
The Global Struggle over Geographic Indications

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Abstract

Geographic indications (GIs) stand at the intersection of three hotly debated issues in international law: international trade, intellectual property and agricultural policy. Akin to a trademark, a GI identifies a good as originating in a particular region, where a given quality of the good is attributable to its place of origin. Well-known GIs include champagne and prosciutto di Parma. Although GIs have a long history, in recent years they have become central to the debate over the expansion of intellectual property rights in the World Trade Organization. We argue that GIs have gained greater political salience and economic value due to major changes in the global economy. Proponents of GIs also raise more diffuse concerns about authenticity, heritage and locality in a rapidly globalizing world. After explaining the origins of the effort to protect GIs in international law, we assess the normative justification for these unusual intellectual property rights. Some GI protection in international law is justifiable. But the existing level of protection afforded by the World Trade Organization – as well as current demands of the European Union for even greater protection – is unjustified. We defend this position through careful consideration of the major theoretical bases for property rights.

1 Introduction

The inclusion of intellectual property rights within the World Trade Organization (WTO) in 1994 heralded a landmark change in international law. It significantly increased the power of international intellectual property law and simultaneously

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engendered debate over the status and scope of intellectual property rights. Many developing countries considered the WTO's Trade-Related Intellectual Property Rights (TRIPS) Agreement¹ to be an attempt by the United States and, to a lesser extent, Europe to force inappropriate, Western-style law on the rest of the world.² The rationale for including intellectual property in the WTO was and remains unclear because the relationship between trade liberalization and intellectual property is hazy and contested. Indeed, some eminent free trade advocates consider TRIPS a straightforward case of rent-seeking by wealthy states against the rest of the world.³

The major substantive rights protected by TRIPS are copyright, patent and trademark. These rights are familiar and generally well supported as a matter of intellectual property theory, even if their connection to trade liberalization is debatable. Some of the rights protected by TRIPS, however, lack even this foundation, which makes their inclusion in the WTO more problematic. Perhaps the most theoretically contested of these rights relates to 'geographic indications' (GIs).⁴ Akin to a trademark, a GI identifies a good as originating in a particular region, where a particular quality of the good is attributable to its place of origin. The fundamental concept behind GIs is that specific geographic locations yield product qualities that cannot be replicated elsewhere. Because the *place* is said to be essential to the *product*, proponents argue that producers outside a specified region cannot be permitted to use its place name in marketing and on product labels. Well-known GIs include champagne, port and parmigiano-reggiano. As these examples suggest, nearly all valuable GIs relate to agricultural products – and many are European in origin.

GIs consequently stand at the intersection of three increasingly central and hotly debated issues in international law: trade, intellectual property and agricultural policy. Within the WTO, the liberalization of agricultural production has been called 'the ultimate deal-breaker'.⁵ Yet, while economic concerns plainly loom large in the debate over GIs, the effort to entrench GI protection in international law also draws

¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, signed in Marrakesh, Morocco on 15 Apr. 1994, available at: www.wto.org/english/docs_e/legal_e/legal_e.htm.

² This effort has continued in the wake of the Uruguay Round via the many 'Trips-plus' bilateral agreements that have been negotiated. See Drahos, 'BITS and BIPS: Bilateralism in Intellectual Property', 4 *J World Int'l Pty L* (2001) 791. Much of the recent debate over TRIPS involves public health concerns. See, e.g., Abbott, 'The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health', 99 *AJIL* (2005) 317; Sun, 'The Road to Doha and Beyond: Some Reflections on the TRIPS Agreement and Public Health', 15 *EJIL* (2004) 123.

³ See, e.g., Bhagwati, 'From Seattle to Hong Kong', 84 *Foreign Affairs* (2005) 2. Cf. Maskus and Penubarti, 'How Trade-Related Are Intellectual Property Rights?', 35 *J Int'l Econ L* (1995) 227.

⁴ There are numerous other terms associated with this phrase, including Protected Designation of Origin (PDO), Protected Geographical Indication (PGI), *Appellation d'Origine Controlée* (AOC), and so forth. There are subtle differences among these terms, which are found in various national and international laws, but for our purposes the distinctions are not especially germane. Hence we follow the existing literature and simply use 'geographic indication'.

⁵ Broude, 'Taking "Trade and Culture" Seriously: Geographical Indications and Cultural Protections in WTO Law', 26 *U Penn J Int'l Econ L* (2005) 1. Broude notes that some 40% of WTO disputes have involved edible products.

strength from more diffuse concerns about authenticity, heritage and locality in a rapidly integrating world. To assert the necessity of GI protection is, in part, to assert the importance of local culture and tradition in the face of ever-encroaching globalization. The GI question is as a result linked to larger, politically sensitive debates about the proper level of protection for farmers and rural communities, the degree to which international law ought to trench upon questions of culture and tradition, the necessity of intellectual property rights and, above all, the importance of economic competition. The GI debate, moreover, chiefly exhibits not the North–South division so familiar to international lawyers, but rather a less common and more interesting split: that between the New World and the Old World.

We begin by defining GIs and explaining the origin of the contemporary struggle over them. Although GIs have a long history, we argue that they gained markedly greater political salience in the post-war period owing to major changes in the global economy.⁶ These changes led to the increasing consolidation of formerly discrete local and regional markets, which in turn meant increased competition – and opportunities – for many traditional producers. This enhanced global competition has raised the value of putative GI rights. It has also led to extensive charges of misappropriation, in particular by the Member States of the European Union. The inclusion of GIs in the TRIPS accord is part of a larger strategy by European states to shield their agricultural producers from increasing New World price-based competition, while simultaneously reforming bloated farm subsidies. Indeed, the European Commission has expressly linked the protection of GIs to reform of the Common Agriculture Policy.⁷ The latest salvo in this struggle is the inclusion, within the Doha Round of world trade talks, of two highly controversial GI-related agenda items: extension of the special TRIPS wine and spirits standard to other products, and the creation of a multilateral system for registration of GIs.⁸

After explaining the origins of the effort to protect GIs in international law, we assess the normative justification for these new rights. Despite a wide range of scholarship on the WTO, intellectual property and agricultural policy, the conceptual underpinnings

⁶ The first mention of GIs in international law is in the 1883 Paris Convention on Industrial Property. In national and regional practice they date much further back, perhaps to the ancient Greeks and Romans. B. O'Connor, *The Law of Geographic Indications* (2004).

⁷ 'The EU has entered, in good faith, into negotiations with its partners in the WTO with a view to further liberalizing world trade in agricultural commodities. This will mean, in practice, less export subsidies to our farmers. This policy is embodied in the Commission's proposed review of the Common Agricultural Policy: compete internationally on quality rather than quantity. Yet, efforts to compete on quality would be futile if the main vehicle of our quality products, GIs, are not adequately protected in international markets': European Commission, 'Why Do Geographical Indications Matter to Us?' (30 July 2003), available at: http://europa.eu.int/comm/trade/issues/sectoral/intell_property/arguen.htm. See also Evans and Blakeney, 'The Protection of Geographical Indications After Doha: Quo Vadis?', 9 *J Int'l Econ L* (2006) 575; Blakeney, 'Stimulating Agricultural Innovation', in J.H. Maskus and K.E. Reichman (eds), *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (2005).

⁸ The Doha Declaration of 2001, WTO Ministerial Declaration, WTO Doc. WT/MIN (01)/DEC/W/1 (14 Nov. 2001). Recent WTO litigation over GIs is discussed *infra*.

of GIs have not been rigorously examined.⁹ We argue that GI protection in international law is justifiable for many of the reasons that trademark protection is justifiable: primarily, to protect consumers against confusion and to lower their search costs.¹⁰ We contend, however, that the current level of protection afforded by TRIPS for wine and spirits – which disallows any mention of a protected GI by a producer outside the region, even if the place of production of the product is clearly indicated – is unwarranted and goes well beyond what any existing theory of property can support.¹¹ *A fortiori*, further expansion of the wines and spirits standard to new products, as currently sought by European and other states in the Doha Round, is unjustified as well. We defend this position through careful consideration of the major theoretical bases for property rights.

2 The International Law of Geographic Indications

In the last two decades intellectual property has become a central part of international affairs. Intellectual property law is traditionally territorial, but the various major multilateral agreements on copyright, patent, and the like have created a measure of convergence in substantive law across states. Until the early 1990s, however, serious differences remained. In the 1980s, the rise of knowledge-based economies made the importance of intellectual property greater.¹² Technological changes also made copying of many intellectual property-related protected products far easier. These changes spurred producers in the US and elsewhere to action. Facing what they considered to be rampant piracy, major firms in the software, film, music, pharmaceutical and other industries pressured the US, Europe and other industrialized states to fight more aggressively for stronger intellectual property protection worldwide. The result was the landmark TRIPS Agreement.

⁹ The most thorough treatments of GIs in international law are O'Connor, *supra* note 6, Broude, *supra* note 5, and J. Hughes, 'The Spirited Debate Over Geographic Indications' (unpublished manuscript on file with authors). None of these works, however, critically assesses the fundamental property rights claims that undergird GI protection.

¹⁰ W. M. Landes and R. A. Posner, *The Economic Structure of Intellectual Property Law* (2003), ch. 7; K. Maskus, *Intellectual Property Rights in the Global Economy* (2000); Economides, 'The Economics of Trademarks', 78 *Trademark Reporter* (1988) 523; Landes and Posner, 'Trademark Law: An Economic Perspective', 30 *JL & Econ* (1987) 265.

¹¹ An earlier brief version of this argument was made in Raustiala and Sprigman, 'Eat, Drink and be Wary: Why the US Should Oppose the WTO's Extending Stringent Intellectual Property Protection of Wine and Spirit Names to Other Products', 12 Dec. 2002, available at: www.findlaw.com.

¹² On TRIPS and the rise of international intellectual property law generally see Gervais, 'The Changing Landscape of International Intellectual Property', 1 *J Int'l Pty L & Practice* (2006) 246; Drahos, 'Intellectual Property Rights in the Knowledge Economy', in D. Rooney, G. Hearn, and A. Ninan (eds), *Handbook on the Knowledge Economy* (2005); Helfer, 'Regime-Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking', 29 *Yale J Int'l L* (2004) 1; P. Drahos and J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (2003); S.K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (2003); C. Bellmann *et al.* (eds), *Trading in Knowledge: Development Perspectives on TRIPs, Trade, and Sustainability* (2003); Maskus, *supra* note 10; M. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property* (1998).

The inclusion of TRIPS in the newly-created WTO substantially augmented the traditional approach of relying on discrete multilateral intellectual property treaties. For the first time the WTO's powerful dispute settlement process was put behind the enforcement of intellectual property rights.¹³ Many states and stakeholders vigorously but largely unsuccessfully opposed this global extension of Western-style property rights. These critics argued that strong intellectual property rights either harm the developing world, as when they raise the costs of essential medicines, or disproportionately benefit advanced industrial democracies, whose citizens and firms hold most patents, trademarks and copyrights.¹⁴ Critics also pointed out that many of the proponents of strong intellectual property rights – in particular, the US – had themselves favoured weak rights when they were developing.

The far-reaching rules enshrined in TRIPS are substantive as well as procedural. These rules establish a set of 'minimum standards' that every WTO Member must follow. They closely track the structure of legal rights found in the US and Europe. In the Western tradition, intellectual property law balances private monopoly rights guaranteed by the state against the general interest in a vibrant public domain. Hence, with the exception of trademark and trade secret, the core rights of copyright and patent are time-limited: at a certain point, creations move into the public domain and can be used and copied freely by all. The importance of the public domain rests on innovation concerns, because most creations derive from earlier creations, as well as liberty concerns, because private monopolies on inventions and expressions restrain free economic competition and may inhibit free expression. Maintaining a vibrant public domain is therefore an important, if often underappreciated, goal of the international intellectual property regime.¹⁵ Politically, however, the TRIPS Agreement was seen as a triumph of private rights and interests – of property over the public domain. As noted earlier, the trade-enhancing effects of TRIPS are widely contested. But the effects on producers, who now stand to receive greater rents, are undeniable.

The TRIPS negotiations focused primarily on the familiar trio of copyright, trademark and patent. The agreement also addresses less well-known issues: rights over plant genetic resources, semi-conductor 'maskworks', and of course geographic indications. While similar to trademarks, GIs differ in that they attach to goods from a particular region rather than from a particular producer.¹⁶ Some GIs, such as cognac

¹³ Dreyfuss and Lowenfeld, 'Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together', 37 *Virginia J Int'l L* (1997) 275.

¹⁴ See, e.g., UK Commission on Intellectual Property Rights, 'Final Report: Integrating Intellectual Property Rights and Development Policy' (2002), available at: www.iprcommission.org/graphic/documents/final_report.htm¹⁴; Bellman *et al.*, *supra* note 12.

¹⁵ See generally Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain', 66 *L & Contemporary Problems* (2003) 33.

¹⁶ GIs, unlike trade marks, are not owned by individuals and cannot be licensed. See O'Connor, *supra* note 6, at 112–114. As Rangnekar argues, '[f]rom an economic standpoint, GIs are seen as a form of collective monopoly right that erects entry barriers on producers either within or outside the relevant geographical area': Rangnekar, 'The Socio-Economics of Geographic Indications: A Review of Empirical Evidence from Europe', UNCTAD–ICTSD Project on IPRs and Sustainable Development Issue Paper No. 8, May 2004, at 15.

and Roquefort, are very well known. Others, such as Kolhapuri chappals from India or Zhostovo metal painted trays from Russia, are more obscure. GIs are a particular focus of European states. Indeed, enhanced GI protection has been widely understood as an effort by the Old World to secure legal protection against the New, particularly for agricultural products.¹⁷ Agriculture is highly protected and subsidized in most advanced industrial states, and farmers are often a politically powerful lobby. GI protection is one arrow in the quiver of governments, particularly in European states, that seek to protect their agricultural sector from low-cost competition from abroad. Falling at the confluence of agriculture, trade and intellectual property, GIs have become ‘a red-hot issue’ in international law.¹⁸

A GI applies to a specific region within a given state.¹⁹ The relevant region can be very large, and in some cases encompasses an entire state. For example, in 2005 the European Court of Justice held that Greece had the exclusive right to call its famous salty white cheese ‘feta’.²⁰ The indication ‘Swiss-made’ is also a protected GI for watches.²¹ Hence, within a GI-protected region there may be numerous distinct and competing producers. Typically, national rules limit the use of a given GI to producers who, in addition to residing in the designated region, follow specified manufacturing practices and use particular ingredients. These rules aim to ensure that the authentic and special quality claimed for the protected good is present in all products that carry the GI. The connection between place of origin and quality of the product is usually understood to be based on climate, geography and the like: on natural features of the locale. The TRIPS Agreement defines a GI as an expression that identifies a product as originating in a particular region, ‘where a given quality, reputation, or other characteristic of the good is essentially attributable to its place of origin’.²² Thus, they are *geographic* indications. Still, some believe that human skills also play a role. The World Intellectual Property Organization, for instance, maintains that GIs can also ‘highlight specific qualities of a product which are due to human factors that can be

¹⁷ Addor and Grazioli, ‘Geographical Indications Beyond Wines and Spirits’, 5 *J World Int’l Pty* (2002) 6. For instance Australia, though a major wine producer, did not have any legislation dealing expressly with GIs until TRIPS: see Battaglene, ‘The Australian Wine Industry Position on Geographic Indications’, Worldwide Symposium on Geographical Indications, 27–29 June 2005, available at: www.wipo.org/meetings/2005/geo_pmf/en/presentations/doc/wipo_geo_pmf_05_battaglene.doc.

¹⁸ International Trademark Association Bulletin, *Special Report on Geographical Indications* (New York, International Trademark Association, 1 Sept. 2003), at 1.

¹⁹ We know of no example of a transnational geographic indication, though as a conceptual matter one could plainly—and indeed ought to—exist, given that natural features do not correspond to political borders. Some GIs do not linguistically refer to a place; ‘Basmati’, for instance, is not a geographical name. Das, ‘International Protection of India’s Geographic Indications with Special Reference to “Darjeeling” Tea’, 9 *J World Int’l Pty* (2006) at 460.

²⁰ Joined Cases C–465/02 and C–466/02, *Federal Republic of Germany and Kingdom of Denmark v. Commission of the European Communities*, [2005] ECR I–09115. This ruling bars other EU producers from using the word ‘feta’ despite the fact that feta is not a place in Greece, or anywhere else for that matter. ‘Feta’ is a Greek word roughly translatable as ‘slice’. We thank the scholar of trade law and cheese Petros Mavroidis for this translation.

²¹ O’Connor, *supra* note 6, at 77.

²² TRIPS, *supra* note 1, art. 22(1).

found in the place of origin of the products, such as specific manufacturing skills and traditions'.²³ As we discuss below, this ambiguity – do GIs refer solely to fixed natural features or also to (moveable) human skills? – has major implications for the normative justification of GIs, as well as the question of who can legitimately use the GI and who cannot.

TRIPS requires that WTO Member States provide the means for interested parties to register GIs and to prevent any use of a GI that amounts to unfair competition or misleads the public as to the origin of the good. Member States also have a duty to refuse or invalidate such misleading marks. The precise structure of the national systems for registering and enforcing GIs is left to the parties to decide, but is subject to general WTO rules on national treatment and non-discrimination. In 2005 Australia and the US successfully challenged the EU's system before the WTO Dispute Settlement Body, arguing that it impermissibly discriminated against foreign products and persons. In *EC-Geographical Indications* the WTO Panel dismissed some of the claims, yet held that the European GI system failed to provide national treatment to foreign products.²⁴ Not all types of GIs are treated in the same way by TRIPS. GIs for wines and spirits receive enhanced protection – what we call here 'absolute protection'. WTO Member States must provide holders of such GIs with the legal means to prevent labelling that, even if it indicates the true origin of a good, includes a GI with the qualification 'kind', 'style', or the like. (There is an important grandfather clause exempting those who have used a wine and spirits GI, such as champagne, for at least 10 years prior to the entry into force of TRIPS.)²⁵ The absolute protection standard for wine and spirits, in other words, goes well beyond that for other products. TRIPS offers no rationale for this bifurcation, though wine and spirits constitute the vast majority of GIs in some countries. In the EU nearly 90 per cent of the registered GIs relate to wine and spirits, and indeed some commentators argue that the absolute protection standard was 'granted solely for the political reason of persuading the EC to join consensus on the Uruguay Round'.²⁶ The EU has subsequently compiled a list of 41 cheeses, meats and other products that it believes should also enjoy absolute protection for relevant GIs.²⁷ Whether, and how, to extend the absolute standard to new products is a major point

²³ 'About Geographic Indications', available at: www.wipo.int/about-ip/en/about_geographical_ind.html (last visited 20 Nov. 2006). O'Connor argues that a GI 'is linked . . . to something more than mere human creativity including topography, climate, or other factors independent from human creativity': O'Connor, *supra* note 6, at 113.

²⁴ Dispute DS/174/R, *EC-Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (2005). See Evans and Blakeney, *supra* note 7, at 595–604, for an analysis.

²⁵ TRIPS, *supra* note 1, Art. 24. This provision aims to negotiate between the protection of existing trade marks and customary terms, on the one hand, and the protection of GIs on the other. In practice a significant number of erstwhile GI violations are harboured by this provision. Generic terms, such as Bermuda shorts, are likewise covered by Art. 24.

²⁶ Das, *supra* note 19, at 477. Percentages calculated are based on figures found in European Commission, 'Why Do Geographical Indications Matter to Us?', *supra* note 7.

²⁷ 'WTO Talks: EU Steps up Bid for Better Protection of Regional Quality Products', Press Release IP/03/1178 of 28 Aug. 2003, available at: <http://europe.eu.int/rapid/pressReleasesAction.do?reference=IP/03/1178> (last visited 20 Nov. 2006).

of contention in the current negotiations within the WTO. Rhetorically, the EU, and others, have taken to referring to the unfair ‘discrimination’ faced by other non-wines or spirits products.²⁸

The TRIPS Agreement is not the first invocation of GIs in international law, though it is the most important. GI protection was part of the Paris Convention for the Protection of Industrial Property (1883), but under a different label (‘false indications’). The 1891 Madrid Agreement for the Repression of False or Deceptive Indications also addresses GIs, though it has relatively few parties. In the 20th century, the Lisbon Agreement on Appellations of Origin (1958) set the standard until the negotiation of TRIPS. National law on GIs is even older. French law first addressed GIs in 1824,²⁹ and plainly GIs existed as common signifiers for centuries if not millennia before that. Nor is GI protection limited to the Old World. In the US the Federal Alcohol Administration Act of 1935 bars misleading labels on wine. More recently, California, the centre of American wine-making, passed a statute requiring that any wine produced or marketed in California and bearing the name ‘Napa’ contain at least 75 per cent Napa Valley-grown grapes.³⁰

Central to the GI concept is the idea that particular regions bestow unique qualities on foods and wines. This idea is often referred to, especially in the wine trade, by the French word *terroir*. In its increasingly active media campaigns to promote GI-denominated foods, the European Commission defined *le goût du terroir* as

a distinct, identifiable taste reminiscent of a place, region or locality. . . . Foods and beverages that evoke the term *terroir* have signature qualities that link their taste to a specific soil with particular climate conditions. Only the land, climate and expertise of the local people can produce the product that lives up to its name.³¹

Consequently, a GI-denominated product is not simply *from* a place; it is said to have unusual, even unique qualities that the place alone can provide. In the recent *Feta* case, for instance, the European Court of Justice argued that there was a close and important interplay between natural geographic factors and human innovation in the making of feta cheese. In the case of feta cheese, this interplay was said to include

the development of small native breeds of sheep and goats which are extremely tough and resilient, fitted for survival in an environment that offers little food in quantitative terms but, in terms of quality, is endowed with an extremely diversified flora, thus giving the finished product its own specific aroma and flavour. The interplay between the natural factors and the specific human factors, in particular the traditional production method, which requires straining without pressure, has thus given Feta cheese its remarkable international reputation.³²

²⁸ ‘Why Do Geographical Indications Matter to Us?’, *supra* note 7. See also Das, *supra* note 19, at 466, promoting the wines and spirits standard for Indian GIs.

²⁹ See generally O’Connor, *supra* note 6; Torsen, ‘Apples and Oranges (and Wine): Why the International Conversation Regarding Geographic Indications is at a Standstill’, 87 *J Patent and Trademark Office Society* (2005) 31, at 34–35.

³⁰ See *Bronco Wine Co v. Jolly*, 33 Cal. 4th 943 (2004).

³¹ Available at www.eu-authentic-tastes-com/system/overview.html (visited on 16 Dec. 2005).

³² ECJ press release on the Feta judgment; Press release No 92/05, 25 Oct. 2005.

GI protection means that producers outside a designated region cannot use recognized GIs, no matter how similar their product is to the GI-protected product.³³ Even the phrase *méthode champenoise* – which denotes a product or process method, rather than any regional quality per se – has been held to be improper for German producers of sparkling wine to employ on their labels.³⁴ Although this restriction is an example of what might be called creeping patentization, it is important to underscore that GIs differ dramatically from patents in that the products from outside a GI region may be identical to those from the GI region.³⁵ These products, however, may not use the GI. Hence, producers of sekt in Germany may employ the *méthode champenoise*, but cannot say so on the label. Likewise, producers of feta in Greece can now stop producers in Denmark from using the name feta. But a virtually identical Danish cheese may still be marketed under a different name, such as ‘Danish White Salty Sliced Cheese’. And not just any cheese made in Greece can be called feta. Only white, crumbly, goat and sheep’s milk cheeses made in Greece in a specific way qualify for the GI. Even the final preparation of a protected product has been held to contravene GI rights. In the recent *Prosciutto di Parma* case before the European Court of Justice, the *Conzorio del Prosciutto di Parma* successfully sued two UK firms that imported whole hams and sliced them in Britain, on the ground that the slicing and packaging of prosciutto di Parma was central to the ham’s valuable reputation and therefore can only occur within the limited region designated by the GI.³⁶

As the *Feta* and *Prosciutto di Parma* disputes suggest, GIs are economically significant monopoly rights that beneficiaries police aggressively. They are also signifiers that aim to halt cultural appropriation by outsiders – a concern that resonates strongly in an increasingly globalized world. In this sense, GIs resemble another frontier issue in intellectual property law, namely ‘traditional knowledge’. Traditional knowledge is understanding or skill, typically possessed by indigenous or local peoples over a significant period of time, that relates to medical remedies, plant characteristics, folklore, and the like.³⁷ GIs and traditional knowledge share several attributes. At the core of each are the concepts of heritage and authenticity. Both aim to help individuals or

³³ Recall, however, that TRIPS Art. 24 has grandfathered in the (mis)use of certain GIs.

³⁴ *Gulmann AG in Case C–306/93, SMW Winzersekt GmbH v. Land Rheinland-Pfalz* [1995] ECR I–5555.

³⁵ The theory of *terroir* suggests that this result is impossible. For more on *terroir* in the GI context see Hughes, *supra* note 9. A recent econometric study claims that the contribution of *terroir* to valuable wine is vastly overstated: see Styles, ‘Terroir Plays No Role, “Parker effect” adds 15% to Bordeaux, Study Finds’ (22 Mar. 2005), available at: www.decanter.com/news/62518.html.

³⁶ Case C–108/01, *Conzorio del Prosciutto di Parma & Salumificio S. Rita SpA v. Asda Stores Ltd & Hygrade Foods Ltd* [2003] ECR I–05121, available at: <http://curia.eu.int>. See also Evans and Blakeney, *supra* note 7, at 587–591.

³⁷ An example of traditional knowledge is information relating to the medicinal uses of the neem tree, a local plant commonly used in South Asia to address various ailments. On the protection of traditional knowledge via intellectual property law generally see UK Commission Final Report, *supra* note 14, ch. 4; Cottier and Panizzon, ‘Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection’, and Lange, ‘Traditional Knowledge, Folklore, and the Case for Benign Neglect’, both in Maskus and Reichman, *supra* note 7; Bellmann *et al.*, *supra* note 12.

groups identify, protect and profit from authentic, traditional practices. A GI such as Rioja distinguishes ‘true’ Rioja wine from foreign red wine imitations; likewise, claims about traditional knowledge, particularly those relating to cultural goods, assert that a given song or practice was created or discovered by a distinct, identifiable group. Both GIs and traditional knowledge typically attach, or purport to attach, to groups rather than individuals. Lastly, neither has any temporal limitation. Indeed, it is central to both concepts that the protected practices or products are long-standing. As a result of these commonalities, GIs, which are currently better protected than traditional knowledge in both national and international law, have been suggested as a vehicle for the protection of traditional knowledge.³⁸ Politically this linkage may increase the salience of GIs among developing countries; GI protection has largely been the subject of debate between the New World and the Old World until recently, and traditional knowledge is largely, though not solely, said to exist in the South. To date, however, the most valuable GIs remain in the North, not the South, and in practice the highest level of protection under TRIPS – for wines and spirits – also favours northern producers.³⁹

In short, at the conceptual core of GIs is a claim about authenticity and heritage. In an age of rapid economic integration and, often, consumer abundance, of a ‘McWorld’ that is increasingly similar around the globe, GIs purport to help individuals and groups identify, protect, and at times profit from authentic production.⁴⁰ A GI such as champagne distinguishes ‘true’ champagne from other sparkling wines. GI proponents believe that a similar product from a different region of the world necessarily lacks the geographically-determined qualities of champagne. It is therefore a kind of fake or impostor. And in their focus on *terroir*, GIs provide a bulwark against homogenization and industrial production of foodstuffs. Given the focus of GIs on heritage, locality and ‘placeness’, it is unsurprising that GIs are championed by those who oppose aspects of contemporary globalization, especially its despatializing

³⁸ UK Commission Final Report, *supra* note 14, ch. 4; Rangnekar, *supra* note 16.

³⁹ See, e.g., Gervais, *supra* note 12, at 250, referring to the GI debate in the WTO as a ‘mostly North–North issue’. The GI debate also shares similarities with the debate over property rights in plant genetic resources, which is a largely North–South debate. Plant genetic resources fall somewhere between traditional knowledge and GIs in terms of protection under international law. Unlike traditional knowledge, which is not mentioned in TRIPS, plant genetic resources receive a form of *sui generis* protection via Art. 27(3)(b) of TRIPS and are the subject of extensive attention in other international treaties, such as the 2001 FAO sponsored International Treaty on Plant Genetic Resources in Food and Agriculture (available at: www.fao.org/AG/cgrfa/itpgr.htm). As in the GI and traditional knowledge cases, here a resource of long-standing, closely associated with and perhaps dependent upon a particular geographic locale, was increasingly seen as being ‘pirated’ by outsiders. The result was a successful campaign to protect property rights in plant genetic resources. On the struggle over rights in genetic resources see Munzer, ‘Plants, Torts, and Intellectual Property’, in T. Endicott *et al.*, *Properties of Law: Essays in Honor of Jim Harris* (2006); Raustiala and Victor, ‘The Regime Complex for Plant Genetic Resources’, 32 *Int’l Org* (2004) 147; Helfer, ‘Using Intellectual Property Rights to Preserve the Global Commons’, in Maskus and Reichman, *supra* note 7.

⁴⁰ B. Barber, *Jihad vs. McWorld: How Globalism and Tribalism are Reshaping the World* (1995).

and homogenizing characteristics.⁴¹ Yet, as we argue below, the very transnational integration that globalization fosters has led to increased demand for GI protection. The protection of GIs can thus be seen as a way to commodify and market placeness and tradition in an increasingly global economy.

3 The Rise of Geographical Indications in Economic Cooperation

Though we have made clear the role of cultural concerns in the GI debate,⁴² the ongoing effort to entrench GIs in international law has important economic underpinnings. The expansion of globalization and of world trade has led to increased demands for international rules on GIs as a means to protect and enhance market share in artisanal products. To be sure, the broader international trend toward greater intellectual property protection has also aided this process. But at the same time globalization has raised the value of property rights in GIs and, we argue, increased the incentives for various actors to seek to create or strengthen intellectual property rights through international agreements. Hence, though we do not dismiss non-economic factors, and we recognize that many traditional producers feel passionately about the issue of GI protection, our causal argument is chiefly economic. Specifically, we claim that:

- falling trade barriers have lowered the prices of GI-protected goods and created global markets out of previously discrete local markets;
- goods similar to GI-protected goods exist in many states due to prior waves of immigration, which brought skills and tastes to new locations; these goods now compete with their 'original' forbears; and
- rising wealth and falling food prices have increased the share of household income available for niche food products, which are often marketed through GIs. The increasing preference for artisanal products accentuates this trend.

High levels of international trade are of course not new. It is often forgotten that world trade levels were quite high in the decades leading up to World War I, and it was not until well into the 1970s that equivalent levels were reached. Post-war globalization differed from late 19th century globalization in many ways, however.⁴³ Most germane here is the nature of international trade, which was, in the post-war era, marked by a far larger percentage of intra-industry trade. Pre-World War I integration was characterized largely by inter-industry trade: that is, trade of one kind of good (steam engines) for something completely different (rubber). Contemporary

⁴¹ Some claim that globalization reflects the idea that activities that were once carried out within nation states are now often carried out regionally or globally—and are even, in that respect, 'deterritorialized'. See, e.g., Woods, 'The Political Economy of Globalization', in N. Woods (ed.), *The Political Economy of Globalization* (2000), at 5.

⁴² See, e.g., Broude, *supra* note 5.

⁴³ Baldwin and Martin, 'Two Waves of Globalization, Superficial Similarities, Fundamental Differences', NBER Working Paper no. 6904 (1999); Garrett, 'The Causes of Globalization', 33 *Comp Political Stud* (2000) 941; J. Frieden, *Global Capitalism: Its Fall and Rise in the Twentieth Century* (2006).

globalization is distinctive in that we see firms and products from many states now competing directly in integrated markets. Japanese cars vie with German, American, Swedish and Korean cars for dominance in the global market. Likewise, agricultural products, especially high-end artisanal products such as wines, meats and cheeses, now increasingly compete globally with their foreign imitators and rivals.

Increasing global trade in GI-related products in the post-war era resulted mainly from three interrelated factors of a technological, economic and political nature, respectively. The first was a precipitous drop in transportation costs. Containerization, shipping improvements and transcontinental aircraft permit transport over long distances at a strikingly low cost. Products that once could not be successfully traded over long distances now can be shipped around the globe cheaply and rapidly. The second factor is the establishment of international trade agreements, such as the WTO itself, which have markedly lowered tariffs and, more recently, reined in non-tariff barriers as well. The third is increased economic demand on the part of consumers in wealthy countries for GI-marked food, drink and other products. These three factors have dramatically increased the flow of many foods across frontiers and created global markets out of local or regional markets. The result is that traditional artisanal products, such as champagne, Roquefort, and Russian caviar, now compete much more directly with their newer variants, such as Australian sparkling wines, Iowa blue cheese, and California paddlefish roe.

A powerful example, and one that is absolutely central to the current debate over GIs, is the world wine industry. For centuries Europe dominated the world's wine market, though the vast majority of production was for local consumption. Well into the 1960s less than 10 per cent of global wine production was traded internationally. Today, the proportion of wine traded internationally is 25 per cent, and rising rapidly.⁴⁴ For the US and the EU, the two major powers in world trade, wine is a highly traded product and is overlain with cultural conflict: New World technique versus Old World *terroir*. Yet, despite differences in approach and style, most US wine exports go to the EU. In 2004, global US wine exports exceeded \$736 million, with exports to the European Community over \$487 million.⁴⁵ For European producers, wine imports are now a major threat. Europe may soon, for the first time in recorded history, import more wine than it exports.⁴⁶

World wine competition, though segmented by price, is thus increasingly fierce. Many of the wines sold on the world market employ varietal grape names, such as Pinot Noir, but many also use famous place names such as Champagne or Chablis to signal their style and type. In this competitive environment, well-protected GI rights are compelling. The legal power to restrict the use of the words 'Chianti', 'Champagne', or 'Rioja' to certain products and producers confers a decided economic advantage

⁴⁴ Anderson, 'Wine's New World', 136 *Foreign Policy* (2003) 49.

⁴⁵ Press release, United States Trade Representative, 15 Sept. 2005, available at: www.useu.be/Categories/Trade/Sept1505_Wine_Accord.html.

⁴⁶ Supp, 'In Vino Vilitas: European Wine Fighting for Survival', 44 *Der Spiegel* (online English edn) (2005), available at: <http://service.spiegel.de/cache/international/spiegel/0,1518,druck-383331,00.html>.

against competitors. And all else being equal, the larger the market is, the higher is the economic value of the GI.

The causal impact of global markets on the creation of legal rights in GIs has been enhanced by two additional factors. First, the prior diffusion of traditional techniques of production created fertile soil for the later assertion of GIs in international law. Past waves of immigration, particularly around the turn of the 19th century, brought millions of farmers and artisans from Europe to the Americas and elsewhere. These immigrants brought with them their food products and, more importantly, their traditional production methods and recipes. Once settled, they often recreated the products they had known at home. The history of wine production is again instructive. Wine grapes were widely planted in California in the 19th century, with the result that today Napa Valley, Sonoma, Mendocino, and the Santa Ynez Valley are highly regarded wine-growing regions. Likewise, wine grapes were first planted in Australia in 1788 and in New Zealand three decades later.⁴⁷ For a small range of high-value, non-perishable products – primarily spirits – this process of diffusion through immigration created some minimal level of economic competition centuries ago. For most other products, however, international trade in agricultural goods was quite low until the 1960s, but has since accelerated rapidly. The non-European share of global wine exports, for example, increased over 600 per cent since the early 1990s.⁴⁸ Much of this wine is inexpensive, but not all – and in any event, cheap New World wines compete favourably with cheap Old World wines, which are increasingly exported from their country of origin.

Second, over the last 50 years household incomes have risen across much of the globe while food costs have dropped.⁴⁹ In this process, the place of high-value food products in daily diets has grown.⁵⁰ Luxury goods, once limited to a tiny coterie of the wealthy, have become widely accessible. This trend dovetails with a heightened awareness of and affinity for regional cuisines and wines on the part of many consumers. Producers of Indiana corn or Australian wheat do not claim GIs (though Finland apparently claims a potato).⁵¹ Rather, GIs are typically asserted for cheeses, wines, spirits, watches, and other highly-specialized artisanal products.⁵² For some

⁴⁷ Anderson, Norman, and Wittwer, 'Globalisation of the World's Wine Markets', 26 *World Econ* (2003) 660–661.

⁴⁸ *Ibid.*, at 665.

⁴⁹ 'Make It Cheaper, and Cheaper', 369 *Economist* (2003) 6.

⁵⁰ See, e.g., Rangnekar, *supra* note 16, at 6: '[i]nterest in and the commercial potential of [GIs] is partly related to the recent growth of socially-constructed quality criteria[sic] such as fair trade, organic, and so forth'; Das, *supra* note 19, at 460: '[g]iven the recent trends in the world market, where consumers, especially those in the developed world, are increasingly finicky about the quality and authenticity of the products that they are buying and are gradually developing preferences for environmentally sound and/or socially responsible products, GIs are increasingly gaining in importance as weapons for such niche marketing.'

⁵¹ Lee and Rund, 'EU-Protected Geographic Indications: An Analysis of 603 Cases' (draft manuscript, American University, Dec. 2003), at 3.

⁵² These products often share qualities—hand-crafted, traditional, artisanal—that the pop-sociologist and *New York Times* columnist David Brooks argues are highly sought after by upper-income consumers in post-industrial societies: D. Brooks, *Bobos in Paradise: The New Upper Class and How They Got There* (2000), ch. 2.

products, like fine wines, silk and tea, long-distance trade has long existed. But the volume of such trade is much higher today – as the wine trade makes abundantly clear. Enhanced global competition in luxury goods markets has raised the incentives for producers to claim and assert GIs in the world's marketplaces as a way of appealing to consumers fascinated by local traditions and authentic products. The apotheosis of these varied trends is perhaps the 'Artisanal Cheese Club', which airships to its members a set of regional, usually GI-protected, cheeses from around the world each month, along with tasting notes and wine suggestions.⁵³

Europe, with its long and rich agricultural tradition, is at the forefront of the effort to expand GI protection. This is true not only for its well-known products but also its less well known, such as turrón de Alicante, a nougat candy from Spain, and grappa del Friuli, a grape-derived spirit from Italy. In 1992 the EU created a system to protect GI-denominated food products. The European Commission also actively promotes European GIs abroad. For example, the EU's 'EAT' campaign – for 'European Authentic Tastes' – has run advertisements in major newspapers and magazines abroad extolling the authenticity of true champagne and denigrating other champagne-style wines as impostors.⁵⁴ The EU favours expanded GI rights in part because its Member States are home to many famous food products. Nevertheless, Europe also has a relatively high proportion of its population employed in agriculture – some four per cent compared to one per cent in the US.⁵⁵ This is especially true for the southern states of Europe, and unsurprisingly the vast bulk of GI activity and litigation in Europe stems from the five states of France, Spain, Italy, Greece and Portugal.⁵⁶ The increasing pressure on the EU to reduce subsidies to farmers by reforming the Common Agricultural Policy only enhances the attractiveness of using GIs to gain market share internationally. As Pascal Lamy, a former high EU trade official and currently Director-General of the WTO, stated: '[T]he future of European agriculture lies not in quantity of exports but quality. . . . That is why we are fighting to stop appropriation of the image of our products and improve protection.'⁵⁷ Faced with an onslaught of inexpensive wine and other agricultural products from the New World, often bearing European place names, EU countries have sought

⁵³ See www.artisanalcheese.com (last visited 20 Nov. 2006).

⁵⁴ See www.eu-authentic-tastes.com (last visited 20 Nov. 2006).

⁵⁵ Normile and Price, 'The United States and the European Union: Statistical Overview', US Department of Agriculture, available at: www.ers.usda.gov/publications/WRS0404/WRS0404b.pdf (last visited 20 Nov. 2006). The European Commission has argued that 'GIs are the lifeline for 138000 farms in France and 300000 Italian employees': European Commission, 'Why Do Geographical Indications Matter to Us?', *supra* note 7.

⁵⁶ Lee and Rund, *supra* note 51.

⁵⁷ Quoted in Babcock, 'Geographic Indications, Property Rights, and Value-Added Agriculture', 9 *Iowa Agric Rev Online* (2003) 4, available at: www.card.iastate.edu/iowa_ag_review/fall_03/article1.aspx (last visited 20 Nov. 2006). See also European Commission, 'Why Geographical Indications Matter to Us?', *supra* note 7: '[g]eographical indications constitute the main pillar of the EU's quality policy on agricultural products . . . [they] create a genuine niche for development of agri-food industries for relatively low development agricultural economies'.

to use the international intellectual property system to assert quality, segment markets, and protect their national producers from what they deem unfair competition.

By contrast, the US and other New World producers tend to oppose strong GI protection, especially at the WTO level. In response to EU initiatives to expand protection in TRIPS, the Australian Ambassador to the WTO pointedly stated that 'Europe is seeking to rewrite' the TRIPS Accord.⁵⁸ EU demands to expand GI protection, moreover, would 'introduce a new form of subsidy for selected European food producers', while also extending a 'new form of neo-colonialism on its former territories by preventing them from using terms which are now generic in their territories'.⁵⁹ These views are shared elsewhere in the New World. As a US Commerce Department official recently declared:

Make no mistake, what the EU is asking for is not fair treatment; it's preferential treatment, it's nothing less than a subsidy of European agriculture interests through claw back of generic terms. If adopted, the EU's demands could undermine the world's systematic approach to intellectual property protections, and not just for GIs.⁶⁰

Of course, neither the US nor Australia rejects the concept of GIs altogether. In fact, the US protects 150 of its own viticultural GIs, including such seemingly unremarkable designations as the 'Mississippi Delta' wine-growing region. Australia has its own famous wine regions, including the McLaren Vale and Hunter Valley. In the recent US-Australia Free Trade Agreement, the respective trade ministers signed a side letter confirming that both Bourbon whisky and Tennessee whisky would be protected GIs in Australia.⁶¹ What New World critics largely oppose is the extension of the absolute protection standard of GI protection to new food products, as well as various proposed procedural extensions that would have the effect of further entrenching the absolute standard in international law.

Developing countries take mixed positions on GI protection. Many favour GIs for their famous products: Mexico, for example, for tequila and mezcal, and India for basmati rice and Darjeeling tea.⁶² Some have also pushed in the ongoing Doha Round for an extension of the absolute standard to other goods, arguing that non-alcohol products ought to receive the same level of protection.⁶³ At the same time, some developing

⁵⁸ Spencer, 'A Way Forward for Geographic Indications', document prepared for the World Symposium on Geographic Indications, WIPO, July 2003, WIPO/Geo/SFO/03/25, at 1.

⁵⁹ *Ibid.*, at 3.

⁶⁰ Dudas, Deputy Undersecretary of Commerce for Intellectual Property, quoted in Torsen, 'Apples and Oranges (and Wine): Why the International Conversation regarding Geographic Indications is at a Standstill', 81 *J of the Patent and Trademark Soc* (2005) 31, at 52.

⁶¹ Letter from Australian Minister for Trade Mark Vaile to USTR Robert Zoellick, 18 May 2004, available at: http://ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/asset_upload_file778_3889.pdf.

⁶² Indeed, Mexico sought and received explicit protection for Tequila and Mescal in NAFTA: see NAFTA Annex 313 (Distinctive Products), North American Free Trade Agreement, 32 ILM (1993) 605. On Darjeeling see Das, *supra* note 19; Srivastava, 'Protecting the Geographic Indication for Darjeeling Tea', Managing the Challenges of WTO Participation Case Study 16, available at: www.wto.org/english/res_e/booksp_e/casestudies_e/case16_e.htm (last visited 20 Nov. 2006).

⁶³ O'Connor, *supra* note 6, at 392.

nations recognize that GI protection is intertwined with other policies of industrialized nations that they oppose. These policies are currently on the WTO negotiating agenda, such as substantial farm subsidies that often harm farmers in developing countries. GI conflicts at the WTO may in some cases simply be prefatory moves aimed at creating bargaining chips for later use in larger negotiating battles.

In sum, the intensifying shift from local to global markets that marks the contemporary world economy both permits information and innovations – in the form of GIs – to flow out, and new competition, often employing these innovations, to flow in.⁶⁴ Globalization raises the returns from assertions of property rights in GIs. According to the European Commission, GI-labelled cheeses from France command a premium of two euros per kilo over French non-GI cheeses.⁶⁵ Extending this market premium worldwide is plainly attractive to producers. Thus, it is no coincidence that GIs have become part of the international debate just as world trade is reaching record levels and economies are integrated ever more deeply. By no means do economic incentives drive all property claims. Many GI proponents plainly fear the levelling and homogenizing encroachment of global competition, even as they seek to capitalize on it through intellectual property law. Yet as the vast literature on the evolution of property rights illustrates, actors tend to demand new property rights when underlying costs and benefits shift in fundamental ways.⁶⁶ The rise of GIs in international law exemplifies this process.

4 Is the Law of Geographical Indications Justified?

So far we have described the conceptual basis of GIs and offered a causal account of the economic and political forces that have thrust them in the last decade onto the global trade and intellectual property agenda. In this section we evaluate the case for GI protection: Why, and to what degree, *should* GI rights be protected by international law? GIs are often debated in terms of ‘piracy’ and misappropriation. But this rhetoric presupposes the existence of valid property rights; it does not justify the underlying property rights. GIs closely resemble trademarks, and trademarks are usually justified under a consumer-based rationale: they are protected so as to reduce the confusion and limit consumers’ search costs in the marketplace.⁶⁷ Nevertheless, to be thorough, we assess the force of a wide range of possible justifications for GIs, not only those deployed in favour of trademarks, and not only those typically applied to intellectual property

⁶⁴ Here again the parallels with the efforts to protect traditional knowledge and plant genetic resources via new international rules are noteworthy.

⁶⁵ ‘Why Do Geographic Indications Matter to Us?’, *supra* note 7.

⁶⁶ See G. Libecap, *Contracting for Property Rights* (1989); Merrill, ‘The Demsetz Thesis and the Evolution of Property Rights’, 31 *J Legal Stud* (2002) 331; Riker and Sened, ‘A Political Theory of the Origin of Property Rights’, 35 *Am J Political Science* (1991) 951; Rose, ‘Economic Claims and the Challenges of New Property’, in K. Verdery and C. Humphery (eds), *Property in Question: Value Transformation in the Global Economy* (2004), at 227–295. Many of these analyses draw on the famous theory of property rights developed by Harold Demsetz.

⁶⁷ Landes and Posner, *supra* note 10.

rights.⁶⁸ We begin with the most fundamental justifications for property rights, and end with those associated with trademark protection, the intellectual property right most similar to GIs in function. Probably no robust property right – whether in real or intellectual property – can be defended on the basis of any single justification, unless one's *idée maîtresse* is utility. GIs are no exception. We are not wedded to efficiency as the sole rationale for property rights. Consequently, we bring in arguments that appeal to utility or efficiency only in some targeted form, such as an incentive to innovate or to protect against confusion among consumers, rather than a broad appeal to whatever maximizes preference-satisfaction across all individuals.

As we demonstrate below, many traditional rationales for property rights fail to justify protection for GIs, at least in the form in which they are currently protected by international law. The conceptual basis of GIs poses two significant challenges in this regard, challenges that have received surprisingly little attention but which underscore the weak foundation of GI protection. First, property rationales grounded in moral rights or desert attributable to individuals can be marshalled to justify GI protection, but at a great cost. These theories suggest that individuals, not regions, ought to enjoy GIs and, moreover, that individuals who emigrate from a GI-associated region ought to continue to enjoy some aspects of the GI wherever they may relocate. Existing international law, of course, is aimed precisely at *preventing* emigrants, and their offspring, from using GIs originated elsewhere. Second, the more GI rights are justified with reference to human innovation, incremental improvements in quality, and the like, the less attributable the characteristics of the GI-protected good are to the local area. Yet conceptually, GIs rest fundamentally on a connection between place and product. Hence the more human factors – which are moveable – matter, the weaker is the rationale for protecting a GI only in a specified region. In short, both of these challenges suggest that GIs, if they are to be protected, must be available to those who emigrate to new locales far from the original area which supplies the 'geographic' element of the mark.

We nonetheless argue that some modest legal protection of GIs is defensible under a mix of various justifications, with consumer confusion and search costs looming the largest. As a result, we contend that the TRIPS standard for non-wine and spirits products – essentially, that only misleading uses of protected GIs are banned – is justified. Consequently, we agree that a Spanish or Californian producer of blue cheese ought to be permitted to label her product 'Roquefort-style Blue from Catalonia' or 'Sonoma County Roquefort Cheese: Product of California'. But she may not use simply the phrase 'Roquefort', even if her cheese tastes remarkably like Roquefort. By contrast, the absolute protection standard, which disallows any use of a GI for wine and spirits even if the true location of origin is made clear, is a different matter. This rule is unjustified by any compelling theory of property and has pernicious economic effects. We therefore conclude that the international legal standard for all GI-denominated

⁶⁸ We recognize that some query whether intellectual property rights ought to be understood as a species of property generally. See, e.g., Lemley, 'Property, Intellectual Property, and Free Riding', 83 *Texas L Rev* (2005) 1031. While mildly sympathetic to this argument, in the interest of fairness and completeness we examine the broadest possible suite of justifications.

products should track that which TRIPS currently embodies for non-alcohol-based products. The existing wines and spirits standard should be eliminated, not extended.

A Labour and Desert

A principle of desert based on labour is favoured by many theorists of property, and is often associated with John Locke.⁶⁹ As typically expounded, a labour-desert principle is merit-based; it conceives of persons as agents who, by their actions, deserve or merit something as a result. If property rights are deserved, their scope and strength must somehow be commensurate with the labour that grounds them. This principle is often invoked, with variable success, to support property rights in inventions and works of literature and art as well as land, moveable goods, and so forth. If the principle is pressed into service for GIs, its justificatory force is decidedly limited. Perhaps the *originators* of the product associated with a particular region deserve property rights in the phrase ‘prosciutto di Parma’ or in ‘Bordeaux’ wine, but they are long dead. From a Lockean perspective, it is hard to see why their remote descendants or unrelated later inhabitants of the region should deserve an intellectual property right in products that they did not originate.

An obvious objection is that property rights are often transferred from one person to another over time. Careful expositions of the labour-desert principle stress that the principle on its own does not support an unrestricted power to transfer property.⁷⁰ Indeed, some theorists argue on these grounds that inheritance of property should be restricted.⁷¹ Others contend that a labour-desert principle, as applied to land and moveable goods, justifies broad powers to transfer only if whatever constraints that apply to the original acquisition continue to be satisfied, and that steep taxes on gratuitous transfers are in order.⁷² Combining utility or efficiency concerns with a labour-desert principle can help to justify the common power to transfer full ownership.⁷³ For instance, appealing to the preferences of both buyers and sellers of land helps to show that what Anglo-American property lawyers call a fee simple absolute, or full ownership, conduces to a useful, smoothly-functioning system of land transfer. But by itself, a labour-desert principle could support no such system. It is therefore no surprise that economists argue that economic efficiency undergirds a limited number of types of property rights, of which a fee simple absolute would be the most conspicuous.⁷⁴

⁶⁹ See, e.g., L. Becker, *Property Rights: Philosophic Foundations* (1977), at 48–56; Becker, ‘Deserving to Own Intellectual Property’, 68 *U Chicago-Kent L Rev* (1993) 609. As Becker and others recognize, Locke’s famous discussion of property offers only thin support for a labour-desert principle. See, generally, J. Locke, *Second Treatise of Government* (1690), paras 25–51, in P. Laslett (ed.), *Two Treatises of Government* (1967), at 303–320. Such a principle is related, though, to Locke’s argument that because no one would labour without expecting some benefit, it would be unfair to let the idle take ‘the benefit of another’s Pains’ (para. 34).

⁷⁰ See, e.g., S.R. Munzer, *A Theory of Property* (1990), at 276–279, 395–396.

⁷¹ See, e.g., J.S. Mill, *Principles of Political Economy* (1848) (ed. W. Ashley, 1976), at 226–227, who wanted to limit inheritance.

⁷² See Munzer, *supra* note 70, at 276–278, 380–418.

⁷³ *Ibid.*, at 217–218, 286–287, 397–402.

⁷⁴ See, e.g., Merrill and Smith, ‘Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle’, 110 *Yale LJ* (2000) 1.

Thinkers have yet to consider whether such philosophical and economic arguments can show that remote descendants of originators, or unrelated later inhabitants of a region, should have an intellectual property right in products that they did not themselves invent. We take up such arguments later in this article under the headings of incentives to innovate and the prevention of consumer confusion. For the moment let it suffice to note that it is highly doubtful that a labour-desert principle by itself justifies GI rights for originators' descendants or later inhabitants of a region.

One might try to sidestep this problem by stressing *improvements* to prosciutto di Parma and Bordeaux wine by later producers. This move requires an inquiry into matters of fact. Have improvements been made? If so, who made them and when? Did the improvements involve small increments or great strides forward? Only when answers to these empirical questions emerge will it be possible to assess labour-desert arguments for improvers of GI-protected products. But three points are immediately clear. First, the application of an improvement-based labour-desert principle to GIs will almost certainly be fact-specific. A single package of GI rights for all regional producers, which can number in the hundreds, cannot fit this rationale. Second, these rights are apt to be modest, because the desert of improvers will often be narrowly incremental and cannot by definition partake of the desert of originators or earlier improvers. For example, we might ask whether the quality of Bordeaux wines today is primarily the result of recent innovations in wine-making technique. To some degree, the answer is yes; the science of oenology has taken great strides in recent decades. Yet Bordeaux has a long and fabled history as a wine-making region, and it is plainly not the case that most, or even much, of the current value of Bordeaux wines results from recent innovations in wine-making. Third, and arguably most significantly, GI rights would not be linked, on this rationale, with *regions as such*, but instead with individuals and firms. These actors can move, and historically have moved, to new regions. There is no good reason under a labour-desert rationale why the property rights they enjoy in GIs would not move with them.

A subtly different defence would stress *maintaining* the quality and artisanal methods of production of a GI-labelled good over time. Without doubt some effort and investment go into preserving attributes of a GI-labelled good. The effort could also ground desert, which in turn could justify granting property rights to GIs. Still, as with improvements, the proportion of desert-tied effort and investment of current maintainers is unlikely to be very large compared to the desert of prior originators, improvers and maintainers. Hence, it would follow that these property rights would be weak. Moreover, this rationale runs into an important conceptual problem noted above. The very notion of a GI rests on characteristics that result not only from human techniques but, critically and substantially, from the specific and special *natural* qualities of that region. GIs embody, in short, a claim to a place-quality nexus. This focus on locality does not fit with labour-desert at all. To stress that a product's quality is chiefly locality-related, such as Carrara marble, says little or nothing about producers and their deserts. (The same argument applies to claims about improvement in quality, discussed above.) Further, arguments for GIs of this sort would work best only for the least-processed products. And consequently it would work poorly for most of the GIs claimed in practice, which concern wines, spirits and artisanal foodstuffs. In sum, the

very conceptual basis of GIs as a locality-based signifier poses serious problems for a theory of desert based on human improvements. The more a desert rationale for GI protection hangs on human improvements and inputs, the less central a given locality is to product quality.

As we mentioned earlier, it is not unknown for GIs to be based entirely on human rather than natural inputs. Swiss watches are perhaps the best-known example. ‘Swiss’ and ‘Swiss-made’ are legally protected GIs. Would labour-desert theory better justify property rights for this kind of GI? Although a GI shorn of all geographic qualities is more readily justified by labour-desert theory, such a defence of GIs raises other serious problems. Most significantly, this argument requires that those skilled individuals who emigrate to a new location outside the border of the GI be able to avail themselves of the GI. If the source of product quality is human skill and not natural features, there is by definition no necessary connection to regional borders. So if labour-desert arguments can justify a GI such as ‘Swiss-made’, those Swiss craftsmen who move their facilities just across the border into France ought to be able to use the GI as well, for it is their human skill, not the climate or soil of Geneva, that imparts a special quality to the watches they produce. Likewise, Swiss watch craftsmen who relocate to Thailand ought to enjoy the same right. Such a result is completely at odds with the existing legal regime. This is not to say that protection of Swiss GI for watches is unwarranted, only that a labour-desert theory cannot justify the existing regime of *geographically-based* indicators.

B *Firstness*

Arguments from firstness, or priority, surface in at least two different ways as a defence of property rights. One is as a justification for an institution of property generally or at least as a justification of certain types of property: those who claimed it first have a legitimate claim. Yet firstness does not work well as a general justification unless it brings in elements from Locke’s famous arguments for property.⁷⁵ The other way is as a justification for *who* should have property rights in a given thing, sometimes called particular justification.⁷⁶ This use presupposes that other underlying justifications for property have already proved sound. In property law, firstness sometimes functions as a particular justification when disputes over desert or incentives prove difficult to decide. Assigning a property right to the party who was ‘first’ promotes order because often priority can be determined even when other things cannot. Thus, property rights to a wild animal might be given to the first person who captures it. Lurking in this thinking is often some form of a desert claim, for granting ownership to those who are second or third would equally promote order.

Some theorists of property rights contend that Lockean justifications, which are often identified or associated with firstness, support strong property rights in, for example,

⁷⁵ Becker, *Property Rights*, *supra* note 69, at 24–56.

⁷⁶ *Ibid.*, at 23.

inventions, songs and literary works.⁷⁷ However, others argue against Lockean justifications of exclusive control over access to and the use of intellectual works. Seana Shiffrin, for example, contends that there is a Lockean presumption *against* natural, private rights over intellectual property.⁷⁸ Although Shiffrin identifies different understandings of the ‘intellectual commons’, her argument presumes that ‘initial common ownership applies to intellectual property’.⁷⁹ One might question this presumption on the ground that many intellectual commons are open-access resources rather than owned in common. For open-access resources, arguments grounded in firstness have some bite. For resources owned in common, arguments invoking firstness would be harder to make. But even if one assumes that firstness has some justificatory force, it fails to justify GIs decisively. The first people to make Roquefort or Chianti are long dead. Again it is difficult to see why their remote descendants should be able to invoke ancestral firstness after 100 or 200 years – or more. But even if one grants this claim, it is especially hard to see why only those descendants still in France or Italy, and not the many who emigrated in decades past to other nations, should enjoy this right.

Moreover, the actual history of developments within a region affects the force of an argument from firstness. The most favourable case for this argument is when many producers hit upon the relevant techniques simultaneously. Much less favourable is the case where only one or a very few producers develop the relevant techniques and over time other producers in the region copy them. Suppose that feta cheese was initially produced only by Georgios, Charmides and Menon in a small area of present-day Greece. Over the next centuries other cheese-makers in Greece copy their techniques. Even if today we can identify our mythical trio, it is, at first blush, hard to understand why all contemporary Greek cheese producers should have a GI of indefinite duration in feta cheese. This point is particularly valid in a global economy. It is hard to fathom why under a firstness rationale a French agribusiness conglomerate, which purchases a local Greek feta factory, ought to be able to avail themselves of a legally protected GI. Similarly, it is difficult to grasp why an American professor of international law, who owns shares in a mutual fund that invests in the conglomerate that buys a Greek cheese factory, ought to enjoy the rents accruing from robust GI protection for Greek feta.⁸⁰ Some other rationale must operate to justify these forms of transfer.

⁷⁷ See, e.g., Child, ‘The Moral Foundations of Intangible Property’, 73 *Monist* (1990) 578; R. Nozick, *Anarchy, State, and Utopia* (1974), at 181–182. Labour dominates Locke’s own discussion of property, but his examples of picking up acorns and gathering apples, which involve precious little labour, suggest that something hinges on firstness: ‘[a]nd ‘tis plain, if the first gathering made them not his, nothing else could’: Locke, *Second Treatise of Government*, *supra* note 69, para. 28. In the present era, Epstein, ‘Possession as the Root of Title’, 13 *Georgia L Rev* (1979) 1221, at 1238–1243, offers a qualified defence of first possession. J. Waldron, *The Right to Private Property* (1988), at 173, 176, 284–287, 386–389, has a shrewd treatment of first occupancy in Locke and other thinkers.

⁷⁸ Shiffrin, ‘Lockean Arguments for Private Intellectual Property’, in S.R. Munzer (ed.), *New Essays in the Legal and Political Theory of Property* (2001), at 138–167.

⁷⁹ See *ibid.*, at 158–166.

⁸⁰ As this example suggests, strong GI protection in relatively open economies could stimulate foreign direct or portfolio investment, which could, ironically, crowd out traditional producers. We thank Christina Davis for this point.

C *Moral Right of the Author and the Community*

Continental intellectual property law stresses the moral right of the author much more than Anglo-American law does. Drawn from Kant and Hegel, the idea of moral right traditionally emphasizes the way in which the author has projected his or her personality into the work. Can this theory justify rights in GIs? Perhaps the community of producers is a group of persons extended over time that plays a role in the creation and continued use of the GI. Although it stretches the concept of personality to apply it to groups, overtones of moral right theory can readily be discerned in the debate over GIs today. Still, the argument thus adapted is not especially powerful. As with our earlier discussion of desert, GIs involve much else besides the efforts of the community over time. By definition they involve the natural attributes of the locality, such as the existence of native plants and a local climate for which no human beings can take credit.

To illustrate, consider the central idea of *terroir*. The most extreme arguments about *terroir* in the wine industry hold that even if precisely the same grapes and techniques are used in Sonoma, California as in the region of Médoc, the concept of a 'California Médoc-style wine' is oxymoronic. A wine could be Médoc-style only if it came from Médoc. This argument leaves little room for human input and hence scant purchase for moral right theory. But perhaps human inputs can be smuggled back in by asserting that the Médoc wine community can take pride in the way it makes effective use of its local *terroir*. Or perhaps the community, over time, has hit upon the best techniques to match its microclimate and soil.⁸¹ Echoes of this symbiotic view of human and natural factors can be found in the ECJ *Feta* decision.⁸² As a general matter, we do not believe that the existence of a non-human element necessarily vitiates a possible moral right of the author or the community. A photographer who takes pictures of the sea or a craggy mountain peak could invoke a moral right of the author as part of the basis for a copyright in the photographs. Similarly, winemakers who take advantage of the soil and microclimate of Médoc and work together, or borrow from one another, to make Médoc wine could claim that a moral right of their community exists. Such a right could be part of the ground for GI protection for Médoc wine.

This approach salvages moral right theory, but only momentarily. There are at least two problems with this argument as applied to GIs. First, the concept of a group personality bound up in a particular product is certainly weaker than the concept of an individual's personality bound up in his or her creations, if for no other reason than that personality is a concept tied to personhood. Second, and much more significantly, moral right theory would seem to preclude copying not of the GI itself, insofar as it is merely a label, but rather of the underlying product: in this example, Médoc wine. Given this second point, international law arguably ought to intervene to protect the copying of the Médoc *style and technique*, not the GI itself (or at a minimum, not *just* the GI). Such a right would be much broader than what currently exists, more akin to a patent than a GI. In short, this argument proves too much.

⁸¹ These arguments reflect the concept of desert as well.

⁸² *Supra* note 20.

This case for GIs is nonetheless somewhat stronger than arguments that rest on firstness or desert. The latter arguments hinge on the different contributions of different individuals over time. It is harder to present firstness or desert based on labour as a justification for a group right. But to speak of the moral right of the *community* is already congenial to the possibility of a group right. The 'group' would extend throughout a region and across time. In the case of Médoc wine, the group or community would include those who planted and grew the relevant vines, harvested the grapes, and made them into wine, from the beginning down to the present day. Yet it is challenging in practice to define the relevant 'community'. If the GI is quite broad, such as Champagne, the community of producers is less likely to be closely knit. Thus, the moral right of the community seems more plausible and compelling when the GI is rather narrower, such as Entre Deux Mers or Turrón de Alicante. But as we have pointed out before, there is a fatal flaw here: individuals move in and out of regions. If a long-standing producer moves to a new, geographically very similar region in another state or across the globe, why should he or she lose community-member status? If the notion here is that the personality of the community is projected into its products and this projection justifies legal protection via property rights, then it is again hard to see why community members who move just outside the borders of a GI region cannot still avail themselves of the GI. Yet there is another, equally fatal objection. It is hard, if not harder, to see why a perfect stranger from a far-away community can move *into* the region and thus avail him or herself of the GI. Yet this is precisely what current GI law permits. In short, moral rights justifications for property fit uneasily at best with the existing protection of GIs. To the degree that they do fit, they demand a radically different legal structure from that currently in place in international law.

D Incentives to Innovate, Maintain Quality and Market

The most common argument for intellectual property rights, especially in Anglo-American law, rests on appeals to utility: unless one recognized such rights, there would not be enough incentive to innovate, and the world would have to do without the benefits of innovation. Of course, this argument needs to be calibrated. We want to have optimal incentives – namely, those that will elicit the most valuable products at the lowest cost. As Mark Lemley argues, making intellectual property rights excludable is only justifiable from this perspective if it creates value and if the right granted properly distinguishes between uses that interfere with incentives to create or maintain and those that do not.⁸³ Still, even if we could optimize these incentives, they scarcely seem pertinent to GIs. Whoever first began to develop Antigua coffee and Rioja wine, and even members of the first several generations of developers, are long in the grave. No incentive can operate on them. And because Antigua coffee and Rioja wine now exist, and indeed have long histories, no need arises to provide a continuing incentive to innovate to the current generation. The same could, of course, be said of existing patents or copyrighted works. The argument in favour of continued protection is instead to incentivize new creations: in our case, new GIs. Unlike patented

⁸³ Lemley, *supra* note 68, at 1057. See also Landes and Posner, *supra* note 10.

inventions and copyrighted works, however, GIs in and of themselves are not useful or desirable. Like trademarks, they are signs. To give incentives for the creation of new signs, without creating new underlying goods that they refer to, is largely pointless.

We have frequently noted that GIs resemble trademarks in their potentially unlimited duration and in their ability to convey information to consumers. They also supply incentives to producers to maintain quality because consumers know to look to the mark as shorthand for a bundle of qualities. However, trademarks typically provide incentives to particular firms, for BMW, say, to sell automobiles with particular and consistent qualities. GIs, by contrast, apply to large sets of individuals and firms within a region, or even to entire countries, as for Greek feta or Swiss watches.⁸⁴ GIs consequently face serious collective-action problems with regard to quality maintenance: each producer faces an incentive to lower quality, if quality is expensive, and free-ride on the quality of others within the GI. Typically this collective-action problem is alleviated by some regulatory process that polices quality and technique among producers within the GI. Hence the policing methods employed – only *this* grape, only *that* minimum age before release – are often aimed at ensuring that quality does not undergo a race to the bottom. This difference between GIs and trademarks weakens still further and spreads even more thinly an incentive to invest in maintaining the reputation of a place name.

Is there nonetheless an incentive fostered by GIs to *improve* goods to which GI labels attach? Some improvements may relate to the process rather than the good or product itself. Present-day Greeks may learn how to make equivalently good feta cheese faster or more cheaply, and they have an incentive to do so because their profits may rise or their share of the global cheese market may increase. Yet GI protection is not necessary in order to have this incentive (trademark certainly supplies it, as may patent), though GI protection may enhance this incentive. For example, the winemakers of Bordeaux go to a good deal of trouble and expense to promote their wine. The wine must be made from certain grapes in a particular way. The continued-improvement argument gets some traction from the idea that others ought not to be able to intercept and appropriate the fruits of the efforts of Bordeaux winemakers to improve their wine quality. This rationale runs into a familiar problem: the more that improvement is found, the less the product's qualities rest on its locational qualities, such as climate or soil. This point does not vitiate the continued-improvement argument. It may be that granting geographically-based property rights is a good way to promote improvement. Still, it plainly cuts against the existing conception of GIs, which rests fundamentally on a place-quality connection.

Finally, GIs can also be said to give an incentive to *market* products identified by place names or similar identifiers. Suppose that 10,000 farmers grow basmati rice. If most farmers are small producers rather than large agribusiness firms, no single small producer has much to gain from putting money into the marketing of basmati rice, or perhaps even in creating a collective mark. But if GI protection is available, a large group of small producers has an incentive to promote basmati rice as a

⁸⁴ There are collective trademarks that have similar qualities – and problems.

high-quality good and to fight off alleged impostors. Though good for producers, it is less clear whether, on balance, this incentive is good for consumers. If it were to lead to improvement in the quality of basmati rice over time, improvement that but for the GI protection would not have occurred, that would add force to this argument.

E *Preventing Confusion*

The most powerful argument in favour of legal protection for GIs is also the simplest, and it tracks the most powerful argument for trademarks. Trademarks are conventionally defended as a way to prevent confusion among consumers and to lower their search costs.⁸⁵ Trademarks enable consumers to better distinguish among different and competing products in the marketplace. In turn, firms have an incentive to increase or maintain quality in order to retain customers. The trademark then persists as long as it retains its significance for consumers – what trademark law refers to as ‘acquired distinctiveness’ or ‘secondary meaning’. GIs are also signifiers that help consumers to distinguish products in the marketplace, and to associate certain qualities with particular products. GIs differ from trademarks, however, in that they are highly aggregated, with numerous producers sharing the use of the GI. A GI such as champagne refers to a large and varied class of sparkling wines within which there are dozens of producers. Trademarks such as Veuve Cliquot and Pol Roger, by contrast, belong to individual firms.

The far larger scale of the typical GI somewhat undermines the consumer-confusion rationale. The more aggregated a class of goods, the less likely it is that consumers can identify and associate a particular set of qualities with a given GI. Consider a GI of ‘French wine’. There is little, perhaps nothing, other than the presence of alcohol and grapes, that links the wide array of wines from such a diverse state as France. A narrower GI such as ‘Bordeaux’ begins to tell the consumer more, but even here variation within the region can be striking. Further demarcations (‘Entre Deux Mers’) can narrow the scope of quality further. Yet even at this level substantial differences among producers plainly exist. This inherent heterogeneity is one reason why GIs do not attach to just any producer that exists within a given region. Rather, producers seek to ensure that the techniques and styles of all the GI-protected products are moderately uniform. Usually, however, these rules pertain to processes rather than outcomes. These aggregation problems undermine the force of consumer confusion as a rationale. Nonetheless, just as the restriction of the mark ‘Chanel’ ensures that consumers purchase the true article, and not a counterfeit, if any liquor could be called Scotch whisky, at least some consumers might not get what they think they are paying for. This point underlies the ‘passing off’ of shoddy goods as the esteemed goods of a competitor, and passing off has long been barred in many legal systems as an unfair method of competition.

It is easy to prevent the confusion associated with passing off through labelling requirements. Producers of prosciutto di Parma will find their interests protected if

⁸⁵ Consumer confusion, while still the core rationale, is decreasingly important in American case law: see Lemley, ‘The Modern Lanham Act and the Death of Common Sense’, 108 *Yale LJ* (1999) 1687.

makers of Jamon Serrano put ‘Not the Same as Prosciutto di Parma’ on their labels. Requiring producers to do so, or, more realistically, to use labels that say ‘Prosciutto Ham: Product of Germany’ makes eminent sense from the perspective of preventing consumer confusion. Following this principle, TRIPS prevents ‘the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good’.⁸⁶ Consumers who seek a particular product for its special qualities can, as a result, easily distinguish between the authentic original and an imitator from another region or nation.

Likewise, French vintners will be protected if Australian winemakers put the following on their labels: ‘Product of Australia: Burgundy-style wine’. As in the prosciutto example, such practices suffice to keep consumers from confusing products from one region with another, perhaps more well-known, region. Yet the TRIPS Agreement currently subjects wine and spirits (though not beer) to a standard of absolute protection. Under Article 23, use of a protected GI for wine and spirits must be prevented ‘even where the *true origin* of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as “kind”, “type”, “style”, “imitation” or the like’.⁸⁷ This rule thus blocks any invocation of a protected GI for wine and spirits, even if the label makes perfectly clear that the product is not from the GI-protected region.

The absolute protection standard, consequently, is not grounded in a consumer-confusion rationale, since no consumer would be confused by a label reading ‘Imitation Champagne from New Zealand’. Moreover, the absolute protection standard can foment confusion. It is often hard to market a similar product with a different name without using or referencing a well-known GI. Consider madeira, a fortified wine traditionally made in the Portuguese islands off the west coast of Africa. Unless a Chilean winemaker can use a phrase such as ‘Madeira-style’ or ‘tastes like Madeira’, or ‘Chilean Madeira wine’, the consumer will not know what to expect. It is hard to grasp how such invocations increase consumer confusion. The same is true for search costs. It will not suffice for the Chilean producer to substitute ‘fortified sweet wine’ for ‘Madeira-style wine’ because port and sherry also fall under this rubric. Over time an avid oenophile may discover, through trial and error or by reading specialty magazines, that Chile produces a fortified wine much like Madeira but cheaper. Yet the search costs involved in this scenario are far higher than they would be if the label simply read ‘Chilean Madeira-style wine’.

The net result of the heightened legal protection for wines and spirits GIs in TRIPS is to allow those GI holders both to capture market share and keep their prices at a supra-competitive level. GIs, like all intellectual property rights, are monopoly rights.⁸⁸ Monopolists can demand supra-competitive prices precisely because they are shielded from competition that would otherwise be present. Under the TRIPS rule, consumers

⁸⁶ TRIPS Agreement, *supra* note 1, Art. 22(2)(a).

⁸⁷ *Ibid.*, Art. 23(1) (emphasis added).

⁸⁸ Rangnekar, *supra* note 16, at 15.

are likely to pay more because they are unaware of a comparable or similar product made elsewhere, a result that plainly runs counter to the idea of aiding consumers. And some potential imitators cannot get started at all if they are unable to market their product effectively. Consequently, though a consumer confusion/search costs rationale supports the general legal standard in TRIPS for nearly all products, the absolute standard of protection must necessarily be justified by something other than preventing confusion. As we have shown, those justifications are quite limited.

F *The Sum of the Parts*

No single argument for GI rights that we have examined is wholly persuasive. But it hardly follows that the entire set of these arguments taken together cannot ground these rights. That is why we claim that some international legal protection for GIs is justified. The arguments from firstness, desert, and an incentive to innovate are jointly and severally weak. There is some force, however, in the arguments from the moral right of the community, incentives to market and improve, and especially in preventing consumer confusion and lowering search costs. These last three arguments are the chief source of our argument that the legal standard in TRIPS for products other than wine and spirits – which allows use of a GI by producers outside the region as long as the true origin of the product is made clear – is defensible. Most important from a prescriptive standpoint, the protection of GIs justified by these property rationales is less than the absolute protection now afforded wines and spirits under TRIPS. *A fortiori*, it is less than the broader package sought by the EU, and other states, in the Doha Round of negotiations within the WTO. The EU currently seeks to expand the absolute standard – no use of the GI, even if the label clearly indicates that the product is not from the relevant region – to additional, non-alcohol-based products. Because only wine and spirits enjoy the absolute standard of protection, the EU argues, other products are in essence discriminated against or treated unfairly.⁸⁹ This extension lacks a compelling justification and would represent a boon for producers with little if any social benefit. Indeed, our analysis suggests that the absolute standard ought to be revoked, not extended. While the discrimination the EU has noted in the treatment of different types of products exists, the proper solution is to harmonize downward to the general TRIPS standard rather than upward to the absolute protection standard.⁹⁰

⁸⁹ ‘Why Do Geographical Indications Matter to Us?’, *supra* note 7.

⁹⁰ Proponents of GIs might argue that discrimination is significant in another sense: there ought to be global equity in the distribution of GIs among various nations. Any such argument could hardly be an independent justification for GIs, however. Instead, it must be, in Nozick’s familiar language, a ‘moral side constraint’ on the distribution of GIs, which would already have to be justified by some other argument, across nation states: R. Nozick, *Anarchy, State, and Utopia* (1974), at 28–35. One could satisfy such a side constraint in several ways: decrease the number or value of GIs held by nations that have a large and valuable portfolio of GIs, or increase the number or value of GIs held by nations that have few or only slightly valuable GIs, or both. The first way weakens further the justification for GIs in most European states and perhaps even in the US and Australia. The second way raises a pair of distinct problems. One is identifying which nations ought to have more GIs than they currently do. The other is making sure that the GIs are valuable. Of late philosophers have written a great deal about international justice but

A determined GI proponent might nonetheless argue that even if we are correct that the absolute standard of protection is unjustified by any established theory of property rights, that in itself does not suffice as an argument *against* such stringent rights. In other words, if the protection of property rights causes little harm, the fact that such rights cannot be justified by property theory should not preclude their creation. We are, unsurprisingly, highly sceptical of this line of argument. GIs, as collective government-granted monopolies, have real economic and social costs, as do all intellectual property rights. These costs can easily – and, in the case of the absolute GI standard, clearly do – outweigh any possible benefits. The costs of intellectual property rights are familiar to any student of monopoly and indeed are central to the law of intellectual property.⁹¹ They are the chief reason that intellectual property rights are scope- and time-limited or, in the case of trademark, subject to the requirement of acquired distinctiveness. A primary cost of granting intellectual property rights is that free economic competition is restrained. Innovation may also be squelched as numerous fragmented rights produce a ‘tragedy of the anticommons’.⁹² Wasteful rent-seeking may be promoted as producers make more effort to secure government-protected property rights and less in creating excellent products. And of course the enforcement of intellectual property rights is itself costly. For all these reasons, the creation and extension of intellectual property rights in international law needs to be carefully scrutinized.⁹³ In the case of

virtually nothing about GIs. See, e.g., J. Rawls, *The Law of Peoples* (1999); Nagel, ‘The Problem of Global Justice’, 33 *Philosophy & Public Affairs* (2005) 113; Julius, ‘Nagel’s Atlas’, 34 *Philosophy & Public Affairs* (2006) 176.

The most useful work on global equity in regard to GIs comes from scholars who are familiar with GIs and the traditional knowledge of indigenous peoples. Some are purely strategic arguments for increasing GIs in developing countries so that members of the EU will have allies in WTO negotiations: Kerr, ‘Enjoying a Good Port with a Clear Conscience: Geographic Indicators, Rent Seeking and Development’, 7 *Estey Centre J Int’l L and Trade Policy* (2006) 1. Rather more helpful are proposals for recognizing GIs in African countries such as Kenya: Grant, ‘Geographical Indications: Implications for Africa’, Tralac Trade Brief no. 6/2005, available at: www.tralac.com. The work of Dwijen Rangnekar also stands out. See Rangnekar, ‘The International Protection of Geographical Indications: The Asian Experience’, UNCTAD/ICTSD Regional Dialogue on ‘Intellectual Property Rights (IPRs), Innovation and Sustainable Development’, 8–10 Nov. 2004 (Hong Kong, SAR, People’s Republic of China). He is sensitive to the interplay between GIs in developing countries and the protection of ‘indigenous knowledge’ in those countries: Rangnekar, *supra* note 16. We must leave ‘traditional’ or ‘indigenous’ knowledge for another article, but Rangnekar’s studies do not avoid the pitfalls we have identified earlier in putative independent justifications for GIs. To the extent that GIs have limited justifications, a global justice side constraint is defensible but is not itself an independent justification. Moreover, increasing the number of GIs in countries that have few GI-denominated goods does little to solve the practical problem of making the GI names economically valuable.

⁹¹ On competition law and its connection to intellectual property see Fox, ‘Can Antitrust Policy Protect the Global Commons from the Excesses of IPRs?’, in Maskus and Reichman, *supra* 7.

⁹² Heller and Eisenberg, ‘Can Patents Deter Innovation? The Anticommons in Biomedical Research’, 280 *Science* (1998) 698.

⁹³ For an elaboration of these costs in the context of IP rights generally see the excellent discussion in Lemley, *supra* note 68, at 1058–1065; Landes and Posner, *supra* note 10. The costs can be so high that some question whether intellectual property rights are needed at all: Boldrin and Levine, ‘The Case Against Intellectual Property’, 92 *Am Econ Rev* (2002) 209.

GIs, too little serious consideration has been given to date as to *why* such rights ought to be protected. The result is that the law of GIs has outpaced our justifications for it.

6 Conclusion

The progressive globalization of the world economy has dramatically altered agricultural politics and policy. It has also raised hard questions about the place of tradition and locality in a world that seems, to many, to be ever-more homogeneous and borderless. Paralleling these phenomena has been a dramatic rise in the power and reach of international intellectual property. GIs, as intellectual property rights that aim to protect both farmers and heritage, stand at the intersection of these major trends. More than a decade past their inclusion in the WTO Agreements, however, GIs have received little sustained attention from international lawyers. Nor have the rationales for protecting GIs been rigorously analysed.

This article has offered both a positive explanation for the rise of GIs in international law and a normative critique of these rights as articulated in the TRIPS Agreement, the most powerful international agreement in intellectual property law. We have argued that GIs have risen on the international agenda because of a confluence of past immigration, current globalization and shifting consumer preferences. The EU, the leading proponent of GI protection, has sought to use GIs to segment markets and pursue a strategy of agricultural competition via quality rather than quantity. While grounded in political and economic calculations, the level of protection afforded most GI-protected products by TRIPS is, we argue, nonetheless justified by a number of theories of property. Most forceful in our view are the consumer-confusion and search-costs rationales that undergird trademark law generally. The higher level of protection afforded wine and spirits, however, cannot be justified in this way because it often increases, rather than decreases, consumer confusion. We are consequently critical of recent suggestions that the wine and spirits standard for GIs be extended to still more products.

We are aware that the GI debate is primarily driven not by philosophical arguments but by political interests. European governments have led the charge to push forward this higher standard in an effort to protect traditional producers from increasing competition from abroad. The expansion of GI protection within Europe is of course not uncontroversial, as the *Feta* and *Prosciutto* cases illustrate. All the same, the European Commission has continued to fight for greater GI protection at the international level. As of this writing it is unclear whether the current effort to expand GI protection in the Doha Round of world trade negotiations will succeed. But however misguided, it is unlikely to be the last such effort. The continuing progress of globalization, the striking pace of technological progress, and the deepening of economic liberalization around the world seem likely to ensure that efforts at propertization through international law will continue to accelerate in the 21st century.