

Enhanced Protections For Geographical Indications Under TRIPs: Potential Conflicts Under the U.S. Constitutional and Statutory Regimes

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INTRODUCTION

In the controversy over intellectual property protections for geographical indications, a rose by any other name would not smell as sweet. The Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs”) defines geographical indications as “indications which identify a good as originating in the territory of a [signatory nation], or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin.”¹ Although TRIPs provides protections for geographical indications,

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¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 321 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPs].

such as “ROQUEFORT” or “COGNAC,” the recent push for enhanced protections, spearheaded by the European Union, is strongly opposed by the “New World.”² Opponents are concerned that the European Union’s proposal to re-appropriate terms such as “Feta,” “Parmesan,” “Mozzarella,” and “Champagne,” which have arguably become generic in the U.S., will adversely affect business and trade.³ However, in addition to these pragmatic concerns, effective implementation of the European proposal in the U.S. may be undermined by constitutional and statutory restrictions.⁴

This Note discusses the potential impediments to the implementation of an enhanced TRIPs Agreement, and discusses one possible compromise solution. Part I of this Note provides a background discussion on geographical indications, the TRIPs Agreement, and opposition surrounding the European Union’s proposal. Part II analyzes U.S. domestic trademark law under the Lanham Act and judicial precedent, and discusses the ways in which geographical indications have been protected therein. Part III notes the main sources of conflict against which an enhanced TRIPs Agreement may founder: the First Amendment, and the statutory scheme under the Lanham Act. Finally, Part IV discusses, first, one possible compromise, in which the Europeans relinquish their designs to “proptertize” generic terms in favor of a regulatory scheme, and second, the practical and political impediments that would remain in either scenario.

² 2 THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 14:19 (4th ed. 2007) (discussing legislative changes which will prohibit new uses of semi-generic names on non-European wines) [hereinafter MCCARTHY ON TRADEMARKS].

³ United States Department of Agriculture, WTO: Beyond the Agreement on Agriculture (Aug. 15, 2007), <http://www.ers.usda.gov/briefing/WTO/geoindications.htm> [hereinafter WTO Agriculture]; see also Albrecht Conrad, *The Protection of Geographical Indications in the TRIPs Agreement*, 86 TRADEMARK REP. 11, 18–19 (1996).

⁴ See Conrad, *supra* note 3, at 20–21.

I. GEOGRAPHICAL INDICATIONS & THE INTERNATIONAL LANDSCAPE

A. *The TRIPs Framework*

Prior to TRIPs, various multilateral agreements provided differing guidelines for intellectual property protections.⁵ The 1994 conclusion of the Uruguay Round of the General Agreement on Tariffs and Trade saw the adoption of the TRIPs Agreement, which aimed to harmonize then-existing intellectual property systems.⁶ Non-discrimination served as the first policy basis of TRIPs; nations agreed to treat foreigners and nationals equally, and pledged to offer equal treatment for nationals of all WTO trading partners.⁷ TRIPs' second policy undercurrent was the belief that greater intellectual property protections would allow for increased technological innovation, resulting in economic and social benefits to producers and consumers alike.⁸ In furtherance of this policy, TRIPs mandated that its signatories amend their domestic legal regimes in order to provide certain minimum levels of intellectual property protections.⁹ These protections covered copyrights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits and trade secrets.¹⁰ TRIPs also required its signatories to ensure the availability of enforcement procedures "so as to permit effective action against any act of infringement of intellectual property rights . . . including expeditious remedies to prevent infringements and remedies which

⁵ A lengthy discussion of these agreements is out of the scope of this Note. However, these agreements include the Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583; the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, Oct. 31, 1958, 923 U.N.T.S. 205; and the Madrid Agreement Concerning the International Registration of Marks, Apr. 14, 1891, 828 U.N.T.S. 389.

⁶ DETLEV F. VAGTS, WILLIAM S. DODGE & HAROLD HONGJU KOH, *TRANSNATIONAL BUSINESS PROBLEMS* 383 (3d ed. 2003).

⁷ World Trade Organization, *Understanding the WTO: The Agreements—Intellectual Property: Protection and Enforcement*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm.

⁸ *Id.*

⁹ VAGTS ET AL., *supra* note 6, at 383.

¹⁰ *See* TRIPs, *supra* note 1.

constitute a deterrent to further infringements.”¹¹ Trade-related disagreements between TRIPs signatory nations would be resolved under the Dispute Settlement Understanding, a legal text that outlines WTO settlement dispute procedures.¹²

B. Geographical Indications Under TRIPs

Articles 22, 23 and 24 of the TRIPs Agreement endeavor to protect geographical indications from (1) the use of false or misleading indications; (2) the registration of geographical indications as trademarks; and (3) “genericide,” or the dilution of geographical indications into generic terms.¹³ Under Article 22, signatories must provide the legal means to protect consumers from the misleading use of geographical indications.¹⁴ Moreover, signatories are obligated to “refuse or invalidate the registration of a trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated, if use of the indication . . . is of such a nature as to mislead the public as to the true place of origin.”¹⁵ Although Article 22 grants signatories discretion to implement methods of enforcement for geographical indication protections, TRIPs mandates that, at minimum, enforcement procedures be “available” in each signatory nation so as to permit effective action against any act of infringement.¹⁶

Article 23 of TRIPs imposes heightened levels of protection for geographical indications for wines and spirits.¹⁷ Under this Article, member nations must “provide the legal means” for parties to prevent the use of inexact or misidentified geographical

¹¹ *Id.* art. 41.

¹² *See* World Trade Organization, Review of the Dispute Settlement Understanding, http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/19dis_e.htm.

¹³ *See* Conrad, *supra* note 3, at 45.

¹⁴ TRIPs, *supra* note 1, art. 22(1).

¹⁵ *Id.* art. 22(3).

¹⁶ *Id.* art. 41(1).

¹⁷ *See id.* art. 23(1) (“Each member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question.”).

indications for wines and spirits.¹⁸ This regulation applies even where the true origin of the goods is indicated, or the geographical indication is used in translation, or accompanied by expressions such as “kind,” “type,” “style,” or “imitation.”¹⁹ Thus, unlike Article 22, Article 23 protects geographical indications for wines and spirits regardless of whether their proffered use would actually result in consumer confusion. In order to facilitate the continued protection of geographical indications for wines and spirits, Article 23 calls for future negotiations and the establishment of a multilateral system of notification and registration.²⁰

Article 24 establishes significant limitations and exceptions to the protections codified in Articles 22 and 23. For example, Article 24 grandfathers in certain preexisting usages of geographical indications that would otherwise violate the TRIPs Agreement.²¹ Signatories are not required to prevent the use of another member’s geographical indication, where the usage at issue has been in a continuous manner for like products, or in good faith, for at least ten years prior to the signing of TRIPs.²² Moreover, Article 24 emphasizes that signatories need not protect geographical indications with respect to products for which the indication is “identical with the term customary in common language as the common name for such goods or services in the territory of that Member.”²³ Thus, U.S. producers could use a geographical indication that is protected in France, so long as that indication is generic in the U.S.²⁴ Specific examples include SWISS and CHEDDAR cheeses, SWEDISH meatballs, PEKING duck, and HAMBURGER meat patties.²⁵ Finally, Article 24 notes that members are not required to protect geographical indications that have ceased to be protected in the country of origin, or which have fallen into disuse there.²⁶

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* art. 23(4).

²¹ *Id.* art. 24(4).

²² *Id.*

²³ *Id.* art. 24(6).

²⁴ Conrad, *supra* note 3, at 40.

²⁵ 2 MCCARTHY, *supra* note 2, § 14:19.

²⁶ TRIPs, *supra* note 1, art. 24(9).

C. *The Road Ahead*

On first glance, the geographical indication provisions of the TRIPs Agreement appear to signify landmark international accord on the issue of protection of geographical locations. However, many TRIPs signatories remained dissatisfied with current protections, and argued for both the creation of a multilateral register for wines and spirits, as well as extending the higher level of protections associated with wines and spirits to all products.²⁷ The latter proposal is the focus of the following discussion.

TRIPs members in favor of extending protections, and those opposed to them, fell roughly into an Old World-New World divide.²⁸ By 2003, the European Union and others²⁹ called for terminating the use of certain generic names for food, wine and spirits unless the products at issue actually came from the regions identified.³⁰ The European Union and its allies view enhanced geographical indication protection as a means to prevent other countries from “usurping” their appellations of origin, as well as a path to improved product marketing.³¹ During the 2003 WTO meeting in Cancun, Mexico, the European Union requested that over forty product terms containing ostensibly generic geographical indications be protected.³² Products affected by this “claw back” proposal would not be saleable, even if such products did not actually mislead consumers as to product origin.³³

²⁷ World Trade Organization, TRIPs: Geographical Indications—Background and the Current Situation (Nov. 21, 2005), http://www.wto.org/english/tratop_e/tripos_e/gi_background_e.htm [hereinafter WTO Background].

²⁸ *Id.*

²⁹ These countries include Bulgaria, Guinea, India, Jamaica, Kenya, Madagascar, Mauritius, Morocco, Pakistan, Romania, Sri Lanka, Switzerland, Thailand, Tunisia and Turkey. *See* WTO Agriculture, *supra* note 3.

³⁰ *Id.*

³¹ WTO Background, *supra* note 27.

³² *See* WTO Agriculture, *supra* note 3. Product terms, which contain ostensibly generic geographical indications, include Beaujolais, Bordeaux, Chablis, Champagne, Chianti, Asiago, Feta, Fontina, Mozzarella di Bufala Campagna, Prosciutto di Parma, and Roquefort. *Id.*

³³ *Id.*

Although the Cancun negotiations collapsed,³⁴ the European Union renewed its efforts to achieve heightened protections in its 2005 Proposal.³⁵ This Proposal remains consistent with the 2003 plan; it seeks to extend the regime of protection currently available for wines and spirits to geographical indications on all products.³⁶ However, the 2005 Proposal also contains a “grandfather” provision that would exempt from the “claw back”³⁷ those producers who have used a geographical indication in a continuous manner with regard to the same or related goods either for at least ten years preceding the date of the amendment, or in good faith preceding that date.³⁸

Those who oppose the 2005 Proposal are led by the United States,³⁹ and contend that the existing level of protection for geographical indications in Article 22 remains adequate.⁴⁰ These opponents are concerned that any enhanced protection would burden and disrupt legitimate business practices.⁴¹ As the then-Deputy Director of the U.S. Patent and Trademark Office noted, the European Union

³⁴ See World Trade Organization, Ministerial Statement of 14 September 2003, WT/MIN(03)/20 (2003) (stating that although considerable progress has been made at the Fifth Ministerial Conference in Cancun, “more work needs to be done in some key areas to enable us to proceed towards the conclusion of the negotiations in fulfillment of the commitments we took at Doha.”).

³⁵ World Trade Organization, General Council, Trade Negotiations Committee, Council for Trade-Related Aspects of Intellectual Property Rights, Special Session, *Geographical Indications—Communication from the European Communities*, WT/GC/W/547, TN/C/W/26, TN/IP/W/11 (July 14, 2005) [hereinafter 2005 Proposal].

³⁶ *Id.*

³⁷ Jon W. Dudas, Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the United States Patent and Trademark Office, Statement Before the Committee on Agriculture, U.S. House of Representatives (July 22, 2003), available at <http://www.uspto.gov/web/offices/com/speeches/stratplan2003apr03.htm> [hereinafter Dudas].

³⁸ *Id.*

³⁹ Other countries include Argentina, Australia, Canada, Chile, Colombia, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, New Zealand, Panama, Paraguay, the Philippines, and Chinese Taipei. See WTO Agriculture, *supra* note 3.

⁴⁰ *Id.*

⁴¹ General Council Trade Negotiations Committee, *Note by the Secretariat: Issues Related to the Extension of the Protection of Geographical Indications Provided for in Article 23 of the TRIPS Agreement to Products Other Than Wines and Spirits*, ¶53, WT/GC/W/546 (May 18, 2005) [hereinafter Issues Report].

is asking the U.S. Government, U.S. producers, and U.S. consumers to subsidize EU producers through this ‘claw back’ of generic terms so that EU producers can charge monopoly prices for their products. . . . We see no basis for our producers, trademark owners, and consumers to be asked to stop the use of generic terms.⁴²

Moreover, opponents of the 2005 Proposal reject the accusation that their nationals have “usurped” protected marks. Indications of origin have often been used in other countries not because users sought to “free-ride,” but rather, because citizens of the first country had emigrated to the second, and used the same terms for their products that they had used in their countries of origin.⁴³

II. U.S. DOMESTIC LAW

In addition to the foregoing pragmatic concerns, statutory and constitutional hurdles may prevent the 2005 Proposal from attaining absolute operation in the U.S. Part II provides the foundation for this conclusion. Specifically, Part II discusses the U.S. trademark law system, which governs geographical indications in the U.S.

A. *Background on U.S. Trademark Law*

Trademark law, a subcategory of intellectual property law, generally permits sellers to market their items in distinctive manners so as to distinguish such items from those of competitors.⁴⁴ United States trademark legislation is founded on policy concerns for consumer protection, property rights and economic efficiency.⁴⁵ For example, the purchasing public has an interest in being safeguarded from the deceptive practices of sellers.⁴⁶ In turn, sellers have the right to enjoy the fruits of their

⁴² Dudas, *supra* note 37.

⁴³ Issues Report, *supra* note 41, at 15.

⁴⁴ VAGTS ET AL., *supra* note 6, at 381.

⁴⁵ See 1 MCCARTHY ON TRADEMARKS, *supra* note 2, § 2:1.

⁴⁶ *See id.*

marks, which may carry connotations of good will and reputation.⁴⁷ In a world without trademark protections, sellers would have no incentive to invest in quality control or similar activities necessary to establish strong brand names.⁴⁸ As a result, consumers' transaction costs in terms of making informed purchasing decisions would rise dramatically.⁴⁹ Thus, trademarks not only protect the producer's investment, they also protect the consumer from deceptive and inefficient⁵⁰ trade practices.⁵¹

The foregoing policies were codified in the Lanham Act of 1946 ("Act"), which proscribes activities such as trademark infringement, trademark dilution, and false advertising.⁵² The Act first provides for the creation of quasi-property rights in trademarks, defined as "any word, name, symbol or device, or any combination thereof . . . used . . . to identify and distinguish . . . goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown."⁵³ The Act also protects collective and certification marks.⁵⁴ Collective marks refer to trademarks that are

⁴⁷ *See id.*

⁴⁸ *Id.* § 2:3.

⁴⁹ *See* William M. Landes & Richard A. Posner, *The Economics of Trademark Law*, 78 TRADEMARK REP. 267, 271 (1988).

⁵⁰ *See, e.g.*, 1 MCCARTHY ON TRADEMARKS, *supra* note 2, § 3:2.

In general, trademarks perform four functions that are deserving of protection in the courts: (1) To identify one seller's goods and distinguish them from goods sold by others; (2) To signify that all goods bearing the trademark come from or are controlled by a single, albeit anonymous, source; (3) To signify that all goods bearing the trademark are of an equal level of quality; and (4) As a prime instrument in advertising and selling the goods. In addition to these four functions, it must also be kept in mind that a trademark is also the objective symbol of the good will that a business has built up. Without the identification function performed by trademarks, buyers would have no way of returning to buy products that they have used and liked. If this consumer satisfaction and preference is labeled 'good will,' then a trademark is the symbol by which the world can identify that good will.

Id. (internal citations omitted).

⁵¹ VAGTS ET AL., *supra* note 6, at 381.

⁵² 15 U.S.C. §§ 1051–1129 (2007).

⁵³ *Id.* § 1127.

⁵⁴ *Id.* § 1054.

used in good faith by members of a cooperative or association in the ordinary course of commerce.⁵⁵ Examples of collective marks include “CPA,” which indicates members of the Society of Certified Public Accountants, and “REALTOR,” which identifies real estate professionals as members of an association.⁵⁶ Certification marks, on the other hand, refer to “any word, name, symbol, or device, or any combination thereof . . . used . . . to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristic of such person’s goods or services”⁵⁷ The “IDAHO” potatoes mark is one example of a certification registered in the U.S.⁵⁸

The Lanham Act currently offers four separate bases for registration of a mark,⁵⁹ each of which is prima facie evidence of the mark’s validity and ownership.⁶⁰ Unauthorized use of a valid mark constitutes the commission of a commercial tort.⁶¹ Because the quasi-property right associated with trademark pertains to the right to prevent consumer confusion, the trademark itself is not actually infringed during the commission of such a tort. Rather, what is infringed is the right of the public to be free from confusion, and the concomitant right of a trademark owner to control a product’s reputation.⁶² Thus, “[a] trademark owner has a

⁵⁵ *Id.* § 1127.

⁵⁶ *See, e.g.,* Zimmerman v. Nat’l Ass’n of Realtors, 2004 WL 763936 (T.T.A.B. Mar. 31, 2004) (holding that the National Association of Realtors, and the name REALTOR, qualifies as a collective mark under the Lanham Act).

⁵⁷ 15 U.S.C. § 1127.

⁵⁸ *See* Idaho Potato Comm’n v. M & M Produce Farm & Sales, 335 F.3d 130, 132 (2d Cir. 2003).

⁵⁹ *See* 3 MCCARTHY ON TRADEMARKS, *supra* note 2, § 19:1 (noting that the following procedures allow for mark registration: (1) use-based application, in which an application to register is based on prior actual use of the mark in interstate or foreign commerce; (2) applications filed by qualified foreign firms, in which applicants must state their bona fide intention to use the mark in the U.S., but need not prove actual use; (3) intent-to-use applications, which are filed by applicants with bona fide intentions to use the mark on the goods or services listed, and which require a verified statement and proof that the mark has been used in commerce; (4) extension under the Madrid Protocol, in which foreign entities with registration in their home nations can seek to extend that protection to obtain U.S. registration).

⁶⁰ LEE BURGUNDER, LEGAL ASPECTS OF MANAGING TECHNOLOGY 445 (4th ed. 2007).

⁶¹ 1 MCCARTHY ON TRADEMARKS, *supra* note 2, § 2:7.

⁶² *Id.* § 2:14.

property right only insofar as is necessary to prevent consumer confusion as to who produced the goods and to facilitate differentiation of the trademark owner's goods."⁶³

Though the Lanham Act appears to authorize a broad scope of trademark protections, certain marks remain ineligible. For example, generic words cannot be protected under the Act⁶⁴ because they merely identify "the genus of which the particular product is a species."⁶⁵ Thus, while the Act precludes the granting of a privatized right in the term "Apple" to a seller of the edible fruit, the Act permits the granting of such a right to a seller of computers.⁶⁶ Similarly, the Act fails to recognize marks that are likely "to cause confusion, or to cause mistake, or to deceive"⁶⁷ The common law tort of deceit was the precursor to this prong of the Act,⁶⁸ which seeks to protect consumers from "confusion as to source."⁶⁹ Finally, purely descriptive geographic terms cannot be protected by trademark without the acquisition of distinctiveness through "secondary meaning."⁷⁰ The purpose of a trademark is to distinguish an individual's products from those sold by others in the locality.⁷¹ Protecting purely descriptive geographic names, without more, would not serve this essential function; such names would merely indicate the locus of production, rather than serve as a meaningful identification of the producer.⁷²

B. Geographical Indications and the Lanham Act

Despite precluding the recognition of property rights in purely descriptive geographic names, the Lanham Act nonetheless permits

⁶³ *Int'l Order of Job's Daughters v. Lindeburg & Co.*, 633 F.2d 912, 919 (9th Cir. 1980).

⁶⁴ 2 MCCARTHY ON TRADEMARKS, *supra* note 2, § 12:1.

⁶⁵ *Liquid Controls Corp. v. Liquid Control Corp.*, 802 F.2d 934, 936 (7th Cir. 1986).

⁶⁶ 2 MCCARTHY ON TRADEMARKS, *supra* note 2, § 12:1.

⁶⁷ 15 U.S.C. § 1052(d) (2006).

⁶⁸ *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 157 (1989).

⁶⁹ *Id.* at 165.

⁷⁰ 2 MCCARTHY ON TRADEMARKS, *supra* note 2, § 15:1 ("Secondary meaning requires only that customers associate the word or symbol with a single, albeit anonymous, commercial source.").

⁷¹ 2 MCCARTHY ON TRADEMARKS, *supra* note 2, § 14:1.

⁷² *See Canal Co. v. Clark*, 80 U.S. 311, 324 (1872).

protections for geographical indications.⁷³ Property rights for geographical indications in the U.S. are protected by appellations of origin for U.S. wine, and regional certification for other products.⁷⁴ Under the Lanham Act and the Federal Alcohol Administration Act, American wine products may indicate a number of specified appellations of origin.⁷⁵ The Lanham Act additionally creates property interests in regional certification marks.⁷⁶ For example, sellers may utilize the mark “ROQUEFORT” to signify that their products have been manufactured from sheep’s milk, and cured in Roquefort, France, in accordance with long-established methods and processes.⁷⁷ Registration⁷⁸ of indications of regional origin prevents outsiders from “free-riding” on producers’ designations, and simultaneously protects consumers from being misled as to product source information.⁷⁹

Although geographical indications may thus be protected under the certification and collective marks doctrine, the Lanham Act does not permit the creation of exclusive, proprietary rights therein. Accordingly, these marks are not owned by the seller/producer, but are owned by the individual, state, or association responsible for specifying standards and terms for licensing use of the mark.⁸⁰ The Act requires that the mark be

⁷³ See generally 15 U.S.C. §§ 1051–1129. The Lanham Act also permits states to develop their own geographic indication protection regimes. Though beyond the scope of this Note, examples include the Florida Citrus Code of 1949, the Georgia Vidalia Onion Act of 1986 and the Idaho Potato Commission’s regulatory actions.

⁷⁴ 2 MCCARTHY ON TRADEMARKS, *supra* note 2, § 14:1.50.

⁷⁵ 27 C.F.R. § 4.25(a)(1) (2006) (options include the United States; a particular county; up to three counties in the same state; up to three contiguous states; or a particular grape-growing “viticultural” region).

⁷⁶ 15 U.S.C. § 1127 (2006).

⁷⁷ Terry E. Holtzman, *Tips from the Trademark Examining Operation*, 81 TRADEMARK REP. 180, 181 (1991).

⁷⁸ An application for certification mark registration must specify the following elements: (1) the manner in which the mark is used; (2) that the applicant exercises legitimate control over the mark; (3) that the applicant is not engaged in the production or marketing of the goods or services at issue; (4) the standards that determine under what conditions the mark may be used by sellers. See 3 MCCARTHY ON TRADEMARKS, *supra* note 2, § 19:50.

⁷⁹ Holtzman, *supra* note 77, at 185.

⁸⁰ *Id.* at 184.

licensed to all sellers whose products or services meet the certifier's standards,⁸¹ and grants owners and licensees alike the right to injunctive and monetary relief for infringement.⁸² Once a mark falls victim to "genericide," in which a designation enters the "linguistic commons," owners and licensees lose their proprietary interests in the mark.⁸³ The Act additionally provides that certain misrepresentations of origin, regardless of whether the mark at issue is deemed generic, constitute commercial tort sounding in false designation of origin.⁸⁴ The following section explores these two doctrines.

C. Applicable U.S. Case Law

1. The Genericness Inquiry

Because valid trademarks are of substantial value to owners and licensees, the issue of whether a particular trademark has become generic is a matter of frequent litigation. The common law test for genericness, as stated by Judge Learned Hand, has been codified in the Lanham Act.⁸⁵ This test examines the factual circumstances relating to the public's understanding of a given mark.⁸⁶ For example, in holding that "ASPIRIN" had become generic, Judge Hand asked "[w]hat do the buyers understand by the word for whose use the parties are contending?"⁸⁷ Pursuant to this inquiry, courts must contemplate whether the public thinks that the mark at issue connotes a generic name of a product, or instead indicates one source of that product.⁸⁸

Judicial decisions bearing on the genericness inquiry prove instructive. In *Community of Roquefort v. William Faehndrich, Inc.*,⁸⁹ the Second Circuit determined that defendant Faehndrich

⁸¹ *Id.* at 183.

⁸² 15 U.S.C. § 1114 (2005); 15 U.S.C. § 1116 (2002).

⁸³ 2 MCCARTHY ON TRADEMARKS, *supra* note 2, § 12:1.

⁸⁴ 15 U.S.C. § 1125.

⁸⁵ *See* 15 U.S.C. § 1064; *Bayer Co. v. United Drug Co.*, 272 F. 505, 509 (S.D.N.Y. 1921).

⁸⁶ *See* 15 U.S.C. § 1064.

⁸⁷ *Bayer*, 272 F. at 509.

⁸⁸ *See, e.g.*, 2 MCCARTHY ON TRADEMARKS, *supra* note 2, § 12:4.

⁸⁹ 303 F.2d 494 (2d Cir. 1962).

had not raised a genuine issue of material fact regarding whether consumers understood “ROQUEFORT” as a generic term.⁹⁰ In that case, the Community of Roquefort was the holder of a registered certification mark for its cheese.⁹¹ As applied to cheese, the “ROQUEFORT” mark could only be used to indicate that the product had been manufactured from sheep’s milk, cured in the natural caves in Roquefort, France, in accordance with “the historic methods and usages of production.”⁹² Though Faehndrich labeled his product “Imported Roquefort Cheese,” his cheese was produced in Hungary and Italy.⁹³ In arguing against summary judgment, Faehndrich contended that a genuine issue existed as to “whether the term ‘Roquefort’ had acquired principal significance as a description of blue-mold sheep’s milk, regardless of its origin, and without reference” to a particular method of production.⁹⁴ The court rejected Faehndrich’s contention, which was unsupported by allegations of facts indicative of genericide.⁹⁵

The Trademark Board’s 1998 decision in *Institut National Des Appellations d’Origine v. Brown-Forman Corp.*⁹⁶ is significant for its analysis of alleged genericide with respect to a common law regional certification mark. At issue in *Brown-Forman* was whether the term “COGNAC” constituted a generic name for brandy.⁹⁷ Applicant Brown-Forman sought to register the mark “CANADIAN MIST AND COGNAC” for its beverage product, which consisted of a mixture of Canadian whiskey and cognac.⁹⁸ The Institut National Des Appellations d’Origine (“INAO”) opposed the application on the ground that “COGNAC” constituted an “appellation of controlled origin” indicative of designations of geographic origin and quality.⁹⁹ The INAO argued that Brown-Forman intended, in contravention of the Lanham Act,

⁹⁰ *Id.* at 498.

⁹¹ *Id.* at 495.

⁹² *Id.* at 496 (internal quotations omitted).

⁹³ *Id.*

⁹⁴ *Id.* at 497.

⁹⁵ *Id.*

⁹⁶ 47 U.S.P.Q.2d 1875 (1998).

⁹⁷ *See id.* at 1883.

⁹⁸ *Id.* at 1877.

⁹⁹ *Id.*

to appropriate and trade upon the substantial goodwill and recognition that had accrued in the “COGNAC” term.¹⁰⁰

In determining that “COGNAC” qualified as a common law regional certification mark that had not become generic, the Trademark Board elaborated on the nature of the required fact-based inquiry. Rather than asking whether the public is expressly aware of the certification *function* of the mark at issue, the Trademark Board emphasized that the proper inquiry focuses on whether the public understands that goods bearing the particular mark come only from the region named therein.¹⁰¹ Moreover, a regional certification mark cannot become a generic term as applied to particular goods unless the mark appears to have lost its significance as an indication of regional origin for those goods.¹⁰² Because the parties agreed, first, that U.S. purchasers primarily understood the designation “COGNAC” to refer to brandy originating in the Cognac region of France, and second, that the INAO in fact controlled and limited use of the designation, the Trademark Board held that “COGNAC” had not fallen victim to genericide.¹⁰³

The case-by-case approach to the genericide inquiry has also produced decisions that uphold genericness. For example, in the pre-Lanham Act case of *La Republique Francaise v. Saratoga Vichy Spring Company*,¹⁰⁴ the U.S. Supreme Court held that the mark “VICHY” could be utilized to denote water even if the source was not located in or around Vichy, France.¹⁰⁵ In that case, the defendant sold water that originated from Saratoga Springs, New York, using labels displaying the word “Vichy.”¹⁰⁶ In denying a right to exclusive use of the term, the Court emphasized that the owners of the spring in France had acquiesced to their mark’s genericide: “For thirty years the defendant . . . has been openly and notoriously bottling and selling its waters under the

¹⁰⁰ *Id.* at 1877–78.

¹⁰¹ *Id.* at 1885.

¹⁰² *Id.*

¹⁰³ *Id.* at 1885.

¹⁰⁴ 191 U.S. 427 (1903).

¹⁰⁵ *Id.* at 435.

¹⁰⁶ *Id.*

name of the ‘Saratoga Vichy’ [Plaintiff] had allowed the name to become generic and indicative of the character of the water.”¹⁰⁷ Not only had the mark “VICHY” become generic, but defendant’s use of the mark was not designed to cause consumer confusion: there was no attempt by the defendant to simulate the plaintiff’s label, and defendant only used the “VICHY” mark in connection with “Saratoga.”¹⁰⁸ Accordingly, the Court determined that the plaintiff was not entitled to relief.¹⁰⁹

2. The False Designation of Origin Inquiry

The Lanham Act provides that certain misrepresentations related to a product’s origin, regardless of genericness, may constitute a commercial tort.¹¹⁰ Section 1125 of the Act establishes civil liability for any person who “uses in commerce any word, term, name, symbol or device, or any false designation of origin . . . which—(A) is likely to cause confusion . . . or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of [a person’s] goods”¹¹¹ Absent indicia of deception, however, a cause of action under Section 1125 will not lie. For example, in *Piazza’s Seafood World v. Odom*, the court determined that a certification mark containing the word “CAJUN,” along with other symbols and text, was not infringed by use of the brands “Cajun Boy” and “Cajun Delight” in relation to seafood products.¹¹² Because the Lanham Act does not protect a single term that a party “chooses to cull out of [its certification] mark,” and because the allegedly infringing marks only utilized one term—“Cajun”—in isolation, the Act provided no basis for recovery.¹¹³ More specifically, the facts of *Odom* contained “no element of ‘passing off’ or deceptive labeling that allows Piazza’s business to prosper by fooling or

¹⁰⁷ *Id.* at 436–37.

¹⁰⁸ *Id.* at 439–40.

¹⁰⁹ *Id.* at 441.

¹¹⁰ 15 U.S.C. § 1125 (2006).

¹¹¹ *Id.*

¹¹² 2007 WL 2874436, at *4 (E.D. La. Sept. 26, 2007).

¹¹³ *Id.*

confusing the purchaser as to origin—conduct which would have taken this case out of the scope of the First Amendment.”¹¹⁴

III. CONSTITUTIONAL AND STATUTORY CONFLICTS

Part III describes the potential First Amendment and Lanham Act-related impediments to absolute U.S. implementation of the European Union Proposal.

A. *Constitutional Impediments to the 2005 Proposal*

The U.S. Supreme Court has determined that the federal treaty power under Article II, Section 2 of the U.S. Constitution is limited in scope, and cannot authorize actions which the Constitution otherwise prohibits.¹¹⁵ Accordingly, the First Amendment¹¹⁶ stands as a bulwark against unfettered U.S. acceptance of the 2005 Proposal to amend TRIPs, whose enhanced protections of geographical indications could impinge on free speech.

Although the First Amendment does not operate as a license for individuals to “trammel on legally recognized rights in intellectual property,”¹¹⁷ the Amendment nonetheless protects certain elements of commercial speech that are applicable to geographical indications. Since the 1976 case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court has recognized a right to commercial speech under the First Amendment.¹¹⁸ In that case, the Court invalidated a state law that prohibited the advertising of prescription drug prices.¹¹⁹ The Court reasoned that, “[a]s to the particular consumer’s interest in the free flow of commercial information, that interest may be as

¹¹⁴ *Id.*

¹¹⁵ *See, e.g., Reid v. Covert*, 354 U.S. 1, 16 (1957) (plurality opinion).

¹¹⁶ U.S. CONST. amend. I.

¹¹⁷ *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979).

¹¹⁸ 425 U.S. 748, 761 (1976).

¹¹⁹ *See generally Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

keen, if not keener by far, than his interest in the day's most urgent political debate."¹²⁰

However, in *Central Hudson Gas v. Public Service Commission*, the Court emphasized that commercial speech is entitled to a lesser degree of protection than are other forms of expression.¹²¹ The *Central Hudson* opinion is significant for its four-part test under which the constitutionality of commercial speech regulation may be analyzed. First, courts must consider whether the speech at issue concerns "lawful activity," and is not "misleading."¹²² Second, courts must ask whether the asserted government interest in regulating the speech is "substantial."¹²³ Third, courts must then determine whether the regulation at issue "directly advances the governmental interest asserted," and fourth, whether the regulation "is not more extensive than is necessary to serve that interest."¹²⁴ The party seeking to uphold the regulation carries the burden of justification.¹²⁵

Government regulation of commercial speech in accordance with the demands of the 2005 Proposal may not always withstand scrutiny under the *Central Hudson* test. The first prong of that test requires that the speech at issue be "misleading." Although proponents of the 2005 Proposal claim that misdescriptive geographical terms are inherently misleading, U.S. judicial precedent provides otherwise. Using the name of a country in a mark does not automatically render that mark geographically descriptive.¹²⁶ Instead, courts must consider whether "consumers would reasonably believe the applicant's goods are connected with the geographic location in the mark"¹²⁷ A mark is considered "geographically deceptively misdescriptive" if, first, the mark's primary significance is a generally known geographic location; and second, consumers would reasonably believe the marked goods are

¹²⁰ *Id.* at 763.

¹²¹ 447 U.S. 557, 563 (1980).

¹²² *Id.* at 566.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983).

¹²⁶ *In re Save Venice N.Y., Inc.*, 259 F.3d 1346, 1352 (Fed. Cir. 2001).

¹²⁷ *Id.*; see also *Japan Telecom, Inc. v. Japan Telecom Am., Inc.*, 287 F.3d 866, 871 (9th Cir. 2002).

connected with the geographic location in the mark, when in fact, they are not.¹²⁸ The proposition seems dubious that the average U.S. consumer who, for instance, purchases Parmesan cheese, has any belief that the product originates from Parma, Italy.¹²⁹ As the Second Circuit determined in 1925 with respect to the mark “BUDWEISER”—derived from the Bohemian town of Budweis— “[w]hatever may have been its original weakness, the mark for years has acquired a secondary significance, and has indicated the plaintiff’s product alone.”¹³⁰ In light of this precedent, government regulation of geographical indication usage under the 2005 Proposal may sometimes restrict commercial speech that is not necessarily misleading. Such regulation would not pass muster under the *Central Hudson* test, and would, accordingly, be constitutionally infirm.

Even if the government restriction of commercial speech were to satisfy the first prong of the *Central Hudson* analysis, the restriction may nonetheless fail the second prong, which requires that the regulation be justified by a “substantial” interest. First, the government may only assert an interest in consumer protection on a case-by-case basis; as noted, in many cases consumers are not misled by geographically misdescriptive marks.¹³¹ Second, the government does not have a substantial interest in protecting members of the European Union from “harmful” commercial speech. As Justice Brandeis proclaimed in his now-vindicated concurring opinion in *Whitney v. California*, more speech, rather than enforced silence, is the remedy for the expression of alleged falsehood.¹³² Finally, an asserted interest in complying with the terms of TRIPs, should the 2005 Proposal be adopted, would likewise fail the second prong of the *Central Hudson* test. Because the federal treaty power is limited by the four corners of the

¹²⁸ 259 F.3d at 1352.

¹²⁹ See, e.g., Peter Gumbel, *Food Fight!*, TIME, Aug. 31, 2003, at 44 (quoting one member of the Grocery Manufacturers of America, who noted that “[n]obody picks up Parmesan cheese in a green can and says, ‘Ah! A fine Italian product.’”).

¹³⁰ *Anheuser-Busch, Inc. v. Budweiser Malt Prods. Corp.*, 295 F. 306, 309 (2d Cir. 1923).

¹³¹ See generally *Duncan McIntosh Co. Inc. v. Newport Dunes Marina*, 324 F. Supp. 2d 1078, 1084 (C.D. Cal. 2004).

¹³² 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

constitutional text,¹³³ the government necessarily can have no interest in abiding by a treaty during those instances in which the government's exercise of power would exceed the Constitution.

B. Statutory Impediments to the 2005 Proposal

The current U.S. statutory regime likewise places limits on the reach of the 2005 Proposal, should it be implemented. The statute which enacted the TRIPs Agreement provides that “[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.”¹³⁴ The statute further emphasizes that “[n]othing in this Act shall be construed . . . to amend or modify any law of the United States . . . or . . . to limit any authority conferred under any law of the United States”¹³⁵ Thus, the default “last-in-time” rule¹³⁶ appears to be inoperative in this instance of express legislative intent. Accordingly, any amendment to the TRIPs Agreement that violates current U.S. law would not be implemented.

The existing U.S. trademark system would thus be controlling in the event of the ratification and implementation of a conflicting 2005 Proposal. The Lanham Act, which is rooted in trademark law rather than the law of geographical indications, does not allow for the protection of generic terms.¹³⁷ This guidepost would stand in opposition to the “claw back” agenda of the 2005 Proposal, which aims to re-appropriate generic terms.¹³⁸ Moreover, the Lanham Act provides that prima facie cases alleging false designations of origin must demonstrate material deception of a substantial segment of consumers.¹³⁹ The 2005 Proposal, however, calls for regulation of

¹³³ See, e.g., Reid v. Covert, 354 U.S. 1, 16 (1957) (plurality opinion).

¹³⁴ Uruguay Round Trade Agreements, 19 U.S.C. § 3512 (1994).

¹³⁵ *Id.*

¹³⁶ See, e.g., Whitney v. Robertson, 124 U.S. 190, 194 (1888) (holding that if a treaty and statute relate to the same subject, courts must endeavor to construe them so as to give effect to both; but if the two are inconsistent, the one last in date will control the other).

¹³⁷ Liquid Controls Corp. v. Liquid Control Corp., 802 F.2d 934, 935 (7th Cir. 1986).

¹³⁸ See WTO Background, *supra* note 27.

¹³⁹ See, e.g., 15 U.S.C. § 1125(a)(1)(A) (2006); see also IQ Prods. Co. v. Penzoil Prods. Co., 305 F.3d 368, 375 (5th Cir. 2002).

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appellations of origin regardless of actual consumer deception.¹⁴⁰ These contradictory elements will arguably lead to difficulties of implementation should the 2005 Proposal be ratified.

IV. FOOD FOR THOUGHT

From a legal, rather than a pragmatic or political perspective, the fate of the 2005 Proposal will be determined by its collision with the Lanham Act, and in some cases, with the First Amendment. As the foregoing analysis demonstrates, the 2005 Proposal is fundamentally at odds with the policy underlying the U.S. trademark regime. The legal viability in the U.S. of any future claw back proposal thus turns on whether the Europeans repudiate their designs to appropriate generic terms, such as Parmesan, which generally do not cause consumer confusion.

Some commentators have suggested that greater comity is possible even without such repudiation, and have offered the U.S.-European Union Wine Pact¹⁴¹ as evidence of a new trend toward extended geographical indication protection.¹⁴² However, the perception that the Wine Pact is precedent for heightened geographical indication protection is inaccurate. In December 2006, the U.S. implemented a Wine Pact with the European Union, which prohibited the use of seventeen semi-generic wine names on new U.S. labels, while grandfathering such use for existing trademarked labels.¹⁴³ The practical effect of the Pact is that U.S. wine producers are prohibited from marketing and selling in the

¹⁴⁰ 2005 Proposal, *supra* note 35 (containing proposed text for art. 22(2) of the TRIPs Agreement).

¹⁴¹ 26 U.S.C. § 5388; *see also* Agreement Between the United States of America and the European Community on Trade in Wine, Mar. 10, 2006, *available at* <http://tcc.export.gov/wcm/groups/tradedataanalysis/@tcc/documents/tradeagreement/euineagreementtext.pdf> [hereinafter Wine Pact].

¹⁴² *See, e.g.,* Michelle Agdomar, Note, *Removing the Greek from Feta and Adding Korbelt to Champagne: The Paradox of Geographical Indications in International Law*, 18 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 541, 556 (2008).

¹⁴³ *Congress Approves Wine Agreement Bill With Exceptions*, *INSIDE U.S. TRADE*, Sec. 50, Dec. 15, 2006.

U.S. new products with labels that include any of the seventeen semi-generic names, such as Champagne.¹⁴⁴

On first glance, the Wine Pact may appear to represent the “proptertizing” of semi-generic terms, and thus to provide a foundation for the implementation of the 2005 Proposal. However, the Pact does not purport to create any property right in the seventeen semi-generic names.¹⁴⁵ Instead, the Pact explicitly states that its provisions shall not be construed as “defining intellectual property or as obligating the Parties to confer or recognize any intellectual property rights.”¹⁴⁶ Accordingly, the names included in the Pact “are neither considered, nor excluded from being considered in the future, geographical indications of the [European] Community under U.S. law.”¹⁴⁷ Rather than creating any property right in semi-generic terms, which would contravene the Lanham Act, the Wine Pact merely creates heightened labeling regulations, which are enforced in the U.S. not under the Lanham Act, but by the Alcohol and Tobacco Tax and Trade Bureau (“TTB”).¹⁴⁸ In other words, the Wine Pact does not change the legal status of the semi-generic terms, and does not give the Europeans any enforcement rights.¹⁴⁹ Moreover, the Pact additionally provides that “[t]his Agreement is without prejudice to the rights of free speech in the United States under the First Amendment of the U.S. Constitution”¹⁵⁰ This First Amendment savings clause aims to protect comparative

¹⁴⁴ See *id.*; see also Wine Pact, *supra* note 141, art. 6(1), art. 7(1).

¹⁴⁵ Telephone Interview with Amy Cotton, Attorney-Advisor, Office of International Relations, United States Patent and Trademark Office (Feb. 1, 2008) [hereinafter Cotton Interview].

¹⁴⁶ Wine Pact, *supra* note 141, art. 12(4).

¹⁴⁷ *Id.*

¹⁴⁸ Cotton Interview, *supra* note 145; see also Alcohol and Tobacco Tax and Trade Bureau, Wine Appellations of Origin, <http://www.ttb.gov/appellation/index.shtml>.

¹⁴⁹ Cotton Interview, *supra* note 145.

¹⁵⁰ Wine Pact, *supra* note 141, art. 12(3).

advertising on wine labels,¹⁵¹ so long as the label passes scrutiny under the *Central Hudson* test.¹⁵²

Finally, the Wine Pact should not be viewed as precedent for a future geographical indication claw back agreement for the simple reason that the U.S. wine industry consented to label regulation.¹⁵³ U.S. owners of semi-generic marks in the U.S. wine industry voluntarily agreed not to seek new uses for the marks in return for requiring the European Union to allow, under specified conditions, the use of certain regulated terms on U.S. wine exported to the EU.¹⁵⁴ Then-U.S. Trade Representative Rob Portman, who signed the Pact on behalf of the U.S., noted that, by establishing predictable conditions for the bilateral wine trade, the Pact “is clearly a win-win situation for U.S. and EU winemakers. . . . Winemakers on both sides of the Atlantic have the right to be proud of how tradition, climate and expertise combine to create unique tasting experiences This agreement honors these differences.”¹⁵⁵ The 2005 Proposal thus stands on different ground than the Wine Pact for two key reasons: first, the 2005 Proposal seeks to create property rights in generic terms; and second, the Proposal seeks to preclude geographic indication usage absent consent by U.S. producers. In sum, the Wine Pact can operate neither as a model, nor as a foundation, for the solution of the Old World-New World divide surrounding geographical indication protections.

From the perspective of U.S. law, then, the viability of any future claw back agreement will require European compromise. Specifically, the Europeans must abandon their anti-Lanham Act designs to obtain property rights in certain generic terms, such as Parmesan and Feta, which do not cause consumer confusion in the

¹⁵¹ See, e.g., Wine Pact, *supra* note 141, art. 12(3). For example, the TTB would permit a sparkling wine label, which reads “Just as good as French Champagne.” See generally *id.*

¹⁵² Cotton Interview, *supra* note 145; see also *supra* notes 121–125 and accompanying text.

¹⁵³ Cotton Interview, *supra* note 145.

¹⁵⁴ The United States Mission to the European Union, United States, European Union Sign Pact on Wine Trade (Mar. 10, 2006), <http://useu.usmission.gov/Article.asp?ID=0B113911-4CF3-4AD2-91DB-6A191AF9F54C>.

¹⁵⁵ *Id.*

U.S. Moreover, absent industry consent, claw back legislation could implicate the First Amendment (and perhaps the Fifth Amendment Takings Clause).

Even after these concessions, however, a number of practical and political problems would remain. For instance, should U.S. producers consent to regulation in exchange for trade concessions, such as increased market access, new agency regulation and administration would be required. U.S. taxpayers will likely not be eager to foot the bill for foodstuff label regulation, when, from their perspective, the status quo ante functioned properly. Moreover, because the TRIPs Agreement mandates most-favored nations treatment under which any advantage given to one trading party under one of the agreements must be given to all trading parties under that same agreement,¹⁵⁶ claw back regulation would become unwieldy. On the other hand, should U.S. producers oppose regulation, policymakers would be imprudent to endorse any European claw back proposal.

CONCLUSION

The proposed extension of TRIPs protections for geographical indications leads to a complex controversy. The ramifications of the 2005 Proposal touch upon not only pragmatic, economic concerns, but also two touchstones of the U.S. legal system—the First Amendment and the trademark regime under the Lanham Act. As the foregoing analysis demonstrates, the broadest reaches of the 2005 Proposal would be constrained by the Constitution and the current statutory scheme. Although the future vitality and legitimacy of TRIPs depend on bona fide attempts to reach consensus, such consensus cannot be achieved at the expense of the U.S. legal regime. The Europeans should render their claw back designs consistent with the policy undercurrents of the *Central Hudson* test and the Lanham Act in order to get the U.S. to the bargaining table. From a systemic perspective, the Old World and New World may, in the end, only be able to raise their glasses of Champagne in a toast to the status quo: allowing the Europeans

¹⁵⁶ TRIPs, *supra* note 1, art. 4.

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to apply directly to the U.S. Patent and Trademark Office for certification mark approval.