

SOCIO-ECONOMIC ASPECTS OF GEOGRAPHICAL INDICATIONS

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Geographical indications and their close cousins, appellations of origin, have taken center-stage in international intellectual property, in particular since the conclusion of the Geneva Act of the Lisbon Agreement.²

Let us begin by briefly defining these terms. Appellations of origin are denominations that designate a locality, which may be as small as a village or as big as a country, in order to distinguish products produced in that locality and produced either according to regulations or “local, constant and trusted usage”³ in such locality which results in certain quality or characteristics of the product and/or its fame. Typically, the special fame, quality or characteristic of the product will be due to a method of production combined with the extraction and use of local natural resources. The notion is not, however, confined to food products. Industrial products may also be protected by an appellation due to the availability of specialized skills, raw materials and/or know-how.⁴ Protection

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² *Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications and Regulations under the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications*, WIPO document LI/DC/19 of May 20, 2015, available at <http://www.wipo.int/wipolex/en/details.jsp?id=15625> [hereinafter the “Geneva Act”]. The earlier version was the *Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration*, Oct. 31, 1958, as revised at Stockholm, July 14, 1967, 923 U.N.T.S. 205 [hereinafter **Lisbon Agreement**].

³ *Actes De La Conférence Réunie À Lisbonne Du 6 Au 31 Octobre 1958* (Geneva, BIRPI, 1963), at 813. The Acts of the Lisbon Conference were published in French. All translations are the authors’ own.

⁴ See *ibid.* For example, Hungary has a protected appellations for fencing blades on the Lisbon register (Szentgotthárd—Lisbon appellation No. 586).

may also extend to a certain presentation of products for sale. The 1958 *Actes* note that an appellation of origin is usually linked to the special qualities of a product associated with a “*terroir*,” while indications of source can be used in association with any kind of product.⁵ In normative terms at least, this notion of *terroir* undergirds the Lisbon system.

By contrast, the TRIPS Agreement and the Geneva Act use the notion of “geographical indications (GI).”⁶ Like appellations of origin, the focus of GIs is on quality or characteristics of goods that derive from geographical origin. TRIPS added semiotic flexibility by encompassing any *indication* (name or otherwise) that would point to a particular geographic origin as long as a certain quality or characteristic (and/or reputation) is attributable to that origin. Indeed, the practice under the Lisbon Agreement has been to register denominations that may not be “names” *stricto sensu*. The 2015 Geneva Act of the Lisbon Agreement uses both notions (appellations of origins and GIs) and thus can be said to blend the 1958 and TRIPS notions.

In this short paper, we suggest first a theoretical framework to understand the sources of the socio-economic functions of the GIs. We then apply the framework and explore how GIs can be used to maintain and increase diversity in the marketplace. In the third and last part we consider the costs and benefits of protecting GIs.

I. Theoretical Aspects

Terroir is a multifaceted notion. It is a vector for cultural, historical but also very real economic narratives.

Economically, attaching an intangible, yet measurable (most notably in terms of higher prices) value to the geographic origin of a product seems to postulate the existence of a correlative, measurable difference in quality, an observable difference between products of different origin but similar

⁵ This notion of “*terroir*” is discussed below.

⁶ TRIPS Agreement, Art. 22.1

composition (say, a wine produced from Pinot Noir grapes in Napa Valley or Bourgogne (Burgundy)). One may make the case that such differences are multifactorial and hard to quantify. Indeed, it is convenient to say that the human and natural factors at play are inseparable, but that is not entirely true. A number of French wine producers are producing wines in the New World, and the knowhow and equipment/technique used in both localities are fairly similar.⁷ One may then posit that the remaining differences lie in natural factors, such as soil and climate.

Culturally, as legal flag-bearer for *terroir* geographical indications implicate a certain emotional resonance, especially in Europe. For French wine and food producers, the *terroir* runs deep: it is not an exaggeration to say it is linked to a search for their national identity. The combination of all three produces a unique product, related to the French concept of *terroir*. Historically, this link between a product and the *terroir* can be traced back to the fifteenth century in Europe and is best epitomized by the system of *Appellations d'Origine Contrôlée* (AOC) in France.⁸ The AOC system established “by the *Law of the 30th of July of 1935* has created a specific type of French wine: AOC wines.⁹ These wines use the notion of *terroir* to distinguish themselves from the other wines. A *terroir* relies on natural and human factors and their specificities.”¹⁰

These historical, cultural and economic threads are woven together in the operation of the marketplace for goods protected by GIs. French AOC wines command a higher price because they incorporate what economists would refer to as a monopoly rent--as essentially any product protected by an intellectual

⁷ “MUMM” is an example of a French producer from the Champagne region now also producing bubbly wine using something resembling *méthode champenoise* but in California. See www.mummnapa.com.

⁸ Code de la Propriété Intellectuelle, aet.721-1 (France).

⁹ See Justin Hughes, Champagne, Feta, And Bourbon: The Spirited Debate About Geographical Indications, (2006) 58 *Hastings L.J.* 299, 307-308.

¹⁰ David Menival, *The Greatest French AOCs: A Signal of Quality for the Best Wines* 1 (2007). Working paper available at <http://academyofwinebusiness.com/wp-content/uploads/2010/04/Menival-The-efficiency-of-french-AOCs-as-signal-of-quality.pdf>.

property right. If the higher price is validated by the market, it is because the consumer gets something in return. Under the AOC system and a number of similar systems administered by the *Institut national de l'origine et de la qualité* (INAO), a number of products (wines, spirits, but also cheese, candy, etc.) can be identified as having been produced in a certain region not only if the geographic provenance is factually correct but if certain codified guidelines for the production were followed.¹¹ A system based on a high level of protection for denominations of origin emphasizes the second cluster of factors and uses it as a marketing tool to extract additional rent. Very concretely, the consumer is asked to pay more (or less) because a white wine made with Sauvignon grapes will not be the same even if made by the same person using the same technique in Loudoun county in Ontario (Canada), the Loire valley of France or the Marlborough region of New Zealand.¹² The acidity of the soil, the amount of rain and sun exposure will affect the outcome. Climate variations from year-to-year but also climate change trends also lead to significant differences in wine produced in *any* given region--a geographic origin is not guarantee of stable climate conditions.¹³

A number of theoretical tools may be useful in efforts to circumscribe and understand the debates about the value of GIs. For example, the theory of Conventions¹⁴ can be used to explain how GIs and its associated socio-economic value(s) emerge in a given locality. At its simplest level, a Convention is “a

¹¹ See <http://www.inao.gouv.fr/>.

¹² Among the soil-related factors that are most important are the drainage capacity, salinity, and the ability of the soil to retain heat thus encouraging ripening and the development of stronger roots. See David Bird *Understanding Wine Technology: The Science of Wine Explained*, 3rd edn. (San Francisco, Board and Bench Publishing, 2011).

¹³ How climate change will affect certain GIs is beyond the scope of this short paper but is certainly a matter worthy of further and ongoing studies.

¹⁴ See Andrea Marescotti, “Marketing channels, quality hallmarks and the theory of conventions,” in Bertil Sylvander, Dominique Barjolle, and Filippo Arfini, eds, *The Socio-Economics of Origin Labelled Products in Agri-Food Supply Chains: Spatial, Institutional and Co-ordination aspects. Proceedings of 67th European Association of Agricultural Economists (EAAE) Seminar*, INRA, Série Actes et Communications, n.17 vol.2, (Paris, 2000), pp.103-122. available at <http://www.origin-food.org/pdf/partners/marmarke.pdf>.

coordination mechanism that emerges to collectively resolve a situation that could not be done exclusively through an individual decision.”¹⁵ While the theory is often associated with game theory (e.g., socialization prior to or as part of the bargaining process), a French offshoot of the theory focuses on process and specifically how “coordination between firms – and more generally between the actors within a given system – can be based on decision making mechanisms,” and social interaction mechanisms between economic operators.¹⁶ We use the latter version here because the notion that a geographical origin is directly linked to a particular quality of a product is particularly strong in that country.

The “quality” of a particular product (such as wine) is neither a pure market-based phenomenon nor a completely fuzzy and subjective notion. Instead, it should be viewed as the result of an “endogenous social construction that contributes to coordinating the actors’ activities, to the same extent as other conventions. Quality emerges from a process of negotiation among actors, with reference to common principles which are able to ‘justify’ their actions, such as the market price, respecting specific standards, adherence to moral and ethical principles.”¹⁷ This explains why a GI, the name (or other identifier) of a locality in which people learn a specific know-how over time, transmit it, protect it and use it to produce goods bearing that name often grows deep cultural and socio-economic roots. Products produced in that locality are perceived by their producer to have a special quality. From a conventions theory standpoint, quality is not as much a result as a process (a “qualification convention”) with strong social and identity functions and feedback loops. This qualification convention, “rather than defining the quality of the exchanged good, refers to *the rules of the game and the role of the actor within the exchange*.”¹⁸ Producers who know how and can (legally and technically) produce the GI product are members of a club, guardians of a process.

¹⁵ *Ibid.* at 104.

¹⁶ *Ibid.* at 105.

¹⁷ *Ibid.* See also François Eymard-Duvernay, « La négociation de la qualité, » [1993] *Economie rurale*, n° 217.

¹⁸ *Ibid.*

It is then the function of the market to communicate this quality to those who do not live in or near that locality. GI products “embed” the special quality. To use Polanyi’s well-known words, “the economy is not embedded in social relations, social relations are embedded in the economy.”¹⁹ Naturally, the consumer in the United States who does not share the history and culture of the French, Italian or Spanish *terroir* may not easily identify with the “conventions” that were used to define the “quality” of the product *at its point of origin*. Yet that same consumer can learn through various mechanisms including advertising of course why she should attribute a higher value to a product, what one might refer to as a *perception* of a higher “quality. This approach is not dissimilar from the approach of letting an industry define its own quality standards and convincing consumers that the standard matters. For GI products, that function may have “non-economic” components—though such components do affect economic outcomes. As the International Organization for Standardization (ISO) reminds us, quality is not (limited to) testing a product against a strict technical standard in a mass production context. It is, and this may especially true for products made by artisans, the “totality of features and characteristics of a product or service that bears its ability to satisfy *stated or implied* needs.”²⁰ Those “needs” may be reflected in the exotic nature of the product or the perceived qualities associated with its origin, in the same way that consumers make purchasing decisions based on perceived quality of a brand. The needs are thus fundamentally perceptions based on experience or information received from peers or marketing.²¹ Quality control, in this context, is not designed for risk reduction (making sure, say, that there is no E.coli bacteria in cheese) but rather the transmission to the product of the combination of knowhow and natural

¹⁹ *Ibid.*, at xxiv

²⁰ From the Online Business Dictionary. See <http://www.businessdictionary.com/definition/quality.html>.

²¹ Marketing theory teaches that “perceived quality depends on consumers’ global evaluation according to the available information.” Oude Ophuis P., H. Van Trijp, “Perceived quality: a market driven and consumer oriented approach,” (1995) 6 *Food Quality and Preference* 177.

factors that infuse it with that *je-ne-sais-quoi* that creates the higher value in the mind of the consumer.

In some cases no measurable objective quality exists between that product and its non-GI equivalent. Yet as Professor McCarthy noted, trademarks also perform an “irrational” yet well accepted function in guiding consumer behavior:

An economist who draws up a set of criteria for market analysis finds that conclusions flow from the criteria set up. If price, quality, and rationality are the only criteria of an economic system, then emotional consumer choices do not fit into this economic model. Advertising investment in promoting such choices are then regarded as wasteful and non-productive. The problem is that human beings, not economists' symbols, purchase products. Moreover, as noted earlier, modern economic analysis teaches that brand loyalty is not irrational consumer behavior. [FN2] It is a common sense, rational method of reducing shopping or "search" costs. Additionally, who can agree on a definition of "irrationality" when it comes to buying goods? Where is this buyer who only buys goods on the basis of price and quality alone, eschewing all feelings and emotional impulses? He or she sounds like quite a dull person.²²

In the world of *terroir*-based products, this has given rise to the phenomenon of “cognitive marketing.”²³ One could argue of course that all marketing is “cognitive” of course to the extent it involves a cognitive process. Fair enough. Marketing does aim to provide information (if the term is loosely defined) to change consumer’s preferences.²⁴ The marketing of geographical origins via GIs, however, is arguably “more cognitive” than traditional marketing because it must engage the consumer by educating her about the somewhat intangible value that she should find in the product with a given geographical origin. Put differently and more concretely, the consumer must believe that that *Brie* will be not just different but *better* because it was produced in Meaux (France) and not in Wisconsin.

²² J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, 4th ed., vol. 1, § 2:38 (Clark Boardman Callaghan, 2014)

²³ See Bernard Lassaut and Bertil Sylvander, “Producer-consumer relationships in typical products supply chains : where are the theoretical differences with standard products ?,” *in* [1997] *Proceedings of the 52nd EAAE Seminar* 239.

²⁴ See *ibid.* at 244.

This discussion has focused mostly on European goods. Several developing countries believe that they could capture additional rents due to the perception of higher quality associated with certain geographical origins if their GIs were protected in major foreign markets.²⁵ For some products, this ties into--or may be confused with--“fair trade” labels and certification processes concerning the sourcing of an increasingly wide range of products, many of which come from the developing world (coffee, tea, cocoa, etc.).²⁶ For example, among the (relatively few) appellations on the Lisbon register for products other than wines and spirits, one finds crafts and coffee from Mexico, one of the few developing nations to have made more than token use of the Lisbon system.²⁷ Not (yet) a Lisbon member, India has indicated a willingness to develop and protect several indications, including for tea and rice.²⁸

²⁵ See Sarah Bowen, *Development from Within? The Potential for Geographical Indications in the Global South*, 2 (2009) DOI: 10.1111/j.1747-1796.2009.00361.x., at 2.

²⁶ For a discussion of fair trade labeling initiatives, see http://www.fairtrade.net/labelling_initiatives.html.

²⁷ See Lisbon-protected appellations such as Talavera (No. 833) for “handcraft objects” and Ambar de Chiapas (No. 842) registered for “semi-precious stones of vegetal origin, for its use in derivative products, namely, jewelry, art objects and religious objects”. In 2007, the European Union granted GI protection to its first non-European indication, namely “Café de Colombia.”

Other examples of denominations of interest for products other than wines and spirits (only a few of which are currently protected under the Lisbon system) include: “Parmigiano-Reggiano” for cheese, (Italy), “Basmati” for rice (India and Pakistan), “Malbuner” for meat products (Liechtenstein), “Ulmo” for honey (Chile), “Curuba” fruit (Colombia), “Phu Quoc” for fish sauce (Vietnam), “Antigua” (Guatemala) or “Mocha” (Yemen) for coffee, “Chuao” for cacao (Venezuela), “Ceylon” (Sri Lanka) or “Long Jin” (China) for tea, “Champagne” for sparkling wine (France), “Bordeaux” for wines (France), “Havana” for tobacco (Cuba), “Bukhara” (Uzbekistan) or “Hereke” (Turkey) for carpets, “Talavera” (Mexico) or “Arita” (Japan) for ceramics, “Limoges” for porcelain (France), “Malaysia” for palm oil, “Kalamkari” for textiles (India); “Geneva” for watches (Switzerland) or “Bobo” for masks (Burkina Faso). See Felix Addor and Alexandra Grazioli, “Geographical Indications beyond Wines and Spirits: A Roadmap for a Better Protection for Geographical Indications in the WTO/ TRIPS Agreement,” (2002) 5:6 *J. World Int. Prop.* 865.

²⁸ See Kasturi Das, “International Protection of India's Geographical Indications with Special Reference to ‘Darjeeling’ Tea,” (2006) 9:5 *J. World Int. Prop.* 459 and S. K. Soam, Analysis of Prospective Geographical Indications of India, (2004) 8:5 *J. World Int. Prop.* 679, at 684.

GIs have broader implications still. Recent research suggests that GI protection may impact future global food consumption patterns and lead to shifts in current agricultural models.²⁹ As such, GIs may have deep environmental significance and they may be form an increasingly relevant part of agricultural and food policy.³⁰ Not surprisingly, the debate has captured the imagination of a number of consumer groups, many of which insist on proper labeling of products to clarify their origin, partly, it seems, in order to buy more locally produced products and reduce the carbon footprint of their consumption patterns, but also on the “quality assurance factor”³¹ associated with specific GIs.³² This is true also in the United States, where consumers are increasingly differentiating among various points of origin even within U.S. borders.³³ GI use is progressing rapidly despite claims that GIs lead to higher prices for no “real” higher value.³⁴

There are several theoretical critiques of GIs that should be mentioned here. A major theoretical critique against protecting GIs (as intellectual property rights) is that GIs do not incentivize innovation or development in the same way other intellectual property rights do. In particular, GI opponents argue that GI protection rewards product conformity within a particular region rather than promoting individual creativity or innovation.³⁵ This makes GIs fit awkwardly within theories of intellectual property protection based on incentives. Indeed GIs are perhaps more about preservation, protection and transmission of

²⁹ See Elizabeth Barham, “Translating *Terroir*: The Global Challenge of French AOC Labelling,” (2003) 19 *J. of Rural Studies* 127, at 127-128.

³⁰ See William van Caenegem, “Registered GIs: Intellectual Property, Agricultural Policy and International Trade,” (2004), 26 *European Int. Prop. Rev.* 170, at 171.

³¹ See Alberto Francisco Ribeiro de Almeida, “Key Differences between Trade Marks and Geographical Indications,” (2008), 30 *European Int. Prop. Rev.* 406.

³² See David Goodman, “Rural Europe Redux? Reflections on Alternative Agro-Food Networks and Paradigm Change,” *Sociologia Ruralis*, 44(1), 3, 5 (2004).

³³ See Daniele Giovannucci, Elizabeth Barham and Richard Pirog, *Defining and Marketing “Local” Foods: Geographical Indications for US Products*, (2010) 13:2 *J. World Int. Prop.* 94.

³⁴ The reality of the notion of “higher quality” in this context is discussed below.

³⁵ See e.g. Kal Raustiala and Stephen R. Munzer, “The Global Struggle Over Geographic Indications,” (2007), 18 *Eur. J. Int’l L.* 337 at 359–60; Hughes, note 9 above, at 368–73.

“traditional” knowledge. GI opponents also suggest that GIs protection fits awkwardly within property theories, as GIs are collective rights that are rooted in a certain locality, and cannot be owned nor commercialized as other rights can be, which also includes the fact that they cannot be assigned or licensed.³⁶ Again this makes GIs a more communal form of intellectual property, another parallel between GIs and traditional knowledge.³⁷

If not for innovation in the usual sense, GIs offer important incentives to promote local and rural development. In particular, GIs facilitate the establishment of GI-denominated (niche) markets by motivating groups of regional producers to meet particular production standards with respect to certain types of products. When these producers have established their products in the market, GIs incentivize the same groups to continue to invest in the quality of the GI-denominated products, and thus facilitates maintaining the social capital for the entire group that operates within the GI-denominated region.³⁸ GIs allow GI producers to capture the value (rent) that consumers—at the local, national, or international level—place on these GI-denominated products based on the product’s geographical origin. In other words, GIs capitalize on people’s desire to choose products with a known geographical identity—ham from Parma, silk from Thailand, tea from Darjeeling, coffee from Colombia, and so on. We will now take a deeper look at this aspect.

II. Economic Benefits of Geographical Indications of Origin for Local Development and Consumers

³⁶ See Dev Gangjee, “Quibbling Siblings: Conflicts Between Trademarks and Geographic Indications”, (2007).82 *Chicago-Kent L. Rev.* 1253, at 1256–59.

³⁷ See Daniel Gervais, “Traditional Innovation and the Ongoing Debate on the Protection of Geographical Indications,” in *Intellectual Property and Indigenous Innovation* (Peter Drahos And Susy Frankel, Eds) (Australia National University Press, 2012), available at http://press.anu.edu.au//apps/bookworm/view/Indigenous+Peoples'+Innovation:+Intellectual+Property+Pathways+to+Development/9731/ch06.html#toc_marker-11.

³⁸ See Dev Gangjee, “Relocating Geographical Indications,” *Cambridge Intellectual Property and Information Law Series*, (2012) at 266, available at <http://ssrn.com/abstract=1863350>.

To capture the value associated with the products bearing their GI, producers rely on the fact that consumers associate the GI-denominated products with the respective GI-denominated locality.³⁹ Accordingly, GI producers need legal protection against confusing uses of terms identical or similar to their GIs. They argue that they need protection against free-riders who would use the GIs outside their accurate geographical context, even when consumers are not confused, as these “not-geographically-accurate” uses could lead to the loss of distinctiveness of the GIs. Free riders are not part of and do not contribute to sustaining the GI-denominated markets.⁴⁰ They could make subpar products with little concern over the impact that lower product standards could have, in the long term, on the perceived market reputation of the GI-denominated markets.⁴¹

GIs typically aim to provide consumers with information about the quality and characteristics of the products. Ultimately this may empower consumers to make better-informed purchasing decisions. Admittedly, sometimes this is very superficial, but the same can be said of advertising generally and trademarks in particular. That said, GIs are a little different. By informing the consumer about the origin of the natural substance and the practices that go into making the products, GIs can offer important information about origin, safety and “quality” of GI-denominated products.⁴² For example, the use of a given GI can indicate a certain method of production, which in turn indicates the level that a product is tied to the land, or the level of “naturalness” of a product. This set of information can assist consumers in identifying potentially healthier foods for their individual

³⁹ Michelle Agdomar, “Removing the Greek From Feta and Adding Korbel to Champagne: The Paradox of Geographical Indications in International Law,” (2008), 18 *Fordham Intell. Prop. Media & Ent. L. J.* 541, at 578-580 For a different perspective, see Rosemary J. Coombe et al., “Geographical Indications: The Promise, Perils and Politics of Protecting Place-Based Products”, in Matthew David & Deborah Halbert eds, *The Sage Handbook of Intellectual Property* 207 (London, Sage, 2014).

⁴⁰ Margaret Ritzert, “Champagne is from Champagne: An Economic Justification for Extending Trademark-Level Protection to Wine-Related Geographical Indicators,” (2009) 37 *AIPLA Q.J.* 191, 212–20.

⁴¹ See Agdomar, note 39, at 586-587.

⁴² *Ibid.* at 587-588.

needs, or artifacts made with traditional or environmental-friendly manufacturing techniques for those countries that provide GI protection beyond food-related products. Along the same lines, GIs can also play an important role in providing information about the impact of the manufacturing and other practices used to produce the GI-denominated products on the environment, public health, and even labor practices, with a possible human rights connection.⁴³

Ultimately, by acting as identification links between GI-denominated regions and GI-denominated products and offering consumers a pool of information from which to select from when selecting products in the market, GIs can contribute to reward those producers who adopt environmental, health, and labor-related friendly policies. Since GIs force producers to remain in a particular locality and use the local land and the local human factor to produce the GI-denominated products, the long term health of the land and its resources is crucial for the long term success of the producers operating in the GI-denominated region. Thus, producers are motivated to adopt environmentally sustainable production methods and maintain the physical health of the region—the land, water, and air. Likewise, GIs can create “geographical accountability” and can assist in holding accountable those producers who do not maintain the “well-being” of the land, but instead cause damage. Ultimately, by tying producers to the land, GIs assist in placing the “cost” of such damage primarily on the shoulders of the producers’ group.⁴⁴ Moreover, GIs may assist in reducing possible “contagion effects” due to negative incidents in a given geographical market, while consumers may continue to purchase the same type of products originating elsewhere.⁴⁵

Accordingly, appropriate protection for GIs is necessary in order to protect producers’ ability to offer correct information to consumers. In contrast, a lack of protection for GIs could lead to the erosion of the ability of GIs to signal the

⁴³ *Ibid.*

⁴⁴ *Ibid.* at 588.

⁴⁵ For example, consumers could avoid contaminated cured meat or cheese from a given area.

geographical origin from which the GI-denominated products originate. In turn, this would deprive consumers of important sources of information about the qualities that are associated with geographical origin and manufacturing process of the GI-denominated products.⁴⁶ Ultimately, it could also lead to the death of the GIs by genericide, as it has been argued by the EU and other countries that have a vested interest in their national GIs, and it has been proven by the fact that several geographical names (many of them originating from Europe) are today considered to be common terms in foreign countries, especially in “New World” countries. Famous examples in this respect are terms such as Asiago, Parmesan, Gouda, and Feta.⁴⁷

III. Benefits and Costs of Protecting Geographical Indications

Like most and perhaps all intellectual property rights, GI protection also comes with significant inherent costs. These costs have to be carefully scrutinized as part of a well-informed debate on GIs. In particular, like other forms of intellectual property rights, granting exclusive rights in GIs can (or does) create barriers to entry in the market for the group-level products for competitors—for example, the broader market for sparkling wine, and the special niche reserved for Champagne-denominated products.⁴⁸

The benefits of GI protection must be carefully considered against these costs, primarily the effect of GI protection on competition and other public interest-related issues such as freedom of expression in commercial and non-commercial settings. GI policy that protects GIs from unfair competition and misappropriation is sound, but this policy must also offer specific limitations to guarantee the functioning of a competitive marketplace.

⁴⁶ See Marco Ricolfi, “Geographical Symbols in Intellectual Property Law”, in Reto M. Hilty, Josef Drexl & Wilhelm Nordemann eds, *Schutz Von Kreativität Und Wettbewerb: Festschrift für Ulrich Loewenheim zum 75. Geburtstag* 239 (Munich, Beck, 2009).

⁴⁷ See Dwijen Rangnekar, & S. Kumar, “Another Look at Basmati: Genericity and the Problems of a Transborder Geographical Indication,” (2010) 13(2) *J. Intell. Prop.* 202; see also Dev Gangjee, “Say Cheese: A Sharper Image of Generic Use through the Lens of Feta,” (2007) 5 *European Int. Prop. Rev.* 172.

⁴⁸ Raustiala & Munzer, note 35 at 359–60; and Hughes, note 9, at 368–73.

The quintessential condition to follow in order to achieve a balanced system of GI protection is that the right to use a GI should be granted only to those producers whose products effectively originate ideally in their entirety from the GI-denominated territory either because the products are grown in that area—for the agricultural products—or because the products are manufactured therein—for products that need to be processed with local human factor. In the latter case, the granting of GI protection should be strictly reserved to those producers that manufacture the products in their entirety in the region, and possibly with ingredients and raw materials also exclusively from the region. In the event that some of the ingredients or raw materials do not originate from the region, the percentages of these variations should be clearly defined as part of the process for obtaining GI protection and the actual origin, and the amounts, of those ingredients and raw materials should be fully disclosed in the product packaging. It is only when the GI-denominated products entirely originate from the GI-denominated regions that GIs can perform their functions as incentive for local development and vehicles of accurate information regarding the origin, quality, and characteristics of the products. Only under these circumstances can GI protection fully motivate GI producers to invest in, and maintain the health and wealth of the GI-denominated regions. Additionally, GI producers can also be held accountable for the conservation and even in some cases the overall well-being of the locality. A strict enforcement of the territorial linkage between the GI-denominated products and the regions is also liable to provide a stronger normative basis to protect GIs because the communities in the locality, and, in turn, the countries in which it is located, which are more likely to benefit when that linkage is present.⁴⁹

When this linkage between product and origin is loosened, however, GI opponents' argument that GIs are a disguised subsidy for local producers against competitors from outside the region takes on a different and more convincing hue. Correlatively, the basis for protecting GIs—as signs that identify the actual geographical origin of the products—becomes weaker. Without a strong

⁴⁹ See Jeremy N. Sheff, "Marks, Morals, and Markets," (2013), 65 *Stanford L. Rev.* 761.

territorial linkage, the use of GIs may give consumers misleading information about the actual origin and characteristics of the products.

This said, when GI protection is based upon or linked to a strict enforcement of the underlying *terroir* requirement, the argument that GI protection “stifles competition,”⁵⁰ which is repeated by GI opponents, is no longer a sound argument. Notably, granting a group of producers in a certain region the exclusive right to identify their products as coming from that region—for example Chianti, Bordeaux, or Napa valley wines—does not affect competition within the type-level products that GIs identify—the market for wines. To the contrary, any competitor from another region remains entitled to produce the same kind of products—red, white, or other type of wine—and sell it in the local, national, and international market. In other words, granting exclusive rights in GIs to local producers simply prevents competitors from using “the same nomenclature”⁵¹ to identify their products and does not prevent competitors from producing the same type of products under their own trade name, or even under the name of their own locality.⁵²

GI protection could actually result in increasing competition and innovation in the market. In particular, the recognition of GIs can force outside producers “to develop innovative techniques to improve upon a product to compete vis-a-vis the [GI-denominated] product category.”⁵³ As Massimo Vittori, along similar lines, “GIs present limited risks of reducing competition in the marketplace, and rather have the potential to promote competitive behaviours among producers keen to differentiate their offer of goods through improved quality.

⁵⁰ Agdomar, note 39, at 590.

⁵¹ *Ibid.* at 591.

⁵² See Doris Estelle Long, “Branding the Land: Creating Global Meanings for Local Characteristics,” in Irene Calboli & Edward Lee eds, *Trademark Protection and Territoriality Challenges in a Global Economy* 100 (Cheltenham, Edward Elgar, 2014).

⁵³ *Ibid.*

Consumers also benefit from GIs as they reduce transaction costs in their search for “niche products”.⁵⁴

For example, it has been argued that it was after Australia ceded to EU pressure and ceased to use several terms protected as GIs in the EU (deemed to be generic in Australia) that the wine industry in Australia truly grew globally because Australian producers started to invest in local names, which became symbols of excellent wines worldwide. Likewise, the U.S., a country notoriously anti-GI protection, has long enforced strong protection for appellation of wines due to the relevant business interests of California and other wine making regions.⁵⁵ Here again, wines from California are among the most successful business stories in the U.S. and these wines are known worldwide for their excellent quality and characteristics. Finally, protecting GIs does not interfere with the competition that naturally exists between producers that operate in the same GI-denominated region. For example, there are several (separately owned) “Champagne” wine-makers in the Champagne region of France, and several (separately owned) “Chianti” wine-makers in the Chianti region of Italy. These winemakers share the interest of maintaining the reputation of the region worldwide, but they also compete with each other for the sales of their individual products.

Still, even though GI protection does not stifle competition in the market for the general type products, not all unauthorized uses of GIs should be forbidden. Indeed, a major issue with GIs and their introduction in New World markets is the recognition that producers of generic products must be protected.

⁵⁴ Massimo Vittori, “The International Debate on Geographical Indications (GIs): The Point of View of the Global Coalition of GI Producers,” (2010) *13:2 J. World Int. Prop.* 304.____

⁵⁵ The U.S. protects GIs identifying wines as appellations of origin for wine. This protection applies both at the federal and state level. At the federal level, it is the Treasury Department’s Alcohol and Tobacco Tax and Trade Bureau (TTB) (until 2003 the same function was performed by the Bureau of Alcohol, Tobacco, and Firearms) that grants applicants the permission to indicate that a certain wine, which meets specific requirements, originates from a particular geographical area in the U.S. See 27 C.F.R. 4.25, 4.25a; 27 U.S.C.A. § 201, § 205. See McCarthy, note 22, vol. 2 §14:19.50. See also Michael Maher, “In Vino Veritas? Clarifying the Use of Geographic References on American Wine Labels,” (2001), 89 *California L. Rev.* 1881

Those producers believe that they have acquired the right to continue to sell their product using what foreign producers consider a GI but that these generic producers consider a term descriptive of a product type rather than a symbol representing a locality. A balanced GI policy should not foreclose the use of GIs by outside competitors with respect to the unauthorized use of GIs for describing and comparing their products with GI-denominated products. These uses may not be desired by GI producers, yet scholars in the U.S. have correctly pointed out that banning these uses would run against the test established by the US Supreme Court in the *Central Hudson* case,⁵⁶ which protects non-misleading commercial speech.⁵⁷ Likewise, it could be argued that preventing these uses in the EU could give rise to a challenge under the principle of freedom of expression embodied in Article 10 of the European Convention on Human Rights.⁵⁸

Accordingly, a balanced system of GI protection should make allowances for generic producers in markets in which GIs protection is introduced. This can take many forms. Transitional periods come to mind of course. They were considered the method of choice when TRIPS was introduced and higher intellectual protection (including GIs) was “pushed” on many developing nations. Yet transitional periods are unlikely to be sufficient to quell opposition to GIs in many New World markets.

Another option is to allow the unauthorized uses of GI-related terms accompanied by the terms “style,” “like,” or “type,” provided these terms are not used to engender consumer confusion and mislead consumers as to the origin of competitors’ products.⁵⁹ This solution is compatible with TRIPS with the exception of the provision in Article 23 of TRIPS that directly excludes the use of

⁵⁶ *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980).

⁵⁷ Harry N. Niska, “The European Union Trips Over the U.S. Constitution: Can the First Amendment Save the Bologna That Has a First Name?,” (2004) 13 *Minn. J. Global Trade* 413, at 440-441.

⁵⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10(1), Nov. 4, 1950, 213 U.N.T.S. 222.

⁵⁹ Irene Calboli, “Expanding the Protection of Geographical Indications of Origin Under TRIPs: “Old” Debate or “New” Opportunity?,” (2006) 10 *Marquette Intell. Prop. L. Rev.* 181, 192-202.

“style,” “like,” or “type” with respect to GIs identifying wines and spirits.⁶⁰ It is, however, unlikely to be found compliant with the Lisbon Agreement (whether the 1958 version of the Geneva Act). Indeed, this option would be strongly opposed by GI beneficiaries, in particular in the EU, which is negotiating for a GI protection that prohibits these uses as part of FTA negotiations with other countries. Yet, this option does resolve the competition and linguistic-related concerns that have been raised, with valid reasons, with respect to GI protection. Ultimately, the adoption of such a compromising approach could offer an even stronger argument in support of additional GI protection, and could contribute to more countries effectively embracing GI protection on a larger basis compared to today.

Options to move forward are not binary, in the sense that it does not mean that either the GI or generic producers must win all. The US-EU wine Pact created a category of semi-generic appellations for example.⁶¹ It is worth noting that almost all wine-related appellations currently on the Lisbon register are protected in the United States under either Article 7(1) or 7(4) of this Pact.⁶² Article 7(4) basically recalls that a number of European wine appellations were already protected under US

⁶⁰ TRIPS Agreement, art. 23. Comparison between GI-denominated products and non-GI-denominated products is also excluded under the system of comparative advertising that has been adopted in the EU with the Comparative Advertising Directive. See, Council Directive 97/55, art. 3a(1), 1997 O.J. (L 290) 18, 21 (EC) (“Comparative advertising shall, as far as the comparison is concerned, be permitted when . . . for products with designation of origin [the comparison] relates in each case to products with the same designation.”).

⁶¹ March 10, 2006. Available at <http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=2541> [**“Wine Pact”**]. See also Agreement In The Form Of An Exchange Of Letters Between The United States Of America And The European Community On Matters Related To Trade In Wine, Document EUUSA/CE/en1 and en2, Nov. 23, 2005, available at http://www.ttb.gov/wine/wineagreement.pdf?cm_sp=ExternalLink--Federal--Treasury.

⁶² There is arguably no new effective protection in the Wine Pact compared to the previous US situation. Under 27CFR4.24(c) and 27CFR12.31, which protect names of geographic significance, which have not been found by the Administrator of the Alcohol and Tobacco Tax and Trade Bureau (Department of the Treasury) to be generic or semi-generic. Examples include Bordeaux Blanc, Bordeaux, Rouge, Graves, Médoc, Saint-Julien, Château Yquem, Château Margaux, Château Lafite, Pommard, Chambertin, Montrachet and Rhône

regulations prior to the Wine Pact. Then Article 7(1) adds a list of additional appellations that “may be used as names of origin for wine only to designate wines of the origin indicated by such a name.” They are described as “names of quality wines produced in specified regions and names of table wines with geographical indications [...] and names of Member States [of the European Union].”⁶³ There are only a few instances where an appellation protected under the Wine Pact seems to clash with a live trademark owned by a third party.⁶⁴ More importantly, the Pact allows continued use of semi-generic appellations used in the United States before December 13, 2005, provided the term is only used on labels bearing the brand name for which an applicable certificate of label approval (COLA) has been issued.⁶⁵

While the Wine Pact mentions that it does not “affect the rights and obligations of the Parties under the WTO Agreement,” which includes the TRIPS Agreement, it would be politically and perhaps legally difficult for the European Communities to complain that the U.S. violates TRIPS by implementing the Wine Pact the Europeans signed.⁶⁶ It is likely that the recent conclusion of the Geneva Act may be seen as an opportunity to get back some of the concession made in the Wine Pact, however.

Conclusion

GIs encapsulate cultural and historical values. They allow producers to translate those values in economic terms and port them to export markets, capturing additional rents that both recognize their role as custodians of

⁶³ Some of which were partially protected as sub-appellations under existing US regulations. For example, “Anjou” was protected under the regulations mentioned in the previous note, but Article 7(1) will also protect more specific sub-appellations such as “Anjou Val de Loire.”

⁶⁴ Examples include “Chéverny” and “Charlemagne.”

⁶⁵ COLAs are issued by the Alcohol and Tobacco Tax and Trade Bureau, under 24CFR4.30. See <http://www.ttb.gov/forms/f510031.pdf>. According to Annex 2 of the Wine Pact, the full list of such denominations, which signal both a geographical origin and a type of product, is as follows: Burgundy (though not the French “Bourgogne”), Chablis, Champagne, Chianti, Claret, Haut Sauterne, Hock, Madeira, Malaga, Marsala, Moselle, Port, Retsina, Rhine, Sauterne, Sherry and Tokay. Provisions implementing Article 6 were introduced in December 2006 by s. 422 of the appropriately named *Tax Relief and Health Care Act of 2006*.

⁶⁶ Wine Pact, Article 12(1).

traditions in the making of specific goods, and hopefully to preserve their locality, know-how and greater diversity in the global marketplace for wines, spirits, agricultural products, crafts and other GI-denominated products. GIs bring value to informed consumers but they increase certain costs, their introduction in markets in which generic producers exist must be carefully considered.