states: “In this Agreement, ‘appellations of origin’ means the geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.”¹⁸

This definition extends beyond indicators of source because a product identified using an appellation of origin must not only originate from a specific place but must also have indigenous characteristics and qualities that reflect the special environment, unique geography, and natural and human factors not likely to be found elsewhere. This is similar to GIs, but the definition of “appellation of origin” has stricter requirements. First, mere “reputation” of the product is not sufficient to obtain protection by appellation of origin; specific qualities or characteristics have to be expressed in the particular product. Second, appellations of origin must be

¹⁶ Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods art. 1, Apr. 14, 1891, 828 U.N.T.S. 389.

¹⁷ Felix Addor & Alexandra Grazioli, *Geographical Indications Beyond Wines and Spirits: A Roadmap for a Better Protection for Geographical Indications in the WTO TRIPS Agreement*, 5 J. WORLD INTELL. PROP. 865, 872 (2002).

¹⁸ Lisbon Agreement for the Protection of Appellations of Origin and their International Registration art. 2, Oct. 31, 1958, 923 U.N.T.S. 189, available at http://www.wipo.int/lisbon/en/legal_texts/lisbon_agreement.htm#P22_1099.

precise geographic names of countries, regions or localities; mere symbols or emblems that indirectly reference a geographical origin are not sufficient. Examples of appellations of origin are “Jaffa” for oranges from Israel, “Habanos” for tobacco from Cuba, and “Veracruz” for coffee from Mexico.¹⁹

The definition of GIs in the TRIPS Agreement includes appellations of origin. The Lisbon Agreement limits appellations of origin to the criteria of quality and characteristics of a product attributable to its geographical origin, whereas the TRIPS Agreement also mentions the reputation of the product. However, the definition of GIs in the TRIPS Agreement does not cover all indications of source because the product identified with a GI has to not only originate from a specific geographical place, but must also have a quality, reputation, or other characteristics which can only be attributable to its geographical origin (not all indications of source fulfill these requirements). Under the TRIPS Agreement, quality, reputation, and other characteristics are each in their own right a sufficient but indispensable condition for the existence of a GI.²⁰

II. THE UNITED STATES’ “SYSTEM” FOR THE PROTECTION OF GIs

GIs are protected in the United States by a trademark system comprised of certification and collective marks. The United States’ system can provide TRIPS-plus levels of protection to GIs of either domestic or foreign origin and has provided protection to foreign and domestic GIs since at least 1946, decades prior to the implementation of the TRIPS Agreement.²¹ GI protection can be implemented at the national level in two ways according to the TRIPS Agreement standards: either through a system of specific protection for GIs that meets the “collective” approach inherent to a GI, or through the system of trademarks which bears an “individual ownership” approach. “The differences of these two implementation concepts have important consequences on the perceptions of members, according to their legal traditions, in relation to the benefits and risks associated with the actual discussion in the Council for TRIPS on improving international protection of GIs.”²²

Like trademarks or commercial names, GIs are signs that identify products on the market. They specifically function as: source-identifiers, guarantees of quality, and valuable business interests.²³ When protected and

¹⁹ Addor & Grazioli, *supra* note 17, at 868.

²⁰ *Id.* at 885-90.

²¹ U.S. Patent & Trademark Office, *supra* note 5, at 1.

²² *Id.*

²³ *Id.*

used properly, GIs are effective and economically valuable marketing tools for conveying the cultural identity of a nation, region, or specific area. They also give notoriety to the natural riches of a country and to the skills of its population, engendering local products with a distinguishable identity.²⁴ The protection of GIs at the international level today is far from being adequate. With the exception of wines and spirits, GIs are easily misused. Although a number of countries have developed legislation to protect GIs for all products, national regulations which only apply in one country are insufficient in a global economy.

The United States has collective trademarks and collective service marks. Both are adopted by a "collective" for use only by its members. As indicated above, a collective may be an association, union, cooperative, fraternal organization, or other organized collective group.²⁵ The members use the mark to identify their goods or services and distinguish them from those of non-members. The Trademark Trial and Appeal Board, a United States Patent and Trademark Office (USPTO) administrative tribunal, has explained the distinction between the two types of collective marks. The "collective" itself does not sell goods nor does it perform services under a collective trademark or collective service mark. However, "the collective may advertise or otherwise promote the goods or services sold or rendered by its members under the mark."²⁶

A collective membership mark indicates only membership in an organized collective group. Neither the collective nor its members use the collective membership mark to identify and distinguish goods or services. Instead the mark indicates that the person displaying it is a member of the organized collective group.²⁷ Collective trademarks and collective service marks indicate commercial origin of goods or services just as "regular" trademarks and service marks do, but as collective marks they indicate origin in members of a group rather than origin in any one member or party. An agricultural cooperative of produce sellers is an example of a collective organization that does not produce nor sell its own goods, but promotes the services and goods of the member sellers. "All members of the group use the mark so no one member can individually own the mark, and the collective organization holds the title to the collectively used mark for the benefit of all members of the group."²⁸

Geographic names or signs cannot be registered as trademarks or

²⁴ Addor & Grazioli, *supra* note 17, at 866.

²⁵ U.S. Patent & Trademark Office, *supra* note 5, at 4.

²⁶ *Id.*

²⁷ Aloe Creme Lab., Inc. v. Am. Soc'y for Aesthetic Plastic Surgery, Inc., 192 U.S.P.Q. 170, 173 (T.T.A.B. 1976).

²⁸ U.S. Patent & Trademark Office, *supra* note 5, at 5.

collective marks because they are geographically descriptive, yet they can be registered as certification marks under the U.S. Trademark Act without showing any acquired distinctiveness.²⁹ As stated, a “certification mark is any word, name, symbol, or device used by a party or parties other than the owner of the mark to certify some aspect of the third parties’ goods and services.”³⁰ Certification marks are used to indicate regional or national origin, material, mode of manufacture, quality, accuracy, other characteristics of the goods or services, or that the work or labor on the goods or services was performed by a member of a union or other organization.³¹

Certification marks can be used to certify more than one characteristic of the goods or services in more than one certification category. They differ from trademarks by two characteristics. “First, a certification mark owner does not use it. Second, a certification mark does not indicate commercial source nor distinguish the goods or services of one person to another.”³² Anyone that achieves the certifying standards is then permitted to use the certification mark.³³ Certification marks are source-identifying in that they attest to the quality of the goods and affirm that the goods have met specific required standards.

The owner of a certification cannot produce the goods or perform the services in connection with the mark that is used.³⁴ Therefore, no one other than the owner may use the mark unless the owner has given his permission. The certification mark owner decides whether others may use the mark on the certified goods or services and has to take steps to ensure the mark is applied only to goods or services that meet the specified requirements established or adopted for the certification.³⁵

The mark’s certification serves to inform consumers that the goods or services that the authorized manufacturer possesses has met the required standards. Certification marks used in connection with goods or services indicate to the consumer that the product has either been examined, tested, inspected, or in some way reviewed by the owner. The mark’s use constitutes that prescribed characteristics have been met.

In the United States, a governmental body or an organization operating under governmental authorization controls the use of geographical terms as certification marks. Those controlling the geographic

²⁹ See Lanham Trademark Act §§ 2, 4, 15 U.S.C. §§ 1052, 1054 (2006).

³⁰ U.S. Patent & Trademark Office, *supra* note 5, at 2.

³¹ *Id.*

³² *Id.* at 3.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

term used as a certification mark are primarily concerned with preserving the freedom of all persons in the region to use the term and preventing abuses or illegal uses of the mark. Unauthorized use of the mark could be detrimental to everyone who is entitled to use the mark. The USPTO has stated that “a private individual is generally not in the best position to fulfill these objectives satisfactorily.”³⁶ The government of a region must control the use of a region’s name, preserve the right of all persons, and prevent abuse or illegal use of the mark (either directly or through a body) to which it has given authority.³⁷

The U.S. government has separate inspectors for various agricultural types of food and beverages to protect GI certification marks. Those seeking to oppose or to cancel registration within the existing U.S. trademark regime, because an inspector does not follow the standards or is unjustifiably denying use of the mark, can file an opposition or cancellation proceeding against the certification mark or bring an action in federal court.³⁸ If the certifier controls the use of the mark and limits it to goods or services meeting the standards of regional origin, and if consumers understand that the sign refers only to goods or services produced in the particular region and not elsewhere, then the sign functions as a regional certification mark.³⁹

The geographic terms that are generic for goods and services are not protected in the United States.⁴⁰ A “generic” geographic term is one that is “so widely used that consumers view it as representing a category of all of the goods and services of the same type, and geographic origin.”⁴¹ For example, the word “carrot” cannot be protected as a trademark for carrots because the word “carrot” is the generic name for a type of vegetables. Many countries including the United States do not protect generic indications because they do not sufficiently identify a specific business source. If a geographic designation becomes generic in the United States, any producer is free to use the designation for its goods and services.

In the United States, when the use of a mark is “likely to cause confusion, mistake or deception” as to the source of the goods and services in the minds of the purchasers, only the trademark or GI owner has the right to prevent the unauthorized party from using that mark or GI.⁴² The

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 4.

³⁹ *Institut National Des Appellations D’Origine v. Brown-Forman Corp.*, 47 U.S.P.Q.2d 1875, 1896 (T.T.A.B. 1998) (holding “COGNAC” as a geographical indication for French brandy).

⁴⁰ U.S. Patent & Trademark Office, *supra* note 5, at 4.

⁴¹ *Id.* at 1.

⁴² *Id.* at 2.

trademark or GI owner is considered a prior right holder and has priority and exclusivity over any later users of the same, similar, related, or in some cases—even unrelated goods or services if consumers are likely to be confused by the two uses.⁴³

III. THE UNITED STATES-EU CASE BEFORE THE WTO: TRADEMARKS AND GIS

European countries argue against the U.S. trademark and GI system when producers want to access a market and are prevented from doing so because there are already products identified by trademarks. These products use the GI even though they do not originate from the indicated region or have the required characteristics to legitimately hold the GI. The trademark holders are essentially free-riding on the GI and preventing the entry of the original product into the market. Countries which do not practice the “first in time, first in right” rule argue that trademarks can prevent products legitimately identified by a GI from entering these markets. Acquiring the rights of an existing trademark may be complicated and expensive, and therefore not feasible for small producers or those with limited resources coming from developing countries. To resolve the clash between trademarks and GIs, they claim that the question should be: “Who is permitted to use a GI?,” and not, “Who used the GI first?” Therefore, the logical argument against the U.S. system is that a specific protection system for GIs would seem more appropriate to provide adequate and suitable protection for this intellectual property right when trademarks are not ideal instruments for ensuring effective and comprehensive GI protection. However, the governing body known as the USPTO processes applications for both trademarks and GIs and uses administrative trademark structures that function well to address the concerns of any interested parties who oppose or want to cancel a registered GI if those parties believe they will be damaged by the registration or continued existence of a registration.

What distinguishes GIs from other intellectual property rights is that GIs are owned and exercised collectively based on collective traditions. GIs are not analogous to intellectual property rights because they confer on the producers, located in the area identified by the GI and producing the particular product, the exclusive right to use this unique designation, which adds economic value. “The main advantage of geographical indications as a means of protection for informal innovation is the ‘relative impersonality’ of the right, i.e. the protected subject-matter is related to the product itself (its attribute or definition) and is therefore not dependent on a specific right

⁴³ *Id.*

holder.”⁴⁴

As provided for in Article 15.1 of the TRIPS Agreement, a trademark is used to distinguish products or services of one competitor from those of other competitors. In order to distinguish a product or service, a trademark must not be descriptive or deceptive. A GI on the other hand is by definition descriptive because a geographic name implies the geographical origin of the product it identifies. In many countries, a GI will not be registered as a trademark for a product despite it being produced exclusively in the geographical area of the GI. This is because a geographic name is considered to be insufficiently distinctive. An example of this occurred when Australian courts refused to permit the registration of “Michigan” as a trademark for earthmoving equipment.⁴⁵

The TRIPS Agreement includes provisions to specifically address the possible conflicts that may arise between trademarks and GI. Article 22.3 provides the basic provision on the relationship between trademarks and GIs.⁴⁶ Article 23.2 deals specifically with trademarks for wines and spirits that contain or consist of a GI identifying wines and spirits.⁴⁷ Article 24.5 establishes a grandfather clause in favor of trademarks that are identical or similar to GIs if they were acquired in good faith either before the date of application of the national provisions as defined in Part VI of the TRIPS Agreement or before the GI is protected in its country of origin.⁴⁸

The United States is accustomed to using trademarks as a tool for protecting intellectual property associated with a business name. Trademarks in the United States belong to individuals or corporations. Corporations can be treated as individuals before the law and can be bought and sold as a business asset. If a trademark is infringed upon, it is up to the individual or corporation to defend their rights to the name before a court of law. The United States has taken the position that the current system of international trademarks can be used to protect origin labeled products. EU countries disagree because they point out that labels of origin belong to the region itself and are only administered by state governments.⁴⁹

Additionally, they claim that “the administration by state governments

44 R. SILVA REPETTO & M. CAVALCANTI, FOOD & AGRIC. ORG. OF THE UNITED NATIONS, MULTILATERAL TRADE NEGOTIATIONS ON AGRICULTURE: A RESOURCE MANUAL IV § 3.4.1 (2000), available at <http://www.fao.org/docrep/003/X7355E/X7355e03.htm>.

45 Clark Equip. Co. v. Registrar of Trade Marks (1964) 111 C.L.R. 511 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/HCA/1964/55.html>.

46 Addor & Grazioli, *supra* note 17.

47 *Id.*

48 *Id.*

49 Org. for an Int'l Geographical Indications Network, A Summary of the 2004 Annual WTO Public Symposium and ORIGIN Round Table on Geographical Indications: Localisation Within Globalisation 2 (May 27, 2004), available at <http://www.ige.ch/jurinfo/documents/j10403e.pdf>.

prevents consumer fraud by overseeing certification systems and other controls.”⁵⁰ However, individual producers within territories covered by GIs cannot buy, sell, or inherit the rights to the name of the territory, as they can with trademark names. Nor can they move their production out of the region and retain the region’s name, as a corporation could move production of a trademarked item, yet retain the trademark name. Producers that are located in a territory protected by a GI are only allowed to use the name of that territory in their product labeling if they follow the requirements placed on their goods.⁵¹

A long-standing struggle between the EU and the United States, little known to those outside the field of international law, has been intensifying ever since the signing of the General Agreement on Tariffs and Trade (GATT) in 1994.⁵² Other countries from around the world have aligned themselves with either the EU or the United States in this debate. The outcome of the dispute concerning the portion of the GATT dealing with intellectual property that addresses GIs could have important repercussions for rural development globally. Furthermore, many developed, developing, and even the least-developed countries around the world are actively working within the WTO to have the existing protection granted by the TRIPS Agreement to GIs for wines and spirits extended to cover GIs identifying all products. They claim this would have economic benefits and great trade potential inherent to GIs.⁵³ These countries fear GIs being illegitimately used by producers and manufacturers who are not located in the designated region because they claim it may cause considerable loss of reputation and long-term income for the producers and manufacturers within their territories.

European countries believe that extending additional protection to identify products of the same category such as agricultural, handicraft, and artisanal production for GIs beyond wines and spirits under the TRIPS Agreement would lead to a satisfactory and balanced international minimal level of protection of GIs for all products. One argument made is that such a step may increase the value of GIs and encourage more quality and niche products to be put on the world’s markets. European countries claim that this is not only in the interest of legitimate producers and manufacturers in all countries, but also in consumers’ interests because they may be keen to see labels that clearly identify traditional quality products.⁵⁴

Conversely, the counterargument to the EU stance is that stronger

⁵⁰ *Id.* at 3.

⁵¹ U.S. Patent & Trademark Office, *supra* note 5, at 2.

⁵² Barham, *supra* note 2, at 127.

⁵³ Addor & Grazioli, *supra* note 17, at 892.

⁵⁴ *Id.* at 890.

protection of GIs is not in the consumer interest. A GI is not awarded based on inherent qualities of the product such as its ingredients. Instead, it is awarded when the presence of the GI on the label carries a very specific message to the consumer about the process of production. Eco-labels such as “organic,” “fair trade,” and “rain forest friendly” focus on process as a key distinguishing feature of product labels that attempt to connect to non-market values held by consumers.⁵⁵ While eco-labels promote worthy goals, they travel with the product, respectively, informing the consumer of how the product was produced, but not necessarily where it was produced. Labels of origin, on the other hand hold the potential of re-linking production to the social, cultural and environmental aspects of particular places, further distinguishing them from anonymous mass produced goods opening the possibility of increased responsibility to place.⁵⁶

As in other interactions between trade and non-trade values, the problem lies in determining the line between disguised protection of trade and bona fide cultural policy. This is a dilemma that arises when trade disciplines and cultural interests clash. The question is: What is cultural policy actually protecting? Assuming that culture is an inherently broad concept, it may be more effective to identify the dimensions of culture that may be affected by trade in any good or service and that have value because of human effort that has brought it into existence. A human effort of creating a widget may generally become cultural in three possible ways: (1) through the culture of its production, (2) the culture of its consumption, or (3) the culture of its identity.⁵⁷ These three dimensions of culture help clarify the cultural basis of the arguments for increased GI protection for food and wine products.⁵⁸ There is no question that food is important as the source of nutrition and sustenance throughout the world. Food is also an important expression of cultural practices, perceptions, and identities, both individual and collective. However, it is important to question whether food and wine should be considered “culture.”

⁵⁵ Elizabeth Barham, *Social Movements for Sustainable Agriculture in France: A Polanyian Perspective*, 10 SOC'Y & NAT'L RES. 239, 245 (1997).

⁵⁶ *Id.*

⁵⁷ Broude, *supra* note 13, at 638. “This cultural attribute corresponds superficially to the requirement in article 4(4)a of the UNESCO First Draft Convention that ‘Cultural Goods or Services’ be the “outcome of human labor (industrial, artistic or artisanal) and require the exercise of human creativity for their production.”” Broude, *supra* note 13, at 638 & n.47, n.48; (citing UNESCO, Preliminary Draft of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions art. 4(4), July 2004, UNESCO Doc. CLT/CPD/2004/CONF-2011/2, available at <http://unesdoc.unesco.org/images/0013/001356/135649e.pdf>).

⁵⁸ See Broude, *supra* note 13, at 642.

IV. GENERICISM RECONSIDERED IN THE UNITED STATES AND THE EU

Growing globalization threatens not only the commodity produced, but its underlying productive culture. The loss of the product due to mass culture is not the true cultural cost, rather it is the method of production and lifestyle it supports that could be displaced by alternative products, industrial substitutes, and indifferently shifting consumer tastes.⁵⁹ A consumer is generally oblivious to the “make” of the product when a hand-produced product and machine-made product perform equally well. The knowledge and culture of handicrafts will be irreparably lost if the process is not considered when a consumer is making a purchase.

Institut National des Appellations d’Origine (INAO) is the French organization charged with regulating controlled place names.⁶⁰ Certain French GIs for wines, cheeses, butters, and other agricultural products that are produced according to rules codified by the INAO are classified as Appellation d’Origine Contrôlée (AOC), which translates to “term of controlled origin.”⁶¹ Understanding the French AOC label of origin process can be useful for making comparisons to label of origin systems outside of France. The AOC influenced the development of the EU Protected Designations of Origin (PDO) to ensure that once an AOC is awarded in France, there is little question of its legitimacy at the level of the EU.⁶² Countries are increasingly requesting assistance from the French government in adapting the system to their particular situation such that the AOC label of origin influences other parts of the world.⁶³ The AOC system draws upon the concept of *terroir* in establishing its regulation of each product to be labeled:

Terroir . . . translates roughly as ‘the vine’s environment,’ but has connotations that extend right into the glass: in other words, if a wine tastes of somewhere, if the flavours distinctly make you think of a particular place on the surface of this globe, then that wine is expressing its terroir.⁶⁴

⁵⁹ See Jessica T. Mathews, *Power Shift, in* THE GLOBAL TRANSFORMATIONS READER 204, 212 (David Held & Anthony McGrew eds., 2d ed., 2003).

⁶⁰ See generally INSTITUT NATIONAL DES APPELLATIONS D’ORIGINE, GEOGRAPHICAL INDICATION: APPLICANT’S GUIDE 1-25 (2005) (detailing the process and requirements for applicants of GIs in France), available at http://www.inao.gouv.fr/repository/editeur/pdf/divers/GUIDE_DU_DEMANDEUR_IG_version_juin_2005-ang1.pdf.

⁶¹ See Danielle B. Shalov, Note, *Will the European Union Prove to be Lactose Intolerant?*, 11 CARDOZO J. INT’L & COMP. L. 1099, 1099-1111 & n.92 (2004).

⁶² See Broude, *supra* note 13, at 628.

⁶³ MAX ALLEN, SNIFF, SWIRL, & SLURP: HOW TO GET MORE PLEASURE OUT OF EVERY GLASS OF WINE 24 (Mitchell Beazley 2002).

⁶⁴ *Id.*

Terroir can also designate a region considered to have influence on its inhabitants. “It is said in French, for example, that ‘certain customs or idioms are rooted in their terroir, or that a person strongly conveys a sense of the terroir of their birth and upbringing.’”⁶⁵

European countries care for AOCs because they have helped maintain agricultural profitability in zones that are considered difficult or marginal and are an important tool for rural development. They have helped many traditional or historic products remain in production and compete on the market that might otherwise have disappeared. In terms of the national economy, France is now the most visited country in the world.⁶⁶ Their contribution is important because it has helped stabilize the population in some rural areas previously considered in decline.⁶⁷ As Elizabeth Barham explains, “[t]he decision to award an AOC designation to a product, and by association to its region of origin, is based on the strength of the link between the two. Evaluation of this link depends directly on the concept of terroir.”⁶⁸ In an important study of how INAO agents use various terms when examining a request for an AOC, the concept of terroir was selected as the most important notion out of twenty-seven different concepts used by the 112 agents included in the study.⁶⁹

In the United States, terroir has become a buzz word in English language wine literature. However, the use of the term may be lighthearted because it disregards reverence for the land, which is a critical element of terroir. The true concept is not easily grasped by Americans and does not include physical elements of the vineyard habitat—the vine, subsoil, siting, drainage, and microclimate.⁷⁰ Although the French claim that terroir is unique to wineries such as Chateau de Beaucastel,⁷¹ ultimately one does not really taste the unusual soil in which the grapes were grown. Additionally modern wine makers outside of France have the technology to very closely imitate the quality of the more expensive French brands of wine. For example, to commemorate the American bicentennial, Englishman Steven Spurrier invited nine leading French wine experts to a blind taste-test of twelve California wines and eight French wines. The judges could not

⁶⁵ Barham, *supra* note 2, at 131.

⁶⁶ France Travel Guide, Travel to France, <http://www.justfrance.org/> (last visited Dec. 15, 2008).

⁶⁷ Barham, *supra* note 2, at 128.

⁶⁸ *Id.*

⁶⁹ *Id.* at 129.

⁷⁰ JAMES E. WILSON, TERROIR: THE ROLE OF GEOLOGY, CLIMATE, AND CULTURE IN THE MAKING OF FRENCH WINES 55, (Stephanie Horner ed., University of California Press 1998).

⁷¹ See Château de Beaucastel, Terroir, http://www.beaucastel.com/terroir_int.php?langue=en (last visited Dec. 15, 2008).

distinguish French from Californian wine.⁷²

Nevertheless, the French call experts to make their judgment about terroir using three main categories: (1) natural factors (tied to the local environment or ecological niche), (2) human factors (particular techniques and know-how confined to that area), and (3) historical (public knowledge of product as originating in that area, recognition of the association between product and place that is consistent and widespread.)⁷³ Each factor is then studied individually as well as in terms of how they combine to determine the “typicity” of the product.⁷⁴ To obtain an AOC, a product must incorporate all three aspects of its terroir and carry them forward to the consumer, but the natural and human factors are significant.⁷⁵

Globalization implies the changes in communications, technology, and transportation that are rapidly blurring borders. Worldwide interactions are taking place more often, which promotes a global culture of “consumerism” affecting fragile local social structures. When we trade freely and borrow traits from other cultures, local customs, products, and production methods are sometimes beaten by foreign globally available alternatives. The abundance of “standardized products of mass culture” threatens to limit local models of cultural expression.⁷⁶ However, it is often argued that local cultures actually die out from “a triumph of cultural imperialism on the ideological battleground of culture.”⁷⁷ Additionally, the spread of western culture could be considered a self-serving goal when imperialism depicts the cultures whose autonomy defends only its own cultural terms. To prevent the danger of a western monoculture, it is suggested that cultures change their traditional ideologies to persist in an era of globalization should emerge.⁷⁸

When surveying the usual measures by which WTO member countries pursue national cultural policies to regulate trade through prohibitive tariffs, import bans, quantitative restrictions, discriminatory taxation, subsidies, domestic content requirements, regulatory prohibitions, licensing restrictions, and foreign investments, constraints are nonetheless used and challenged in the name of cultural protection.⁷⁹ It is rarely argued that

⁷² Patrick Comiskey, *Tasted 30 Years Later: They're Alive!*, L.A. TIMES, May 31, 2006, at F1, F7.

⁷³ Barham, *supra* note 2, at 128.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ HERBERT I. SCHILLER, *MASS COMMUNICATIONS AND AMERICAN EMPIRE* 112, (Westview Press 1992) (1969) (“Everywhere local culture is facing submersion from the mass produced outpourings of commercial broadcasting.”).

⁷⁷ Broude, *supra* note 13, at 638.

⁷⁸ *Id.* at 632.

⁷⁹ Mary E. Footer & Christoph B. Graber, *Trade Liberalization and Cultural Policy*, 3 J.

globalization, however conceived, does not produce any changes in local cultures and traditions. Generally, the “trade and culture” debate characterizes trade that is enforced through the reciprocal trade obligations of the WTO and regional trade agreements that force global cultural change. Free trade brings new imported products, services, and production methods to the domestic market. Each new cultural influence threatens to alter the local tradition. Clearly, those who feel that their culture is at risk because of exposure to such global influences will protest and confront the international law that facilitates it.⁸⁰

CONCLUSION

The United States appropriately protects GIs through the trademark system and provides TRIPS-levels of protection to domestic and foreign GIs. Businesses, both foreign and domestic, are already familiar with the trademark regime and no additional government resources or taxpayer money is required to create a new GI registration or protection system. Unlike the EU, the United States uses only resources already committed to the trademark system to protect GIs. The U.S. system also accommodates GIs that are not merely place names as does the EU system.

In addition, unlike the EU system, the U.S. system is self-policing. This allows private owners to preserve profits by determining when to take action and act immediately at the first sign of infringement instead of waiting for their government to take action against infringement by a competitor or address unauthorized use. Generally, under the U.S. trademark and GI system, businesses in the geographic area, competitors, or trademark owners can raise issues of infringement and governments do not have to commit additional resources to enforce compliance.