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GEOGRAPHICAL INDICATIONS AND INTERNATIONAL TRADE

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Introduction

1. With over 1000 U.S. Wineries, it would be presumptuous for any individual to claim to speak for the entire industry. Geographical Indications (“GI’s”) are the focus of a lot of attention in the wine industry. Most New World wines and U.S. wines are marketed using trademarks, grape varietal names and geographical indications. By contrast, for European wines the focus is still on GI’s. In 1996, I participated in a panel on similar subjects, under the auspices of the EU and USTR. I am struck by that fact that more than 8 years later, not only have none of the issues been resolved, but the EU has begun additional initiatives widening the gulf between the EU and the New World Wine producers.

Basic Principles

2. Most if not all U.S. Wine producers would agree on most of the following basic principles:

- Geographical Indications should not be used as trade barriers.
- Consumer deception is the key harm to be avoided.
- Geographical Indications should not be used to deprive trademark holders of their legitimate rights. In essence, we believe in the first come, first protected system envisioned in TRIPs Article 24.5. The most egregious example of the potential for mischief is what happened to the Spanish Wine Company Torres. Torres was the holder of a trademark first registered in 1911, and was forced to co-exist with a Geographical Indication first recognized in 1989. Until the EU changed its regulations, the Torres family was at risk of losing all their rights. The regulation was tailored to the particular facts of the Torres mark. The risk of losing all of one’s EU trademark rights is still real if you have a mark that is less than 25 years old or is not owned by the original holder.

3. The names sought to be protected as GI’s ought to be real geographical names. Made up –fanciful names– should not be given protection particularly at the expense of other intellectual property rights.

4. Most of you are familiar with the concept of a name – be it a trademark or geographical indication – becoming generic – losing all connotation of a specific producer or place. U.S. Wine law has a category of wine – called “semi-generics” where the name has a geographic significance and has also become a description of a class or type of wine. There are 16 such names, including Champagne, Port, Sherry, Chablis and Burgundy. In U.S. Law, these terms may be used so long as the true place of origin is disclosed to the consumer. Thus, we have California or New York Champagne. Many, but not all, believe that the users of those names have a legitimate right to keep using those names or be compensated for giving them up. The rule permitting such use is clearly articulated in TRIPs Article 24. Those unfamiliar with the facts might sympathize with the European view. The following is a short summary of the U.S. position.

5. By and large, the U.S. Wine industry was started by European immigrants and their descendants. They wanted to make wine in the style of their homeland. The nomenclature, the use of words like Champagne, Chablis and Burgundy, naturally followed from this.

6. U.S. law has a concept called laches. Simply put it means that if you do not protect your rights you lose them. The concept of waiver is also embodied in the trademark laws of many countries. U.S. winemakers have used these terms for over a century. For example, there is an unpublished manuscript by a wine historian William F. Heintz chronicling the history of Chablis in the United States. He states the term has been used in the U.S. since at least as early as 1880 and possibly as early as 1860. Heintz notes that at the 1889 Paris World Fair, a California Chablis won a gold medal. There are other examples of European acknowledgments of the propriety of using those names before the turn of the century. U.S. regulations regarding wine semi-generics have been in effect since at least 1935.

7. In short, use of these names began innocently and was not challenged by Europe until the terms had already become semi-generic and we have both a moral and legal right to use these names.

8. It is also interesting that until recently, French companies used these terms for wines made outside of the stated geographical area. In the 1990's one of France's largest champagne producers sold products using the Portuguese word for Champagne (i.e. Champanha) on sparkling wine made in Brazil. It also used the Spanish term for Champagne for its Argentine champagne.

9. The overriding purpose of U.S. wine label law is to prevent misleading the consumer. The regulations concerning semi-generics require that the true place of origin be stated on the label in direct conjunction with the semi-generic term being used. Lengthy studies are unnecessary to establish the obvious. No one could think that California Chablis comes from any place other than California. Consumers who buy Chablis because it has a geographical connotation and want Chablis from Chablis, can simply read the wine label. [See for example Statement of Leonard Matthews before BATF Rulemaking Procedures re: Notices Nos. 739 and 744. Mr. Matthews was the former CEO of Leo Burnett North America, Young & Rubican and the American Association of Advertising Agencies. Mr. Matthews also served as Assistant Secretary of Commerce under President Ford.] Mr. Matthews wrote that it is ridiculous to suggest that a consumer looking at a bottle labeled "American Champagne" or "California Champagne" would assume it to be from France.

Current Controversies

The EU-US Bilateral Negotiations

10. Almost five years ago the EU and U.S. agreed to negotiate a bilateral agreement along the following lines. First, the EU and U.S. would negotiate a Mutual Acceptance Agreement that would provide that if a wine is legally made in the country of origin, it can be imported and sold in the other country. This gives the U.S. what we are already entitled to under the WTO SPS and TBT agreements – there are no legitimate health concerns. Second, we are willing to negotiate a phase out of so called semi-generic terms as a wine type, if there is agreement on the following issues: (1) tariff harmonization at the lowest level between the two parties; (2) compensation to the companies giving up the use of the terms; (3) reducing subsidies; and (4) generally streamlining import entry of products into the EU.

EU's Proposed Traditional Expression Regulations

11. The EU's new draft regulations about so called Traditional Expressions for Wine are an unacceptable attempt to create a new Intellectual Property Right. The EU is attempting to gain monopoly over the use of terms such as "Vintage" for port. This is having a negative effect on the EU-US bilateral negotiations.

EU's Proposed Wine Labeling Regulations

12. The EU is also promulgating new labeling regulations for wine. Among the new concepts espoused is the attempt to restrict certain bottle shapes to wine from a given GI. While the bottle shapes that are in the proposed regulation are innocuous, the principle is unacceptable.

Registry For Geographical Indication

13. The EU proposal regarding the creation of the GI registry, as called for in TRIPs, is also troubling. The U.S. Wine Industry supports the U.S. Government's position. We don't believe the registry should be used to create substantive rights not already in TRIPs – it should simply be a database for consultation.

California Legislation Regarding NAPA

14. Under U.S. Federal law, a wine may be labeled with a name of geographic significance without meeting the requirements of the GI, if there was an approved label issued before July 7, 1986. California has a recent law that prohibits any use of the term NAPA or any recognized GI within NAPA as a wine brand, unless the wine meets the requirements of the Napa AVA. A lower state court has invalidated the law on the basis that the Federal Law precludes an inconsistent state law. The matter is now before the California Supreme Court.

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