



**EAT, DRINK AND BE WARY:
Why the U.S. Should Oppose the WTO's Extending
Stringent Intellectual Property Protection of Wine
and Spirit Names to Other Products**
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Later this month, when you and your family are tucking into your holiday dinner, take a moment to think about where the food and drink on your table comes from, and the deep significance of geography to cuisine.

Perhaps this connection is most evident in the wine on many holiday tables. "Burgundy," "Champagne," "Bordeaux": these words refer not only to highly-prized wines but also to the geographic regions of France in which these wines are produced. These regions and the wines they are famous for are closely entwined historically and culturally. Intellectual property law acknowledges and protects this connection through a concept known as "geographical indications" (GIs).

A GI is similar to a trademark. But rather than attaching to a particular product or firm, GIs attach to products from a particular region. They may refer not only to wine, but also to foods such as Roquefort cheese and Basmati rice, and clothing items such as Kohlapuri slippers.

Currently, the World Trade Organization (WTO) protects all GIs, and accords a higher level of protection to GIs for wine and spirits GIs. Recently, the EU and a few other countries have stated that they will push, in the upcoming round of negotiations to extend that higher level of protection to a broad range of other products, as well.

We believe that is a mistake, and the U.S. is right to oppose the expansion, for reasons we will discuss below.

The WTO Agreement Provides Greater Protection for Wine and Spirits GIs

The 1995 [WTO Agreement on Trade-Related Aspect of Intellectual Property Rights](#) (the "TRIPs Accord") regulates the use of GIs. However, it is not designed to be the last word on the subject: TRIPs itself requires additional negotiations aimed at increasing the level of protection for GIs.

The TRIPs Accord's rules on GIs apply to any good from a WTO member in which "a given quality, reputation, or other characteristic is essentially attributable to its geographical origin." This definition embraces two distinct factors: the local physical environment, such as the quality of the soil or the microclimate, and local labor characteristics, such as a tradition of especially high-quality workmanship.

Under the TRIPs Accord, WTO member countries must adopt laws or regulations to prevent the use of GIs in a manner that "suggests that the good in question originates in a geographic area other than the true place of origin," and would "mislead the public as to the true place of origin." Thus, one cannot, for instance, call a spirit "Tennessee Whiskey" when it is really from Latvia.

[Column continues below ↓](#) In addition, the TRIPs Accord provides a second, higher, level of protection for GIs that relate to wines and spirits. It requires countries to adopt laws or regulations prohibiting the use of an inaccurate GI for wines or spirits even where there is no danger of consumer confusion. This provision also prohibits use of GIs accompanied by expressions such as "kind", "like", "style", or "type."

Thus, a Latvian company not only cannot offer "Tennessee Whiskey," but also cannot offer lookalike, taste-alike and smell-alike "Tennessee-style Whiskey." And it does not matter a bit if consumers are crystal clear on the fact that the "Tennessee-style Whiskey" is from Latvia, not Tennessee.

In essence, the TRIPs Accord establishes an unusual form of exclusive right. The right is unusual in part because it is held in common by producers from the region to which the protected GI refers - even new ones who had no role in creating the region's reputation. (For instance, a newly-established Tennessee whiskeymaker will benefit).

Certain Wine and Spirits GI Uses Are Grandfathered In

There is an exception to the WTO's higher level of protection for wine and spirits GIs. It protects GIs that have been used in a country continuously and in good faith for 10 years prior to April 15, 1994. Thus, if the Latvian "Tennessee-style Whiskey" manufacturer has been operating at least since April 14, 1984, it is fine - for the moment.

In practice, this grandfather exception is quite large, thanks largely to the U.S. wine industry, which fought hard for it. It is the reason why sparkling wine manufacturers can call their product "California Champagne," if they like (though many high-end producers choose not to.)

The fact that, under the TRIPs Accord, each country can determine what geographical indications are protected within its own jurisdiction also leads to some practical exceptions regarding certain GI uses. For instance, "Champagne" is protected as a GI in the EU, but it is viewed as a generic descriptive term in some other markets, including the U.S..

Why There Are Special Rules for Wine And Spirits?

The impetus for special treatment for wine and spirits is not just historical, though GIs have long been in place for wine and spirits. It also builds on a particular "theory" of wine, what the French call "terroir": the notion that the particular soil or microclimate in which a wine grape grows is critical to the character of the wine produced from that grape.

The type of grape matters too, of course, as do production methods. But many French winemakers and consumers believe that the "gout de terroir" (roughly, the "taste of the soil") is the most important factor. On this view, enforcing strong GIs for wine makes a lot of sense, and the French and their EU allies had their views written into TRIPs.

In particular, the rejection by TRIPs of phrases like "burgundy-style" wine hews closely to this line of thinking about geography. Under a "terroir" theory, it is deceptive to call a wine burgundy-style simply because it contains the same grape mix or uses similar aging techniques as actual wines from Burgundy, France.

On this view, a wine is only truly "burgundy-style" if the grapes are nurtured by the soil and climate of the Burgundy region. Thus, "California burgundy-style wine" is an oxymoron.

How GIs are Similar To, and Different From, Trademarks

GIs are like trademarks, in that their main role is to protect information about the source of goods and products. Like trademarks, they may also be unlimited in duration.

Like trademarks, GIs can be justified on the ground that they permit firms to convey information to consumers, and thus permit consumers to make more informed choices, and avoid confusion regarding products' origins. Like trademarks, GIs also facilitate "communication" regarding branding, reputation, and quality between firms and consumers.

However, there is an interesting difference between GIs and trademarks: GIs are granted only after

a place-name becomes valuable; trademarks, in contrast, may be registered immediately. As a result, GIs create a relatively weak incentive to invest in activities aimed at establishing (as opposed to maintaining or expanding) a place-name as a signature for quality or unique characteristics. Trademarks, in contrast, incentivize producers to establish their trademarks as signatures from day one.

Moreover, unlike trademarks, GIs apply to large collectivities of firms, such as the Cognac region, or even to entire countries, such as Switzerland (watches, chocolate). As a result, the incentives to invest in maintaining reputation are further diluted - weakening even more the spur to investment that allegedly underlies GI protection.

In sum, GIs are, in a sense, like broad, belatedly-granted trademarks, and thus they do not provide incentives as sharp as those trademarks offer. Nevertheless, GIs have an important role to play in providing consumers with information; preventing consumer confusion; facilitating product differentiation; and stimulating investment to maintain and improve the GIs' reputation.

Why the U.S. Should Not Support Extending Higher-Level GI Protection

That role, however, is fully expressed in the ordinary level of TRIPs Accord protection for GIs, which prevents their confusing or misleading use. As noted above, under this level of protection, only cheese from the Roquefort region, for instance, can be called "Roquefort." That makes sense: Consumers who want the real Roquefort can readily identify it, and reject imitators.

But what about the higher level of TRIPs Accord protection, currently granted to wines and spirits - which essentially means that if imitations occur, they cannot be directly presented as such? This level of protection may actually cause more consumer confusion than it prevents.

It is hard to present an imitation without saying that is what it is. Indeed, for some products, it is virtually impossible. How, for example does one identify an American port-style wine in a manner that consumers will recognize without referring to the GI "port"? "Fortified wine" won't do the trick, since that could refer to sherry, Madeira, and so on.

Unless the word "port" can be used by the port imitators, customers are left in the dark, and imitators - or, to put it more neutrally, out-of-region producers - are out of luck. The result may be, in some cases, to allow a regional oligopoly to maintain prices at a supracompetitive level. That is, consumers will pay more because they don't know they have a cheaper option of buying the imitator (or the imitator cannot get started in the first place, because it cannot effectively market its product).

That's a problem - particularly under the WTO, which is meant to encourage free international trade.

The Current WTO Debate Over GIs

For wine and spirits, the "grandfather" provision provides some damage control, though not for new businesses. Moreover, as we noted earlier, the EU and others are currently proposing that the WTO should extend the higher level of protection to other products besides wine and spirits.

The U.S. and seven other WTO member-nations - including major wine producers Argentina, Australia, Chile and New Zealand - have filed a communication with the WTO opposing the proposal.

The U.S. may lack some degree of credibility, however, because it has itself executed bilateral agreements that adopt a similar, expanded level of protection when it has suited the interests of U.S. producers. For instance, the U.S. has agreed that it would recognize the French GIs "Cognac", "Armagnac", and "Calvados," in exchange for France's reciprocal treatment of "Bourbon" and "Bourbon Whisky." Accordingly, an American company is prohibited from calling its product "California cognac" or "cognac-style liqueur, made in the U.S.A." (In this particular case, consumers are aided by the existence of a closely-related generic name, brandy, which can be used instead.)

Nevertheless, consistency isn't everything. Despite these agreement, the U.S. is right to oppose the extension of the higher-level protection of wine and spirits' GIs to GIs for food and other products. Opposing the extension, from the point of view of free trade, and open competition, is the right thing to do.

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