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A WAY FORWARD FOR GEOGRAPHICAL INDICATIONS

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## Introduction

I would like to thank the World Intellectual Property Organization and the United States Patent and Trademark Office for organizing this conference and also for giving me the opportunity to speak to you here today. It is a great pleasure for me to be here. My name is Frank Hellwig and I work for Anheuser-Busch, the brewers of the world's largest selling beer, BUDWEISER.

I would like to begin my talk with a quote, which I think is particularly appropriate given that the subject of this panel discussion is "A Way Forward for Geographical Indications." The quote is from the American philosopher, and former baseball great, Yogi Berra. He said: "If you don't know where you are going, you will wind up somewhere else." So just to make sure we don't wind up somewhere else, that is, in the wrong place, we should figure out where we are going.

In order to help us figure out where we are going, we should first look at the "why" we are going there. If you don't look at the "why," that is, the motivations, the justifications for the way forward, we will not be able to figure out the "where" we are going. So let's take a moment to look at the "why." And let's look at it from the perspective of each of four interested parties.

### These four interested parties are:

Consumers, G.I. users, other producers or manufacturers (including trademark owners and users of generic geographic terms) and Governments.

### Interests of the Consumer

First, let's look at the interests of the consumers—the purchasing public. What are their interests?

They want to avoid being confused.

They want to avoid being misled.

They want decision-making economy. That is, they do not want to spend hours of time reading labels in the store just to figure out what they are buying.

They want competition - this insures choice, high quality and lower prices.

Those are the interests of the consumers.

### Interests of the GI Users

The next group I will look at are the GI users. What interests do they have?

They want ease of protection. They want it to be easy and cheap to obtain protection for their GIs.

They want breadth of protection. Breadth of protection in two senses:

- They want the covered terms to be protected against a wide scope of uses;
- They want more terms to be eligible for protection.

They want easy access to foreign markets—that is, they would like to be able to label their product one way and ship it anywhere in the world. We'll call this “label economy” or “label uniformity.”

### Interests of Other Producers and Manufacturers

The next group I will look at are other producers and manufacturers, including trademark owners and users of generic terms that are geographic terms. What do they want?

They want their existing trademarks to be protected from being taken away or cancelled. That is, they want to avoid expropriation of their trademarks. They also do not want their trademarks to be forced to coexist with confusingly similar terms. (It is in this area that the trademark owners and consumers have identical interests—that is, against confusion in the marketplace.).

They want to be able to call their products by their proper generic name—here their interests are similar to the interests of the consumer as well. The producer wants to call the product by a name the consumer will easily recognize. We will call this interest of the producer “product identification economy.”

Lastly, this group wants ease of access to markets. Just like the GI users, they want “label economy” or “label uniformity” as well.

### Interests of Governments

Lastly, we have the governments and their interests.

They want to protect the health, welfare and human rights of their citizens.

They want to protect their consumers – from fraud, deception, confusion, etc.—essentially, consumer protection.

Lastly, they want to protect the economic interests of their domestic producers.

But as to this third interest, we must draw a distinction between acceptable protections and unacceptable protections. For example, a regime that favors domestic owners of intellectual property rights over foreign owners would not be an acceptable protection: there must be identical treatment for the citizens and non-citizens alike in terms of protection of intellectual property rights—that is known as national treatment in the TRIPs agreement. For example, the US could not enact a trademark statute that would allow only US citizens to apply—this would clearly be a violation of TRIPs. Similarly, a system, such as the EU regulation on Geographic Indications, Regulation 2081/92, that, in effect, protects only geographic indications that are located in the EU, is likewise flawed and a violation of international agreements. The point here being that while governments may provide legitimate protections for the economic interests of its domestic companies, these protections must be closely scrutinized to make sure they, in fact, are legitimate. Quoting the TRIPs

agreement, we must “ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.”

If we take into consideration all parties’ concerns, we might be better able to plot a course so we know where we are going. So using these considerations, we can analyze the merits of various initiatives involving GIs. In this way, we can try to determine which initiatives would not only merit being adopted (or abandoned) but also which ones have a better *chance* of being adopted.

### Relationship Between GIs and Trademarks

The first issue that I would like to subject to this analysis is the relationship between GIs and trademarks. I would like to ask the question: Should an earlier trademark be able to be cancelled by virtue of a later protected GI? Or put a different way, should the principle of priority and exclusivity, also known as first in time/first in right, be abolished when comparing an earlier trademark with a later GI? What I will do now is look at this question from the perspective of the four groups mentioned above—the consumer, the GI user, other producers and government.

The consumer’s interest would be against this idea because if you allowed a later GI to replace an earlier trademark, this would undoubtedly lead to confusion on the part of the consumer, particularly in transition periods. This would then likewise lead to diseconomies in decision-making.

The next group, the GI user, of course, would be in favor of this proposition as it would give the GI users greater opportunity to protect and use GIs.

The next group, other producers, would be strongly opposed to this proposition because, as trademark owners, their rights would be subject to being cancelled or, in other words, subject to expropriation.

Next, what is the governmental interest in this proposition? The first interest of governments would be to protect the human rights of its citizens. Given that trademarks are a property right and given that the taking of property without compensation is considered a violation not only of human rights principles but also of fundamental international law, the government interest would be strongly opposed to this proposition and in favor of maintaining first in time first in right.

The next interest of the government is consumer protection and the interest here would be identical to that of the consumers mentioned above. That is, the government’s interest in protecting its consumers would be in opposition to the possibility of an earlier trademark being trumped by a later GI.

Lastly, the governmental interest in protecting the economic interests of the domestic producers; here the interest would depend on whether you have more GI users or more trademark owners at risk, so this could really go either way, depending on the particular country involved. But understand that regardless of the country, you would probably have some parties that fall into either of the camps.

So where do we come out?

Consumers: against

GI users: in favor

Other producers: against

Governments: against, but with some interest going in favor because of the domestic users of the GI's, but I have to put this in the "against" category because of the human rights violation of taking of property.

As you can see, there is a fairly strong interest against the proposition of allowing a trademark owner to lose its existing rights to a later GI, with the only interest going in favor being the economic interest of GI users and the governments that support them. This interest must be compared to the economic interests of the trademark owners, the consumer's interest and the government interest to potential human rights.

The EU's answer to this is to allow coexistence of an earlier trademark with a later GI. If we apply the same analysis we pretty much come out the same way except the interest of the consumers would be even more strongly against due to the increased possibility of confusion that will occur even more often and on a perpetual basis. This would lead to very high decision-making diseconomies. The interest of the government likewise goes more opposed so as to prevent confusion by its consumers.

What does this example show? How does this help us with showing the way forward? This analysis is useful in showing the relative merits of initiatives to determine which ones should be pursued. The understanding being that if there are overwhelming policy considerations in favor of a proposal, then it should be pursued and if there are overwhelming policy considerations against a proposal, then it should not be pursued. The understanding being that where the policy considerations are stacked one way or the other, the difficulties of overcoming the policy considerations would suggest not trying. In the case of GI priority over earlier trademarks, the policy considerations are stacked so much against the proposition that it would indicate that it is a policy that should not be maintained. So what is the way forward as it relates to first in time/first in right? It should be maintained.

As I mentioned, this analysis, the analysis of looking at the issues through the point of view of these four groups is useful in analyzing and identifying those policies and initiatives that are worth pursuing. It can also be useful in devising or amending a policy or initiative to make it a more promising initiative.

To illustrate this point, let's take a quick look at another example: A worldwide wine and spirits register. Looking again at the four interested groups, we would see the consumers would likely be against it because this would undoubtedly result in the renaming of certain generic named products and possibly certain trademarks as well. A change in how products are named will likely cause confusion on the part of the consumer, at least in the transition period. This would also likely decrease competition leading to increased prices. The GI users would be in favor, obviously, because it provides ease of protection and broadened protection. The other producers would be opposed because it risks the loss or expropriation of existing trademarks and it risks the claw back of generic wine and spirit terms. Governments would be against this initiative since it would result in the improper taking of trademarks in violation of human rights. Governments would also be against it in that it would lead to confusion among its consumers. But governments would be split in terms of furthering the economic

interests of its businesses, depending on whether they have more GI users or more of the other producers that would be hurt by enhanced GI protection. If the analysis stopped there, it would tend to indicate that this might be an initiative worth abandoning due to policy considerations against such a register. If you take this analysis, however, and try to identify how you can change the initiative in such a way that the policy considerations against the initiative are neutralized, then the initiative has a much greater chance of success. Take the analysis, identify the opposing forces, and then see if there are ways to address the concerns of the opposing forces so that the opposition is neutralized. For example, in the context of the wine and spirits register, if the initiative was to include five principles, then much of the opposition to the initiative would be eliminated or neutralized. These principles are as follows:

Clear statement that an earlier trademark can block a GI for which protection is sought. That is, the principle of priority and exclusivity. This will satisfy most of the interests of the trademark owners. Genericness refusal—that is, a GI cannot be protected if it is the generic name of a product. This will satisfy for the most part the interests of those that are using geographic terms generically. Territoriality-- that is, issues of priority and genericness to be determined on a country-by-country basis. Due process—that is, any interested party must have their day in court—an opportunity to object in a fair and impartial hearing. Equal protection—that is, every interested party must have an equal opportunity to object, and to apply to register, for that matter.

This would also further the interests of the GI user in that it would increase the ease of protection and potentially increase the number of protected GIs. While it is not a perfect solution for the GI user, it is a very good one. And most importantly, an initiative that includes these principles or provisions has a much greater chance of being adopted.

These are but two examples of how the analysis I have formulated can be used to determine viable initiatives and how initiatives can be changed to make them viable. This same analysis can be used on any of the various GI initiatives that are currently being discussed in the context of GIs.

But where does this take us? How have I answered “What is the way forward?” I began this speech with a quote from the American philosopher and baseball great, Yogi Berra. Let me begin my conclusion with a quote from the French philosopher Voltaire. Voltaire said; “The perfect is the enemy of the good.”

What this means is that if you are only satisfied with perfection, you risk not achieving what is good. If the GI users and the governments supporting them are only satisfied with a perfect and absolute protection for GIs, then we will likely not even reach a good solution. The perfect solution will get in the way of what could in fact be a very good solution.

So if the policymakers regarding GIs will only be satisfied with a perfect solution, then the way forward is no way at all. There will be an impasse and we will find ourselves at the next WIPO biannual meeting on GIs in exactly the same place we are now: no progress will have been achieved. That is, if “perfect” GI protection is deemed the only protection acceptable, then possible good solutions will not be achieved because of the countervailing policy and commercial interests at stake.

However, there is another way and a way that has promise of progress. First, use this analysis that I have gone through above to identify which initiatives merit more consideration and which should be abandoned. Second, use this analysis also to amend initiatives to take into consideration the countervailing interests of other parties. If these two exercises are done and if the policy makers are willing to compromise and accept “good” GI protection, as opposed to only “perfect” protection, then there will be a future for GIs that will be different than simply remaining in the same place.

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