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# A Sober Second Look at Appellations of Origin: How the United States Will Crash France's Wine and Cheese Party

Jim Chen\*

France regulates the production methods of certain fine foods and beverages through appellations of controlled origin, or *appellations d'origine contrôlée* (AOCs).<sup>1</sup> The AOC system restricts the right to produce select wines and cheeses to a designated geographic region associated with those foods. Sparkling wine from Champagne and Roquefort cheese are but two celebrated examples. French law ensures localized control of AOC-regulated products by requiring them to be processed in the same region where the raw agricultural commodities — grapes or milk — are produced. Only those wines and cheeses produced according to these rules may be legally marketed under the geographically significant appellation of origin.

Although France hopes to place the successful marketing of AOCs at the heart of its agricultural policy,<sup>2</sup> the AOC system is not likely to win full legal recognition in the United States.

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To the fullest possible extent, I have used official translations from French to English. The polyglot editors of the *Minnesota Journal of Global Trade* have generously helped me translate French texts for which no official English translation is available. I alone bear the responsibility for any mistranslations. Cf. Jim Chen, *Law as a Species of Language Acquisition*, 73 WASH. U. L.Q. 1263, 1269-72, 1283-90 (1995) (describing foreign language acquisition, including the inevitable perils of mistranslation, as the nonlegal activity most akin to legal learning).

1. See CODE DE LA CONSOMMATION [CODE CONSOM.] art. L. 115-1 to -33 (Fr.).

2. See, e.g., Marie-Hélène Bienaymé, *La protection des mentions géographiques par les appellations d'origine contrôlées*, 237 REVUE DE DROIT RU-

France faces an uphill struggle in reconciling this distinctly French and uniquely agricultural form of intangible property with hostile notions in foreign and international law. Although AOCs are commonplace in the civilian legal systems of Catholic Europe and recognized under the laws of the European Union, their American counterparts are far less protective of the “geographic” and “human” factors embraced by the French AOC system. International recognition of geographical indications suggests that AOCs are *not* fully protected outside the boundaries of France and the European Union. In short, substantial legal barriers hamper the restructuring of the global food and beverage trade according to the French model, as epitomized by the AOC system.

This pessimistic assessment of French AOCs is not rooted in a cultural or ideological opposition to this form of intangible property. In one sense, of course, the very idea of protecting intellectual and cultural property unique to agriculture is a form of resistance to the reconciliation of agricultural law with modern economic and social conditions.<sup>3</sup> French agricultural experts, convinced that the AOC system can serve as a springboard for French food and beverage exports, are debating the best form of international legal recognition for French AOCs.<sup>4</sup> Outside France, admirers of the AOC system have

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RAL (forthcoming 1996) (manuscript at 11, on file with author) (describing the AOC as “an agricultural policy of the future”).

3. Cf. Louis Lorvellec, *Rapport de synthèse*, 233 REVUE DE DROIT RURAL 251, 252 (May 1995):

At least since the *Code civil*, and up to the little revolution of preferential attribution, agriculture was regulated in French law as the act of appropriating the fruits of the earth, perfectly encompassed by the concepts underlying individual property and contract. Since 1938, we have become increasingly willing to accept the idea that the law should organize agricultural business as a for-profit business — that is, a business generating wealth through independent means of production. (“*Au moins depuis le Code civil, et jusqu’à la petite révolution de l’attribution préférentielle, l’agriculture a été régie en droit français comme l’activité d’appropriation des fruits de la terre, parfaitement encadrée par les concepts de base de la propriété individuelle et du contrat. Depuis 1938, l’idée s’est progressivement imposée que l’économie agricole devait être organisée par le droit comme une économie d’entreprise, c’est-à-dire une économie de la production de richesses par des unités autonomes de production.*”)

4. See, e.g., Véronique Romain Prot, *Origine Géographique et Signes de Qualité: Protection Internationale*, 237 REVUE DE DROIT RURAL (forthcoming 1996) (on file with author).

lauded the French legal approach.<sup>5</sup> What is needed — and what this Article hopes to supply — is not a set of philosophical musings on the juridical nature of AOCs, but rather a dose of cold realism regarding the inhospitable legal climate that AOCs will likely find in the world's richest nation.

Part I of this Article describes AOCs and allied concepts in their native legal context. French law and the law of the European Union vigorously protect AOCs and the agribusiness model made possible by the imposition of strict geographic limits on the production of certain fine foods. In surveying the American equivalents of these laws, Part II shows how alien the AOC is to the American legal system. Part III of this Article explores the extent to which treaty obligations require the United States to accommodate the appellation of origin as a legal concept and to shield products bearing a French AOC from “unfair” competition in American consumer markets. Key exceptions to the recent accord on Trade-Related Aspects of Intellectual Property (TRIPS)<sup>6</sup> effectively eviscerate any legal protection for many of the most prominent AOC-protected products. Part IV concludes that supporters of the French AOC system would be better advised to engage in more aggressive marketing and consumer education than to prolong a losing battle against American law.

## I. APPELLATIONS OF ORIGIN UNDER FRENCH AND COMMUNITY LAW

### A. FRANCE

Throughout Europe and especially in France, the AOC system structures the division of agricultural labor and shapes food markets. The French *Code de la Consommation*<sup>7</sup> defines an AOC as “the designation of a country, of a region, or of a locality that serves to indicate that a product originates from that place and owes its quality or characteristics to its geographic sur-

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5. See, e.g., Kevin H. Josel, Note, *New Wine in Old Bottles: The Protection of France's Wine Classification System Beyond Its Borders*, 12 B.U. INT'L L.J. 471 (1994).

6. See Annex 1C to the General Agreement on Tariffs and Trade, Uruguay Round, World Trade Organization, done at Marrakesh, April 15, 1994, reprinted in WORLD TRADE ORGANIZATION, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 365 (1995) [hereinafter TRIPS].

7. The *Code de la Consommation* is an autonomous body of legislation addressing food-related aspects of agricultural regulation. It is separately codified so that its multidisciplinary scope will not be diluted by other sources of French law, especially the law of contracts. See Jean-Pierre Pizzio, *Introduction*, in CODE DE LA CONSOMMATION 1,1 (1995).

roundings.”<sup>8</sup> Critically, this definition comprises both “natural factors *and* human factors.”<sup>9</sup> An AOC thus protects both “nature” and “culture”:<sup>10</sup> the geographic component of an AOC identifies the “natural” factors that contribute to a product’s distinctiveness, while the express legal protection of “human factors” guarantees that local farmers will continue to control the lucrative value-adding process by which raw materials are transformed into prized foods or beverages.

The AOC is an unusual and an unusually strong species of intangible property. It combines aspects of trademark law and of the law of regulated industries. An AOC conveys a highly complex set of information to the consumer. Unlike most products protected by commercial trademarks, which generally communicate consistency in manufacturing, AOC-protected products typically reflect seasonal and annual variations in the designated locale’s climate.<sup>11</sup> Furthermore, unlike traditional forms of intellectual property, an AOC “can *never* be considered to reflect a generic character and thus can never fall into the public domain.”<sup>12</sup> The geographic component of an AOC “may not be used for any similar product or for any other product or service as long as such a use is capable of altering or weakening the distinctiveness of the appellation of origin.”<sup>13</sup> Thus, French law prohibits not only the use of “Roquefort” to designate cheeses produced outside the terms of Roquefort’s AOC,<sup>14</sup> but also the use of “Champagne” as the name of a perfume.<sup>15</sup> Although one must take care in analogizing to the American

8. CODE CONSOM. art. L. 115-1 (“*la dénomination d’un pays, d’une région ou d’une localité servant à désigner un produit qui en est originaire et dont la qualité ou les caractères sont dus au milieu géographique*”).

9. *Id.* (emphasis added) (“*des facteurs naturels et des facteurs humains*”).

10. See generally ALAIN, L’HOMME ET L’ANIMAL (1962).

11. See generally Romain-Prot, *supra* note 4.

12. CODE CONSOM. art. L. 115-5 (emphasis added) (“*ne peut jamais être considérée comme présentant un caractère générique et tomber dans le domaine public*”).

13. *Id.* (“*ne peuvent être employés pour aucun produit similaire . . . ni pour aucun autre produit ou service lorsque cette utilisation est susceptible de détourner ou d’affaiblir la notoriété de l’appellation d’origine*”).

14. See Judgment of July 5, 1994 (Confédération générale des producteurs de lait de brebis et des industriels de Roquefort v. Chambre syndicale des industriels de Roquefort), Cass. com., 1994 Bull. Civ. 7, No. 249, at 197 (Fr.).

15. See Judgment of Dec. 15, 1993 (SA Yves Saint-Laurent Parfums v. Institut National des Appellations d’Origine), Cour d’appel de Paris, 1994 D.S. Jur. 145 (Fr.); Caroline Lambre, *Le champagne ou le parfum de la renommée*, 27 RECUEIL DALLOZ SIREY 213 (1994).

legal system,<sup>16</sup> one can safely say that the French AOC law combines the consumer protection rationale of the federal Lanham Act<sup>17</sup> with the "moral rights" rationale underlying the Berne Convention for the Protection of Literary and Artistic Works,<sup>18</sup> the Copyright Act of 1976,<sup>19</sup> and various state laws that prohibit the dilution of trademarks and trade names.<sup>20</sup>

There may be an even more suitable analogy in American and Community law. The AOC is a close cousin of the ecolabel, a consumer-oriented mark that seeks to identify a category of products that adheres to a publicly ascertainable list of specific ecological criteria.<sup>21</sup> In 1992, the Council of Ministers of the European Union promulgated a regulation authorizing the establishment of an ecolabel under the supervision of the European Commission and in consultation with various industrial, com-

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16. Cf. Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 746 (1993) (noting that analogical reasoning typically leads to "incompletely theorized judgments" based on "principles operating at a low or intermediate level of abstraction" but nevertheless yields a sort of "principled consistency" in legal analysis).

17. 15 U.S.C. §§ 1051-1127 (1988). Consumer confusion is the central concern of the Lanham Act, the primary piece of federal trademark legislation in the United States. See generally *Two Pesos, Inc. v. Taco Cabana, Inc.*, 112 S. Ct. 2753 (1992); *Anheuser-Busch, Inc. v. L & L Wings, Inc.*, 962 F.2d 316, 318 (4th Cir.), cert. denied, 113 S. Ct. 206 (1992).

18. Berne Convention for the Protection of Literary and Artistic Works, art. 6bis (signed at Berne, Sept. 9, 1986) (guaranteeing, "[i]ndependently of the author's economic rights," the "right to claim authorship of [a] work and to object to any distortion, mutilation, or other modification . . . which would be prejudicial to [the author's] honor or reputation"); Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified in scattered sections of 17 U.S.C.).

19. See 17 U.S.C. § 106A (1988) (awarding an author the right "to claim authorship," "to prevent the use of his or her name as the author of any work of visual art which he or she did not create," and "to prevent the use of his or her name as the author of [a] work of visual art in the event of a distortion, mutilation, or other modification which would be prejudicial to his or her honor or reputation").

20. See, e.g., N.Y. GEN. BUS. LAW § 368-d (West 1988); *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 30 (1st Cir. 1987) (noting that state antidilution statutes "fill a void left by the failure of [federal] trademark law" to prohibit uses of marks that do not exhibit a "likelihood of confusion between the original use and the infringing use"); *Allied Maintenance Corp. v. Allied Mechanical Trades, Inc.*, 369 N.E.2d 1162, 1165 (N.Y. 1977).

21. See generally, e.g., Eric W. Orts, *Reflexive Environmental Law*, 89 N.W. L. REV. 1227, 1246-50 (1995); Ciannat M. Howett, Note, *The "Green Labeling" Phenomenon: Problems and Trends in the Regulation of Environmental Product Claims*, 11 VA. ENVTL. L.J. 401 (1992).

mercial, labor, consumer, and environmental interest groups.<sup>22</sup> The closest equivalent of the ecolabel in American law is the certification of organic food production and processing made possible by the federal Organic Foods Production Act of 1990<sup>23</sup> and its state-law counterparts.<sup>24</sup> State laws may impose more stringent production and labeling standards for organic foods, subject to approval by the United States Secretary of Agriculture.<sup>25</sup>

American law provides one final analogy — unsuccessful efforts to force the disclosure of intense production methods in animal agriculture.<sup>26</sup> Indeed, AOCs may share more in common with organic food and “humane treatment” labels than with ecolabels. Whereas an ecolabel suggests that the certified food production method is more beneficial for the environment than are noncertified alternatives, neither an organic food certificate nor an AOC guarantees any specific beneficial impact on food quality, the environment, or the structure of the food production and processing industries. Rather, the geographically based production standards underlying an AOC and the anti-chemical promises underlying an organic food certificate rest on a general belief that reducing the number of synthetic substitutes for agricultural land — as all biological inputs such as pesticides and fertilizers ultimately are<sup>27</sup> — has a net positive impact on agriculture’s natural and human constituents.

22. See Council Regulation 880/92, art. 6, 1992 O.J. (L99) 1; Dinah L. Shelton, *Environmental Rights in the European Community*, 16 HASTINGS INT’L & COMP. L. REV. 557, 575-76 (1993).

23. 7 U.S.C. §§ 6501-22 (1994).

24. See, e.g., California Organic Foods Act of 1990, CAL. HEALTH & SAFETY CODE § 26569.24 (West Supp. 1995); FLA. STAT. § 504.21-.33 (Supp. 1995); cf., e.g., MINN. STAT. §§ 31.92-.94 (Supp. 1995) (authorizing the administrative promulgation of rules defining standards for the production and labeling of organic foods); VT. STAT. ANN., tit. 6, § 181(1995 Supp.) (same); WIS. STAT. § 97.09 (Supp. 1995) (same); 1985 Minn. Laws 237, § 2 (declaring “a public benefit in establishing standards for food products marketed and labeled using the term ‘organic’ or a derivative of [that] term”).

25. See 7 U.S.C. §§ 6503(b), 6506(c), 6507 (1988). See generally Charles P. Mitchell, *State Regulation and Federal Pre-emption of Food Labeling*, 45 FOOD DRUG COSM. L.J. 123 (1990) (discussing the reconciliation of potential conflicts between federal and state organic food labeling laws); Kyle W. Lathrop, Note, *Pre-empting Appels with Oranges: Federal Regulation of Organic Food Labeling*, 16 J. CORP. L. 885 (1991) (same).

26. See, e.g., *Animal Legal Defense Fund, Inc. v. Provimi Veal Corp.*, 626 F. Supp. 278 (D. Mass. 1986) (rejecting an effort to require veal producers to disclose on-farm practices that allegedly violated state laws against cruelty to animals).

27. See, e.g., Vernon W. Ruttan, *Agricultural Policy in an Affluent Society*, 48 J. FARM ECON. 1100, 1104 (1966); Vernon W. Ruttan, *Constraints on the Design of Sustainable Systems of Agriculture*, 10 ECOL. ECON. 209, 212 (1994).

The economic and sociological effects of the AOC system are both *célèbre* and *célébré* in France — that is, “celebrated” in the sense of “famous” and in the sense of “revered”. The legal union of “natural factors” and “human factors” enables French farmers — freeholders and tenants alike<sup>28</sup> — to capture and control the value-adding process that transforms their raw products into gourmet consumption goods. The AOC system segments the production market and shields it from outside competitors, thus helping to prop up farming and related industries as significant sources of jobs. On the consumer side, tight geographic and processed-based restrictions guarantee certain consumer expectations.<sup>29</sup> The AOC as quality control thus accordingly fulfills the “Catholic” *satisfaction* and *service* objectives of the *droit agro-alimentaire* in France.<sup>30</sup>

The impact of the AOC laws on the political economy of French and European agriculture cannot be understated. Farmers armed with AOC rights are not merely producers of raw materials; thanks to the exclusive nature of their right to process those materials into the finished food products bearing the prized AOC, these farmers become agribusinesses in their own right.<sup>31</sup> Farmers such as the vintners in Champagne who pro-

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28. Thanks to a tenant farmer's virtually inviolate right of renewal under the Law of Tenant Farming and Sharecropping (“*Statut du fermage et du métayage*”), CODE RURAL, art. L. 411-417 (Fr.), tenants and freehold farmers alike can capitalize any economic advantage from the AOC system directly into their rights to cultivate a specific tract of land.

29. See generally Jean-Pierre Lestoille, *Les outils juridiques de protection de dénomination au service d'une dynamique de qualité*, 237 REVUE DE DROIT RURAL (forthcoming 1996) (manuscript at 4-6, on file with author).

30. See Jean-Paul Branlard, *La reconnaissance et la protection par le Droit des mentions d'origine géographique comme élément de qualité des produits alimentaires*, 237 REVUE DE DROIT RURAL (forthcoming 1996) (manuscript at 2, on file with author) (“*L'attente 'qualité' se fait sur la Sécurité, la Santé, le Service et bien évidemment la Satisfaction des sens, c'est la qualité gustative.*”). Health and safety — *la Santé* and *la Sécurité* — constitute the so-called “Protestant” objectives of French food regulation. Together, Protestant *santé* and *sécurité* and Catholic *satisfaction* and *service* form the four “S’s” in France's *droit agro-alimentaire*.

31. The term “agribusiness” is attributed to John H. Davis of the Harvard Business School and has come to denote “the sum total of all operations involved in the manufacture and distribution of farm supplies; production operations on the farm; and the storage, processing, and distribution of farm commodities and items made from them.” JOHN H. DAVIS & RAY A. GOLDBERG, A CONCEPT OF AGRIBUSINESS 2 (1957); see also *id.* at 2 n.1 (attributing the term “agribusiness” to an October 1955 speech by Davis). The term has become something of a lightning rod, attracting the condemnation of those who believe that industrialization and mass production are the root of all the evils that have befallen American agriculture. See, e.g., A.V. KREBS, THE CORPORATE REAPERS:

duce that region's prized sparkling wine control the viticultural process from the vineyard to the dinner table, directing all value-added processes along the way and capitalizing these profits into their land. French law thus dictates what American law is merely content to facilitate through the Capper-Volstead Act<sup>32</sup> and the Agricultural Marketing Agreement Act:<sup>33</sup> farmstead-to-doorstep domination of discrete product markets. Such a transformation of the farmer as an economically weak supplier of natural resources into a captain of agribusiness requires government to suspend the ordinary rules of free enterprise.<sup>34</sup> On occasion American courts have balked at granting farmers and their cooperatives the degree of monopoly power needed to integrate an entire line of food processing into their business portfolios.<sup>35</sup> By contrast, monopoly power over clearly segmented markets for certain fine foods is precisely what the AOC system hopes to deliver to French farmers.

In his response to this Article, Louis Lorvellec argues that "the appellation of origin is not an object of property at all."<sup>36</sup> Professor Lorvellec's protest notwithstanding, the French AOC

THE BOOK OF AGRIBUSINESS (1992); INGOLF VOGELER, *THE MYTH OF THE FAMILY FARM: AGRIBUSINESS DOMINANCE OF U.S. AGRICULTURE* (1981).

32. 7 U.S.C. §§ 291-292 (1988) (exempting cooperative associations owned by "[p]ersons engaged in the production of agricultural products as farmers" from certain types of antitrust liability so that they may freely engage "in collectively processing, preparing for market, handling, and marketing" their products). The Capper-Volstead Act is regarded as the "Magna Carta of Cooperative Marketing." THEODORE SALOUTOS, *THE AMERICAN FARMER AND THE NEW DEAL* 27 (1982).

33. 7 U.S.C. §§ 601-624, 671-674 (1988).

34. For paradigmatic expressions of American law's willingness to excuse farmers from state and federal antitrust laws, see *National Broiler Marketing Ass'n v. United States*, 436 U.S. 816, 842 (1978); *Tigner v. Texas*, 310 U.S. 141, 146 (1940).

35. See, e.g., *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 472 (1960) (exposing an agricultural cooperative to federal antitrust liability for monopolization, anticompetitive mergers, and conspiracies extending outside the cooperative's membership); *United States v. Borden Co.*, 308 U.S. 188, 206 (1939) (refusing to immunize conspiracies between a cooperative and outside coconspirators). *But cf.* 7 U.S.C. § 292 (1994) (authorizing the Secretary of Agriculture to regulate any association of producers that "monopolizes or restrains trade . . . to such an extent that the price of any agricultural product is unduly enhanced"); *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1045 (2d Cir. 1980) (limiting agricultural cooperatives' liability under section 2 of the Sherman Act, 15 U.S.C. § 2, to "the acquisition of [monopoly] power by . . . predatory means" rather than "such acts as the formation, growth and combination of agricultural cooperatives"), *cert. denied*, 454 U.S. 818 (1981).

36. Louis Lorvellec, *You've Got to Fight for Your Right to Party: A Response to Professor Jim Chen*, 5 MINN. J. GLOBAL TRADE 65, 72 (1996).

is most assuredly a form of property. French wine and cheese producers adhering to a particular AOC jealously guard their rights and privileges against all perceived threats. Under the *Code de la Consommation*, “[e]very person who claims that an appellation of origin is applied . . . contrary to the origin of [a] product” in such a way as to cause “direct or indirect prejudice” to the claimant’s rights may demand a hearing that could lead to an injunction against the usage of the offending AOC.<sup>37</sup> Certain vintners recently exercised this extraordinary right in a spectacular fight over “Margaux,” a prized viticultural appellation of origin. Spurred by complaints from established Margaux vintners, the Institut National des Appellations d’Origine (INAO) initially denied the Margaux AOC to Société Château d’Arsac, an upstart winery whose lands had previously housed chickens rather than vineyards.<sup>38</sup> In July 1995, the *Conseil d’État*, France’s supreme administrative court, ordered the INAO to award the Margaux AOC to Château d’Arsac.<sup>39</sup> Although a “geological study” has “concluded that part of [Château d’Arsac’s] land did have the same characteristics as Margaux terrain,” rival vintners plan to continue challenging the legal proceedings that have given the newcomer “‘a Margaux passport without being geologically correct.’”<sup>40</sup>

An entitlement to challenge rival AOC claims arms French wine and cheese producers with property as that term is understood in American constitutional law, in Hohfeldian jurisprudence, and in the law of regulated industries. The *Code de la Consommation* “support[s] claims of entitlement” by favored farmers to “certain benefits” associated with the exclusive use of commercially valuable appellations of origin.<sup>41</sup> Under the Code, these farmers enjoy (1) the *privilege* of producing and marketing an AOC-protected wine or cheese, (2) *rights* and *claims* against others who misappropriate the informational value of an AOC, (3) the *power* to challenge an AOC not granted in accordance

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37. CODE CONSOM. art. 115-8 (“*Toute personne qui prétendra qu’une appellation d’origine est appliquée, à son préjudice direct ou indirect et contre son droit, à un produit naturel ou fabriqué, contrairement à l’origine de ce produit, aura une action en justice pour faire interdire l’usage de cette appellation.*”).

38. See Société Château d’Arsac, NC 112.635 (Conseil d’État, Fr. Sept. 20, 1993) (reversing the INAO’s denial of Château d’Arsac’s application for a Margaux AOC).

39. See Société Château d’Arsac, NC 158.609 (Conseil d’État, Fr. July 28, 1995).

40. Thomas Kamm, *In Vintage Quest, Frenchman Throws Down the Goblet*, WALL ST. J., Nov. 3, 1995, at A1, A16.

41. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

with previously established geographic criteria, and (4) *immunity* against the transformation of an AOC into a generic label resting in the public domain. The AOC thus displays nothing short of the full panoply of Hohfeldian interests in property.<sup>42</sup> At the heart of this proprietary scheme lies a legal commitment to avoid "economic injury to an existing [producer]" through dilution or other misuse of an appellation of origin.<sup>43</sup> It is true, as Professor Lorvellec observes, that an AOC-protected farmer may not transfer or transport her production and processing rights to a third party.<sup>44</sup> That farmer nevertheless wields the power to exclude certain competitors, just as any residential tenant holds the right of quiet enjoyment even if she is barred from subletting or assigning her lease. The power to exclude is the power of property, and the AOC system gives that power to French farmers in abundance.

## B. THE EUROPEAN UNION

Community law undoubtedly protects AOCs in their full sense under French law. The relevant regulations of the Council of Ministers of the European Union create two regimes governing appellations of origin. Wines and other alcoholic beverages may be protected as "distinctive regional wines" [*vins de qualité provenant de régions déterminées*] or VQPRDs for short.<sup>45</sup> All other products may bear a "protected designation of origin."<sup>46</sup> France reconciles the Community's VQPRD and designation of origin systems by restricting VQPRDs to wines that qualify for an AOC under French law.<sup>47</sup> From the French consumer's point of view, the three competing regimes are

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42. See generally Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 746-47 (1917).

43. FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476 (1940) (holding that "economic injury to an existing" broadcast licensee "is not a separate and independent element to be taken into consideration" in federal radio regulation). But cf. Carroll Broadcasting Co. v. FCC, 258 F.2d 440, 442 (D.C. Cir. 1958) ("[E]conomic injury to an existing station, while not in and of itself a matter of moment, becomes important when . . . it spells diminution or destruction of service."). See generally Jim Chen, *The Last Picture Show on the Twilight of Federal Mass Communications Regulation*, 80 MINN. L. REV. (forthcoming 1996) (describing the "renewal expectancy" and other forms of regulatory property in federal broadcast licensing).

44. See Lorvellec, *supra* note 36, at 69; cf. 47 C.F.R. § 1.597 (1995) (restricting the resale of federal radio and television broadcast licenses).

45. Council Regulation 24/62 of Apr. 4, 1962, 1962 O.J. (989) 1.

46. Council Regulation 2081/92 of July 14, 1992, 1992 O.J. (L208) 1.

47. See CODE CONSOM. art. 115-26-1 alinéa 3; See also LOUIS LORVELLEC, DROIT RURAL 421 (1988) (noting that individual member-states are free to regu-

merged in a single label: the same emblem on cheese is recognized as an AOC in Paris and a designation of origin in Brussels, and only those vintners who have secured AOC protection under French law may seek shelter under the European VQPRD system.

The European definition of a designation of origin therefore controls the legal status of a French AOC in the other member-states of the European Union. Community law defines a designation of origin in terms indistinguishable from those used in French law to define an AOC:

the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff . . . originating in that region, specific place or country, and the quality or characteristics of which are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors, and the production, processing and preparation of which take place in the defined geographical area.<sup>48</sup>

Like French law, the Community definition of a designation of origin makes the crucial connection between "natural" and "human" factors. By contrast, a mere "geographical indication" lacks this essential link. Community law defines a "geographical indication" as a designation for "an agricultural product or a foodstuff . . . which possesses a specific quality, reputation or other characteristics attributable to that geographical origin . . . ."<sup>49</sup>

Moreover, under Community law, an agricultural product or foodstuff bearing a geographical indication may have any one of three connections with "the defined geographical area."<sup>50</sup> Unlike a product bearing a designation of origin, whose "production, processing *and* preparation" must all "take place in the defined geographical area," *either* "production," "processing," or "preparation" standing alone supplies a sufficient territorial link between a product and its geographical indication.<sup>51</sup> These definitions under Community law are significant because they show that a multinational agreement can easily distinguish between

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late their own appellations more stringently than required under Community law).

48. Council Regulation 2081/92 of July 14, 1992, 1992 O.J. (L208) 2 (art. 2.2(a)). There is no small irony in the fact that this regulation was promulgated on the French national holiday. For more extensive discussion of these aspects of Community law, see Bienaymé, *supra* note 2 (manuscript at 14-16).

49. Council Regulation 2081/92 of July 14, 1992, 1992 O.J. (L208) 2 (art. 2.2(b)).

50. *Id.*

51. Compare *id.* art. 2.2(a) (designation of origin) with *id.* art. 2.2(b) (geographical indication).

ordinary geographical indications and appellations or designations of origin, which combine "geographic" and "human" factors.

Although Community law does not permit a generic designation to be registered either as a designation of origin or as a geographical indication, the determination of generic status depends, *inter alia*, upon "the existing situation within the Member-State" and upon pertinent national legislation.<sup>52</sup> For purposes of Community law, a designation is generic if it has become so "at the time of entry into force of that Convention [concerning AOCs and geographical indications] or subsequently thereto . . . in the country of origin."<sup>53</sup> Like French law, Community law prohibits "any direct or indirect commercial use of a name registered in respect of products not covered by the registration" and "any other practice liable to mislead the public as to the true origin of the product."<sup>54</sup> No "misuse, imitation or evocation" will be tolerated even if tempered by words "such as 'style', 'method', 'as produced in', 'imitation' or 'similar'.<sup>55</sup>

From the French perspective, it is vital that the European Union's definition of designations of origin rests explicitly on *national* legal standards. The Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods highlights the importance of this factor.<sup>56</sup> The Madrid Agree-

52. *Id.* at 3 (art. 3.1).

53. Case 3/91, *Exportur SA v. LOR SA Confiserie du Tech* (Nov. 10, 1992) (emphasis added).

54. Council Regulation 2081/92, 1992 O.J. (L208) 6 (art. 13.1(a), (d)).

55. *Id.* (art. 13.1(b)); *see also* Case 306/93, *SMW Winzersekt GmbH v. Land Rheinland-Pfalz* (Dec. 13, 1994) (prohibiting the marketing of sparkling wine marked "Flaschengärung im Champagnerverfahren" or "klassische Flaschengärung — méthode champenoise" — *i.e.*, "in-the-bottle fermentation according to the Champagne method" or "classic in-the-bottle fermentation — Champagne method"); *cf.* ARRÊT DU 30 MARS 1990, 1990 REVUE SUISSE DE LA PROPRIÉTÉ INTELLECTUELLE 371 (prohibiting, under the authority of the Franco-Swiss treaty of March 14, 1974, D 75 1041 du 23 octobre 1975 J.O. 11, the sale of bottles marked "Champagne" even though the manufacturer also provided "the indication of the actual geographic origin on the label" ("*l'indication de la provenance réelle sur l'étiquette*"). The free trade provisions of European law may pose an independent restraint on the AOC and AOP laws of individual member-states. *Cf.* Case 47/90, *établissements Delhaize frères et Compagnie Le Lion SA v. Promalvin SA* (June 9, 1992) (holding that a Spanish AOC regulation that limited the exportable quantities of a protected wine constituted a quantitative export restriction in violation of the TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY art. 34).

56. Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods of Apr. 14, 1891, revised at Washington on June 2, 1911, at The Hague on Nov. 6, 1925, at London on June 2, 1934, and at Lisbon on Oct. 31, 1958, 828 U.N.T.S. 165 (1972). The United States is not a signatory to this agreement.

ment requires that “[a]ll goods bearing a false or deceptive indication by which one of the countries to which this Agreement applies, or a place situated therein, is directly or indirectly indicated as being the country or place of origin shall be seized on importation into any of the said countries.”<sup>57</sup> Like its predecessor, the Paris Convention for the Protection of Industrial Property,<sup>58</sup> the Madrid Agreement does not prevent uses that disclose a product’s true origin.<sup>59</sup> The Agreement’s sole promise for greater protection of AOCs lies in its fourth article: despite giving national courts the power to “decide what appellations, on account of their generic character, do not fall within the provisions of this Agreement,” the treaty explicitly provides that “regional appellations concerning the source of products of the vine [are] excluded from [this] reservation . . . .”<sup>60</sup>

The Madrid Agreement thus implies, but does not explicitly state, that national courts should determine the generic status of geographical indications for wine by reference to the laws of the state from which the wine originates. Perhaps because of this exception’s odd phrasing, courts in countries bound by the Arrangement of Madrid have accorded virtually no protection for foreign viticultural products. The Supreme Court of Brazil, for example, has explicitly held that the AOCs Champagne and Cognac are generic and part of the Brazilian public domain.<sup>61</sup> Japan consistently allows importation of American and Australian wines that incorporate French AOCs into their labels.<sup>62</sup>

This brief survey of French and Community law highlights how vigorously French AOCs and European designations of origin are protected. In the Catholic countries of southern Europe, especially France and Italy, the notion of “quality” embodied by the AOC comprises “the flavor, the excellence, and the authenticity of the land.”<sup>63</sup> By contrast, in an American legal system strongly influenced by its Protestant, Anglo-Saxon origins, qual-

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57. *Id.* art. 1(1).

58. Paris Convention for the Protection of Industrial Property of Mar. 20, 1883, 24 U.S.T. 2140, 6 I.L.M. 806 (1967) as revised at Brussels on Dec. 14, 1900, at Washington on June 2, 1911, at The Hague on Nov. 6, 1925, at London on June 2, 1934, at Lisbon on Oct. 31, 1958, and at Stockholm on July 14, 1967, and amended on Oct. 2, 1979.

59. See Romain Prot, *supra* note 4 (manuscript at 9).

60. Madrid Agreement, *supra* note 56, art. 4.

61. See Romain Prot, *supra* note 4 (manuscript at 9) (citing the decision of the Brazilian Supreme Court of 26 Nov., 1974, Ronéo INAO n.95-105).

62. See *id.* (manuscript at 9).

63. See *id.* (manuscript at 2) (“*la saveur, l'excellence et l'authenticité des terroirs*”).

ity is "above all synonymous with security, with a regularity that follows a trademark more closely than it does a geographical indication."<sup>64</sup> How little respect the geographical indication has in the United States will be evident from even the most cursory of surveys of American law.

## II. APPELLATIONS OF ORIGIN UNDER AMERICAN LAW

Whereas France gives the INAO regulatory authority over a wide range of food and beverage products,<sup>65</sup> the United States confines appellations of origin to wine. Viticultural regulation is primarily a matter of federal law. The United States' 14-year experiment with Prohibition<sup>66</sup> inflicted serious damage on wine- and beer-making traditions that were already much younger and weaker than their European counterparts.<sup>67</sup> Short of imposing discriminatory taxes on out-of-state products,<sup>68</sup> individual states remain free to regulate commerce in alcoholic beverages;<sup>69</sup> some localities ban their manufacture, sale, or both.

In 1935, Congress passed the Federal Alcohol Administration Act (FAAA)<sup>70</sup> in order to fill the legal vacuum created by Prohibition and its repeal.<sup>71</sup> The FAAA bans wine labels and advertisements that are not:

in conformity with such regulations, to be prescribed by the Secretary of the Treasury . . . as will prohibit deception of the consumer . . . and as will prohibit, irrespective of falsity, such statements . . . as the Secretary of the Treasury finds to be likely to mislead the consumer; . . . as will provide the consumer with adequate information as to the identity

64. *Id.* ("avant tout synonyme de sécurité, de régularité correspond plus à une démarche de marque que d'indication géographique").

65. See CODE CONSOM. art. L. 115-19 (dividing the INAO into three committees: one for wines, brandies, ciders, and other liqueurs and apéritifs ["*les vins, eaux-de-vie, cidres, poirés, apéritifs à base de cidres, de poirés ou de vins*"]; another for dairy products ["*des produits laitiers*"]; and a third for other products).

66. See U.S. CONST. amends. XVIII, XXI (imposing a nationwide prohibition of all "intoxicating liquors" in 1919 and then repealing it in 1933).

67. *But see* ALEXIS LICHINE, NEW ENCYCLOPEDIA OF WINES AND SPIRITS 482-84 (1981) (tracing the history of American viticulture to roots predating the California gold rush of 1849); Josel, *supra* note 5, at 474-75.

68. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *accord James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990).

69. See U.S. CONST. amend. XXI, § 2.

70. 27 U.S.C. §§ 201-19a (1988).

71. See *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1588 (1995); *National Distrib. Co. v. United States Treasury Dep't*, 626 F.2d 997, 1004-06 (D.C. Cir. 1980).

and quality of the products . . . [and] as will prohibit statements [on the label] that are . . . false [or] misleading.<sup>72</sup>

Within the Department of the Treasury, the Bureau of Alcohol, Tobacco, and Firearms (BATF) regulates viticultural labeling and advertising,<sup>73</sup> activities historically thought to be fraught with deceptive and misleading practices.<sup>74</sup> The BATF's oenological standards govern, among other things, standards of identity,<sup>75</sup> the effects of blending and cellar treatment,<sup>76</sup> designations of grape types,<sup>77</sup> standards for the "estate bottled" designation,<sup>78</sup> and vintage.<sup>79</sup>

The BATF also regulates what it calls "appellations of origin."<sup>80</sup> Although the American analogue of the French AOC does not specifically protect both geographic and human factors, it does take both elements into account. The BATF rules distinguish between designations that refer to political subdivisions (such as a country, a state, a county, or the political equivalent in non-American legal systems) and designations that refer to "viticultural area[s]."<sup>81</sup> "Political" appellations of origin impose a relatively weak limit on the content; at least seventy-five percent of the wine must be "derived from fruit or agricultural products grown" in the indicated area.<sup>82</sup> There is no obligation to provide any evidence regarding the viticultural characteristics of the chosen political entity. A bottle containing seventy-five percent wine derived from fruit grown in Georgia may call itself "Georgia wine," even though "[t]he climate is wrong, there's no history" of winemaking, and the state consumes a miniscule 4.73 liters of wine per capita each year.<sup>83</sup> An appellation of origin referring to two or three counties in one state means that "all of the fruit or other agricultural products were grown in the coun-

72. 27 U.S.C. § 205(e) (1988) (labeling); *id.* 205(f) (advertising).

73. *See id.* § 202.

74. *See Taylor Wine Co. v. Department of Treasury*, 509 F. Supp. 792, 794 (D.D.C. 1981).

75. *See Labeling and Advertising of Wine*, 27 C.F.R. § 4.21 (1994).

76. *See id.* § 4.22.

77. *See id.* § 4.23.

78. *See id.* § 4.26.

79. *See id.* § 4.27.

80. *See id.* § 4.25a.

81. *See Wawszkiewicz v. Department of the Treasury*, 480 F. Supp. 739, 742 n.7 (D.D.C. 1979), *aff'd in part and rev'd in part*, 670 F.2d 296 (D.C. Cir. 1981).

82. *See* 27 C.F.R. § 4.25a(b)(1)(i) (1994) (American wine); *id.* § 4.25a(b)(2)(i) (imported wine).

83. Anita Sharpe, *Georgia Wine? Why the Very Thought Comes as a Surprise*, WALL ST. J. EUROPE, July 4, 1995, at 1, 5.

ties indicated" and that "the percentage of the wine derived from fruit or other agricultural products grown in each county is shown on the label with a tolerance of plus or minus two percent."<sup>84</sup> Multistate appellations of origin are likewise available for wine derived from products grown in two or three contiguous states.<sup>85</sup>

The BATF sets more stringent requirements for appellations of origin that refer to a specific "viticulural area" rather than to a more general political designation. Any wine so designated must derive at least eighty-five percent of its volume from grapes grown within the viticultural area.<sup>86</sup> For imported wine, the BATF accepts the definition of the viticultural area under foreign law.<sup>87</sup> American wine with an appellation of origin based on a viticultural area must come from a "delimited grape growing region distinguishable by geographical features."<sup>88</sup> The BATF process for identifying an "Approved American Viticultural Area" requires, *inter alia*, (1) evidence that the chosen name is locally or nationally known as the name of the specified area, (2) historical or current evidence of the area's boundaries, and (3) evidence of geographic features (such as climate, soil, elevation and topography) that distinguish the area's viticultural characteristics from those of surrounding areas and establish a local reputation for winemaking.<sup>89</sup>

According to BATF rules, all wines using an appellation of origin must follow any applicable local, state, or foreign laws governing the composition, manufacture and designation of such wines.<sup>90</sup> Except for wines using a multicounty appellation of origin, American wines must be fully finished within the geographic area designated.<sup>91</sup> Whether imported wines are similarly restricted depends on foreign law.

Although much weaker than their French counterparts, the BATF rules do address soil type, mineral content and quality

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84. 27 C.F.R. § 4.25a(c) (1994).

85. *See id.* § 4.25a(d).

86. *See id.* § 4.25a(e)(3)(ii).

87. *See id.* § 4.25a(e)(1)(ii), 4.25a(e)(3)(i).

88. *Id.* § 4.25a(e)(1)(i).

89. *See id.* § 4.25a(e)(2); *see also id.* §§ 9.23, 71.41(c).

90. *See id.* § 4.25a(b)(1)(iii) (American wine); *id.* § 4.25a(b)(2)(ii) (imported wine).

91. *See id.* § 4.25a(b)(1)(ii) (nationwide, statewide, or countywide appellations); *id.* § 4.25a(d)(2) (multistate appellations); *id.* § 4.25a(e)(3)(iv) (multistate appellations). A similar requirement is inexplicably missing from the provision describing the requirements for a multicounty appellation of origin. *See id.* § 4.25a(c).

control.<sup>92</sup> Under American law, as much as a quarter of the wine in a geographically designated bottle may be derived from grapes grown in an altogether different area.<sup>93</sup> The seventy-five percent rule has been justified as a “reasoned and amply elucidated” application of a statutory standard that requires the BATF to prohibit “statements . . . likely to mislead the consumer.”<sup>94</sup> Furthermore, the only real link between “geographic” and “human” factors is the very weak requirement that wine be finished in the same area identified by its appellation of origin.<sup>95</sup> Federal law relegates the regulation of “human” factors such as quality control and supply management to state, local or foreign law. If there is no such law, all that federal law requires is (1) that a wine derive seventy-five percent of its volume from grapes grown in the designated area (or eighty-five percent for wines originating in a recognized “viticultural area”) and (2) that the wine be finished in the designated area.<sup>96</sup>

Weak as these rules may appear to French eyes, they were even more lenient at one time. BATF rules in effect before December 31, 1982, accorded an appellation of origin to any wine (1) deriving as little as seventy-five percent of its volume from the geographic region indicated by its name, (2) fully manufactured and finished “within the State in which such . . . region is located,” and (3) conforming to any state or local rules governing the composition, manufacture, and designation of such wine.<sup>97</sup> Wine did not necessarily have to be finished within the wine-growing region itself, as long as this process took place within the same state. Cellar treatment or blending outside the region

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92. *Contra* Josel, *supra* note 5, at 474 (asserting that the BATF rules do not address these matters).

93. See 27 C.F.R. § 4.25a(b) (1994) (requiring “[a]t least 75 percent” of an imported wine or an American wine claiming “an appellation of origin other than a multicounty or multistate appellation, or a viticultural area” to be “derived from fruit or agricultural products grown in the appellation area indicated”); *cf. id.* § 4.25a(e)(3)(ii) (requiring a wine “labeled with a viticultural area appellation” to derive “[n]ot less than 85 percent of” its wine content “from grapes grown within the boundaries of the viticultural area”). For a list of American viticultural areas approved by the BATF, see *id.* part 9.

94. See *Wawszkiewicz v. Department of the Treasury*, 670 F.2d 296, 302-03 (D.C. Cir. 1981), (quoting 27 U.S.C. § 205(e)(1) (1988)) (emphasis added).

95. See 27 C.F.R. § 4.25a(b)(1)(ii) (1994) (nationwide, statewide, or county-wide appellations); *id.* § 4.25a(d)(2) (multistate appellations); *id.* § 4.25a(e)(3)(iv) (multistate appellations).

96. As to wine content, see *id.* § 4.25a(b), (e)(3)(ii). As to the finishing requirement, see *id.* § 4.25a(b)(1)(ii), (d)(2), (e)(3)(iv).

97. *Id.* § 4.25(a); see also *id.* § 4.25(c) (depriving this rule of legal effect after December 31, 1982).

of origin did not deprive such wines of their entitlement to an appellation of origin.<sup>98</sup> The seventy-five percent rule represented a substantial increase from the fifty-one percent limitation under the original rules that the BATF adopted soon after the passage of the FAAA in 1935.<sup>99</sup> Those rules were not formally approved (much less challenged or changed) until the late 1970s.<sup>100</sup>

The strongest form of legal protection for geographical indications in the United States may be found in state law. Some state statutes restrict the use of specific geographical indications associated with local specialty products. Georgia bans the use of the word "Vidalia" to describe onions other than those grown in a specified area near the town of Vidalia,<sup>101</sup> and Hawaii imposes labeling and minimum content requirements on Kona coffee — that is, coffee grown in the North and South Kona districts on the island of Hawaii.<sup>102</sup> The Kona coffee statute, however, permits a beverage labeled "Kona coffee blend" to contain as little as 10 percent Kona coffee.<sup>103</sup> The Minnesota wild rice statute is unusual in that it regulates not only geographical indications but also production methods and the nature of the human labor used.<sup>104</sup> Under this statute, wild rice that is produced out of state or cultivated (rather than harvested from a natural lake or river) must be labeled accordingly.<sup>105</sup> The statute also prohibits any label suggesting Indian participation in the harvest or processing of this traditional Indian food unless "the package contains only 100 percent natural lake or river wild rice harvested by Indians."<sup>106</sup> These state statutes have limited territorial effect, however, and do nothing to protect importers of foreign food or beverage products.

98. See *id.* § 4.25(b).

99. See *Wawszkiewicz v. Department of the Treasury*, 480 F. Supp. 739, 741-42 (D.D.C. 1979), *aff'd in part and rev'd in part*, 670 F.2d 296 (D.C. Cir. 1981).

100. See *id.* at 742 & n.6; Notice of Informal Rulemaking, 42 Fed. Reg. 30,517, 30,518 (June 15, 1977) (proposing to raise the old 51 percent limit to 75 percent).

101. See GA. CODE ANN. §§ 2-14-130 to -135 (1986 & Supp. 1995).

102. See HAW. STAT. § 486-120.6 (1991). The state of Hawaii comprises several islands, including Oahu, Maui, and the "big island" named Hawaii. See generally Elizabeth Royte, *On the Brink: Hawaii's Vanishing Species*, 188:3 NAT'L GEOG. 2, 14-15 (Sept. 1995) (accompanied by a double map supplement describing the geography and natural history of the Hawaiian islands).

103. See HAW. STAT. § 486-120.6(a)(1)(B) (1991).

104. See MINN. STAT. § 30.49 (1989 & Supp. 1994).

105. See *id.* § 30.49 subds. 1-2a, 5a.

106. See *id.* § 30.49 subd. 5.

Finally, Minnesota's effort to regulate "human factors" by restricting the commercial use of Indian likenesses in wild rice marketing may unconstitutionally restrict the right to engage in commercial speech. As "part of a firm's marketing plan to provide certain information to the consumer,"<sup>107</sup> a product label is constitutionally protected commercial speech.<sup>108</sup> In 1992, the BATF approved a malt liquor label using the name and likeness of Oglala Sioux chief Crazy Horse. The label was widely considered to be offensive because alcohol consumption is a serious health problem among American Indians and because Crazy Horse himself had urged his tribe not to drink alcohol.<sup>109</sup> Congress responded by ordering the BATF to disapprove any label "which authorizes the use of the name Crazy Horse on any distilled spirit, wine, or malt beverage product."<sup>110</sup>

A federal court invalidated this statute, holding that the government had not adequately proved "that the use of a revered Native American name may cause any discernible increase in alcohol consumption among Native Americans."<sup>111</sup> This holding strongly implies that the use of an American Indian name or likeness is not inherently misleading.<sup>112</sup> Accord-

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107. *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1546 (10th Cir. 1991), *aff'd*, *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995).

108. *See generally* *Coors* 115 S. Ct. 1585; *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993); *Central Hudson Gas & Elec. Corp. v. Public Serv. Com'n*, 447 U.S. 557 (1980); *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748 (1976).

109. *See Hornell Brewing Co., Inc. v. Brady*, 819 F. Supp. 1227, 1229-31 (E.D.N.Y. 1993); *see also Confronting the Impact of Alcohol Labeling and Marketing on Native American Health and Culture: Hearing Before the House Select Committee on Children, Youth, and Families*, 102d Cong., 2d Sess. 7-8 (1992) (reporting high rates of alcohol consumption and alcohol-related health problems among native Americans, including an alcoholism rate six times that of the general population and an incidence of fetal alcohol syndrome twenty times that of the general population).

110. *Treasury, Postal Service, and General Government Appropriations Act of 1992*, Pub. L. No. 102-393, 633, 106 Stat. 1729 (1992); *see also* MINN. STAT. ANN. § 340A.311 (West Supp. 1995) (banning sales in Minnesota of a "malt liquor" whose "brand label states or implies in a false or misleading manner a connection with an actual living or dead American Indian leader"); *cf.* *Trade-Marks Registrable on Principle Register; Concurrent Registration*, 15 U.S.C. § 1052(a) (1994) (prohibiting the registration of a trademark that "[c]onsists of or comprises . . . matter which may disparage or falsely suggest a connection with persons, living, or dead, . . . or bring them into contempt, or disrepute").

111. *See Hornell Brewing Co.*, 819 F. Supp. at 1237.

112. *See id.* at 1233-34. Commercial speech that is misleading or that concerns unlawful activity may be freely regulated by the states and the federal government. *See Central Hudson*, 447 U.S. at 563-64; *cf. Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341-42 (1986) (recog-

ingly, it appears that product marketers in the United States are presumptively free to exploit names or images associated with a geographic or ethnically distinct group, and the government must prove that any restriction on such commercial speech directly advances some substantial interest.<sup>113</sup>

### III. THE ENFORCEABILITY OF FOREIGN APPELLATIONS OF ORIGIN IN THE UNITED STATES

#### A. GEOGRAPHIC SIGNIFICANCE AND GENERIC STATUS

All wines qualifying for an AOC under French law may legally use this appellation of origin in the United States. Whether the right to use the AOC will be *exclusive* within the United States is another matter altogether. The ability to exclude others from using a French AOC in the United States is a question of federal trademark law and state unfair competition law. Although an American commentator has recently argued that these laws should protect French AOCs within the United States,<sup>114</sup> these legal strategies hinge on a crucial factual issue: the extent to which each AOC conveys significant information on a product's geographic origins or processing. The decisive questions are, first, whether the typical American consumer associates a French AOC with a specific French locale and, second, whether that association materially affects the consumer's purchasing decision.

#### 1. BATF Rules Concerning Names of Geographic Significance.

In the viticultural context, the BATF's classification of geographical indications will probably prove crucial. Under BATF rules, a name of geographic significance may be generic, semi-

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nizing a substantial governmental interest in reducing demand for casino gambling).

113. Cf. 15 U.S.C. § 1052(a) (1988) (prohibiting the registration of a trademark that "[c]onsists of or comprises . . . matter which may disparage or falsely suggest a connection with persons, living, or dead, . . . or bring them into contempt, or disrepute"). In *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995), the Supreme Court invalidated a federal ban on the disclosure of alcoholic content on beer labels, see 27 U.S.C. § 205(e)(2) (1988); 27 C.F.R. § 7.26(a) (1994), on the grounds that the ban "makes no rational sense," *Coors*, 115 S. Ct. at 1592. Nothing in *Coors* undermines the holding in *Hornell*; indeed, the Supreme Court's most recent application of its "commercial speech" doctrine significantly strengthens advertisers' free speech rights.

114. See *Josel*, *supra* note 5, at 495.

generic, or nongeneric.<sup>115</sup> The BATF describes vermouth and sake as examples of generic “designations for a class or type of wine” that have lost their “original[ ] . . . geographic significance.”<sup>116</sup>

Semi-generic names retain their “geographic significance” but also serve as “the designation of a class or type of wine.”<sup>117</sup> They “may be used to designate wines of an origin other than that indicated by such name only if there appears in direct conjunction therewith an appropriate appellation of origin disclosing the true place of origin of the wine.”<sup>118</sup> Such wine must also “conform[ ] to the standard of identity, if any, for such wine” under BATF regulations.<sup>119</sup> Alternatively, “if there be no such standard,” the wine must conform “to the trade understanding of such class or type.”<sup>120</sup> The BATF lists the following names as examples of semi-generic designations: Angelica, Burgundy, Claret, Chablis, Champagne, Chianti, Malaga, Marsala, Madeira, Moselle, Port, Rhine Wine, Sauterne, Haut Sauterne, Sherry, and Tokay.<sup>121</sup>

Finally, the BATF recognizes nongeneric names of geographic significance. Such a name, however, “shall not be deemed to be the distinctive designation of a wine unless the Director [of the BATF] finds that it is known to the consumer and to the trade as the designation of a specific wine of a particular place or region, distinguishable from all other wines.”<sup>122</sup> Nondistinctive, nongeneric names are the equivalent under American law of a geographical indication; they “may be used only to designate wines of the origin indicated by such name[s].”<sup>123</sup> This category includes “American, California, Lake Erie, Napa Valley, New York State, French, [and] Spanish.”<sup>124</sup> By contrast, names such as “Bordeaux Blanc” and “Château Yquem” are “distinctive designations of specific grape wines.”<sup>125</sup>

French AOC wines thus fall into one of two categories under BATF rules. Many French AOCs are regarded as distinctive, nongeneric geographic designations. It is hard to imagine how

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115. See 27 C.F.R. § 4.24 (1994).

116. *Id.* § 4.24(a)(2).

117. *Id.* § 4.24(b)(1).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* § 4.24(b)(2).

122. *Id.* § 4.24(c)(1).

123. *Id.*

124. *Id.* § 4.24(c)(2).

125. *Id.* § 4.24(c)(3).

the BATF rules on appellations of origin and geographic designations can permit any winemaker who has not complied with French law to use the French AOC within the American market. On the other hand, some of the most celebrated French AOCs — among them burgundy, chablis, and champagne — fall into the BATF's semi-generic category. Nothing in the BATF rules stops an American winemaker from selling "California champagne" that uses a mixture of grapes — say, seventy-five percent from California, fifteen percent from New York, and ten percent from Virginia — and follows the *méthode champenoise* for producing a sparkling wine. Adherence to the *méthode champenoise* is guaranteed; the geographic origin of the grapes and the idea that champagne should be bottled in Champagne are not.

## 2. Trademarks and Generic Trade Names.

The ultimate question of exclusive rights to the trade name "chablis" or "champagne" depends on federal and state trademark law. In turn, both bodies of law depend on a critical fact: whether a trade name has become generic in the United States. If a French AOC has become generic, neither a French vintner nor the INAO can block an American competitor from registering a trademark that incorporates that appellation of origin.<sup>126</sup>

In *Institut National des Appellations d'Origine v. Vintners International Co.*,<sup>127</sup> the U.S. Patent and Trademark Office allowed an American company to register a trademark for "Chablis with a Twist," further labeled as "California White Wine with Natural Citrus."<sup>128</sup> Vintners' label fully complied with the relevant BATF regulations.<sup>129</sup> INAO opposed the registration, arguing that it violated two provisions of the federal Lanham Act of 1946.<sup>130</sup> First, section 2(e)(2) of the Lanham Act prohibits the registration of a mark, which "when used on or in connection with the goods of the applicant is primarily geographically . . . deceptively misdescriptive of them."<sup>131</sup> A mark is primarily geographically deceptively misdescriptive under section 2(e)(2) if two conditions are fulfilled: (1) the primary significance of the

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126. There is no real question that the INAO may represent the interests of French vintners and cheese makers in the United States. See *Institut National des Appellations d'Origine v. Vintners Int'l Co.*, 958 F.2d 1574, 1579-80 (Fed. Cir. 1992).

127. 958 F.2d 1574 (Fed.Cir. 1992).

128. *Id.* at 1576 & n.3.

129. *Id.* at 1577.

130. 15 U.S.C. § 1051-1127 (1994).

131. *Id.* § 1152(e)(2).

mark as used is a generally known geographic place, and (2) the public makes a critical "goods/place association" in that it "believe[s] that the goods . . . originate in that place."<sup>132</sup> Federal courts stress the word "primarily" to ensure that the statute does not obstruct registration of marks whose geographic meaning is "minor, obscure, remote, or unconnected with the goods."<sup>133</sup> The INAO also argued that registration of Vintners' "deceptive" mark would violate section 2(a) of the Lanham Act.<sup>134</sup> A violation of section 2(a) may be established by showing, first, that a mark is primarily geographically deceptively misdescriptive under section 2(e)(2), and second, that the geographic misrepresentation is material to the decision to purchase the goods so marked.<sup>135</sup>

The Federal Circuit held that neither section 2(e)(2) nor section 2(a) barred the registration of the "Chablis with a Twist" mark. The Patent and Trademark Office and the court alike ruled that the word "chablis" in the United States is the common, descriptive name for a type of wine.<sup>136</sup> The court held that INAO had "failed to establish whether [American] . . . consumers of wine and wine products[ ] would perceive . . . the term 'Chablis' to indicate that the product came from the Chablis region of France."<sup>137</sup> Nor did INAO present any evidence that the geographic association, even if present, would be a factor in consumer decisions to buy Vintner's "Chablis with a Twist" product.<sup>138</sup> Drawing support from the BATF's classification of "Chablis" as a semi-generic geographic designation for wine, the Federal Circuit concluded that the word "Chablis" was "generic and, therefore, in the public domain."<sup>139</sup>

According to the *Vintners* court, "the term 'Chablis' [is not] used in the United States as anything other than a generic name for a type of wine with certain general characteristics."<sup>140</sup> In the absence of consumer surveys or other evidence to the contrary,

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132. *In re Société Générale des Eaux Minérales de Vittel, S.A.*, 824 F.2d 957, 959 (Fed. Cir. 1987); see also *In re Loew's Theatres, Inc.*, 769 F.2d 764, 767 (Fed. Cir. 1985); *In re Nantucket, Inc.*, 677 F.2d 95, 98-99 (C.C.P.A. 1982).

133. *Nantucket*, 677 F.2d at 99.

134. *Vintners*, 958 F.2d at 1575.

135. See *In re Budge Mfg. Co.*, 857 F.2d 773, 775 (Fed. Cir. 1988); *In re House of Windsor, Inc.*, 221 U.S.P.Q. 53, 56-57 (Trademark Trial & Appeal Bd. 1983).

136. See 958 F.2d at 1578, 1581.

137. *Id.* at 1581.

138. See *id.*

139. *Id.*

140. *Id.* at 1582.

the same is almost surely true of other French AOCs that the BATF has classified as semi-generic. For instance, *burgundy*, the English translation of the French AOC "Bourgogne," is so far removed from its original geographic meaning that it denotes a deep shade of red.<sup>141</sup> Similar fates have befallen *champagne* and *claret* (a Spanish wine).<sup>142</sup> *Chablis* and *sauterne* have joined *burgundy* and *champagne* as words designating not only a specific wine from France, but also any other wine sharing the general characteristics of French wines produced under a specific AOC.<sup>143</sup> In their generic or semigeneric senses, these words are frequently coupled with a term designating their actual origin; thus, "California claret" or "New Zealand claret" are common and perfectly acceptable locutions in the American language.<sup>144</sup> If a competing mark "as a whole" is not "perceived by consumers in [the United States] to be the name of a place where the . . . product originates or is produced," there can be no protection of a foreign appellation of origin under American law.<sup>145</sup>

Ironically, some of the most celebrated AOCs are the likeliest designations to be found generic. This should not be especially surprising; the more successful a trade name, the likelier it is to attract imitators and to overwhelm the original producer's ability to fend off infringers. By virtue of their own success, the French wines and cheeses most familiar to the American public — Burgundy, Chablis, Champagne, Sauterne, Camembert, Roquefort — are the likeliest to be declared generic designations by the courts of the United States. These products may already have gone the way of the hamburger, frankfurter, and wiener — foods of German or Austrian origin so thoroughly imitated in the United States that their names have been incor-

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141. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 299 (4th ed. 1976) (defining *burgundy* as "a variable color averaging a dark grayish reddish brown that is redder and slightly stronger than carbuncle and redder and duller than average brown mahogany" or "a blackish purple that is redder and less strong than average eggplant").

142. See *id.* at 372 (defining *champagne* as "a pale orange yellow to light grayish yellowish brown"); *id.* at 415 (defining *claret* as "a moderate red that is slightly lighter than cerise, lighter than Harvard crimson . . . , very slightly bluer and paler than average strawberry . . . , bluer and lighter than Turkey red, and bluer and stronger than pepper red").

143. See *id.* at 368 (*chablis*), 2019 (*sauterne*).

144. *Id.* at 415.

145. *Vintners*, 958 F.2d at 1581.

porated into the American language and the foods themselves are now considered stereotypically "American" cuisine.<sup>146</sup>

The surest way to lose the battle over AOCs in the United States is to rely on lawyers rather than marketing experts. In the skirmish over "Chablis with a Twist," the INAO gravely erred by "rel[ying] heavily, if not exclusively," on an argument that French law and BATF regulations establish the crucial goods-place relationship "as a matter of law."<sup>147</sup> Even a sympathetic American commentator has conceded that INAO "should not simply assume that which needs to be proven"<sup>148</sup> — the link in the consumer's mind between a geographically descriptive name and the full panoply of natural and human factors associated with that name. In France, AOCs do so by force of law and longstanding social custom. In the United States, neither culture nor positive law gives any meaning to many AOCs, and France should not expect to win legal protection for geographical indications that mean nothing to the American consumer.<sup>149</sup>

The fight for AOCs is an exclusively nonlegal struggle: in this fight over the way in which Americans eat, drink, and talk, the decisive factors will be commercial, cultural, and linguistic — not legal. Though perhaps harsh, this conclusion is consistent not only with the international legal principle of territoriality<sup>150</sup> but also with the commercial realities of the American food and beverage market. If the defenders of French AOCs hope to enjoy greater success in American courts, they would do well to adopt the thoroughly American habit of waging trademark litigation through consumer surveys and the testimony of marketing experts.<sup>151</sup> To be sure, the resulting battle of experts

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146. In fact, the words *hamburger* and *frankfurter* are frequently shortened to *burger* and *frank* and thereby even further removed from their original geographic significance. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 127, at 298 (*burger*), 903 (*frank*, in its eleventh sense).

147. *Vintners*, 958 F.2d at 1580.

148. Josel, *supra* note 5, at 486.

149. The contrary strategy in the *Vintners* litigation effectively presumed that Americans share French expectations regarding wine, cheese, and other fine foods. *Liberté, égalité, . . .* and cultural imperialism.

150. See generally, e.g., Friedrich-Karl Beier, *La territorialité du droit des marques et les échanges internationaux*, 98 JOURNAL DU DROIT INTERNATIONAL 5, 16-17 (1971); A. David Demiray, *Intellectual Property and the External Power of the European Community: The New Extension*, 16 MICH. J. INT'L L. 187, 209-11 (1994).

151. See generally Larry C. Jones, *Developing and Using Survey Evidence in Trademark Litigation*, 19 MEMPHIS ST. U. L. REV. 471 (1989); Jack P. Lipton, *Trademark Litigation: A New Look at the Use of Social Science Evidence*, 29 ARIZ. L. REV. 639 (1987).

may be confusing and ungratifying,<sup>152</sup> and virtually no “consumer survey research” can overcome the fact “that people are more careful when they are laying out their money than when they are answering questions.”<sup>153</sup> Warts and all, however, this is the American legal system at its finest, and French litigants must play by the rules of our game in order to win.

## B. AMERICAN OBLIGATIONS UNDER INTERNATIONAL TRADE AGREEMENTS

In lamenting the United States’ failure to protect French AOCs, an American commentator has concluded: “What is needed is not a uniform wine labeling law that imposes one set of rules on all countries, but rather an agreement not to allow one nation’s system to dilute or undercut the integrity of another’s.”<sup>154</sup> Two such agreements already exist. The coming years will test whether international law can require American courts to modify their treatment of foreign AOCs.

Through a bilateral exchange of letters, the United States has agreed to honor the French AOCs Cognac and Armagnac in exchange for reciprocal French treatment of Bourbon and Bourbon Whisky.<sup>155</sup> By the terms of these letters, an American company may not call its product “California cognac” or “cognac-style liqueur, made in the USA.” Disclosure of the product’s actual origin does not cure the infringement of the French AOC. Besides their obviously limited scope, these letters might be construed as evidence that other AOCs should *not* receive similar legal protection in the United States. “*Expressio unius est exclusio alterius*”:<sup>156</sup> if France needs a special accord to secure this sort of protection for some of its AOCs in the United States, other French AOCs by implication are not protected against competing products that exploit the terms “type” or “style” or whose labels disclose their true origin.

A more recent and vastly more important source of international legal obligations emerged from the recently concluded

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152. See, e.g., *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. Partnership*, 34 F.3d 410, 415 (7th Cir. 1994) (Posner, J.); *Olympia Equipment Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 382 (7th Cir. 1986) (Posner, J.).

153. *Indianapolis Colts*, 34 F.3d at 416.

154. Josel, *supra* note 5, at 495.

155. See Romain Prot, *supra* note 4 (manuscript at 6) (citing 12 décembre 1970, 18 janvier 1971, D 71-448 du 11 juin 1971 (J.O. 16 juin)).

156. E.g., *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160, 1163 (1993).

Uruguay Round of world trade talks. The Uruguay Round yielded not only a new General Agreement on Tariffs and Trade (GATT),<sup>157</sup> but also a specific Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>158</sup> TRIPS now requires its member states to offer special protection to geographical indications recognized under other Members' laws.<sup>159</sup> The wide-ranging TRIPS accord represents the only realistic means by which to enforce foreign geographical indications in the United States, a country that has virtually no commercially valuable appellations of origin and therefore nothing to gain from joining specific international agreements such as the Strésa Convention<sup>160</sup> or the Arrangement of Lisbon.<sup>161</sup> As a political matter, it will be easier to convince the United States that affording greater protection to foreign geographical indications under TRIPS will be offset by other terms more favorable to American commercial interests, such as the requirement that all Members "provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof."<sup>162</sup> To the extent that France hopes to win fuller recognition of its AOC system in "powerful countries such as the United States,"<sup>163</sup> those hopes rest on TRIPS.

TRIPS provides generally that its "Members shall provide the legal means for interested parties" to protect geographical indications.<sup>164</sup> It defines a geographical indication as those "which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."<sup>165</sup> Notably, TRIPS' definition of a geographical indication omits the "human factors" so vital to the French and European definition of an AOC; "the connection between natural and human factors has disap-

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157. GATT, *supra* note 6.

158. TRIPS, *supra* note 6.

159. See TRIPS, *supra* note 6, arts. 22-24.

160. Convention de Strésa, D. n 52-663 du 6 juin 1952 (J.O. 11 et 20 juin) (Aus.-Belg.-Den.-Fr.-It.-Nor.-Neth.-Swed.-Switz.) (protecting appellations of origin and other geographical indications for cheese).

161. Lisbon Arrangement for the Protection of Appellations of Origin and Their International Registration, adopted on October 31, 1958, and revised at Stockholm, July 14, 1967, reprinted in MARSHALL LEAFFER, INTERNATIONAL TREATIES ON INTELLECTUAL PROPERTY 17, 278 (1990).

162. TRIPS, *supra* note 6, art. 27.3(B).

163. Romain Prot, *supra* note 4 (manuscript at 2) ("*les pays puissants comme les USA*").

164. TRIPS, *supra* note 6, art. 22.2.

165. *Id.* art. 22.1.

peared."<sup>166</sup> By simplifying and enlarging the concept of an AOC into a catch-all "geographical indication," TRIPS considerably weakens the jurisprudential underpinnings of the AOC system.<sup>167</sup> TRIPS protects the use of a commercially meaningful geographical indication, but not the quality-control factors and exclusive production rights that have enabled the holders of French AOCs to segment and thereby to dominate that nation's wine and cheese markets.<sup>168</sup>

Nevertheless, TRIPS does seem to provide relatively far-reaching remedies against infringement of geographical indications. The accord bans "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."<sup>169</sup> It also requires a Member to "refuse or invalidate the registration of a trademark" that violates this legal standard.<sup>170</sup> TRIPS extends "additional protection for geographical indications for wines and spirits."<sup>171</sup> These indications are to be protected "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."<sup>172</sup> Already, American commentators are reading this provision as the end for products marked "'Champagne-style' sparkling wine or 'California Port.'"<sup>173</sup>

This conclusion may be somewhat premature. The GATT giveth, and the GATT taketh away. Three key exceptions weaken TRIPS' protection of geographical indications.<sup>174</sup> First, competing uses of geographical indications that have lasted at

166. Romain Prot, *supra* note 4 (manuscript at 10) ("*la conjonction facteurs naturels-facteurs humains a disparu*").

167. *See id.*

168. *See* Louis Lorvellec, *GATT, agriculture et environnement*, 234 *REVUE DE DROIT RURAL* 284, 291-92 (June/July 1995).

169. TRIPS, *supra* note 6, art 22.2(a).

170. *Id.* art. 22.3.

171. *Id.* art. 23.

172. *Id.* art. 23.1.

173. Ralph Oman, *Intellectual Property After the Uruguay Round*, 42 *J. COPYRIGHT SOC'Y* 18, 30 (1994).

174. *See* TRIPS, *supra* note 6, arts. 24.4-24.6. Other exceptions are fairly insignificant for the purposes of this discussion. There is little likelihood that INAO would wait five years before attacking an alleged infringement of an AOC in the United States. *See id.* art. 24.7. Moreover, since French law prevents an AOC from falling into the public domain, the TRIPS exception for "geographical indications which are not or cease to be protected in their country of origin" is inapplicable. *Id.* art. 24.9.

least ten years before April 15, 1994, are exempted from the accord.<sup>175</sup> Second, trademarks which are secured in good faith before the accord takes effect in a member state or "before the geographical indication is protected in its country of origin" need not be invalidated.<sup>176</sup> Presumably the "Chablis with a Twist" trademark at issue in the *Vintners* litigation would be permitted to stand. Finally and most significantly, TRIPS provides that:

[n]othing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to goods or services for which the relevant indication is identical with the term customary in common language as the common name for such goods or services in the territory of that Member.<sup>177</sup>

Likewise, there is no protection for any geographical indication that is "identical with the customary name of a grape variety existing in the territory of [a] Member."<sup>178</sup> Unlike the Madrid Agreement, nothing in TRIPS indicates that this determination, effectively a legal ruling that a geographical indication has become generic in a particular jurisdiction, should be performed outside a member state's courts or by reference to any law other than that of the member state.

This final exception is so expansive that it virtually eliminates any practical effect on American commercial practice or on the operation of American law. "Champagne" and "port" are precisely the types of geographical indications that are "identical with the term[s] customary in common language as the common name[s]" of wines, cheeses, and other foods in the United States. Within the United States, the BATF, the Patent and Trademark Office, and the Federal Circuit have all concluded that "Chablis" is a more or less generic name for a white wine with certain characteristics. Nothing in TRIPS requires American legal institutions to revisit or rethink this conclusion.

If anything, TRIPS reinforces American law's reliance on the expectations of the ordinary consumer. In the United States as in the rest of the world, wine connoisseurs will know that Chablis comes from grapes grown in a delimited region roughly 260 kilometers southeast of Paris and that Chablis farmers oversee the fermentation of Chablis grapes into Chablis wine according to Chablis-specific oenological guidelines. The ordinary wine-chugging philistine knows nothing of the sort. In this respect, TRIPS accomplishes nothing. The connoisseur hardly

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175. *See id.* art. 24.4.

176. *Id.* art. 24.5.

177. *Id.* art. 24.6.

178. *See id.*

needs an international treaty to tell her what she already knows: the AOC indication on the label of a French wine guarantees a certain savor and satisfaction. The ordinary consumer, on the other hand, has no such knowledge, and American law as reinforced by TRIPS will take no steps to educate her.

### C. LEGAL AND CULTURAL HOSTILITY TO APPELLATIONS OF ORIGIN

The very idea of an AOC is alien to American law and American culture. If the AOC is a characteristically French or even European legal concept, it makes a very poor export. As a jurisprudential concept, the AOC does not weather the high seas and stormy conditions of global trade. The French should bear in mind that American intellectual property law has only recently and begrudgingly begun to accept the French notion of "*droit moral*," or moral rights. In a legal system whose constitution forbids the granting of perpetual patents and copyrights,<sup>179</sup> the indestructible appellation of origin has little chance of finding a warm reception. American intellectual property law is designed to maximize dissemination of knowledge through expansion of the public domain and minimized grants of proprietary protection. The United States has long favored a positive law theory of intellectual property over a natural law theory,<sup>180</sup> emphasizing the "limited" nature of "monopoly privileges" as a necessary evil<sup>181</sup> over the putatively natural birthright of the inventor to prevent others from reaping where she has sown.<sup>182</sup> Far from rewarding "hard work" for its own sake, American law denies proprietary protection for mere ideas and facts so that new entrants in the creative marketplace may "sav[e] time and effort by relying upon the facts contained in prior works."<sup>183</sup> No one can deny the artistic accomplishment of the farmers who developed the winemaking methods often associated with Champagne. Once uprooted from Champagne soil, however, those methods travel the world as readily as do the wine bottles. Neither do-

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179. See U.S. CONST. art. I, § 8, cl. 8 (confining congressional power over patents and copyrights to grants "for limited Times").

180. See, e.g., *Graham v. John Deere Co.*, 383 U.S. 1, 5-10 (1965).

181. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

182. See, e.g., *International News Serv. v. Associated Press*, 248 U.S. 215, 239-40 (1918); Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 VA. L. REV. 149, 166-96 (1992).

183. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352, 354 (1991).

mestic nor international law prevents late-arriving but enterprising winemakers from using either the methods or the generic trade name of those French farmers.

The symbolically powerful battery of agricultural legislation enacted in 1862 shows the stark contrast between the legal approaches to agricultural knowledge in France and in the United States. The 1862 statutes, passed during the height of the Civil War, represent the intellectual core of American agricultural law.<sup>184</sup> The Homestead Act of 1862<sup>185</sup> typified the United States' historical willingness to use its abundance of land to attract fresh labor, without regard to the link between the land and its "human factors." How could there be any expectation that the land served as a repository of agricultural and culinary culture when the federal government had spent much of its first seventy-five years conquering new territories and purging them of indigenous inhabitants and rival colonizers?<sup>186</sup>

American law envisions a different means for propagating agricultural knowledge: the network of agricultural universities endowed by the Morrill Land-Grant College Act of 1862.<sup>187</sup> The expectation that these universities would pump their discoveries directly into the public domain remains so strong that American policymakers continually debate whether these universities should be able to patent their discoveries.<sup>188</sup> Finally, the 1862 statute establishing the United States Department of Agricul-

184. See generally Jim Chen, *The American Ideology*, 48 VAND. L. REV. 809, 831-33 (1995) (discussing the jurisprudential significance of the 1862 statutes); Jim Chen, *Of Agriculture's First Disobedience and Its Fruit*, 48 VAND. L. REV. 1261, 1274-75 (1995) (same).

185. Act of May 20, 1862, ch. 75, 12 Stat. 392.

186. See, e.g., *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 590-91 (1823) (Marshall, C.J.) (describing how cultivation rendered "the country in the immediate neighborhood of [European] agriculturists . . . unfit for" the Indians, who followed as "game fled into thicker and more unbroken forests"); LAURA INGALLS WILDER, *LITTLE HOUSE ON THE PRAIRIE* 237 (1953) ("When white settlers come into a country, the Indians have to move on. The government is going to move these Indians farther west . . . . White people are going to settle all this country, and we get the best land because we get there first and take our pick."); Douglas W. Allen, *Homesteading and Property Rights; Or, "How the West Was Really Won"*, 34 J.L. & ECON. 1, 9-12 (1991) (describing homesteading as a means for attracting white settlers who would then help defend the United States' property interests against hostile Indians).

187. Act of July 2, 1862, ch. 130, 12 Stat. 503 (codified as amended at 7 U.S.C. §§ 301-308).

188. Compare Chris Minion, *Publicly Funded Scientific Entrepreneurs Are Entitled to Profit from Their Discoveries*, 1991 J. AGRIC. & ENVTL. ETHICS 186 with Ammon Goldworth, *Publicly Funded Scientific Entrepreneurs Are Not Entitled to Profit from Their Discoveries*, 1991 J. AGRIC. & ENVTL. ETHICS 192.

ture ordered that body "to acquire and to diffuse among the people of the United States useful information on subjects connected with agriculture . . . in the most general and comprehensive sense of those words, and to procure, propagate, and distribute among the people new and valuable seeds and plants."<sup>189</sup>

These statutes express a shared attitude about the nature of agricultural knowledge. By the terms of the French philosopher Alain's famous dichotomy,<sup>190</sup> the American legal vision of agriculture assumes that the "nature" inherent in the land can be freely severed from the "culture" embodied in the human contribution to agriculture. If an agricultural or culinary practice can be reduced to paper, deposited at the Patent and Trademark Office, taught in a land-grant college classroom, or spread through the Agricultural Extension Service, American law is prepared to facilitate the idea's widest dissemination, without regard to its geographical or cultural provenance. This separation of land-based and knowledge-based factors in food production undoubtedly arose during "the evolution of an agriculture based on an abundance of land and a relative scarcity of labor."<sup>191</sup> Certain natural factors may be bound to the land, but human factors such as labor and know-how are as transportable as the seeds that have made the Americas the world's biological clearinghouse since 1492.<sup>192</sup> Thus, in France the earth-bound AOC is given permanent legal life, whereas American courts routinely conclude that defining agriculture by reference to "land has no legal or economic validity."<sup>193</sup>

#### IV. AMERICA IS ONE TOUGH CUSTOMER

In a predominantly Protestant country whose notions of food quality embrace neither "service" nor "satisfaction," whose signature cheese is a bland corruption of English cheddar and Colby, the AOC is a hard sell, both legally and commercially. Most American consumers are blissfully ignorant of the way in which AOCs and other geographical indications express complex linkages between the territorial origins of food products and the human contribution to their refinement. Neither American law

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189. Act of May 15, 1862, ch. 72, § 1, 12 Stat. 387 (codified as amended at 7 U.S.C. § 2201).

190. See generally ALAIN, *supra* note 10.

191. Ruttan, *supra* note 27, at 1100.

192. See generally ALFRED W. CROSBY, *THE COLUMBIAN EXCHANGE: BIOLOGICAL AND CULTURAL CONSEQUENCES OF 1492* (1972).

193. *National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 847 (1978) (White, J., dissenting).

nor the United States' international legal obligations will compel any changes in this longstanding consumer attitude.

The United States as a profitable but merciless commercial arena sheds harsh light on appellations of origin. There is nothing mystical about the AOC system or the products it protects. Avant-garde medical science has demystified the much ballyhooed and envied "French paradox" — the perception that the French have deflected much of the cardiovascular damage that ordinarily attends a diet rich in cholesterol and saturated fat by consuming red wine, preferably from France (or at least from one of its winemaking neighbors in Mediterranean Europe). It turns out that any reduction in the risk of coronary heart disease is attributable to ethanol, not constituents unique to wine, red wine, or French red wine.<sup>194</sup> Moderate alcohol intake of any sort will do; Budweiser proves as effective as Burgundy in warding off myocardial infarctions.

Appellations of origin must survive the dual acid tests of science and economics. In a world of free trade, scientifically unjustified or unjustifiable assertions regarding nature are more often than not the accomplices of economic self-dealing. The Court of Justice of the European Communities recognized as much in invalidating a German appellation of origin linked to nothing more than a requirement that the vineyards and finishing facilities in question be found on German territory.<sup>195</sup> A similar instinct animates the Uruguay Round's Agreement on the Application of Sanitary and Phytosanitary Measures, which demands that all measures "necessary to protect human, animal or plant life or health [be] based on scientific principles" and justified by "sufficient scientific evidence."<sup>196</sup> Science, not mystery, is the new legal currency of world trade.

Likewise, it is time to demystify the legal apparatus that underlies French appellations of origin. French law's vaunted connection between natural and human factors is a smokescreen for normatively debatable decisions on rural development and industrial policy. As Professor Lorvellec concedes in his re-

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194. See J. Michael Gaziano *et al.*, *Alcohol Beverage Type, HDL and Risk of Myocardial Infarction*, 92:8 CIRCULATION 1-800 (Oct. 15, 1995) (abstract no. 3847); Yasuyuki Nakamura *et al.*, *Moderate Alcohol Intake and Outcome After an Acute Coronary Event*, 92:8 CIRCULATION (Oct. 15, 1995) (abstract no. 3402). It bears remembering that "heavy alcohol intake increases total mortality." Gaziano, *supra*, at 1-800.

195. Case 12-74, Commission/Germany, the affair of "Sekt" and "Weinbrand," CJCE Feb. 20, 1975.

196. S.P.S. ACCORD ART. 2.2

sponse to this Article, the French AOC system and the analogous AOP system within the European Union are "measures of the Common Agricultural Policy [CAP] and not . . . laws aimed at consumer protection."<sup>197</sup> The link with the CAP, the notoriously expensive and unwieldy program of agricultural subsidies that has become "the most important . . . policy" of the European Union "in terms of the number of people directly affected, its share of the [Union's] Budget and the extent of the powers transferred from national to European level,"<sup>198</sup> exposes the true nature of appellations of origin. The AOC is designed primarily to maximize producer incomes and only secondarily, if at all, to protect consumer expectations.

Even if one contests the widespread evidence that some of the most famous AOCs have become generic trade names in the United States, it makes little sense to focus on a disputed AOC's "geographic significance" to the consumer as the sign's "intended recipient" without also considering the French contribution to the "lapsing" of French producers' rights.<sup>199</sup> AOCs lie at the heart of an elaborate scheme to secure exclusive production rights and a desirable return on incumbent farmers' entrepreneurship. After centuries of common commercial usage in the United States, all unchecked by French interests, Champagne and Chablis are on the verge of going the way of the hamburger, the frankfurter, and the Swedish meatball. As the primary (and perhaps the exclusive) beneficiaries of the AOC system, producers properly bear the onus of staving off the accelerating downward slide toward generic status for the most celebrated AOCs.

Finally, Professor Lorvellec's argument that AOCs "favor the preservation of the environment" merits at least a Parthian volley, if not a fully developed response.<sup>200</sup> This survey of appellations of origin provides neither the time nor the place for discussing the dramatic scope and harmful impact of the numerous "agroecological fallacies" that pervade American and European agricultural policy.<sup>201</sup> For the moment it suffices to note that

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197. Lorvellec, *supra* note 36, at 212.

198. TIMOTHY BAINBRIDGE & ANTHONY TEASDALE, *THE PENGUIN COMPANION TO EUROPEAN UNION* 48 (1995).

199. Lorvellec, *supra* note 36, at 75.

200. *Id.* at 77.

201. For more extensive discussions of these agroecological fallacies, see Jim Chen & Edward S. Adams, *Feudalism Unmodified: Discourses on Farms and Firms*, 45 *DRAKE L. REV.* (forthcoming 1996); Jim Chen, *Get Green or Get Out: Decoupling Environmental from Economic Objectives in Agricultural Regulation*, 48 *OKLA. L. REV.* (forthcoming 1996).

this defense of AOCs falls victim to the biggest agroecological fallacy of them all: forgetting that “[f]arming is not an environmentally benign activity.”<sup>202</sup> Professor Lorvellec’s legitimate concern with agricultural overproduction would be more effectively redirected toward reform of France’s *statut du fermage et métayage* (Law of Tenant Farming and Sharecropping).<sup>203</sup> The French tenant farmer’s obligation to keep rented land in agricultural production and to maximize harvests<sup>204</sup> is attracting increasingly close scrutiny as a source of trouble in French agricultural policy.<sup>205</sup> Environmentally speaking, relatively little hinges on the performance of French wines in foreign liquor stores and restaurants and the performance of French AOCs in foreign courts. It simply stretches credulity to imagine that the fate of the French environment depends on Champagne vintners’ share of the global market for sparkling wines.

These normative defenses of French AOCs invite a larger debate over agricultural policy, a debate that defies easy resolution. Regardless of the outcome of that debate, this much is clear: TRIPS and the AOC system have reached an uneasy stalemate. In this unstable legal milieu, what are French parties who are interested in protecting their AOC system to do? For the moment, perhaps INAO should spend less time litigating losing causes in American courts and more time on marketing. That, at any rate, is the clear message of the *Vintners* litigation and the TRIPS accord. The American consumer is not entirely insensitive to the foreign origins of foods; even the hint of an exotic provenance appeals to the American palette. One of the greatest American culinary creations is “soup Vichyssoise” (or “*crème vichyssoise glacée*”), invented at the old Ritz-Carlton Hotel in New York City and served throughout the United States.<sup>206</sup> For the town of Vichy, granting one’s name to a dish concocted in Manhattan may be the ultimate form of flattery. For the stakeholders of French AOCs, however, commercial imitation is a particularly costly form of flattery. The remedy lies not in legal reform, but rather in superior marketing and con-

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202. Chen, *The American Ideology*, *supra* note 167, at 872.

203. CODE RURAL art. L. 411-1 to 416-9 (Fr.).

204. *See id.* art. 411-27.

205. *See, e.g.*, Jacques Foyer, *Aménager le statut du fermage*, 233 REVUE DE DROIT RURAL 246, 247 (May 1995). The *statut du fermage* takes on great significance in light of the growth of tenant farmers in France, who now outnumber their owner-operator counterparts in French agriculture. *See* MINISTÈRE DE L’AGRICULTURE ET DE LA PÊCHE, GRAPH AGRI FRANCE 94, at 13 (1994).

206. *See* LOUIS DIAT, GOURMET’S BASIC FRENCH COOKBOOK 27, 59 (1961).

sumer education. As “le bon La Fontaine” has instructed generations of French children, “*Apprenez que tout flatteur / Vit aux dépens de celui qui l’écoute.*”<sup>207</sup> For the defenders of French AOCs, “*cette leçon vaut bien un fromage, sans doute.*”<sup>208</sup>

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207. JEAN DE LA FONTAINE, FABLES, *Le Corbeau et le renard* 3 (Cambridge, John Bartlett, 3d ed.).

208. *Id.*

Learn that every flatterer

Lives at the flattered listener’s cost:

A lesson worth more than the cheese that you lost.

THE FABLES OF LA FONTAINE 14 (Marianne Moore trans. 1954).