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A Cheese by Any Other Name: A Palatable Compromise to the Conflict over Geographical Indications

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NOTES

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I. INTRODUCTION

In many grocery stores, shoppers must look in two places to find cheese. The first cheese section is usually near the dairy case; the second is often a specialty cheese case located in the produce department. Why make harried supermarket shoppers rush back and forth between two locations to find what they need for a fondue? The most noticeable difference between the cheeses in the two cases is probably the price: cheeses in the specialty case are generally much more expensive. A second difference is the packaging: many cheeses in the dairy aisle are pre-grated, pre-shredded, or pre-sliced and individually wrapped, or pre-cut into stars or dinosaurs; most cheeses in the specialty case, however, are sold in wedges or blocks. The most important difference between the cheeses in the two locations, however, can be found by reading the labels closely. Almost all cheeses found in the dairy aisle are produced in the United States, so even cheeses labeled "Swiss," "Parmesan," "Gorgonzola," or "Feta" (cheeses which are traditionally produced in European countries) are actually made in the United States. The specialty cheese case, on the other hand, is where most imported cheeses are kept; here a shopper is more likely to find Parmesan and Gorgonzola cheeses made in Italy or Feta cheese from Greece. Does it matter whether two cheeses sold under the same name are produced in different countries?

The answer to this question is central to the current battle between the United States and the European Union regarding intellectual property protection for agricultural products. The EU has proposed an agreement whereby U.S. producers will not be permitted to label their products using names of foods that reference the food's area of origin in EU member countries. If the EU proposal is accepted, U.S. producers will no longer be able to label many products using traditional names such as "Gorgonzola," "Feta," or "Parmesan." In general, the United States has strongly opposed the EU proposal, partly because the labeling requirements may cause U.S. consumers to buy more imported food products since domestic products would bear unfamiliar names.¹

1. See *infra* notes 14, 116–117, and accompanying text.

In 1992, the EU initiated a program to protect certain food products “historically tied to specific regions of Europe.”² Under this program, the EU grants “geographical indication” (“GI”) protection to foods if they are associated with a specific regional birthplace and have unique production or processing methods which define their character.³ The list of foods selected for GI protection includes cheeses, cured meats, and other specialty products.⁴ The GI protection system is already enforced in EU member countries, but the EU now wants to implement the program in other countries worldwide by means of a World Trade Organization (“WTO”) agreement.⁵

The EU’s WTO proposal purports to achieve international protection for forty-one products which are considered “most valuable [to EU members] and most commonly pirated” by other countries.⁶ Many countries strongly oppose forfeiting the ability to use the familiar names which have been used to label domestic products for many years, claiming that many of the names at issue have become generic and are thus undeserving of intellectual property protection.⁷ They also argue that it would be unfair to preclude the use of certain names after their own producers have spent years producing, marketing, and investing in products under those very names.⁸ In addition, countries object to the expected consequences of the EU proposal, which include the expense of naming and re-branding products as well as the possibility that consumers may be confused by renamed items.⁹

Due to vehement opposition by many countries to the EU proposal, the 2003 WTO negotiation attempt regarding international

2. Harry N. Niska, Note, *The European Union Trips over the U.S. Constitution: Can the First Amendment Save the Bologna that has a First Name?*, 13 MINN. J. GLOBAL TRADE 413, 413–16 (2004).

3. Bruce Stokes, *Protecting French Cheese and Italian Prosciutto*, 35 NAT’L J. 2556, 2557 (2003).

4. *Id.*

5. See Niska, *supra* note 2, at 413–19 (listing the WTO’s summary of the EU’s proposed agreement).

6. Daniel Schwammenthal & William Echikson, *Europe Asserts Right to Names of 41 Products; On the Eve of Crucial Talks, Move Complicates Efforts to Liberalize World Trade*, WALL ST. J., Aug. 29, 2003, at A6.

7. See, e.g., Stokes, *supra* note 3 (discussing the U.S. opinion that Parmesan cheese is generic because it “describes everything from savory imported varieties [of cheese] to flavorless, mass-produced spaghetti toppings”).

8. See Katherine M. Skiba, *EU Proposal has U.S. Cheesed*, MILWAUKEE J. SENTINEL, Aug. 3, 2003, at 3A (discussing the position that American producers deserve credit for popularizing many European food products).

9. See *id.* (describing how the EU’s plan would “seriously disadvantage” U.S. farmers, food processors and distributors, due to the costs of re-branding and consumer confusion in the marketplace).

GI protection failed miserably.¹⁰ Going forward, the EU is unlikely to accept defeat in its battle to protect some of its most valuable, historical, and well-known agricultural products.¹¹ Furthermore, since neither side has shown a real interest in compromise, the current “global food fight” will simply continue.¹² The U.S. cheese industry has been one of the most vocal opponents of the EU proposal. This is understandable since most of the products on the EU’s list are cheeses, many variations of which are produced in the United States.¹³

Many commentators have condoned, explained, and rationalized the U.S. opposition to the EU proposal.¹⁴ The possibility of the United States compromising with the EU concerning GI protection, however, has received little attention, even though such a compromise might actually benefit food producers and consumers in the United States. This Note will concentrate on GI protection of cheeses because these constitute a large portion of the EU’s proposed protected foods, and also because the dairy industry has been one of the most vocal opponents of the EU proposal. It will propose a compromise between the United States and the EU for international protection of regional cheeses which includes a means of protecting U.S. cheeses along with a modification of the EU’s demands. Part II of this Note will follow the background of the EU’s WTO proposal; Part III will describe the history of food intellectual property protection in both the United States and the EU, specifically as applied to cheeses; Part IV will analyze the current U.S. position on the EU’s WTO proposal; Part V will offer a solution to GI protection and detail the benefits that the United States would obtain through such an agreement.

10. Niska, *supra* note 2, at 413–14.

11. *See id.* at 422 (“The EU . . . considers their proposals to be important to the future vitality of their agricultural sectors and does not seem likely to abandon the fight.”).

12. James Cox, *What’s in a Name?*, USA TODAY, Sept. 9, 2003, at 1B.

13. Some of the cheeses on the EU’s list for GI protection include Asiago, Parmigiano Reggiano, Mozzarella, Pecorino Romano, Roquefort, Fontina, Feta, and Manchego. *Id.*

14. For examples of articles focusing on U.S. opposition to international GI protection, see Skiba, *supra* note 8; Jeffrey Sparshott, *EU’s Name Game No Fun for U.S. Food Producers*, WASH. TIMES, Aug. 29, 2003, at A01; Tom Webb, *Wisconsin, Europe Butt Cheeseheads Over Names*, ST. PAUL PIONEER PRESS, Sept. 5, 2003, at A1.

II. BACKGROUND INFORMATION: DETAILS OF THE EU'S WTO PROPOSAL

A. *The WTO and Current GI Protection*

The EU is attempting to gain international protection for its GIs through a WTO agreement. The WTO, the "only global international organization dealing with the rules of trade between nations,"¹⁵ was established on January 1, 1995 to enforce the General Agreement on Tariffs and Trade ("GATT").¹⁶ Enforcement is accomplished during trade negotiations which are held whenever necessary.¹⁷ Several previous WTO negotiation rounds have addressed the issue of intellectual property protections, and although there have previously been four international agreements addressing GI protection,¹⁸ the EU desires a higher level of protection from WTO member countries.

The most recent WTO agreement to address intellectual property issues is the 1994 Uruguay Round Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). TRIPS was "signed with a view towards establishing common international rules for the protection of intellectual property and facilitating settlement of trade disputes between Members over intellectual property rights using the WTO's dispute settlement system."¹⁹ Although TRIPS acknowledges GIs by providing protection against the misleading use of these terms, it does not provide absolute GI protection; instead, TRIPS GI protection focuses solely on avoiding misleading consumers.²⁰

15. Bella I. Safro & Thomas S. Keaty, *What's in a Name? Protection of Well-Known Trademarks Under International and National Law*, 6 TUL. J. TECH. & INTELL. PROP. 33, 36 (2004).

16. ALAN RUGMAN, *THE END OF GLOBALIZATION: WHY GLOBAL STRATEGY IS A MYTH & HOW TO PROFIT FROM THE REALITIES OF REGIONAL MARKETS* 23 (2001).

17. *Id.*

18. The four previous WTO agreements are the 1883 Paris Convention for the Protection of Industrial Property, the 1891 Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, the 1958 Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, and the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights. Stacy D. Goldberg, Comment, *Who Will Raise the White Flag? The Battle Between the United States and the European Union Over the Protection of Geographical Indications*, 22 U. PA. J. INT'L ECON. L. 107, 111-15 (2001).

19. Safro & Keaty, *supra* note 15, at 50.

20. CHRISTOPHER ARUP, *THE NEW WORLD TRADE ORGANIZATION AGREEMENTS: GLOBALIZING LAW THROUGH SERVICES AND INTELLECTUAL PROPERTY* 196 (2000).

B. The EU's Proposed Plan to Protect GIs

While TRIPS provides relatively little protection for most GIs, it does give additional protection for GIs of wines and spirits. For example, the label "Champagne" can only be used to refer to the sparkling wine produced in the Champagne region of France.²¹ The EU now wants to extend this same protection to qualifying regional food items, including cheeses.²² Under the EU's plan, protection would no longer be based on preventing consumer confusion, as is currently the case under TRIPS; instead, countries would provide protection even if there were no possibility of consumer confusion.²³

The EU demands for GI protection are far-reaching and comprehensive. First, the EU demands that a GI cannot be used "even if the true origin of the goods is indicated."²⁴ This means that a product could not be labeled "American Feta" or "Roquefort—Made in the U.S.A." Second, a product could not be labeled with a GI even if the "use is accompanied by expressions such as kind, type, style, imitation, or the like."²⁵ This would prevent the use of labels such as "imitation Asiago" or "Pecorino Romano-style cheese." The EU also wants to prohibit "derivations and Anglicized versions of European names."²⁶ This requirement would mean that the name "Parmesan" could not be applied to cheese, because this word is an Anglicized version of the Italian cheese name "Parmigiano²⁷ Reggiano." These demands would strengthen the existing protections under TRIPS, which do not prohibit labels including the origin of goods, expressions of similarity, or Anglicized names because they are not deemed to cause consumer confusion.

The first WTO attempt to negotiate the EU's proposal occurred in September of 2003 in Cancun, Mexico.²⁸ Talks leading up to this round of negotiations involved heated arguments from both the EU and from countries opposing the proposal, and, predictably, the negotiations failed.²⁹ While it appears that there is no chance of an

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Cox, *supra* note 12; see also Skiba, *supra* note 8 (describing the EU's attempt to "bar the use of translations of . . . products into any language").

27. Skiba, *supra* note 8.

28. Niska, *supra* note 2, at 413–14.

29. See *id.* at 414 (describing the lack of any progress on the issue of GI protection during the Cancun negotiations).

agreement on the immediate horizon,³⁰ it is unlikely that the EU will back down from its position.³¹ Clearly, a compromise is needed to settle this issue, but, as previously discussed, the United States currently opposes such a compromise. To better understand why the United States so vehemently opposes granting GI protection to EU products and to determine whether a solution is possible, it is helpful to consider both the tradition of food trademark protection and the history of treatment of specialty foods in each region.

C. *Geographical Indications: The EU's Choice to Protect Food Intellectual Property*

1. Background Information on EU Food Protection

European countries have traditionally been proactive in protecting specialty foods produced in certain regions. This history of protection is especially discernable in the safeguards European countries have created to protect European cheeses. For example, the Swiss government³² protects cheesemakers using regional cooperatives;³³ France created the Appellation d'Origine Controllee system to certify the authenticity of certain traditional cheeses;³⁴ and the British Stilton cheese is protected by copyright.³⁵ The tradition of protecting geographical indications of cheeses led to the creation of a Western European system of geographical indication protection in 1992.³⁶ To receive protection under this system, a food must have a "specific regional birthplace . . . as well as production, processing, or preparation methods unique to that place."³⁷ Because GIs are tied to specific regions, they cannot be bought, sold, or otherwise

30. See World Trade Organization, TRIPS: Geographical Indications: Background and the Current Situation, http://www.wto.org/english/tratop_e/trips_e/gi_background_e.htm (last visited Apr. 30, 2006) ("Members [of the WTO] remain deeply divided, with no agreement in sight, although they are ready to continue discussing the issue" of geographical indications.).

31. See Stephanie Bodoni, *GI Debate Back on the Agenda*, MANAGING INTELL. PROP., June 1, 2005, at 18 (discussing the EU's firm stance on GI protection).

32. Although Switzerland is not a member of the EU, this country's treatment of intellectual property protection of cheeses is an example of such treatment in other European countries and is therefore helpful to consider.

33. JUDY RIDGWAY, *THE CHEESE COMPANION: THE CONNOISSEUR'S GUIDE 18* (Rosie Hankin ed., 1999).

34. *Id.* at 11.

35. *Id.* at 14.

36. Jason Stein, *Switzerland's Cheesemakers Try to Roll with Global Punches: One Company Combined Old World Methods with Cheaper American Milk*, WIS. ST. J., Sept. 21, 2003, at A1.

37. Stokes, *supra* note 3, at 2557.

transferred;³⁸ therefore, GI protection essentially gives a region a strict monopoly over a food's traditional name. Despite the protection given to regional specialty items in EU countries, however, there are large gaps in the protection accorded to them by other countries throughout the world. The EU's GI proposal is an attempt to extend GI protection for its products to other countries.

2. Why the WTO is the EU's Chosen Forum

The EU has chosen to seek protection for its regional food items through a WTO agreement because this type of agreement is the most efficient and comprehensive way to ensure protection in the largest numbers of countries. There are, however, other ways that the EU could ensure protection of food names. One method of protection is forming trade agreements with individual countries for specific products. This method has been used to protect some cheeses, including Stilton and Parmigiano Reggiano. Stilton, a British cheese, is protected by the Stilton Cheesemakers' Association, which owns a copyright for the cheese.³⁹ Therefore, in countries that recognize British copyrights, the Association controls the use of the name "Stilton." Parmigiano Reggiano is similarly protected worldwide through the support of an Italian certification organization.⁴⁰

While food intellectual property protection can be achieved for individual products through trade agreements on a country-by-country basis, this method of protection is not feasible for many cheeses. Individualized protection requires the creation of a certification organization, or some other backing group, which is very expensive. Many producers of regional specialty cheeses do not have the resources necessary to fund such an organization. Furthermore, the number of producers of some cheeses is too small to support the creation of a group to lobby for trade agreement or copyright protection. Because country-by-country protection is so difficult to obtain, only the most well-known and popular cheeses are currently protected in this manner. In contrast, the WTO proposal for GI protection could apply to any selected cheese, regardless of the cheese's popularity or the resources of the cheese's producers.

38. *Id.*

39. *Id.*

40. Skiba, *supra* note 8.

III. THE NEED TO PROTECT THE INTEGRITY OF CHEESE

Governments must consciously decide to protect small cheese producers. To many Americans, however, it makes little sense to limit production of cheese when doing so will make the cheese more expensive.⁴¹ Furthermore, “[m]ost American consumers are blissfully ignorant of the way in which . . . geographical indications express complex linkages between the territorial origins of food products and the human contribution to their refinement.”⁴² Even more confusing to some Americans is that the EU’s objective of ensuring the continued existence of its own specialty cheese producers through a monopoly over many of the world’s traditional cheeses’ appellations seems much like protectionism.⁴³ Although the United States would not accept the EU proposal if it were based strictly on protectionism, there are other, more palatable, objectives behind GI protection: preserving the integrity of traditional specialty cheeses and protecting cheese consumers.

The character of a cheese may be greatly affected by both the method and location of its production.⁴⁴ Therefore, small-scale and regional production of cheeses more effectively ensures the integrity or quality of the cheese than does large-scale or foreign production.⁴⁵ According to one cheese industry publication, “The edge that European cheeses have over American cheeses (or any New World cheeses for that matter) is hundreds of years of tradition, resulting in cheeses that are indelibly linked to their place of origin or certain methods of production that distinguish them from all others.”⁴⁶

41. See Jim Chen, *A Sober Second Look at Appellations of Origin: How the United States Will Crash France’s Wine and Cheese Party*, 5 MINN. J. GLOBAL TRADE 29, 60 (1996) (“In a predominantly Protestant country whose notions of food quality embrace neither ‘service’ nor ‘satisfaction,’ whose signature cheese is a bland corruption of English cheddar and Colby, [protection of European cheeses] is a hard sell, both legally and commercially.”).

42. *Id.*

43. Jim Eagles, *It’s Time to Fight Fire with Fire*, NEW ZEALAND HERALD, Aug. 19, 2003 (acknowledging that it is difficult to believe that the EU’s GI proposal is not “just another insidious form of trade protection”).

44. See Goldberg, *supra* note 18, at 108 (noting that one objective of GI protection is to ensure quality and origin); see also Sparshott, *supra* note 14 (“A well-established link to the territories where [cheeses] are produced is an essential part of the value for many agricultural products.”).

45. “Foreign” production can refer to either a product made in a non-originating country, or to production anywhere outside of the region for which the product is named and where the product originated.

46. James Mellgren, *Cheese Series III: Protecting Tradition*, GOURMET RETAILER, Oct. 1, 2004, at 36–39.

A. Method of Production

In the past, cheese had to be made in small batches because producers used milk from their own farms or from nearby dairies.⁴⁷ Milk from several different sources could not be easily combined because of sanitation concerns; therefore, producers in different locations naturally developed different processes and techniques.⁴⁸ The necessity of small-batch production of cheese is one of the factors that led to different varieties of cheese being produced in different regions of the world.

The advent of the pasteurization of milk in 1886 drastically changed the landscape of cheese production as large-scale production was possible for the first time. Because of pasteurization, “[m]ilk from different locations and different herds could be mixed together to achieve a standardized product and the risk of fault-producing organisms was cut right back.”⁴⁹ As a result, over the past one hundred years, large factories have accounted for more and more of the world’s cheese production.⁵⁰ Small producers, however, have been unable to compete with these factories that can produce cheese on a larger scale and for a cheaper price.⁵¹

However, the use of pasteurized milk in cheese also represents the most significant way that large-scale production affects the characteristics of a cheese.⁵² Pasteurization allows for the mixing of milk from different sources, as well as for easier control of harmful bacteria that can interrupt the cheesemaking process.⁵³ Yet most traditional cheese varieties were developed well before the invention of pasteurization; thus a plausible argument can be made that the pasteurized version of a cheese traditionally made with unpasteurized milk is an entirely different product from the original. Therefore, most factory-made cheeses could be considered a different type of cheese altogether from cheeses produced using raw milk. Indeed, “[m]ost cheese connoisseurs believe that the contrast between cheese made from unpasteurized milk and pasteurized milk is like the difference between fine wine and regular table wine.”⁵⁴

47. RIDGWAY, *supra* note 33, at 24.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* (“Cheesemakers in many countries have copied the world’s most successful cheeses and are mass-producing them on a very large scale.”).

52. *Id.* at 24.

53. *Id.* at 9.

54. *Id.* at 25.

Unfortunately, while pasteurization has allowed mass-producers to copy many of the world's most popular cheeses by standardizing and simplifying their production, the "result has been a down-grading of the individuality and quality of cheese generally."⁵⁵

Furthermore, cheese made from pasteurized milk is more standardized than raw-milk cheese, resulting in a more uniform product largely "devoid of any real character."⁵⁶ This may be, as some argue, because "pasteurization inactivates the natural enzymes in . . . milk which . . . normally help the final flavor of the cheese to develop."⁵⁷ In addition, because pasteurization allows for the mixing of milks from many different sources—due to the minimized bacterial concerns—one of the prominent qualities of farmhouse cheeses is destroyed: the producers' careful selection of the type and qualities of milk used for individual cheeses.⁵⁸

The EU argument, therefore, is that some cheeses are so altered by the process of pasteurization and other aspects of the large-scale manufacturing process that such cheeses should not be labeled under their traditional names; doing so compromises both the reputation of the traditional cheese and the consumer's expectation and enjoyment of the product.⁵⁹ The cheese market in Great Britain provides an example of the way that mass-produced, pasteurized cheese can affect a country's cheese production. Following the advent of pasteurization, most traditionally-made cheeses were gradually replaced with factory-made substitutes; the result was that almost all British cheeses came to be considered "at best mediocre and at worst simply bad."⁶⁰

55. *Id.* at 9.

56. *Id.* at 25.

57. *Id.*

58. *See id.* at 26 ("Different breeds of cattle produce very differently flavored milk. The food the animal has been eating, the soil on which its pasture is growing, and even the weather on the day the animal is milked all affect the milk itself. Milk produced toward the end of the milking is higher in fats than that at the beginning and there is also a difference between morning and evening milk. Summer milk is reputed to produce better cheese because it tends to be richer than winter milk. The small cheesemaker will take all these factors into account when making cheese.").

59. *See, e.g.,* Stokes, *supra* note 3, at 2557 (describing how, under the GI system, foods are given protection if they are associated with a specific regional birthplace and have unique production or processing methods which define the character of the foods).

60. RIDGWAY, *supra* note 33, at 15. *But see id.* (describing the recent revival of high quality British farmhouse cheeses).

B. Region of Production

Another reason that the EU wishes to protect geographical indications of cheeses is that, even if all traditional production specifications are followed, certain cheeses possess characteristics that cannot be reproduced outside of the region from which the cheese originated. "The idea of terroir, a term borrowed from the world of French winemaking, applies more directly to many of the cheeses and other products of Europe than it does to American cheeses."⁶¹ Many factors contribute to the flavor, texture, and quality of a cheese, including the climate, the soil, what the milk-producing animals eat, the seasons, and the ways cheeses are stored.⁶² Because of the unique contributions of original growing regions, many cheeses that are not produced in the traditional regions differ significantly in taste, appearance, and texture from the original versions.

Some consider the claim that region and production methods actually and substantially affect a cheese to be only the "romantic notion of a few misguided food writers, or just marketing hype."⁶³ Yet, even ancient "Romans recognized that cheese, like wine, is influenced by the soil and climate."⁶⁴ Indeed, "[e]ven the smallest change in the cheesemaking process will influence the final outcome" of the cheese.⁶⁵ Therefore, the objective of protecting the integrity of regional varieties of cheeses can also be considered necessary to protect the very existence of many types of cheeses. Without a concentrated effort to make sure that traditional cheeses are produced according to strict specifications, a likely future scenario could be the eventual loss of many cheeses as they are replaced by factory substitutes.

The following examples demonstrate the extent to which regional and production factors actually contribute to the final cheese

61. Mellgren, *supra* note 46.

[T]erroir is a much-discussed term for the total natural environment of any viticultural site. No precise English equivalent exists for this quintessentially French term. Major components of terroir are soil . . . and local topography, together with their interactions with each other and with macroclimate The holistic combination of all of these is held to give each site its own unique terroir.

Greg O'Byrne, *Wine Matters: When it Comes to Wine, Origins are as Important as Pedigree*, THE SANTA FE NEW MEXICAN, Oct. 6, 2004, at C-2.

62. RIDGWAY, *supra* note 33, at 61, 182; *see also id.* at 78 (describing the production of the Spanish cheese Cabrales, the distinctive characteristics of which are in part due to its maturation in "caves which are aired by cold, damp, and salty winds blowing up from the Bay of Biscay").

63. JULIET HARBUTT, CHEESE: A COMPLETE GUIDE TO OVER 300 CHEESES OF DISTINCTION 110 (1999).

64. *Id.*

65. *Id.*

product. While foreign-produced cheeses are not necessarily inferior or “bad,” they are definitely quite different from the original versions, and for many cheeses, there can simply be no real comparison between the traditional cheese and the copy.⁶⁶

C. Well-known Cheeses and Their Geographical Identifications

True Parmigiano Reggiano is an Italian cheese produced in the province of Emilia Romagna.⁶⁷ Parmigiano Reggiano’s aroma is “full of sharply defined raisins and dried fruit with wine”; the “flavor is wonderfully full and fruity with a salty tang.”⁶⁸ Some other characteristics of this cheese include “crunchy casein crystals and a lingering aftertaste.”⁶⁹ The distinctive attributes of the cheese are due to strict adherence to the twelfth-century production methods, even to the diet of the cows that produce the milk.⁷⁰ In contrast to the traditional version of this cheese, generic Parmesans⁷¹ are produced “in huge mechanized plants at the expense of the extraordinary flavour and character of authentic Parmigiano.”⁷² This “parmesan” is often sold pre-shredded in cardboard or plastic tubs and bears little similarity to Parmigiano Reggiano.⁷³

There are also significant differences between the Italian and American versions of another traditional Italian cheese, Asiago. The “American variety . . . is considerably sharper” than the Italian, is aged for a shorter period of time, and “does not exhibit the Italian one’s proliferation of tiny apertures, featuring instead a smooth, usually hole-less interior.”⁷⁴

Cheddar is one of the most-copied cheeses in the world. Although Cheddar is not one of the cheeses on the EU’s list of GIs to be protected, it still provides a helpful example of how a traditional European cheese is changed when it is produced in a foreign country.

66. Although some cheeses lose many of their defining characteristics when produced outside of their originating regions, others have been duplicated successfully; some experts deem that these copies are equal to the original cheeses, sometimes with only slight variation. *See, e.g.,* RIDGWAY, *supra* note 33, at 55 (describing good versions of Asiago cheese made in the U.S. by BelGioioso Auricchio Cheese Inc. of Wisconsin and the Vella Cheese Company of California).

67. *Id.* at 174.

68. *Id.*

69. *Id.*

70. HARBUTT, *supra* note 63, at 110 (noting that milk to produce Parmigiano Reggiano is obtained from cows that eat “no silage or turnips, only fresh grass, hay or alfalfa”).

71. Parmesan is the anglicized version of “Parmigiano.”

72. HARBUTT, *supra* note 63, at 110.

73. RIDGWAY, *supra* note 33, at 176.

74. STEVEN JENKINS, CHEESE PRIMER 368 (1996).

Cheddar originated in Great Britain and is produced by a process called cheddaring.⁷⁵ Although this same process is used to create American versions of Cheddar, “there are enormous differences between factory-made American versions and authentic English farmhouse Cheddar” including color, taste, and texture.⁷⁶

A fourth example of an original variety of cheese that is significantly different from its foreign-made version is the Italian cheese Gorgonzola, traditionally produced in the Lombardy region of Italy.⁷⁷ Traditional Italian Gorgonzola is a “soft-textured, beige cheese with profuse greenish-blue striations.”⁷⁸ Gorgonzola produced in the U.S., on the other hand, “has little, in terms of flavor and texture, in common with Italian Gorgonzola . . . [being] a crumbly, white cheese with blue striations.”⁷⁹ Foreign-produced Gorgonzola, then, not only tastes differently from the traditional version, but also has a different appearance altogether.

Finally, still another Italian cheese, Mozzarella, varies considerably from the American version. Italian Mozzarella is a tender, nutty cheese with a milky-sweet flavor and a springy texture.⁸⁰ The “American version is much denser, drier, less perishable,” and does not have the same nutty, sweet flavor.⁸¹ Even more, the Italian version is usually sold in small ovals and is packaged in whey to preserve its moisture and texture; American-made Mozzarella is sold in rectangular blocks and is often packaged quite differently from its Italian counterpart.⁸²

While not all of the above cheeses are included on the EU’s proposed list of forty-one products to protect, these examples are useful demonstrations of how the characteristics of a cheese can vary drastically depending on the production methods used and the region

75. *Id.* at 371. The traditional cheddaring process involves stacking large blocks of curd into piles and then rotating the blocks to ensure even pressure. Laura Mason, *In the Hills and Dales of Somerset*, THE INTERNATIONAL HERALD OF TASTE, Jan. 2003, available at http://www.slowfood.com/img_sito/riviste/slowark/EN/38/somerset.html. “Cheddaring changes the curd because the stacking of the blocks physically presses out whey, but the most significant changes are chemical. Acidity rises during cheddaring as the lactic bacteria consume lactose sugar and release lactic acid, causing casein protein molecules to lengthen and bind together into stringy filaments. This increased acidity also helps give the final cheese its natural tang.” *Id.*

76. *Id.* See also Mason, *supra* note 75 (“While industrial cheddaring produces a slightly sticky cheese with a gummy texture, hand-cheddared cheeses have a fine, flaky texture that breaks into large mica-like shards.”).

77. *Id.* at 374.

78. *Id.*

79. *Id.*

80. *Id.* at 377.

81. *Id.*

82. RIDGWAY, *supra* note 33, at 168.

where the cheese is produced. Many, although not all, of the cheeses on the EU's proposed list are subject to these differences. Thus, the protection of traditional production regions and processing techniques is necessary to preserve qualities inherent in European specialty cheeses.

D. Current U.S. Protection of Intellectual Property Rights in Cheese

1. Major Differences in U.S. and EU IP Protection

The origin of the controversy of the EU's WTO proposal stems from the different ways the United States and the EU approach intellectual property protection for food, as well as the difference in their views on specialty cheeses. Indeed, the differences are deeply-rooted: the theories behind the U.S. common law and European intellectual property systems are worlds apart. The intellectual property protection system in the United States is primarily driven by an economic philosophy that gives inventors an incentive to create by allowing them to gain financial rewards by protecting their works.⁸³ Conversely, continental European intellectual property emphasizes natural rights and the "importance of reputation and noneconomic aspects of intellectual property."⁸⁴ While this may explain the different positions taken by the United States and the EU on the issue of intellectual property protection of cheeses, the existence of international trade creates a need to bring the two approaches to a consensus.

2. Trademarks: The U.S. Choice for Food Protection

The United States employs a national trademark system to protect unique goods, including foods.⁸⁵ Under U.S. trademark law, a trademark may be "any word, name, symbol, or device or any combination thereof . . . used by a person . . . to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods."⁸⁶ Congress enacted the

83. See ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 11 (3d ed. 2003) ("[B]oth the United States Constitution and judicial decisions seem to acknowledge the primacy of incentive theory in justifying intellectual property.")

84. *Id.* at 5.

85. See Goldberg, *supra* note 18, at 136–37 ("Rather than protect exclusive rights to geographic regions, the United States, through its system of trademarks, provides protection for a unique product or good that is distinguishable from those manufactured or sold by others.")

86. 15 U.S.C. § 1127 (2006).

trademark system to ensure equal protection for unique goods in all fifty states.⁸⁷ Under this system, a merchant or manufacturer must register its trademark to receive protection.⁸⁸

The trademark system serves two primary objectives: to protect merchants and manufacturers, and to protect consumers. Merchants and manufacturers need protection against misappropriation, which occurs when others try to “pass off” their products as those rightfully belonging to someone else.⁸⁹ Trademark law also protects consumers from confusion in the marketplace, which is defined as the “risk that the public believes that the goods or services in question come from the same undertaking or from economically linked undertakings” even though the goods are not so related.⁹⁰ Consumer confusion could result, for example, if a consumer bought a cheese labeled as “Asiago.” The consumer might assume that since this cheese bears an Italian name, it is produced in Italy or is guaranteed to have the same characteristics as the traditional Italian cheese. Under current law, however, a cheese produced in the United States can bear the name “Asiago” even if it bears no similarity to the Italian version.

Although unique products can receive protection under the U.S. trademark system, protection will be lost if the trademark becomes generic.⁹¹ A trademark becomes generic when it is used to describe a product or service and “ceases to serve its function of identifying the source (and quality) of the product or service.”⁹² Once a good is deemed generic, its trademark no longer qualifies for protection and thus can be used by anyone to describe a good with similar qualities or characteristics.⁹³ For example, if a trademark was used on a certain cheese, but eventually that mark came to identify in

87. See Kenneth L. Port, *Trademark Harmonization: Norms, Names & Nonsense*, 2 MARQ. INTELL. PROP. L. REV. 33, 33 (1998) (noting that the trademark system was needed “because goods traveled in one national marketplace, so a unified system of trademark laws was necessary to avoid inefficiencies that would be passed on to consumers as manufacturers tried to compete in 50 different jurisdictions under 50 separate trademark laws”).

88. See The Commission on Trademarks and Unfair Competition, *21st Century Trademark Basics*, 55 THE RECORD 662, 670 (2000) (“[R]egistration of the mark usually provides substantive and procedural benefits to the trademark owner.”).

89. See Elke Elizabeth Werner, Comment, *Are We Trading our Lanham Act Away? An Evaluation of Conflicting Provisions Between the NAFTA and North American Trademark Law*, 2 SW. J.L. & TRADE AM. 227, 235 (1995) (describing trademark law as a protection against “misappropriation by pirates and cheats” (citations omitted)).

90. Sebastien J. Evrard, Note, *Trademark Law in the European Union: An Overview of the Case Law of the Court of Justice and the Court of First Instance (1997-2001)*, 9 COLUM. J. EUR. L. 175, 185 (2002).

91. The Commission on Trademarks and Unfair Competition, *supra* note 88, at 676.

92. *Id.*

93. *Id.*

the minds of the public all cheeses with similar characteristics, the mark would probably become generic and thus would no longer be protected. To prevent such a loss of valuable protection, trademark owners must be on continual watch to protect their marks and to prevent them from becoming generic.

While trademarks obtained under the U.S. system provide protection for the mark's use within the United States, such trademarks offer no guarantee of protection in other countries.⁹⁴ Intellectual property rights are typically created and enforced on a country-by-country basis; each country has its own system of protection, and "[t]he concept of [a] global economy does not automatically translate to global trademark protection."⁹⁵ Therefore, to gain protection for the use of their trademarks outside of the United States, U.S. merchants and manufacturers must enter into multinational agreements with other countries.⁹⁶ Although merchants and manufacturers are able to protect themselves prospectively in this way, it is important to remember that consumers have no opportunity to protect themselves under this system.

3. How Cheeses are Protected under U.S. Trademarks

Unique food products are protected in the United States under the same trademark system as other types of goods. No special laws exist to protect cheeses or other specialty foods which are traditionally produced in specific regions or through unique manufacturing processes.⁹⁷ As a result of this lack of regional protection, U.S. consumers "give little geographic significance" to geographical indications, or names of foods tied to specific areas.⁹⁸ In contrast to the geographical indication system of the EU, names of cheeses are generally used to describe the style of the product rather than the

94. See Safto & Keaty, *supra* note 15, at 34 ("As a general rule, the exclusive rights of a trademark owner do not extend beyond the territory of a political subdivision, be it a country or a smaller unit within a country.")

95. *Id.* at 35.

96. See *id.*

Multinational trade agreements facilitate commerce and make the products of different manufacturers available in the most remote corners of the world. To deal with the challenges of expanding trade channels, international bodies have been grappling with the need to provide a uniform approach to protecting and enforcing intellectual property rights in different countries.

Id.

97. See Goldberg, *supra* note 18, at 108–09 ("[T]he United States, historically, has not had separate law, apart from its system of trademarks, to protect geographical indications.")

98. *Id.* at 137.

food's place of origin.⁹⁹ Therefore, most geographical indications are not protected under U.S. trademark law;¹⁰⁰ instead, they are deemed generic.¹⁰¹

Some geographical indications, however, are eligible for protection in the United States as certification marks, which are "word[s], name[s], or symbol[s] used . . . to certify origin, material, mode of manufacture, quality, or other characteristics of . . . goods."¹⁰² Unlike GIs, certification marks must "have an exclusive certifying organization behind them and must be sought on a country-by-country basis."¹⁰³

Although certain cheeses are protected under a certification mark, this does not provide the same level of protection as does a geographical indication as defined by the EU. For example, even though Parmigiano Reggiano is protected through a certification mark in the United States, domestic cheeses may still be labeled "Parmesan," the anglicized derivative. This is true even though the cheeses labeled "Parmesan" generally bear little or no resemblance to the original Italian cheese.¹⁰⁴ Therefore, the current certification system is inadequate as a means of providing the level of protection the EU demands for its geographical indications.

4. Cheese History in the United States

The history of how foods have been introduced and produced in the United States provides insight into the shaping of the American attitude towards geographical indications and the protection of intellectual property of cheeses and other specialty foods. While European countries developed different specialty food items like cheese over centuries, the United States acquired knowledge of cheese production from immigrants who brought the production processes from their countries of origin.¹⁰⁵ Thus, "[t]here are very few 'American' cheeses and it could be argued that even Colby and Jack

99. Niska, *supra* note 2, at 415.

100. See Goldberg, *supra* note 18, at 136 ("Summarily, the United States has no geographical indication law, but rather protects geographical indications, if any, through trademark law and unfair competition law.")

101. While U.S. intellectual property law recognizes few GIs, some examples that are protected include Washington apples, Napa wine, and Idaho potatoes.

102. Xuan-Thao N. Nguyen, *Nationalizing Trademarks: A New International Trademark Jurisprudence?*, 39 WAKE FOREST L.REV. 729, 779 (2004).

103. *Id.*

104. See HARBUTT, *supra* note 63, at 110 ("Parmesan, a generic term, describes a multitude of cheeses made like Parmigiano, but in huge mechanized plants at the expense of the extraordinary flavor and character of authentic Parmigiano.")

105. Sparshott, *supra* note 14.

[which are generally considered to be some of the few cheeses that truly originated in the U.S.] take their inspiration from Cheddar.”¹⁰⁶ U.S.-produced “cheeses are almost entirely derivative of European originals, albeit transmogrified into uniquely American examples due to the pastureland (or in some cases, lack thereof), milk, and the intention of the cheesemaker.”¹⁰⁷ Furthermore, because this knowledge transfer took place many years ago, by “now consumers have come to recognize [the names of cheeses which originated in Europe] as a type of product, not a location.”¹⁰⁸

In addition to the differences in origins of cheeses, the general attitudes about food vary significantly between the United States and the EU.¹⁰⁹ The American food industry has traditionally focused on mass production.¹¹⁰ Furthermore, Americans are generally less concerned with obtaining top-quality cheeses than are Europeans. For example, Americans “consume the undemanding cheeses on sale in most supermarkets, and so they use large quantities of processed (Cheddar) cheese and imitation and substitute cheeses.”¹¹¹ In contrast, many consumers in European countries hold superior quality specialty cheeses in high regard, and are willing to pay more for traditionally produced foods “despite the advance of factory-based production methods.”¹¹² Because of U.S. consumers’ general attitude regarding the substitutability of cheeses as well as the fact that most U.S.-produced cheeses are based on traditional European cheeses, the United States is understandably reluctant to restrict the use of geographical indications. Many Americans simply see little reason to

106. RIDGWAY, *supra* note 33, at 22.

107. Mellgren, *supra* note 46, at 36.

108. Sparshott, *supra* note 14.

109. See Stokes, *supra* note 3, at 2557 (quoting a U.S. trade official’s opinion that “this dispute [about intellectual property protection of specialty foods, including cheeses] goes to the heart of the differences between the way Europeans and Americans look at food in culture”).

110. JENKINS, *supra* note 74, at 365.

111. RIDGWAY, *supra* note 33, at 22. In addition, the American attitude toward cheese may be a result of the fact that, because few cheeses actually originated in the U.S., *id.*, consumers have never been familiar with original cheese varieties.

112. *Id.* at 17 (referring to French and Italian attitudes toward cheese). An extreme example of willingness to expend more resources in order to preserve traditional methods of cheese production is found in Switzerland. This country has an agricultural policy which ensures that “farms are small and family owned.” HARBUTT, *supra* note 63, at 112. The Swiss landscape “has retained its charm with chalets, pine forests and small parcels of lush, green pastures.” *Id.* Maintaining small cheese farms has allowed Switzerland to preserve “the magnificent scenery, protection from erosion and avalanche, a healthy farming economy and superb cheeses.” *Id.* One can imagine that without the objective of protecting farmland for small cheese producers throughout the country, land for cheese production could be concentrated in a few areas, and farmland could be converted into more industrialized uses.

give additional protections to European cheeses, especially when this would result in restrictions on U.S. cheese producers.

IV. ANALYSIS: THE CURRENT U.S. POSITION ON GIS

A. Criticism

The strongest contention the United States has against the EU's WTO proposal is that most of the forty-one geographical indications on the EU list are considered by the United States to be generic descriptions of products rather than true designations of origin.¹¹³ While the foods on the list originated in Europe, the United States argues that many of these foods have been consistently produced in the United States for years, and thus the processes and styles related to the foods should not belong exclusively to European producers.¹¹⁴ The Bush administration, in particular, has opposed protection of geographical indications, arguing that most indications became generic in the United States too long ago to now afford protection.¹¹⁵

Domestic farmers and food producers form the core of the U.S. opposition.¹¹⁶ These parties insist that GI protection would unfairly preclude them from labeling many of their products with names familiar to U.S. consumers. Indeed, they argue that the very purpose behind trademark law, which is to prevent consumer confusion, would be thwarted by the EU proposal because consumers would become confused if domestic products had to be renamed and re-branded.¹¹⁷

The U.S. cheese industry has also been among the most vocal critics of the EU proposal, likely because cheeses comprise the bulk of the forty-one products on the EU list. Indeed, "U.S. cheesemakers think they deserve credit for popularizing European cheese in

113. See Sparshott, *supra* note 14 ("The United States has resisted taking up the issue [of geographical indications], saying many of the product names have become generic over time.").

114. See *id.* (noting that U.S. "consumers have come to recognize [many product] names as a type of product, not a location").

115. See Stokes, *supra* note 3, at 2557 ("The Bush administration opposes enforcement of geographic indicators through trade sanctions. It argues that many geographic indicators have become generic terms.").

116. See, e.g., Lisa Carricaburu, *WTO Forum Deciding Fate of Tooele Feta*, SALT LAKE TRIB., Sept. 14, 2003, at E1 (noting that U.S. cheese producers are "reacting with alarm" to the EU's GI proposal).

117. See, e.g., *id.* (noting that if feta were protected under a geographical indication, U.S. feta producers would "have to completely rename [their] . . . products"); see also Stein, *supra* note 36 (noting that if GI protection were given to cheeses, U.S. producers would have to "make the same cheeses [while] changing the name").

America.”¹¹⁸ U.S. Representative Bob Goodlatte agrees, claiming that “Parmesan cheese is not on the tip of everyone’s tongue because of anything anyone in Parma, Italy, ever did.”¹¹⁹ Instead, he believes that it is “because dairy processors, led by Kraft, have spent millions of dollars promoting this terminology so that the vast majority of Americans would put a can [of shredded Parmesan cheese] in their refrigerator.”¹²⁰

Aside from the expense and inconvenience of renaming cheeses necessitated by GI protection, U.S. producers would also face increased competition from European producers who would be able to continue using the traditional, well-known names for GI-protected cheeses.¹²¹ “Despite the remarkable groundswell of American specialty and artisanal cheeses, [American consumers] still tend to look across the Atlantic Ocean towards Europe, our cheese muse as it were, for the largest variety of cheese to fill cheese cases across the country.”¹²² U.S. producers fear that if a shopper wants a certain variety of cheese, he or she will be more likely to purchase the cheese labeled under the geographical indication rather than the American counterpart with a newly created name. As one critic stated, “People will still ask for feta cheese, but if you have to call it ‘Mediterranean white cheese,’ you’re going to confuse the consumer.”¹²³

Although one facet of opposition focuses on loss of market share for U.S. cheese producers, another group disparages the EU proposal by claiming that consumers will never “switch to more expensive European products simply because of labeling restrictions placed on the U.S. products they are used to.”¹²⁴ Some believe that “[n]either American law nor the United States’ international legal obligations will compel any changes in this longstanding consumer attitude.”¹²⁵ In essence, this argument is that the EU proposal is without any merit because it will not accomplish any of the objectives it is designed to

118. Webb, *supra* note 14.

119. Carricaburu, *supra* note 116.

120. *Id.*

121. See, e.g., Skiba, *supra* note 8 (“Allowing the EU to enhance GI . . . protections and strip Wisconsin-produced products of names consumers expect to see on their store shelves will seriously disadvantage [Wisconsin cheese] farmers, food processors and distributors.”).

122. Mellgren, *supra* note 46, at 36.

123. Webb, *supra* note 14.

124. Niska, *supra* note 2, at 422.

125. Chen, *supra* note 41, at 60–61.

address, such as assisting EU food producers and protecting food integrity for consumers.¹²⁶

Although consumer protection is one of the stated objectives of GI protection, subtle or even significant differences between cheeses which are mass-produced and those which are handcrafted in small batches or produced according to traditional standards may not matter to all consumers.¹²⁷ In addition, there is no question that protecting GIs will result in reduced availability of some “substitute” domestic cheeses which are generally less expensive than imported versions. Those opposing GI protection can make the argument that the American public simply does not care about protecting traditional cheeses, and therefore the United States should deny the EU’s request.

Furthermore, some have postulated that if the EU wins protection for the forty-one products on the proposal list, there will be no limit to the EU’s demands for further protection of more goods.¹²⁸ If the EU gains geographical indication protection now, it may try to achieve protection for product names not even related to specific regions or for things such as packaging, colors, or adjectives. For example, “French winemakers might argue that California wineries have illegally copied the shape of Bordeaux, Bourgogne, and Champagne bottles. Italy’s food police could demand the right to certify that Italian restaurants in the USA and elsewhere are adhering to Italian cooking traditions.”¹²⁹ The United States understandably does not want to start down a path that could lead to never-ending protections being granted to the EU, simply because many items produced in the United States originated (however distant in the past) in Europe.

Some critics of the EU proposal have even argued that a WTO agreement enforcing EU geographical indications is prohibited by the First Amendment of the United States Constitution, and therefore must be rejected outright.¹³⁰ Supreme Court Justice Black once stated, “[N]o agreement with a foreign nation can confer power on . . .

126. Cf. Editorial, *Cheesy Dispute: Taste is More Important than a Name*, DALLAS MORNING NEWS, Sept. 21, 2003, at 2H (arguing that Americans will continue to consume the same cheeses even if the name on the label is changed).

127. See, e.g., *supra* notes 41–42, and accompanying text.

128. See Schwammenthal & Echikson, *supra* note 6, and accompanying text (the forty-one products on the EU’s list for GI protection represent only the most commonly-pirated foods).

129. Cox, *supra* note 12.

130. See generally Niska, *supra* note 2 (arguing that because the U.S. position is that many geographical indications have become generic over the years, they are therefore a part of commercial language, and to restrict their use would be a violation of free speech under the First Amendment).

any . . . branch of government which is free from the restraints in the Constitution.”¹³¹ If the restriction of geographical indications actually amounts to a violation of the First Amendment’s guarantee of free speech, no agreement with the WTO regarding GIs could be made.

Finally, one reason why granting the EU proposal for geographical indication protection is so abhorrent to many Americans is that it appears to be “just another insidious form of trade protection.”¹³² The United States sees no reason to support a program which might be viewed as “pure protectionism” on the behalf of the EU, especially when the resultant benefits to the United States appear to be negligible.¹³³

B. Support

Although there is much opposition to the EU’s WTO proposal, it is not without U.S. support. Some recognize that significant differences between many European and American products justify the use of different cheese names; even a U.S. cheese producer concedes that differences in products exist, “especially in some mass-produced cheeses made from cow’s milk but still called feta.”¹³⁴ In this and similar situations of product variations, the “consumer should not be deprived of information about the character of the product that they buy.”¹³⁵ When European names are used to label products made in the United States, consumer confusion is often the result.¹³⁶ This is because what appears to be a geographic indication actually “gives no assurance about the [product’s] origin” and does not “give the slightest guarantee of the product’s nature and composition.”¹³⁷

131. *Id.* at 423 (quoting *Reid v. Covert*, 354 U.S. 1, 16 (1957) (Black, J., plurality opinion)).

132. *Eagles*, *supra* note 43.

133. *See id.*

134. Sparshott, *supra* note 14. Traditional feta cheese, on the other hand, is made with sheep’s or goat’s milk. RIDGWAY, *supra* note 33, at 124. Additionally, the “name ‘feta’ is ‘inextricably associated . . . with a specific foodstuff: the cheese produced in a large area of Greece, using sheep’s milk or a mixture of sheep’s milk and goat’s milk, but the natural and artisanal process of coagulation at normal pressure.” *Feta Cheese is Greek, Says EU Court Adviser*; *European Policy News*, AGRA EUROPE, May 13, 2005, at 5 (quoting Advocate General Ruiz Jarabo of the European Court of Justice).

135. Louis Lorvellec, *You’ve Got to Fight for Your Right to Party: A Response to Professor Jim Chen*, 5 MINN. J. GLOBAL TRADE 65, 76 (1996).

136. *See, e.g.*, Carricahuru, *supra* note 116 (describing the difficulty consumers and producers would face if, for example, American feta cheese had to be renamed and re-branded).

137. Lorvellec, *supra* note 135, at 76. Many U.S. products have strong associations to places of origin, such as Washington apples. It would probably make little sense to American consumers if apples grown in Mexico were labeled “Washington apples,” or if wines produced in Australia were called “Napa.” Indeed, such labeling would probably confuse consumers.

Additionally, many U.S. producers recognize that the specialty cheese business "is founded on place and a sense of place."¹³⁸ For example, one cheese producer admits that she "appreciate[s] what (the EU) has accomplished in making specifications for cheese made in a place."¹³⁹ She knows it would be a challenge for U.S. cheese producers to create original names for their products, but believes that it can be done, pointing to her own French-style cheeses to which she has given descriptive rather than geographic names.¹⁴⁰

Some supporters of the EU proposal base their stance on a purely moral perspective. They believe that U.S. producers have wrongfully usurped traditional European geographical indications. These supporters contend that the historic and common use of product names by U.S. producers does not excuse the continued use of the names.¹⁴¹ While it is unlikely that the United States would ever adopt a position merely because of its moral implications, this view adds one more layer behind the logic of support for the EU proposal.

While there can be no doubt that geographical indication protection would work to protect many EU farmers and food producers, this Note argues that the United States should look beyond any protectionist purposes and focus instead on the real advantages to the U.S. cheese industry of the EU's proposed WTO agreement. Although it is unlikely that the EU proposal will be accepted in its present form,¹⁴² the GI conflict between the United States and the EU can be resolved by a compromise that is advantageous to both sides. The next Part will examine benefits the United States can gain through a modified geographical indication protection agreement with the EU that focuses on treatment of regional and specialty cheeses. While many of the U.S. concerns about the problems inherent in granting the EU geographical protection for cheeses are valid, a close consideration of possible benefits will demonstrate that it is in the best interest of the United States to reach an agreement with the EU on this issue.

138. Carolyn Said, *The Label Police: Europeans are Getting Snippy About Foreigners Using Their Place Names for Food*, S.F. CHRON., Aug. 17, 2003, at I1.

139. *Id.*

140. Some of the names Sue Conley has given to her cheeses include "crème fraiche" and "fromage blanc." *Id.* These names effectively convey that the cheeses are made in the French style and give an indication of their characteristics, without copying traditional French cheese names.

141. Lorvellec, *supra* note 135, at 74 ("The sin of dishonesty does not become excusable just because multiple competitors committed the same fraud nor does the act ever cease to be wrong.")

142. The current EU proposal seems unlikely to be accepted in its current form both due to the failed 2003 Cancun negotiations as well as the multiple U.S. objections to the proposal.

V. THE SOLUTION: WHY A COMPROMISE REGARDING GI PROTECTION FOR CHEESES WILL BENEFIT THE UNITED STATES

A. *Benefits to the United States.*

The benefits to the United States of reaching a compromise regarding the EU's geographical indication proposal largely outweigh the negative implications. First, consumers would benefit from an accurate description of the geographical origins of cheeses. If the United States accepted the geographical indication proposal, then U.S. consumers would be presented with a more direct and accurate portrayal of both the origin of the product and its characteristics. Thus, use of accurate geographical indications on cheeses would fulfill the U.S. trademark law's goal of preventing consumer confusion by ensuring that consumers have more information about the products they purchase.

In addition, by accepting the EU proposal for geographical indications, the United States would in effect allow consumers to make more autonomous and independent decisions about the foods they purchase. Currently, it seems as though some U.S. producers are trying to mislead consumers about the true geographic origins of cheeses.¹⁴³ Conversely, a clear indication of origin on products would allow U.S. consumers to make more conscious decisions about the exact nature of the cheeses they want to purchase. Many U.S. consumers already choose products at least in part based on geographic origin,¹⁴⁴ so it is only right to give consumers the most accurate information possible.¹⁴⁵

Though providing increased information on cheese labels would benefit consumers, U.S. food producers fear that if given precise information, many consumers would prefer authentic cheeses from Europe over domestic "copies" or versions of the cheese.¹⁴⁶ This

143. For example, many Americans who purchase Gorgonzola cheese might assume because of the name of the cheese that it was produced in Italy, when, in reality, it may have been produced in the U.S. or elsewhere.

144. See, e.g., Lorvellec, *supra* note 135, at 74 ("When [consumers] order a German or Mexican beer, it is done conscientiously, and when they purchase Champagne or true Chablis the same is true.")

145. See *id.* ("[T]he information for a market is calculated by the buyer-consumer [I]t is necessary to protect the consumer-buyer from a law which permits manufacturer dishonesty.")

146. See, e.g., Mellgren, *supra* note 46 (consumers may prefer European cheeses because "[t]he edge that European cheeses have over American cheese (or any New World cheese for that matter) is hundreds of years of tradition, resulting in cheeses that are indelibly linked to their place of origin or certain methods of production that distinguish them from all others").

concern, however, may be invalid. Domestic cheeses will generally be less expensive than European imports thus creating a price incentive to purchase U.S. cheese. Furthermore, it would be incorrect to assume that Americans will refuse to buy domestic cheeses simply because they cannot be labeled using traditional European geographical indications. While some consumers will certainly wish to buy imported cheeses, others will prefer domestic counterparts for reasons such as price, availability, preference for U.S. products, or a desire to support U.S. farmers and producers.

Of course, cheese producers in the United States will be challenged to find acceptable and effective ways of labeling and marketing their cheeses if they are precluded from using certain geographical indications. Instead of harming domestic producers, however, this could actually work to their benefit by inducing them to create original and attractive trademarks for cheeses. If U.S. cheeses which currently use European names were instead given unique trademarks, such marks could help "permit global marketing and create an incentive for the trademark owner to produce goods and services capable of crossing language and cultural barriers."¹⁴⁷ In other words, U.S. cheese producers would be forced to find new ways to market their products in order to effectively compete with European cheeses, both domestically and abroad, which could result in an increased market share for U.S. cheese.

Many American cheeses which are currently marketed under traditional European geographical indications are substantially different from their European counterparts. One such cheese is Kraft Parmesan, which, unlike Italian Parmigiano Reggiano, is sold pre-grated in a plastic tube. If this cheese were instead marketed as "pizza cheese," "grated pizza topping," or the like, it may be possible for Kraft to extend its market share into other countries, as the company could create a niche which may not be filled by traditional Italian Parmigiano Reggiano. This strategy has been effectively utilized by a California producer of port, which markets its product in Europe under the trade name "Starboard," thus differentiating its product from traditional port.¹⁴⁸

While an agreement concerning GIs could be beneficial to U.S. cheese producers in the long run, it is unlikely that objectives such as

147. Werner, *supra* note 89, at 227; see also Nicholas S. Economides, *The Economics of Trademarks*, 78 TRADEMARK REP. 523, 533 (1988) ("Instead of limiting competition, trademarks allow firms to compete in one more dimension.").

148. Tom Hill, *Generic Wine Labels Are Not Deceptive*, ALBUQUERQUE J., Aug. 18, 2005, at S1 (describing how "[o]ne of California's finest port producers, Andrew Quady," labeled and trademarked "his version of port as Starboard").

consumer protection or creating an impetus for U.S. producers to develop original products will be sufficient to actually propel the United States towards an agreement. Therefore, more immediately persuasive justifications must also be considered.¹⁴⁹ Fortunately, these justifications come in the form of powerful economic benefits derived by the United States as a result of an agreement with the EU.

First, the United States must consider the fact that if GI protection is given to EU cheeses, the same protection could be gained for domestic products that could be exported to other countries.¹⁵⁰ While it is true that many U.S. specialty food products are simply copies or versions of things that originated in other countries, numerous unique U.S. products could benefit from worldwide GI protection. Currently, such well-known products as Florida oranges and Idaho potatoes do not receive protection in the EU.¹⁵¹ In addition, many U.S. cheesemakers have succeeded in creating original, high-quality cheeses which could benefit from GI protection.¹⁵² Some of these cheeses include "Tillamook Cheddar from Oregon, Vella's Bear Flag Dry Jack from California, Maytag Blue from Iowa, and Old Kentucky Tomme."¹⁵³ In the future, it is possible that there could be demand from Europe for such American cheeses.¹⁵⁴ Of course, "the United States cannot expect the world to respect and protect [its producers'] economic and intellectual property rights if the United States refuses to do so for other countries."¹⁵⁵ Therefore, a mutual GI protection agreement is necessary to benefit all parties involved.

Finally, the U.S. food industry in general would benefit from a policy that encourages the recognition of geographical indications.

149. This is especially true because the EU is unlikely to back down from its stance on geographical indications. See text accompanying note 11.

150. Such a trade-off could be included in a WTO agreement, providing for the protection of certain U.S. products. This would be more efficient and provide more protection for the U.S. than would individual agreements with other countries. In addition, this solution could gain protection for U.S. products, which cannot currently obtain the support of backing organizations. The end result would be increased recognition and worldwide demand for many U.S. products, which would be accompanied by a higher volume of international trading.

151. Deborah Haynes, *WTO Panel to Study Dispute by US, Australia with EU over Home Grown Brands*, AGENCE FRANCE-PRESSE, Oct. 2, 2003.

152. See RIDGWAY, *supra* note 33, at 22 ("[P]ioneering cheese-sellers are gradually wooing the public back to an appreciation of good cheese . . . by encouraging [purchases of products from] the first-class producers that do exist in the United States itself."); see also Mellgren, *supra* note 46 (listing several unique cheeses produced in the U.S. and discussing how "American cheesemakers and marketers are adapting quickly to the concept [of terrior] and applying it to several artisan and farmhouse examples").

153. RIDGWAY, *supra* note 33, at 22.

154. See, e.g., Stein, *supra* note 36 (noting that cow's milk is rarer in Europe than in the U.S., so cow's milk cheese is one viable option for export to Europe).

155. Goldberg, *supra* note 18, at 141.

The "law and policies of geographical indications hold the potential of 're-linking production to the social, cultural and environmental aspects of particular places, further distinguishing them from anonymous mass produced goods, and opening the possibility of increased responsibility to place.'"¹⁵⁶ Such a focus on "sense of place" could only improve the quality and variety of U.S. cheeses and other foods.

B. Elements of a WTO Compromise: Creating a Formula for Protecting GIs

Once the United States accepts the notion that agreement with the EU is needed and is, in fact, beneficial, a compromise can be achieved. This Note concentrates primarily on the need for and benefits of a compromise regarding geographical indication protection for cheeses, but the same principles can likely be applied to all the types of food products on the EU's proposed list.

First, it is not necessary for the United States to grant GI protection for every cheese on the EU's list. Indeed, as the EU will likely request protection of more items in the future, a more efficient solution would be to create a formula for identifying necessary qualifications for GI protection. In this way, future requests for protection can be solved in advance. Considering each item individually would more easily facilitate an international agreement than would requiring a wholesale grant of protection for all cheeses on the EU's current list. Such a formula could also be used to determine which U.S. cheeses are worthy of receiving international GI protection.

The first step of the GI protection formula should be to determine whether the GI has truly become generic. This will probably be the most controversial element of the formula, as the United States currently maintains that most of the cheeses on the EU's proposal list have become generic names. Consideration of the many benefits the United States stands to gain from an agreement with the WTO demonstrates, however, that an incentive to bargain does exist.¹⁵⁷ Food experts from both the United States and the EU

156. Molly Torsen, *Apples and Oranges (and Wine): Why the International Conversation Regarding Geographic Indications Is at a Standstill*, 87 J. PAT. & TRADEMARK OFF. SOC'Y 31, 31 (2005) (quoting Elizabeth Barham, *Translating Terroir: The Global Challenge of French AOC Labeling*, 19 J. RURAL STUD. 127, 129 (2003)).

157. Despite the lack of current recognition of the benefits of this change to the U.S., it is important to remember the various ways that U.S. cheesemakers can label cheeses using names other than traditional European geographical indications, as well as the benefits to be found in using original names.

can offer opinions on whether a GI is generic, using such factors as the number of countries that currently produce the type of cheese, the number of variations or versions of the cheese, the general consumer opinion and expectation of the cheese, and the length of time the cheese has been produced outside of its original region. Geographical indications failing this multi-factor test would be deemed truly generic and would not receive international protection.

Even if a cheese is determined to be generic, a country would still be able to disallow imported versions of GI-protected cheeses. This option could encourage countries to relax their demands that some cheeses be designated generic, because their ability to export their own versions to the country of origin would be eliminated. At the same time, countries that value the authentic version of the cheese that has been deemed generic would still be able to protect the region of origin.

Regarding cheeses that are not generic, countries would have several options to protect the geographical indication of the cheese. If a foreign country produces a version of the cheese, and that version is substantially similar to the original cheese, the country of origin would have the option of certifying and overseeing the production of the copy in other countries. If the country of origin agrees to certify the production of the cheese, a fee could be charged. For example, a U.S. cheese producer that makes a cheese very similar to the original British version could pay a certifying organization for the rights to use the traditional geographical indication to label the cheese. To prevent consumer confusion, the cheese label would include both the country of origin of the original version of the cheese as well as the country where the cheese is produced. This option would ensure the quality and standards of the cheese while concurrently allowing U.S. producers to continue to label the foods under the traditional name. Furthermore, the dual objectives of protecting consumers from inferior or substandard cheeses and protecting European cheesemakers could simultaneously be accomplished.

Of course, the above system may not be acceptable in all situations. Some U.S. cheese producers may not want to pay a certifying organization for the right to use a geographical indication, and some European countries may be unwilling to allow specialty cheeses to be produced in other countries. Additionally, the production of some cheeses may be so dependent on the origin country's unique growing conditions or available ingredients that production elsewhere in the world simply is not possible. In such circumstances, U.S. producers could just change the name of the cheese completely and use an original, non-geographical indication.

This option is especially viable for cheesemakers just entering the market, as they would not have to change the existing labeling of an established cheese. The cheesemaker would be encouraged to create a unique and distinctive marketing plan instead of relying on name recognition.

Another possibility for cheeses that cannot be certified for production in a foreign country would require a modification to the EU demand for GI protection. Although the EU currently will not allow GI-protected foods to be labeled with any type of derivative name such as Guyere-style, American Swiss, or imitation Parmesan, the EU may, however, be persuaded to allow certain cheeses to be labeled as "imitation." This compromise might be acceptable to the EU if such "imitation" cheese labels include a clear indication of where the cheese is actually produced. This solution would provide consumers with adequate information about the origin of the cheese, as well as notify them that the cheese is not the authentic, European version. In addition, the label could include information about the differences between the authentic version of the cheese and the foreign copy.

In general, this proposed compromise focuses on a way of allowing some versions of traditional European cheeses to be produced in the United States while still maintaining their unique characteristics and quality. It also recognizes, however, that there are some cheeses which cannot be successfully reproduced outside of Europe, and that some countries may not be willing to allow traditional regional cheeses to be produced elsewhere.

Although it is unlikely that this proposed solution will fully satisfy either the EU or the United States, an agreement on geographical indication protection is necessary. While a future WTO agreement is indeed possible, the United States should keep in mind that its traditional intellectual property motivations may need to be modified in order to accomplish such an agreement. The focus of intellectual property in the United States has been to protect consumers and manufacturers of unique goods, but other justifications could be considered in order to make the EU geographical indication protection proposal more attractive.

Unlike the U.S. view, the European view of intellectual property has typically been driven by a sense of place. In order for the United States to ensure that a compromise can be reached, it would have to place more value on ensuring that specialty regional cheeses and other foods continue to be available in their traditional versions. Without focusing on this objective, one can imagine a future trip to a U.S. supermarket in which no imported or authentic versions of European cheeses can be found in the cheese aisle.

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