



125th Anniversary

Special Report

September 1, 2003

on Geographical Indications

GI Protection Systems Around the World

Recently, the IP community has taken notice of a seemingly new, red-hot issue – geographical indications (GIs). But GIs have been recognized and protected for more than a century. Why the sudden interest? The IP community is alarmed because GI protection may be significantly increased in the near future, placing long-established trademarks and generic names in jeopardy.

A GI is a sign used on goods that have a specific geographical origin and possess qualities or a reputation that is due to that place of origin. Generally, a GI consists of the name of the place of origin of the goods. It can encompass everything from an “indication of source,” such as Florida oranges or New Zealand mussels, to highly specialized terms called “appellations of origin” (recognized in few countries), such as Champagne sparkling wines. Protection for these terms varies from country to country, as in the example with Champagne sparkling wines, which are protected only as a “semi-generic” in the United States (i.e., the term can be used by U.S. vintners outside of the Champagne region in France as long as the correct origin is also noted, in expressions such as “California Champagne”). The principal methods for protecting geographical indications are under global treaties, bilateral treaties and national legislation.



The World Trade Organization (WTO) TRIPS Agreement (TRIPS), a treaty that addresses GIs in Articles 22-24, has placed GIs at the top of the worldwide IP agenda for two reasons, namely: level of GI protection and GI registration. Under TRIPS, GIs for wines and spirits are given so-called “absolute” protection under Article 23, i.e., an “incorrect” use of a claimed GI is prohibited even if the use is clear (e.g., MT. EVEREST chardonnay).

The movement in the WTO is to expand that level of protection to all goods, e.g., MT. EVEREST cheese. Thus, trademarks and generic terms that have geographical significance are at risk since, although their uses are clear, they may conflict with a claimed GI. While trademark owners and manufacturers using generic terms (e.g., “feta” is now a GI claimed by Greece) may think that their uses will be grandfathered, this is not certain.

Moreover, future choices of trademarks or generic terms will be forever changed because trademark owners will need to worry about claims from GI regions or even third parties seeking to attack their use as violating GI law.

The other major issue on the WTO agenda is the establishment of a global GI register. Although many plans are currently being considered, specifically whether these registers will be for wines and spirits only or for all goods, or whether they will be voluntary or mandatory, there is no question that change is imminent. There may well be a mandate for a global GI register that will cover all goods, with any new GI

needing to be opposed in 146 WTO member countries individually.

The Lisbon Agreement is the only other major GI treaty, but it has TRIPS compliance problems and a very limited membership. However, it is noteworthy because certain major countries adhere to it, such as France, Italy and Mexico. Additionally, it incorporates provisions such as the mandatory phase out of conflicting prior trademarks. Several developing countries would like to use the Lisbon Agreement as a model for future GI protection worldwide.

Editor's Note

Geographical indications (GIs), appellations of origin and indications of origin have moved to the forefront of issues affecting trademark and related rights. GIs, as defined by the WTO, are indications that identify “a good as originating in the territory of a member or region or locality in that territory where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”

This issue of the *INTA Special Report* presents some views of the GI debate affecting many industries in numerous countries – from spirits and alcoholic beverages to cheese and rice. Some of the information provided might appear to intrude on traditional concepts, but that is part of what makes GIs an increasingly controversial topic.

Olga M. Nedeltscheff, Editor in Chief

“The movement in the WTO is to expand that level of protection to all goods, thus trademarks and generic terms that have geographical significance are at risk since, although their uses are clear, they may conflict with a claimed geographical indicator.”

Geographical Indications

According to Article 22 (1) of the TRIPS Agreement, geographical indications (GIs) identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

Appellation of Origin

Article 2 of the Lisbon Agreement defines “appellation of origin” as the geographical name of a country, region or locality that serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.

Indications of Source

Although used, “indications of source” are not defined in Articles 1 (2) and 10 of the Paris Convention and in the Madrid Agreement on Indications of Source. According to WIPO Document SCT/6/3 Rev on “Geographical Indications Historical Background, Nature of Right, Existing Systems for Protection and Obtaining Protection in Other Countries,” Article 1 (1) of the Madrid Agreement on Indications of Source contains language that clarifies “indications of source” as defined as: “all goods bearing a false or deceptive indication by which one of the countries to which this agreement applies, or a place situated therein, is directly or indirectly indicated as being the country or place of origin shall be seized on importation into any of the said countries.”

Doha

The Doha Declaration of the Fourth WTO Ministerial Conference in Doha, Qatar of November 2001 provides the mandate for negotiations on a range of subjects and other work, including issues concerning the implementation of the present agreements. Geographical indications were at the core of paragraph 18 of the Doha Declaration in which WTO member states agreed “to negotiate the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits by the Fifth Session of the Ministerial Conference (2003)” and to address “the extension of the protection of geographical indications provided for in Article 23 to products other than wines and spirits.”

For more information about GIs, visit INTA's GI portal at

www.inta.org/gis

GI Protection Systems Around the World

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By Clark Lackert, King & Spalding, New York, New York, USA

Another medium of GI protection is the bilateral treaty. The EU in particular has used bilateral treaties for wines and spirits. For example, the recent EU/Canada wine accord phases out the use of Bordeaux, Burgundy, Chablis, Champagne, Chianti, Claret, Grappa, Madeira, Malaga, Marsala, Medoc, Mosel, Ouzo, Port, Rhine, Sauternes and Sherry in Canada in return for phasing out Rye Whisky in the EU. Other bilateral treaties have been reached with various countries, including Australia and South Africa, among others.

To implement TRIPS, many countries have chosen to enact national GI statutes. These are unnecessary, since GIs can receive protection from national unfair competition law and trademark law (through certification marks), and TRIPS does not require GI registration. Many countries do not have opposition procedures for registration of GIs, and several do not have specific periods of protection. The EU has several regional directives on GIs, but one in particular, 2081/92, is currently in the TRIPS Council based on alleged TRIPS violations.

Will we still have Swiss cheese from Wisconsin in 2010? Will trademarks with geographical connotations be phased out? While the future remains uncertain, it is essential for trademark owners to educate themselves on GI issues.

Comparing Positions on GIs

The relationship between trademarks and later conflicting geographic indications (GIs) has emerged as an important issue affecting the rights of trademark owners. The controversy involves the question of what happens when a recently established GI comes in conflict with (is identical to or is confusingly similar to) an earlier trademark. There are three possible answers: The prior trademark right takes precedence over the later GI, the prior trademark and the later GI are allowed to coexist or the GI takes precedence over the prior trademark. INTA favors a “Madrid-type” system that follows the principles of territoriality, priority and exclusivity.

Territoriality, Priority and Exclusivity



By Burkhard Goebel
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Co-Chair, INTA Geographical
Indications Subcommittee

“Through facilitating GI protection through a legally binding mechanism, a ‘Madrid-type system’ would ensure that trademark owners and users of prior generic terms can enforce their legal positions through the national court and PTO systems.”

The TRIPS Agreement has revolutionized the protection of geographical indications (GIs) by creating uniform minimum standards of protection for all World Trade Organization (WTO) Member States. Practical experience in applying those rules is limited, since for many WTO members the rules have only recently become mandatory or have not yet been implemented. However, an important group of WTO Member States, led by the European Community, has placed several issues of additional protection for GIs at the top of its negotiating agenda. These issues include:

- Establishment of a multilateral system for the notification and registration of GIs
- Expansion of additional protection currently provided for wines and spirits under Art. 23 TRIPS to all products
- The “claw-back” of certain GIs for their “countries of origin,” whether they constitute generic terms or trademarks in the countries where they are currently used

The proposal for a multilateral system suggests a mandatory system at the WTO level under which trademark owners could not object to the protection of a confusingly similar GI. In effect, this system jeopardizes the very core of a prior trademark right: its exclusivity. A U.S.-led proposal favors a nonbinding database. Actively participating in the ongoing discussion, INTA has submitted its own position (available at www.inta.org/gis), proposing a “Madrid-type” system following the principles of territoriality,

priority and exclusivity. By facilitating GI protection through a legally binding mechanism, it ensures that trademark owners and users of prior generic terms can enforce their legal positions through the national court and PTO systems.

Regarding the extension of additional Art. 23 TRIPS protection to all products, INTA believes that the protection provided by Art. 23 TRIPS is inadequate. Protection is awarded to GIs against any use in translated form even when there is no likelihood of confusion, e.g., “Cactus Valley,” which is considered a translation of “Napa Valley” according to the EU. Such terms are difficult to search. Expanding Art. 23 instead of redefining its scope would create legal uncertainty and create additional barriers to trade.

Finally, the European Community wishes to “claw-back” certain GIs originating in the European Community. Under the EC proposal, a trademark such as PARMA, one of Mexico’s leading brands for ham and sausages, would have to be cancelled, despite the fact that it was registered in good faith and not geographically descriptive in Mexico when its application was submitted. “Clawing-back” GIs means confiscating trademarks without any compensation and without representation from the trademark owner during the negotiations. INTA strongly opposes this approach.

Trademark owners need to be vigilant. For further information, visit INTA’s information portal at www.inta.org/gis.

Comparing Positions on GIs

The Prior Trademark Right Takes Precedence over the Later GI



By Frank Z. Hellwig
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The phrase “first in time, first in right” refers to the combined principles of priority and exclusivity. In other words, the sign that is protected first, whether it is a trademark or a GI, shall take precedence over and prevent the use of any conflicting subsequent sign. These two principles form the very heart of trademark law.

One problem with resolving the GI conflict in a manner other than “first in time, first in right” is that it would lead to an illegal seizure of property without compensation. Since trademark rights are property, the seizure of a trademark, either by cancelling the right entirely, or by taking away the right to exclude others, would violate the most basic right guaranteed to private property.

Another risk of the other two approaches is that they would undoubtedly lead to consumer confusion. By allowing co-existence

between an earlier trademark and a later conflicting GI, perpetual confusion on the part of consumers is guaranteed. Even if the earlier trademark is cancelled (the more draconian approach of the two), consumer confusion would ensue for years to come due to the residual goodwill in the trademark. To undermine the benefits that consumers receive through a strong trademark system by allowing and endorsing a regime that would undoubtedly lead to consumer confusion makes little or no sense.

Trying to avoid the problem by choosing as a trademark a term that is not a geographic term is of little help. First, it does nothing to help those trademark owners that have already adopted geographic terms as trademarks. Second, under some regimes, a term does not need to be a geographic term to qualify for GI protection. If a term does not need to be a geographic term to qualify for GI protection, then there is no way to avoid terms that could someday be GIs. Avoiding the adoption of a potential GI as a trademark is even more difficult since this must be done without the GI having been adopted, protected or registered in the country in question or, quite possibly, anywhere in the world.

Despite the problems with co-existence,

the European Union (EU), in EC Regulation 2081/92 regarding geographic indications, has established a system that specifically allows for co-existence between a prior trademark and a later GI. The United States has challenged this regulation by initiating the dispute settlement procedures of the World Trade Organization based on the incompatibility of this regulation with TRIPS Agreement Article 16.1, which states: “The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner’s consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion.” This challenge is still pending.

Increased protection for GIs is not a bad thing. The problem, however, is when the increased protection comes at the expense of trademarks. Consequently, as international negotiations continue in efforts to expand free trade, it remains imperative to avoid compromising trademark rights in any fashion. To do otherwise would reverse more than a century of progress that has made the trademark property right one of the pillars of a thriving free trade economy.

The GI Takes Precedence over the Prior Trademark

Although current EU regulations provide special protection for wine and spirits, agricultural products and foodstuffs (including beer), many countries within the European Union (EU) would like to expand protection to non-food products.

This enhanced protection of GIs calls for World Trade Organization members to provide a legal means to prevent the use of GIs on goods originating in a place other than that indicated by the GI. Proponents of this viewpoint maintain a number of reasons for this enhanced protection.

One of the stronger reasons, according to *Intellectual Property Trade* magazine in the EU, is that GIs help to maintain a strong regional economy. According to the magazine, with some 4,800 GIs registered in the EU alone, they constitute the lifeline of

138,000 agricultural outfits. GIs also provide quality assurance, since the reputation of not only the owner, but also the entire region is affected if the quality of a GI is not up to par.

Another reason for enhanced GI protection is that GIs protect the consumer, since they are perceived as both origin and quality indicators. GI products unlock value by capitalizing on the consumer’s desire for diverse, quality products. For example, French GI cheeses are sold at an average of two euros per kilo more than French non-GI cheeses, and producers of Italian “Tuscano” olive oil have managed to increase prices for their olive oil by 20 percent since it was registered as a GI in 1998. Moreover, studies show

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The Prior Trademark and the Later GI are Allowed to Co-exist

The use of geographical indications (GIs) is an old tradition. We know that the Italian appellation of origin “Falernum” has long been familiar to the Roman connoisseur of wine. On the world-wide market, the use of GIs constitutes an important marketing instrument. It attaches to a trademark additional goodwill connected with the geographical origin of the products. This is why today, countries attribute great importance to the protection of GIs.

Under international law, states do not have rights to GIs, if such rights do not result from a treaty of international law. However, states are entitled to seek protection of their GIs in other jurisdictions.

Today the TRIPS Agreement contains certain treaty obligations concerning GIs. It obliges its members to provide for protection of GIs against use in a manner that misleads the public [Art. 22]. Members of the TRIPS Agreement have undertaken to establish additional GI protection for wines and spirits [Art. 23] and to enter into negotiations aimed to increase the protection of other GIs [Art. 24]. These obligations do not, however, require members to prevent the continued use of a GI of another Member State that was used, *inter alia*, in good faith before the conclusion of the TRIPS Agreement [Art. 24 (4)]. The Agreement also protects trademarks in this situation that are identical or similar to GIs [Art. 24 (5)].

Thus, under TRIPS, no Member State is bound to stop a bona fide use by its nationals of, for example, “Falernum” or “Falerno” for wine originating in that country. Similarly, the owner of a trademark designating wine consisting of or containing the word “Falernum” may find protection against cancellation and may be

allowed to continue the use of his trademark.

During the last round of negotiations on the Revision of the Paris Convention for the Protection of Industrial Property, an attempt to include a protection for GIs into the Convention failed, since no agreement could be found on this issue. The issue, known as “the sins of the past,” means, in particular, the use of European GIs for wine by immigrants in the countries of the “New World.” Negotiating TRIPS states have found a compromise solution, setting a rule of co-existence that preserves the interests of both sides in case of conflict.

The European Union has adopted rather strict rules on the use of geographical designations for wine and spirits and by Regulation 2081/92 has introduced a registration system for the protection of geographical designations and designations of origin for agricultural products and foodstuffs, including beer. On April 8, 2003, a Regulation 692/2003 was issued to amend Regulation 2081/92 and to make it compatible with relevant articles of TRIPS. Pursuant to the amended version of Regulation 2081/92, the EU applies Articles 22 to 25 in relations with non-EU countries. It is expected that the TRIPS co-existence principle will also govern future relations between the EU and other countries in matters concerning the use of GIs.



By Dr. Hans Peter Kunz-Hallstein, Law Offices of Dr. Hans Peter Kunz-Hallstein, Munich, Germany

The GI Takes Precedence

that consumers are willing to pay the extra premiums for GIs, since the quality of the product is considered to be guaranteed.

Proponents of the enhanced protection for GIs note that GIs are essentially collective marks, and as such, are owned by all of the producers in a specific region. These producers, who are usually small business agricultural owners, normally do not have the resources to engage in expensive litigation and register their names in all 145 country members of the WTO.

In addition, laws that have been created to protect GIs are not necessarily adequately enforced. For example, as long as a producer from a non-GI country labels the product to imply that it is made in another country, they can go ahead and use the otherwise protected GI, e.g., “Manchego cheese, made in the USA.”

Also, the WTO rules are crafted in such a way that GIs that were registered as trademarks in third-party countries cannot be attacked and subsequently cause tremendous loss to the GI producers. For example, a Canadian citizen registered the name “Parma” before the TRIPS Agreement entered into force. This forced Italian producers of “Prosciutto di Parma” to resort to expensive litigation and relabelling procedures to continue distinguishing their product.

However, despite these arguments, with impending legislation at the WTO that would decide the issue of GIs, the question for GI owners remains uncertain.

Source: DG Trade, July 30, 2003

Geographical Indications in Developing Countries



By Chander M. Lall, Lall & Sethi
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Enforcement Committee

Evidence of the existence of geographical indications (GIs) in India can be traced back to medieval times, as ruins of early civilizations on the banks of the river Indus have revealed artifacts such as Harappan pottery and jewelry or Mohenjodaro toys.

The importance of GIs has grown steadily over the years, since they can contribute to the economic growth of a developing country. An example is the East India Company, which began as a trading venture dealing in the South Indian spices, Indian cotton, Indian silks, and Darjeeling and Assam tea. Eventually, it evolved into a ruling enterprise until well into the 20th century. The goods in question were what could today be termed as GIs, illustrating the role that GIs can play in the development of nation states.

Currently, India is attempting to secure protection for its world-renowned Basmati rice. This extra long-grain, aromatic rice has long been cultivated in the foothills of the Himalayas. The climate of this region endows Basmati rice with certain characteristics not found elsewhere. Basmati rice growers believe that the name Basmati should be accorded the same protection as that accorded to Colombian coffee, Belgian chocolate and Scotch whisky. The belief is that this is a product unique to its environs and that it should be capable of reaping the advantages of a GI when competing on the global market. However, India is currently waging a multi-jurisdictional battle against attempts by a U.S. rice producer to introduce American-grown rice with names bearing the suffix "mati" in a number of countries. The counter-argument to the Basmati rice growers is that Basmati is a class of rice the way "durum" refers to a class of wheat.

Since the term GI was formally defined in international IP law in the TRIPS Agreement, the various provisions have provoked considerable debate in the TRIPS Council. Thus far, protection has remained confined to wines and spirits. Several developing countries, including India, have been highly critical of this approach because of its adverse trade implications. The issue came to the forefront finally at the Doha meeting in November 2001, where it was decided that the issue of "extension" of the protection of GIs to other products would be addressed in the regular meetings of the TRIPS council on a priority basis.



Protection for Cheeses

To date, there are 149 cheeses protected through Regulation 2081/92 of TRIPS on geographical indications (GIs) and designations of origin. The Regulation establishes rules for the Community protection of designations of origin and GIs for certain agricultural products and foodstuffs. Several of the protections afforded by the Regulation have been contested at the European Court of Justice (ECJ), mainly due to the wide interpretation of the Regulation. The Commission's practice in this area has also been reviewed, as its interpretation of the Regulation could become a ticking bomb for cheese producers if they are cut off from the markets in which they have been operating for years.

One of the Commission's main issues requiring clarification has been to determine whether a designation is a generic name and therefore ineligible for protection. The ensuing discussions reveal great differences of opinion among the Member States and the different producers. In some cases, disagreements have been resolved by restricting the name protected, i.e., Emmental de Savoie is protected but Emmental is not, as the designation Emmental is considered a generic name in

several Member States.

However, restrictions in Member States are inconsistent. The protected designation Parmigiano Reggiano, for example, claimed to cover protection of the name "parmesan," which is considered generic in several Member States. The ECJ was asked to rule on this subject but refrained from doing so.

Now, despite the fact that the ECJ once before ruled on the question of genericness with respect to feta cheese, a second feta cheese case is pending. In both cases, it has been argued that the designation "feta" does not meet the conditions for registration as a designation of origin. Once again, the argument is that the name "feta" is a generic name.

Hopefully, the next ruling will show, directly and in general, the importance of being restrictive when evaluating designations by setting up guidelines so the reputation of the designations protected will remain intact.



By Susie
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Protection for Wines and Spirits

The image of wine as a product of the land is important to wine marketing. Winemakers frequently reinforce this imagery by adopting brand names containing a geographic term. The wine industry promotes this imagery by creating geographic indications, such as Napa Valley, Southeastern Australia or Bordeaux, from which a number of individual brands originate. Because geographic indications cannot be registered as trademarks, it is important to be able to distinguish between brand names containing a geographical term and a geographical indication (GI).

Identifying GIs is very straightforward for a wine lawyer – you look them up. A label can contain a GI only if the wine in the bottle has been made according to the rules for the GI. The most important rule is that most of the grapes must have originated in the geographic designation. Accordingly, the boundaries of GIs are defined in detail so that winemakers know where to source their grapes. The United States

regulations (27 C.F.R. Part 9), administered by the Alcohol and Tobacco Tax and Trade Bureau (TTB), are somewhat unique in that they refer to “American Viticultural Areas,” not “geographical indications.”

Most trademark offices and examiners seem to understand that a GI is a defined term that can be looked up. Unfortunately, some do not.

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Two objections to registering geographic brand names for wine are common. One is: “it could become a geographic indication.” Under this theory, if “Merced Cellars” were the name of a town

where grapes are grown or wine is made, the registration would be refused because the town might become a GI (e.g., “Merced Valley”) in the future.

A more common objection is to refuse trademark registration because the proposed mark is an actual place name in an area known for winemaking. Under this theory, registration might be refused for Alcatraz Island or Yosemite Falls solely because they are place names (“geographic terms”) in a state known for winemaking (California). Yet anyone familiar with California’s geography knows that grapes cannot be grown in either location, and a wine lawyer would laugh if told these were to be claimed as “geographical indications” for wine.

Such objections are wrong. The absolute grounds for refusal apply only to GIs, or in the case of the United States, to American Viticultural Areas or prior certification or collective marks, which are legally defined grape growing areas. An application for a garden-variety geographic wine name should be examined like an application for any other goods. To do otherwise would deprive winemakers of a common and important source of brand names.



By Paul W. Reidl, E&J Gallo, Modesto, California, Vice President, International Trademark Association

GI Event Calendar

September 2003

The following programs on geographical indications and the issues surrounding them will take place in September.

INTA Government Seminar

Date: September 2, 2003

Location: Sofia, Bulgaria

Details: INTA representatives will give a presentation on GIs and the latest WTO developments. Contact Chehrazade Chemcham at cchemcham@inta.org for more details.

The Fifth WTO Ministerial Conference

Date: September 10 – 14, 2003

Location: Cancun, Mexico

Details: Participants will take stock of progress in negotiations and other work under the Doha Development Agenda. Visit www.wto.org for more details.





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Educational Resources

The International Trademark Association (INTA) is dedicated to educating its members and the public about the many issues surrounding geographical indications. The following educational resources can be found at INTA's geographical indications portal page, www.inta.org/gis.

Report on Worldwide Symposium on Geographical Indications

From July 9 – 11, the World Intellectual Property Office (WIPO), in cooperation with the U.S. Patent and Trademark Office (USPTO), held a symposium in San Francisco, during which experts in the field of intellectual property expressed a plethora of views on the protection of GIs. Read a reprint of the essay that was submitted by INTA for the symposium.

INTA Board Resolution

Access INTA's board resolution titled "Protection of Geographical Indications and Trademarks," which supports the view that conflicts between trademarks and geographical indications should be resolved based on the priority principle.

Establishment of a Multilateral System of Notification and the Registration of Geographical Indications for Wines and Spirits Pursuant to TRIPS Article 23 (4)

This position paper advocates a similar approach towards GIs to that held in the Madrid and Patent Cooperation Treaties.

What is a Geographical Indication?

Find answers at www.wipo.org/about-ip/en/index.html to questions about GIs and agricultural products, current international GI protection systems and generic GIs.

For more information on GIs, contact INTA's government relations staff at: +1-212-642-1742.

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