

**CHEERS!: AN EXAMINATION OF “VODKA” UNDER
LEGAL REGIMES FOR THE PROTECTION OF
GEOGRAPHIC INDICATIONS AND APPELLATIONS
OF ORIGIN**

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INTRODUCTION

The publication of Russian author and food critic Vilyam Pokhlebkina's book, *Istoriya Vodki*, is cited as the source of a widespread rumor that the legal rights to his home country's most iconic spirit, vodka, were in jeopardy of being lost forever. He claimed that in 1978, the Polish government sued the Soviet Union alleging that it had exclusive rights to the word "vodka," such that no other country could use the term in commerce and should have to label similar spirits as "bread wine."¹ The rumor took on a life of its own, and like all rumors, as it spread the facts changed with each re-telling of the story. Poland was replaced by

1. *Wodka Wars*, VICE (2009), available at <http://www.vice.com/video/wodka-wars> (last visited Nov. 5, 2016); see Maria Chekhovskaya, *Russia Nearly Lost its Vodka During Soviet Era*, PRAVDA.RU, (Jan. 31, 2013), available at http://www.pravdareport.com/business/companies/31-01-2013/123644-russia_vodka-0/ (last visited Nov. 5, 2016).

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the West, which was later replaced by the United States.² Regardless of the validity of this rumor, it raises an interesting legal question: could Poland, or any other country, company, or person, possibly obtain exclusive control over the word vodka? This might not be as farfetched as it seems, if one considers that the names of many foods and beverages, such as Roquefort cheese and Tequila, are almost universally recognized as legally protected appellations of origin; in these cases, belonging exclusively to France and Mexico, respectively.³

First, this paper will explore the general commercial incentives for creating a geographic indication or trademark limiting the use of the name of a specific region. These policy considerations will then be illustrated through case studies on Champagne and Vidalia Onions. This paper will then analyze the policy considerations arising from these case studies, and apply them to the current state of vodka production and marketing.

Second, this paper will analyze the above-mentioned controversy between Poland and Russia through the lens of United States federal trademark law. In particular, this paper will examine geographic indications under the Lanham Act, with an emphasis on the laws governing trademarks and certification marks, and how the Patent and Trademark Office (“PTO”) would likely apply these laws to vodka. Furthermore, this section will conclude with a brief overview of the current law on generics and whether or not vodka fits into this designation.

Third, this paper will analyze the controversy between Poland and Russia over the word vodka under European Union laws governing the protection and maintenance of geographic indications in relation to wines and spirits, foodstuffs, and generics. This section will conclude with an analysis of the European Court of Justice’s opinion in *Republic of Germany and Kingdom of Denmark v. Commission of the European Communities* (the “Feta Case”) and how this opinion would relate to a country’s claim to an exclusive right to the word vodka.

Lastly, this paper will conclude with a brief overview of some geographic indication protections created by multi-lateral treaties.

2. See Chekhovskaya, *supra* note 1.

3. *Roquefort v. William Faehndrich Inc.*, 303 F.2d 494, 496 (2d Cir. 1962) (establishing Roquefort Cheese as a distinctive product of France, which must come exclusively from the Municipality of Roquefort); North American Free Trade Agreement, Can.-Mex.-U.S., Annex 313, Dec. 17, 1992, 32 I.L.M. 319 (1993) [hereinafter “NAFTA”] (establishing Tequila as a distinctive product of Mexico under the laws of the United States and Canada).

Specifically, the World Intellectual Property Organization's ("WIPO") Lisbon Agreement for the Protection of Appellations of Origin and their International Registration ("Lisbon Agreement"),⁴ and the World Trade Organization's ("WTO") Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS").⁵

I. HISTORY AND BACKGROUND INFORMATION

A. *The Origins of the Dispute over Vodka:*

Vodka has a long history obscured by the passage of time. There is no clear consensus as to where vodka originated, or who first invented the drink.⁶ According to Pokhlebkina, vodka was created in Moscow in 1478.⁷ However, Polish sources claim the word vodka originates from old Polish, and state that the beverage was first produced in Poland during the early 1400s.⁸ Alternatively, Russian historian A.P. Smirnov asserted that vodka can trace its origins all the way back to Russia in 1250, and that the word originates from the old Slavic word "voda."⁹ Today, the word vodka, as used in the English language, is derived from the Russian word for "water" or "little water."¹⁰ English-language dictionaries appear to support Russia's claim to the word's origin.¹¹

4. Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, Oct. 31, 1958, 923 U.N.T.S. 205 [hereinafter Lisbon Agreement].

5. Agreement on Trade-Related Aspects of Intellectual Property Rights, annex 1C, Apr. 15, 1994, 33 I.L.M. 1125, 1197 (1994) [hereinafter TRIPS].

6. See *Vodka History, Development & Origin*, GIN & VODKA, available at <http://www.ginvodka.org/history/vodkaHistory.asp> (last visited Nov. 17, 2016); see Florence Fabricant, *Vodka Choice is a Matter of Taste*, N.Y. TIMES (Dec. 26, 1984), available at <http://www.nytimes.com/1984/12/26/garden/vodka-choice-is-a-matter-of-taste.html> (last visited Nov. 17, 2016).

7. MARK LAWRENCE SCHARD, VODKA POLITICS 65 (2014). Pokhlebkina's book is widely cited as the authority on vodka but in recent times has faced increasing skepticism concerning the validity of its findings. See *id.* at 63-65.

8. *History of Vodka*, POLISH VODKA ASSOCIATION, available at <http://pva.org.pl/page-new/index.php/en/polish-vodka/history-of-vodka> (last visited Nov. 5, 2015); see Fabricant, *supra* note 6; *About ZP PPS*, ASSOCIATION OF EMPLOYERS POLISH VODKA INDUSTRY, available at <http://zppps.pl/en/about-zp-pps,7> (last visited Nov. 5, 2016).

9. See SCHARD, *supra* note 7, at 68. Like Pokhlebkina's findings, Smirnov's research has been scrutinized and asserted by some as being erroneous in recent years. See *id.* at 68-70.

10. SCHRAD, *supra* note 7, at 68; *Vodka* OXFORD ENGLISH DICTIONARY, 1619 (Judy Pearsall & Bill Trumble et al. eds., 2nd ed. 2003); Fabricant, *supra* note 6.

11. RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 2129 (Wendalyn R. Nichols et al. eds., 2nd ed. 2001) (defining vodka as "an unaged, colorless, distilled spirit, originally made in Russia"); OXFORD ENGLISH DICTIONARY, *supra* note 10 (defining vodka as "an alcoholic spirit made esp. in Russia by distillation of rye . . .").

According to Pokhlebkina, his book was instrumental in the Soviet Union's successful legal defense to Poland's claim to the exclusive right to call its spirit vodka to the exclusion of all others.¹² However, according to Mark Schrad, Assistant Professor of Political Science at Villanova University, Pokhlebkina fabricated this lawsuit in his book.¹³

Regardless of the truth as to where vodka originated, who invented it, and whether the Soviet Union ever actually faced off against Poland or any other country in a legal battle over the word, what is clear is that the origins of vodka to this day are a subject of debate. Vodka's lack of a clear pedigree becomes important vis-à-vis intellectual property law when analyzing whether a county, individual, or company could have exclusive control of the word through an internationally sanctioned trademark or geographic indication. Without definitive proof as to where vodka originated, it becomes increasingly difficult for a country to claim the exclusive right over the term. Consider, for example, the Scottish Exchequer Roll from 1494-95, which clearly noted the first production of whiskey in Scotland.¹⁴ Incidentally, Scotland does have exclusive rights to the name "Scotch Whisky" in the United States, by virtue of federal regulation.¹⁵

B. The Vodka War

In the mid 2000s, the European Union erupted into a contentious political battle over the proposed definition of vodka.¹⁶ Western European nations advocated for a liberal definition that would allow for

12. See SCHRAD, *supra* note 7, at 62; see generally *Vodka Wars*, *supra* note 1.

13. SCHRAD, *supra* note 7, at 65-66. According to Peter Maggs, a specialist in Russian trademark law, there is no record at the International Court of Justice, the Permanent Court of Arbitration, and the Law Library of Congress showing that this lawsuit ever occurred. *Id.* Maggs notes that the Soviet Union during the 1970s would not have even submitted to the jurisdiction of a western style international court or an arbitration panel that would issue a legally binding decision against the Soviet Union on the basis that such a court would be biased towards the west. *See id.* at 65. Similarly, the records from the Coordination Council of Comecon, the international trade organization that handled international trade regulations and disputes within the satellite states of the Soviet Union, show no evidence of such a dispute ever being brought. *See id.* at 66.

14. *See id.* at 62.

15. 27 C.F.R. § 5.22 (b) (7).

16. See *Vodka War May Soon Be at an End*, EU PARLIAMENT (June 22, 2007), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20070131STO02626+0+DOC+XML+V0//EN> (last visited Nov. 7, 2016); Chris Mercer, *Vodka War Splits EU*, BEVERAGEDAILY (June 28, 2006), available at <http://www.beveragedaily.com/Markets/Vodka-war-splits-EU> (last visited Nov. 7, 2016).

flavored vodkas and vodkas made from non-traditional ingredients.¹⁷ On the other hand, Eastern European nations wanted to protect their tradition of producing vodkas only from traditional ingredients.¹⁸ The Western European nations countered that if the narrow definition of vodka was accepted, it would be contrary to the broad definition used in the United States, which permits vodka to be produced using non-traditional ingredients.¹⁹ The Eastern European definition would have prompted the United States to lodge a complaint with the WTO under the theory that the European Union was enacting legislation that excluded American vodka from the European market.²⁰ Ultimately, under an agreement called the Schnellhardt Compromise, vodka was given a broad definition, satisfying the wants of Western European Union nations.²¹ However, to appease Eastern European Union nations, the definition requires that vodka made from non-traditional ingredients indicate this on the label.²² Because the European Union ultimately established a broad definition of vodka, the predicted litigation before the WTO was avoided. For purposes of vodka intellectual property law, these combined liberal definitions allow producers of vodka in countries around the globe to sell their products within the European Union and American markets. These broad definitions of what legally constitutes vodka also make it more difficult for a single country or region to assert that they alone can produce the one true vodka using only genuine ingredients.

17. *EU Distills Vodka Rule*, N.Y. TIMES (June 19, 2007), available at <http://www.nytimes.com/2007/06/19/world/europe/19iht-vodka.4.6216260.html> (last visited Nov. 7, 2016) (stating non-traditional ingredients include grapes, beets and citrus fruits).

18. EU PARLIAMENT, *supra* note 16. The main traditional ingredients wanted by Eastern European countries were potatoes, grains, or beet juice molasses. *Id.*; Dan Bilefsky, *Spirited War: What is Real Vodka?*, THE INT'L HERALD TRIBUNE (Nov. 24, 2006), reprinted in available at <http://www.nytimes.com/2006/11/23/world/europe/23iht-vodka.3648566.html> (last visited Nov. 7, 2016).

19. See 27 C.F.R. § 5.22 (a)(1) (defining vodka as “neutral spirits so distilled, or so treated after distillation with charcoal or other materials, as to be without distinctive character, aroma, taste, or color”).

20. EU PARLIAMENT, *supra* note 16.

21. *Id.*; see Council Regulation 110/2008, of the European Parliament and of the Council of 15 January 2008 on the Definition, Description, Presentation, Labeling and the Protection of Geographical Indications of Spirit Drinks and Repealing Council Regulation No. 1576/89, annex II, § 15, 2008 O.J. (L59/16) (EC) (stating (a) “Vodka is a spirit drink produced from ethyl alcohol of agricultural origin obtained following fermentation with yeast from either: i) potatoes and/or cereals, or ii) other agricultural raw materials. . .with a minimum alcoholic strength of 37.5%).

22. EU PARLIAMENT, *supra* note 16; see Council Regulation 110/2008, *supra* note 21 ((d). . .labeling of vodka not produced exclusively from the raw materials listed in paragraph (a)(i) [potatoes and/or cereals] shall bear the indication ‘produced from . . .’, supplemented by the name of the raw material(s) used).

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II. THE BENEFITS OF GEOGRAPHIC INDICATIONS AND TRADEMARKS – A CASE STUDY OF SPARKLING WINE AND ONIONS

A. The Economic Benefits of Trademarks and Geographic Indications:

Trademarks and geographic indications serve a multitude of purposes, which benefit both the consumer and the manufacturer. Generally, intellectual property law can be broken down as serving two rationales: “(1) the protection of consumers from misleading information and (2) the integrity of trade, i.e., the protection of producers and merchants from unfair competition”.²³ The intellectual property laws of various countries serve these rationales to differing degrees. For example, the United States emphasizes consumer protection, as evidenced by the Lanham Act’s and courts’ focus on avoiding trademarks and certification marks that are “deceptive” or “primarily geographically deceptively misdescriptive.”²⁴ The European Union generally focuses on protecting manufacturers within geographic indication protected regions.²⁵ However, these distinctions are not absolute, as intellectual property law in both the European Union and United States generally cover both rationales to some extent.²⁶

Trademarks and geographic indications create a link between the product and the manufacturer by allowing the consumer to associate the mark with a certain level of quality from a particular manufacturer or from a particular region. Without trademarks, a seller’s substandard quality products would be untraceable to their source.²⁷ Harvard professor and economist F.M. Scherer noted, “[i]f there were no brand names and trademarks, the consumer might never be sure who made a product and would have difficulty rewarding through repeat purchases

23. Albrecht Conrad, *The Protection of Geographical Indications in the TRIPS Agreement*, 14 TRADEMARK REP. 11, 13 (1996).

24. See Lee Bendekgey & Caroline Mead, *International Protection of Appellations of Origin and Other Geographic Indications*, 82 TRADEMARK REP. 765, 766 (1992); see also 15 U.S.C.A. § 1052 (a), (e) (West 2016); *Cmty of Roquefort et al. v. William Faehndrich Inc.*, 303 F.2d 494, 498 (2d Cir. 1962).

25. See generally Bendekgey & Mead, *supra* note 24, at 766.

26. See generally Frances G. Zacher, *Pass the Parmesan: Geographic Indications in the United States and The European Union – Can There be Compromise?*, 19 EMORY INT’L L. REV. 427, 431 (2005).

27. 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION: THE QUALITY ENCOURAGEMENT FUNCTION OF TRADEMARKS § 2:4 (4th ed. 2015).

manufacturers who achieve high quality or cater to his or her special tastes.”²⁸ This statement shows the dual benefit of the trademark: providing information to consumers so that they can make informed purchasing decisions while also providing an incentive to manufacturers to foster good will by maintaining high quality goods and services. In essence, “trademarks create an incentive to keep up a good reputation for a predictable quality of goods.”²⁹

Geographic indications function in a similar manner, but rather than focusing on the micro level, they focus on the macro level by looking at the manufacturers within an entire geographic region. The geographic indication, like the trademark, is intended to protect the consumer. In the case of geographic indications, the protection is from false or misleading indications of geographic origin,³⁰ so that consumers know that the product they are purchasing is actually from that location.³¹ Like trademarks, geographic indications can benefit manufacturers through product differentiation, which can foster goodwill and consumer awareness in cases where the products coming from a particular region are considered to be superior in quality, or noticeably different from those found in other locales.³²

Not surprisingly trademarks are extremely valuable to businesses as a form of intangible intellectual property, which in some cases, due to years of branding, marketing, and consumer recognition, can be worth billions of dollars.³³ In light of this, it is evident that another purpose of trademark law is “the protection of the trademark owner’s investment in the quality of the mark and the quality of the goods or services the mark

28. F.M SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 378 (2nd ed. 1980).

29. MCCARTHY, *supra* note 27.

30. See Lorie E. Simon, *Appellations of Origin: The Continuing Controversy*, 5 Nw. J. INT’L L. & BUS. 132, 137 (1983).

31. See *id.* at 154 (citing *Singer Mfg. Co v. Birginal-Bigsby Corp.*, 319 F.2d 273 (C.C.P.A. 1963) (noting that . . . “[a] segment [of the population] is entitled to buy according to its prejudices and preferences without the danger of being deceived or confused by geographically misdescriptive marks”).

32. See Simon, *supra* note 30, at 154 (citing 3 S. LADAS, *PATENTS, TRADEMARKS AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTION* 1576 (1975)).

33. James Cox, *What’s in a Name?*, USA TODAY, Sept 9, 2003, at 1B (noting that Anheuser-Busch’s trademark for the name “Budweiser” was worth \$12 billion); see generally Sean Stonefield, *The Ten Most Valuable Trademarks*, FORBES (June 15, 2011) available at <http://www.forbes.com/sites/seanstonefield/2011/06/15/the-10-most-valuable-trademarks/print/> (last visited, Dec. 30, 2016) (noting that Google’s trademark for “Google” was worth \$44.3 billion, IBM’s trademark on “IBM” was worth \$36.2 billion, and Wal-Mart’s trademark for “Wal-Mart” was worth \$36.2 billion).

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identifies.”³⁴ If a producer of a certain product is able to distinguish itself from that of its competition then, as a result, the producer can demand a higher price for the product. This same theory also ties into the basic economic concept of scarcity in supply and demand analysis: if there is a high demand for a product but a small supply, the price of the product will rise.³⁵ If there is a high demand for a product that is trademarked, such that no one else can legally produce that product under that name, the holder of that trademark can control the market value of his or her good by determining how much or little to produce.³⁶ In this way a trademark can create a quasi-monopoly,³⁷ but never result in a true monopoly.³⁸

Geographic indications are also extremely valuable to manufacturers within the protected region, as these producers can capitalize on the geographic area for purposes of branding and marketing. Furthermore, geographic indications allow manufacturers to market the unique history and traditions associated with the region,³⁹ something the holder of a trademark generally cannot.

In many respects, the recognition of geographic indications can also manipulate the market in terms of scarcity.⁴⁰ For example, in order to label blue-mold cheese as Roquefort cheese in the United States, it must come from the French municipality of Roquefort and be aged in the limestone caves within that municipality.⁴¹ Since the cheese must come from a specific municipality in France and must be aged in specific caves, this makes the supply of Roquefort relatively limited compared to the

34. MCCARTHY, *supra* note 27.

35. See COSTAS PANAYOTAKIS, REMAKING SCARCITY: FROM CAPITALIST INEFFICIENCY TO ECONOMIC DEMOCRACY 10 (2011) (“Neoclassical economics understands scarcity as a lack of sufficient material means to provide all the goods and services that people desire”).

36. See P. Sean Morris, *The Economics of Distinctiveness: The Road to Monopolization in Trademark Law*, 33 LOY. L.A. INT’L & COMP. L. REV. 321, 328-29 (2011).

37. Theodore H. Davis Jr., *Applying Grecian Formula to International Trade: K Mart Corp. v. Cartier Inc. and the Legality of Gray Market Imports*, 75 VA. LAW. REV. 1397, 1418 (1989).

38. See Kexin Li, *Coordinating Extensive Trademark Rights and Competition Policy*, 9 BUFF. INTELL. PROP. L. J. 35, 42 (2014).

39. See Zacher, *supra* note 26, at 437.

40. See GianCarlo Moschini, Luisa Menapace, and Daniel Pick, *Geographical Indications and the Competitive Provision of Quality in Agricultural Markets*, 90 AM. J. AGRIC. ECON. 794, 796 (2008).

41. See *Cnty. of Roquefort et al. v. William Faehndrich Inc.*, 303 F.2d 494, 495 (2d Cir. 1962).

total blue cheese market. Because of the limited supply, the cheese makers of Roquefort can demand a premium price for their cheese and control the market supply of this product. In this way, a geographic indication can, like a trademark, create a quasi-monopoly. However, there are multiple cheese producers within the municipality of Roquefort so there is competition on a micro scale.⁴² There are also other blue cheese makers outside of Roquefort, so there is competition on a macro scale.⁴³ Thus, like trademarks, geographic indications cannot create a true monopoly.

In the United States, foreign geographic indications, especially European-registered geographic indications, are not typically enforced⁴⁴ unless the geographic indication has the force of law, such as through a United States registered trademark/certification mark,⁴⁵ treaty,⁴⁶ or federal regulation.⁴⁷ While a geographic indication can protect the manufacturers of a region from mislabeled products⁴⁸ trademarks and geographic indications also have their limitations. For example, in 2003, the European Union farm commissioner stated that “EU producers are losing billions a year because non-European producers are free-riding on the reputation of European quality. . .”⁴⁹ Thus, both geographic indications and trademarks collectively suffer from consumer confusion arising from products that use deceptive terms, such as “blue cheese made in the Roquefort style,” to describe cheese made outside the region of Roquefort. With respect to redressing damages for violations of geographic indications and trademarks, it is worth noting that geographic

42. *Roquefort cheese from the Aveyron*, FRENCH ENTREÉ, available at <https://www.frenchentree.com/living-in-france/food-recipes/terroir/roquefort-cheese-from-the-aveyron-2/> (last visited Mar. 5, 2017).

43. See e.g. *Over 40 Years of Industry Leadership, Innovation, and Excellence*, PACIFIC CHEESE, available at <http://www.pacificcheese.com/our-story/> (last visited Mar. 5, 2017) (blue cheese made in the United States); *The Stilton Producers*, STILTON, available at <http://www.stiltoncheese.co.uk/> (last visited Feb. 17, 2017) (an association of Stilton cheese (a type of blue cheese) producers located in England).

44. Zacher, *supra* note 26, at 434-35; see Simon, *supra* note 30, at 133-34; see, Cox, *supra* note 33.

45. *Cmty. of Roquefort*, 303 F.2d at 495.

46. See NAFTA, *supra* note 3, at Annex 313.

47. 27 C.F.R. § 5.22(b) (7)-(8), (d) (2) (1969) (establishing Scottish and Irish whiskey as coming exclusively from Scotland and Ireland respectively and Cognac as “grape brandy distilled [exclusively] in the Cognac region of France”).

48. See *Cmty. of Roquefort*, 303 F.2d at 495, 497-98. (upholding an injunction on an American cheese manufacturer from improperly using the term ‘Roquefort Cheese’ on its products as the term was a registered certification mark held by the Municipality of Roquefort in France).

49. Cox, *supra* note 33.

indications, because they often cover an entire region, provide all harmed manufacturers within that region with standing to file suit to protect their collective interests,⁵⁰ while the holders of trademarks are generally on their own.

B. The Case of Champagne

Around 1668, a Benedictine monk named Dom Pérignon, at the vineyards of Abby Hautvillers, began to produce a sparkling wine now synonymous with the province where he lived, Champagne.⁵¹ France began to enact national laws designed to protect consumers while also controlling the production of sparkling wine from the Champagne region in the early to mid-1800s.⁵² Today, the production of champagne is governed at a micro level by the Comité Interprofessionnel du Vin de Champagne (“CIVIC”), which is comprised of members elected from champagne producers and merchants.⁵³ CIVIC has the statutory authority to regulate the production, distribution, and labeling of champagne.⁵⁴ Similarly, for international matters, the Institut National Des Appellations d’Origine (“INAO”) monitors and attempts to prevent the misappropriation of French geographic indications, such as Champagne or Chablis, from foreign producers.⁵⁵

The Champagne region, as a registered geographic indication, has collectively enabled the vintners of champagne to demand a higher price

50. See generally Cmty. of Roquefort, 303 F.2d at 495.

51. Alfred Phillip Knoll, *Champagne*, 19 INT’L AND COMPARATIVE L. QUARTERLY 309, 309 (1970). Incidentally the name Dom Pérignon today has itself become associated with high quality champagne. See Eric Pfanner, *On Dom Pérignon’s Bubbly Tail*, N.Y. TIMES. (Sept. 28, 2012), available at, <http://www.nytimes.com/2012/09/29/dining/29iht-wine29.html> (last visited Oct. 23, 2016).

52. See Simon, *supra* note 30, at 137.

53. MAGGIE MCNIE, CHAMPAGNE 92, 94-95 (Faber & Faber eds. 1999).

54. *Id.*

55. See Institut National Des Appellations d’Origine v. Vintners Int’l Co. Inc., 958 F.2d 1574, 1576 (Fed. Cir. 1992) (where the INAO unsuccessfully attempted to stop the issuing of a trademark for the term “Chablis with a Twist” to an American wine maker, claiming that Chablis was a protected French geographic indication.); Institut National Des Appellations d’Origine v. Brown-Forman Corp., 47 U.S.P.Q.2d 1875, 1877, 1884-85 (T.T.A.B. 1998) (where the INAO successfully argued that Cognac was not a generic term in the United States but rather was a protected French geographic indication as a common law regional certification mark, where a Canadian company had applied for a trademark on the term “Canadian Mist and Cognac”); Linda E. Prudhomme, *The Margarita Wars: Does the Popular Mixed Drink “Margarita” Qualify as Intellectual Property?* 4 SW. J. OF L. & TRADE AM. 109, Footnote 303 (1997).

on the global sparkling wine market in three key ways. First, through the marketing and fostering of a positive consumer perception of champagne as a luxury drink for special celebrations.⁵⁶ Second, the production of champagne is restricted, as only 31,050 hectares are suitable for the planting of grapes within the already limited region of Champagne.⁵⁷ Third, the geographic indication is monitored by the INAO and CIVIC, which both actively litigate against foreign vintners and companies who attempt to use the champagne name on their products.⁵⁸ This ensures that champagne's public perception is not tarnished by poor quality knock-offs, and that there are industry-wide standards for production, labeling, and distribution.

C. The Case of Vidalia Onions

The United States, on the other hand, has not adopted the geographic indication scheme used by the European Union and champagne producers of France. Instead, the United States has focused on trademark law as the preferred means of protecting a region's producers and global consumers.⁵⁹ The Georgia Department of Agriculture, in order to protect the growers of Vidalia Onions, acquired a federal certification mark for the word Vidalia.⁶⁰ The Georgia legislature also enacted the Vidalia Onion Act of 1986, which created the "Vidalia Onion Production Area," which is limited to 20 of the 159 counties within the state.⁶¹ This law also sets strict standards for labeling, handling, and inspection protocols for Vidalia onion farmers.⁶²

This case mirrors that of champagne in terms of creating product

56. See Knoll, *supra* note 51, at 309.

57. McNIE, *supra* note 53, at 101.

58. See *id.* at 95-97; see also *J Bollinger SA v. Costa Brava Wine Co. Ltd.* (1961) 1 W.L.R. 277 (Eng.) (Holding that all sparkling wine labeled as 'champagne' sold in England must be produced in the Champagne region of France). It should be noted however that within the US, champagne is currently designated not as a protected geographic indication but rather as a "semi-generic" name. 27 C.F.R. § 4.24(b) (2) (2006). However, the name Champagne, without a direct conjunction of the true appellation of origin, such as "Napa Valley Champagne", would not be considered semi-generic but rather a non-generic name. *Id.* at (b) (1).

59. See Bendekgey & Mead, *supra* note 24, at 767; 2 THOMAS J.McCARTHEY, MCCARTHEY ON TRADEMARKS AND UNFAIR COMPETITION § 14:21, (4th ed. 2015).

60. Mariana Rubino & Elizabeth M. Williams, *Food, Geography, & The Law*, 54 LA. B. J. 12, 13 (2006).

61. *Id.* at 13-14; GA CODE ANN. § 2, 2-14-132.1 (2012); *Georgia Facts and Symbols*, GA. GOV., available at <http://georgia.gov/georgia-facts-and-symbols> (last visited Nov. 6, 2016).

62. Rubino & Williams, *supra* note 60, at 14.

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scarcity due to a limited geographic area. Here, the onions can be grown only in several counties, thereby reducing the supply of Vidalia Onions and enabling a higher market price when compared to other onions.⁶³ Similarly, the marketing and branding of Vidalia Onions as a superior quality product has also created a demand for the onion, which further increases their price.⁶⁴ Lastly, in order to protect the Vidalia name from imitations, Georgia law makes it both a civil and criminal offense for anyone within and outside the State of Georgia to label their onions as Vidalia, unless those onions were handled under the production requirements set forth by the law and grown within the Vidalia Onion Production Area.⁶⁵ Thus, like the Champagne region's INAO and CIVIC, the Georgia law helps protect regional producers from foreign competition.

D. The Policy Considerations of Vodka as a Trademark and Geographic Indication:

In light of the two case studies above, we can begin to analyze the ramifications of vodka as a trademark in the United States, or as a drink coming from an internationally recognized geographic indication in the European Union. In the case of Vidalia onions or champagne, the goods in question are limited to specific geographic areas of production. Vodka however, is not produced in any specific geographic region and there is no specific town or region called "vodka."⁶⁶ Rather, vodka today is produced all over the world.⁶⁷ While specific brands of vodka are trademarked, such as Stolichnaya⁶⁸ and Smirnoff⁶⁹, the word vodka itself arguably does not create any manner of consumer recognition other than invoking the consumer's personal preference in a specific vodka brand.

Although vodka is not affiliated with one specific place, it is

63. *Id.*

64. *Id.*

65. *Id.*; GA. CODE ANN. § 2-14-134 (1986).

66. See generally OXFORD ATLAS OF THE WORLD, Index (19th ed. 2012).

67. See Serge Schmemmann, *Dispatches from the Front Line of the Great Vodka War*, N.Y. TIMES (Apr. 15, 2007), available at <http://www.nytimes.com/2007/04/15/opinion/15sun4.html> (last visited Nov. 6, 2016).

68. See, Toby Sterling, *Stolichnaya Vodka Brand Must Return to Russian State Firm: Dutch Court*, REUTERS (Mar. 25, 2015, 4:15 PM), available at <http://www.reuters.com/article/2015/03/25/uk-netherlands-stolichnaya-vodka-idUSKBN0ML2HF20150325#hDcYPJ0kteR7zmJc>.⁹⁷ (last visited Nov. 6, 2016).

69. *Joint Stock Society v. UDV North America Inc.*, 266 F.3d 164, 169 (3rd Cir. 2001).

generally associated with Eastern Europe, and as such, it has been proposed that countries such as Poland, Russia, Sweden, Finland, and the Ukraine could collectively share a “supra-national geographic indication” as the official vodka-producing region.⁷⁰ However, if we consider that a key function of trademarks and geographic indications is to provide consumers with information about the product they are buying⁷¹, it would be difficult for vodka from Eastern Europe to meet this requirement. Consumers would still not know where in Eastern Europe their bottle of vodka was made or under which country’s standards. Furthermore, the European Union law defining vodka is written in such a broad manner⁷² that there would still likely be no uniformity in terms of the production methods or ingredients. The fact that several vodka-producing Eastern European nations are not bound by European Union law⁷³ makes it even harder to establish uniform production methods and ingredients. This is in contrast with champagne coming from one region of France and being made from only certain grape varieties,⁷⁴ or Vidalia Onions coming from only 20 counties in Georgia.⁷⁵ The net result is that vodka producers cannot justify setting a very high price for their product through manipulations in the market because vodka as a drink is not scarce due to limited production regions or costly and difficult production methods and ingredients.

Another key difference that applies to vodka producers as opposed to champagne vintners and Vidalia onion farmers is that the vodka industry does not have an overarching organization that governs and monitors the production volume or methods, or protects the integrity of the vodka name. There are some national vodka producing associations, which serve these purposes, however their authority ends at the edges of their nation’s borders.⁷⁶ Furthermore, while the associations that monitor the production and distribution of Vidalia onions and champagne have the authority to enforce their regulations because of government support in the form of legislation, vodka production associations lack any form

70. *Wodka War*, *supra* note 1.

71. *See* MCCARTHY, *supra* note 27.

72. *See* Council Regulation 1334/2008, art. 15, 2008 O.J. (L 354/34) (EC).

73. *See EU Member Countries*, EUROPEAN UNION (Feb. 20, 2017), available at https://europa.eu/european-union/about-eu/countries/member-countries_en (last visited Mar. 5, 2017); *see* Eric Arnold, *What the World Drinks*, FORBES (Dec. 23, 2008), available at http://www.forbes.com/2008/12/23/vodka-scotch-spirits-forbeslife-cx_ea_1223spirits.html (last visited Mar. 5, 2017).

74. Simon, *supra* note 30.

75. Rubino & Williams, *supra* note 60, at 14.

76. *See* POLISH VODKA ASSOCIATION, *supra* note 8.

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of official mandate from a national or provincial government.⁷⁷

Since there is no official vodka authority to monitor the industry, there is no way to stop manufacturers who produce a poor quality spirit from calling their product vodka. This, in turn, could tarnish and dilute the vodka name for those manufacturers who create a high quality product. One possible solution to this problem could be for vodka producing nations in Eastern Europe to enter into a multi-lateral treaty which would create a “supra-national geographic indication” covering all traditional vodka producing regions. Part of this proposed treaty could establish an inter-governmental monitoring board whose purpose, like that of the French INAO and CIVIC, would be to enforce the legal rights created in the geographic indication and also establish standards for production and distribution. Of course, whether or not the political will exists to create such a treaty is another issue entirely.

III. AN ANALYSIS OF VODKA UNDER THE INTELLECTUAL PROPERTY LAWS OF THE UNITED STATES

A. The Purpose and Evolution of Section 1052 of the Lanham Act

The Trademark Act of 1946, commonly known as the Lanham Act, is a federal law that codified state common law concerning trademark protections in the United States.⁷⁸ The Lanham Act defines a trademark as “. . .any word, name, symbol, or device, or combination thereof”⁷⁹ used by any person “to identify and distinguish his or her goods, including a unique product, from those sold by others and to indicate the source of the goods, even if that source is unknown.”⁸⁰ While the scope and breadth of the act is sweeping, of particular importance is Section 1052, which governs whether a proposed trademark can be registered on the principal register of the PTO.⁸¹

Section 1052 (e) (2) originally required that “[The PTO shall not register a mark that] when used on or in connection with the goods of the applicant is primarily geographically descriptive or deceptively

77. *Id.*; see also Sterling, *supra* note 68.

78. *In re Spirits Int’l, N.V.*, 563 F.3d 1347, 1354 (Fed. Cir. 2009). The Lanham Act is named after Congressman Fritz Lanham, a main proponent of the law in the late 1930s. *In re The Newbridge Cutlery Co.*, 776 F.3d 854, 858 (Fed. Cir. 2015).

79. 15 U.S.C.A. § 1127 (West 2006).

80. *Id.*

81. 15 U.S.C.A. § 1052 (West 2006).

misdescriptive of them,”⁸² unless secondary meaning was shown.⁸³ After the ratification of NAFTA, Congress removed the “primarily geographically deceptively misdescriptive marks” language from section (e) (2), and inserted this language in a new subsection under (e) (3).⁸⁴ The Court of Appeals for the Federal Circuit has interpreted this modification of the law as Congress implicitly adding a requirement for trademark registration, such that the misdescription in the proposed mark must materially affect the public’s decision to purchase the goods.⁸⁵ The amended Lanham Act treats geographically deceptively misdescriptive marks in (e) (3) the same as geographically deceptive marks under § 1052(a).⁸⁶

While this change may seem minor at first glance, primarily geographically deceptively misdescriptive marks, which were denied under (e) (2) in the pre-NAFTA Lanham Act, could still be registered if they became distinctive by acquiring a secondary meaning.⁸⁷ Today, primarily geographically deceptively misdescriptive marks cannot be placed on the PTO’s primary register unless they acquired secondary meaning before the date NAFTA came into effect (Dec. 8, 1993).⁸⁸ Today, marks that are primarily geographically deceptively misdescriptive, but acquired secondary meaning after 1993, are treated like deceptive marks under Section (a)⁸⁹ and cannot be registered.

The pertinent part of Section 1052 now reads:

“No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—

(e) Consists of a mark which (1) when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them, (2) when used on or in connection with the goods of the applicant is primarily geographically descriptive of them, except as indications of regional origin may be registrable under section 1054 of this title, (3) when used on or in connection with the goods of the applicant is primarily geographically deceptively misdescriptive of

82. In re Spirits Int’l, N.V., 563 F.3d at 1352; Courtney Liotti, *The Registrability of Primarily Geographically Deceptively Misdescriptive Marks: The Development of § 1052 (E) (3)*, 22 TOURO L. REV. 511, 524 (2006).

83. McCarthy, *supra* note 27, at § 14:31.

84. In re Spirits Int’l, N.V., 563 F.3d 1347, 1353 (Fed. Cir. 2009).

85. *Id.*; In re The Newbridge Cutlery Co., 776 F.3d 854, 859 (Fed. Cir. 2015).

86. In re California Innovations Inc., 329 F.3d 1334, 1340 (Fed. Cir. 2003).

87. *Id.* at 1337.

88. Liotti, *supra* note 82, at 524.

89. *Id.* at 525.

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them, . . . “90

In spite of this change, primarily geographically descriptive marks are still registrable under (e) (2) and (f) where an applicant for a trademark registration can show prima facie evidence that the mark has become distinctive of that applicant’s goods in commerce.⁹¹

B. Application of 1052 (e) (2), and (e) (3) to an Application for a Trademark on the Word Vodka

The test, as noted in *In re The Newbridge Cutlery Co.*, for determining if a term is primarily geographically descriptive under 1052(e)(2), and therefore unable to be registered absent a secondary meaning is: 1) “[T]he mark sought to be registered is the name of a place known generally to the public’ . . . , and 2) ‘[T]he public would make a goods/place association, i.e., believe that the goods for which the mark is sought to be registered originate in that place’ . . . , and 3) ‘[T]he source of the goods is the geographic region named in the mark’.”⁹² The public being contemplated in this test is the purchasing public of the United States.⁹³ The public in relation to terms in a foreign language are those members of the consuming public who are part of the target community who speak the non-English language,⁹⁴ i.e. those who can understand the foreign term.

In applying this test to “vodka,” under the first element, the word vodka would fail, as vodka is not the name of any region or place known to the American consuming public. This is in contrast to champagne, which is the name of a known location in France and the American consuming public would likely be aware of the Champagne region. Alternatively, in *In re The Newbridge Cutlery Co.*, the reviewing court found that the town of Newbridge, Ireland, with a population of fewer than twenty thousand people would not be known to the American public even though mentioned on some internet websites.⁹⁵

As to the second element, the goods/place association that the consuming public would make for vodka also fails due to the fact that

90. 15 U.S.C.A. § 1052(e) (West 2013).

91. *Id.* at § (f).

92. *In re The Newbridge Cutlery Co.*, 776 F.3d 854, 860-61 (Fed. Cir. 2015) (*internal citations omitted*).

93. *Id.* at 861.

94. *In re Spirits Int’l, N.V.*, 563 F.3d 1347, 1356 (Fed. Cir. 2009).

95. *In re The Newbridge Cutlery Co.*, 776 F.3d at 862-63.

vodka is produced in so many different nations around the globe. The consuming public would not be able to make a goods/place association, as there is no definitive place associated with vodka. Arguably, it may be that the consuming public generally associates vodka with Eastern Europe, however this does not identify any particular country or region within Eastern Europe and, more importantly, the vodka the consumer is examining on the shelf in the local liquor store may in fact be from France, Holland, or any other non-Eastern European country.

Lastly, for the third element, a proposed trademark for the word vodka does not identify any particular geographic region, for the reasons stated above, and thus fails this element. Because the test requires all three elements be met for a proposed trademark to be denied as being primarily geographically descriptive,⁹⁶ vodka would not be granted registration under 1052(e) (2) as all three elements have not been met and vodka has not taken on a secondary meaning. Therefore, the word vodka is not primarily geographically descriptive.

As to whether vodka would be denied registration under 1052(e) (3) as a primarily geographically deceptively misdescriptive mark, the courts have established a three-part test, which is similar to that used for (e) (2) as elements one and two are the same for both tests.⁹⁷ However, for primarily geographically deceptively misdescriptive terms, the third element required for dismissal of a trademark application is that “. . . 3) the misrepresentation was a material factor in the consumer’s decision.”⁹⁸

Under the first element, noted previously, there is no geographic location known to the American consuming public called vodka. Also previously noted, vodka fails the second element of the test because the consuming public cannot make a goods/place association with vodka; unlike champagne or tequila, the consuming public cannot associate vodka with a specific location or even a particular country because vodka is produced all over the world. As for the third element, it is questionable to what extent this would be a misrepresentation of the geographic location that the product comes from, resulting in the consumer’s decision to purchase the spirit. Even if a consumer were deceived of the origin of a bottle of vodka, because vodka has failed the first two

96. *See id.* at 863-64 (noting that because the town of Newbridge, Ireland was not a generally known place, failing the first element of the test, the trademark application for “Newbridge Home” was not primarily geographically descriptive and the other two elements of the test did not need to be examined).

97. *In re Spirits Int’l, N.V.*, 563 F.3d at 1350; *In re The Newbridge Cutlery Co.*, 776 F.3d 854, 860-61 (Fed. Cir. 2015).

98. *In re California Innovations Inc.*, 329 F.3d 1334, 1341 (Fed. Cir. 2003).

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elements, a court would have to conclude that vodka is not geographically deceptively misdescriptive.

In conclusion, it would appear that under Section 1052 of the Lanham Act, an individual, corporation, or government that submitted an application for a federal trademark registration on the word vodka such that it would have the exclusive right to use that word on its products would pass the tests under section (e).⁹⁹ This section, when viewed alone, would suggest that the word vodka could be registered. However, it is my belief that in actuality, a reviewing court would never get to an analysis of vodka under Section 1052 as the court would find vodka to be generic.

C. Vodka as a Generic Term in the United States

1. The Law on Generics in the United States

A generic term is one that is commonly used as the name of a kind of good and can never function as a trademark.¹⁰⁰ A generic term cannot be a trademark since a generic term fails to do the job of a trademark as it cannot distinguish the applicant's goods or services from those of others.¹⁰¹ The Supreme Court, echoing the rule established by the federal circuit courts, has determined that a generic mark is one which "refer[s] to the genus of which the particular product is a species."¹⁰² For determining whether a given term is generic, "the critical issue. . .is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question."¹⁰³ The Federal Circuit has elaborated on this definition by providing a two-part inquiry, "[f]irst, what is the genus of goods or services at issue? Second, is the term sought to be registered. . .understood by the relevant public primarily to refer to that genus of goods or services?"¹⁰⁴

99. See 15 U.S.C.A. § 1052(e) (West 2013).

100. *Liquid Controls Corp. v. Liquid Control Corp.* 802 F.2d 934, 935-936 (7th Cir. 1986).

101. *McCARTHY*, *supra* note 27, at § 12:57.

102. *Two Pesos, Inc. v. Taco Cabana Inc.* 505 U.S. 763, 768 (1992); *Liquid Controls Corp.*, 802 F.2d at 935-936; *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976); *Soweco, Inc. v. Shell Oil Co.*, 617 F.2d 1178, 1183 (5th Cir. 1980).

103. *In re 1800Mattress.com IP, LLC*, 586 F.3d 1359, 1362-63 (Fed. Cir. 2009).

104. *Id.* at 1362-63; *In re Cordua Restaurants, Inc.*, 823 F.3d 594, 599 (Fed. Cir. 2016).

2. *Application of the Law of Generics to Vodka*

Vodka is a distilled spirit, which through the passage of time has lost any definitive traces of its origin and has been disseminated across the globe. As such, the American consuming public would likely find the word vodka to represent nothing more than a broad category of alcoholic beverage. It could be said, in applying the genus/species concept advocated by the Supreme Court, that vodka is a genus of spirit within which the various brands of vodkas are the species. Supporting this position is the fact that sake and vermouth, names of wines which once had geographic significance, but are now indicative of a class or type (i.e. a genus of wine), have been determined to be generic in the United States.¹⁰⁵ If we consider that many American consumers, arguably, would make a goods/place association between sake and Japan such that in their mind, sake would be a geographic term rather than a generic one;¹⁰⁶ it seems then that the word sake should be registrable as a trademark on the basis of it being a geographic term, which has acquired a secondary meaning. However, despite this analysis, sake has been found to be generic.¹⁰⁷ It then stands to reason that vodka, which at its best may be associated with any number of Eastern European countries, is therefore less likely to be a geographic term and more likely to be considered generic. It seems evident that vodka would share the same fate as sake or vermouth in terms of being labeled generic in the United States.

D. Certification Marks in the United States

Perhaps the best possibility a community in Russia or Poland may have for getting the word “vodka” registered under United States law is to seek a certification mark rather than a trademark. A certification mark as defined under the Lanham Act “. . . means any word, name, symbol, or device . . . to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics . . .”¹⁰⁸ Certification marks, unlike trademarks, can be given to an entire municipality to certify that goods produced in that municipality meet the

105. 27 C.F.R. § 4.24 (a) (2) (2006); Prudhomme, *supra* note 55, at 156.

106. OXFORD ENGLISH DICTIONARY, *supra* note 10, at 1275 (defining sake as “A Japanese alcoholic drink made from rice”); RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY, *supra* note 11, at 1692 (defining sake as “A Japanese fermented, mildly alcoholic beverage made from rice”).

107. 27 C.F.R. § 4.24 (a) (2) (2006); Prudhomme, *supra* note 55, at 156.

108. 15 U.S.C.A. § 1127 (West 2006); Int’l Info. Sys. Sec. Certification Consortium, Inc. v. Sec. Univ., LLC, 823 F.3d 153, 159-60 (2d Cir. 2016).

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standards set by the certification mark in terms of production specifications or quality.¹⁰⁹ For example, the Parma region of Italy holds a certification mark on the word “Parma”,¹¹⁰ the Midlands region of England holds one for “Stilton Cheese”¹¹¹, as previously noted, the Georgia Department of Agriculture holds one for the name “Vidalia” as related to a variety of onion,¹¹² and the Municipality of Roquefort for “Roquefort Cheese” as related to blue cheese.¹¹³

Certification marks can be acquired in what is referred to as a “common law regional certification mark”,¹¹⁴ “. . .if the use of the geographic indication is controlled and limited in such a manner that it reliably indicates to purchasers that the foods bearing the designation come exclusively from a particular region . . .”¹¹⁵ However, a regional certification mark which appears to have lost its significance as an indication of regional origin for a particular good such that the name is being used on goods which originate somewhere else, may be cancelled and the term, which was once protected, may be deemed generic.¹¹⁶ For example, if Stilton were no longer used to identify cheese from the Midlands region of England but rather just cheese of the same flavor and characteristics as true Stilton, then the certification mark may be cancelled because the name Stilton has become generic.

1. Application of Certification Marks to Vodka

If it were the case that vodka could be clearly traced to a specific region, then perhaps registration as a certification mark would be viable. If the city of Moscow, for example, could prove that vodka was created within the city limits and the distillers of Moscow or the municipal government organized a regulatory body to ensure that their spirit was produced in the “traditional” vodka producing manner under specific quality controls, then this would suggest that vodka could qualify for protection as a certification mark. It would essentially be no different

109. *Cmty. of Roquefort v. William Faehndrich Inc.*, 303 F.2d 494, 497 (2d Cir. 1962).

110. *MCCARTHY*, *supra* note 27, at § 14:21.

111. *Id.*

112. *Id.*

113. *Cmty. of Roquefort*, 303 F.2d at 497.

114. *See Institut Nat’l Des Appellations d’Origine v. Brown-Forman Corp.*, 47 U.S.P.Q.2d 1875, 1883 (T.T.A.B. 1998); *MCCARTHY*, *supra* note 27, at § 14:21.

115. *Brown-Forman Corp.*, 47 U.S.P.Q.2d at 1885.

116. *Cmty. of Roquefort*, 303 F.2d at 497.

from Roquefort cheese since the municipality of Roquefort has established historically strict production methods that are scrutinized by a monitoring body that holds the certification mark.¹¹⁷

Rather, vodka is generic and cannot be registered as a certification mark because vodka is produced in so many different locations and there is no way one specific region or country could prove to American consumers that vodka comes exclusively from their region. For example, what if the Polish Vodka Producers Association attempted to register a certification mark for vodka as coming from the region around Warsaw? To be successful, it would mean that the American consuming public would need to not also use the name vodka to refer to the same spirit coming from any other location in the world other than Warsaw, Poland. In today's world where vodka is produced in many places, this is essentially impossible. Even if the Warsaw region of Poland currently held a registered certification mark on the term vodka, it would be cancelled today since the term is no longer exclusively used to relate to products coming from that region. It therefore seems clear that under either United States trademark or certification mark law, vodka would be deemed as a generic term.

IV. THE LAWS OF THE EUROPEAN UNION AND THEIR RELATION TO VODKA

A. The European Union's Laws on Geographic Indications and Generics

The European Union is comprised of a bloc of nations¹¹⁸ that have collectively ceded some of their sovereignty in order to create what was initially an economic union (the "European Economic Community")¹¹⁹ but has since developed into a political union with its own legislative and judicial branches in addition to various administrative agencies.¹²⁰ The European Union's legislative branch, which has authority to pass binding legislation on all member states at the supra-national level, is composed of The European Parliament, The European Commission, and the Council of the European Union.¹²¹ One of the legal topics that the legislative

117. *See generally, id.* at 495-96.

118. *EU Member Countries*, EUROPEAN UNION (Oct. 15, 2015), *available at* http://europa.eu/about-eu/basic-information/about/index_en.htm (last visited Oct. 31, 2016).

119. *Id.*

120. *EU Institutions and Other Bodies*, EUROPEAN UNION (June. 1, 2016), *available at* http://europa.eu/about-eu/institutions-bodies/index_en.htm (last visited Oct. 31, 2016).

121. Commonly called the "Parliament," "Commission," and "Council" respectively. *Id.*

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branch has authority to regulate are the laws relating to geographic indications concerning spirits,¹²² as well as foodstuffs and agricultural products.¹²³ Geographic indications in the European Union can notably be registered apart from trademark law,¹²⁴ whereas in the United States they are part of the greater body of trademark law.¹²⁵

The European Union statute governing spirits defines a geographical indication as “an indication which identifies a spirit drink as originating in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of that spirit drink is essentially attributable to its geographic origin.”¹²⁶ Some of the pertinent requirements for registering a geographic indication for a spirit are: “. . .(c) the definition of the geographical area concerned; (d) a description of the method for obtaining the spirit drink and, if appropriate, the authentic and unvarying local methods; (e) the details bearing out the link with the geographical environment or the geographical origin; [and] (f) any requirements laid down by Community and/or national and/or regional provisions. . .”¹²⁷ Thus, it is necessary for an applicant to address national laws on production, the production method of the spirit including historical and traditional modes of production, (if some such modes are being used as the basis for obtaining geographic origin registration for the spirit), the relationship between the environment identified as the geographic region and the spirit, and the precise region of production.

Notably, European Union law on spirits mimics, in some respects, certain trademark protections under United States federal law, specifically protections against marks which are primarily geographically deceptively misdescriptive under section 1052(e)(3) of the Lanham Act.¹²⁸ The European Union law on spirits protects registered geographic indications from “[a] false or misleading indication as to the provenance, origin, nature or essential qualities on the description, presentation or

122. Council Regulation 110/2008, *supra* note 21, at art. 1.

123. Council Regulation 510/2006, art. 1, on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, 2006 O.J. (L. 93) (EC).

124. MCCARTHY, *supra* note 27, at 442.

125. *Id.* at 439.

126. Council Regulation 110/2008, *supra* note 21, at art. 15(1).

127. *Id.* at art. 17(4) (c-f).

128. *See generally* 15 U.S.C.A. § 1052.

labeling of the product¹²⁹ In both American and European Union laws, the purpose of the law is to protect the consumer from, among other things, false labeling relating to the origin of items.

As for the European Union's law on generics, both regulations on spirits and foodstuffs include their own sections on establishing when a term has become generic within the scope of the respective statutes.¹³⁰ The spirit regulation gives a relatively simple definition, stating that a generic name "means the name of a spirit drink which, although it relates to the place or region where this product was originally produced or placed on the market, has become the common name of a spirit in the [European] Community."¹³¹ The spirit statute also provides protection to drinks, which have a registered geographic indication, so that they cannot become generic once they have been registered.¹³² This is a significant difference from the United States law on certification marks,¹³³ trademarks,¹³⁴ and patents.¹³⁵

B. Seeking a Geographic Indication for Vodka

There are several issues that would arise if a country were to seek a geographic indication for vodka, such that it would be able to exclude all other states within the European Union from producing vodka under that name. To clarify, it is not impossible to acquire a geographic indication for a type of vodka, which several countries have already successfully done.¹³⁶ These geographic indications are all limited in that no single one is for the blanket term vodka, but rather for terms such as 'Swedish Vodka', 'Polish Vodka', and 'Vodka of Finland'.¹³⁷

As for a claim on the term vodka alone, it seems likely that the word has taken on a generic connotation within the meaning of the legislation on spirits. The law requires that a geographic term, which has lost its

129. Council Regulation 110/2008, *supra* note 21, at art. 16(c).

130. *Id.* at art. 15(3); Council Regulation 510/2006, *supra* note 123, at art. 3.

131. Council Regulation 110/2008, *supra* note 21, at art. 15(3). It is important to note that the statute on foodstuffs uses a nearly identical definition for generics in relation to foods. Council Regulation 510/2006, *supra* note 123, at art. 3(1). In particular, the foodstuffs statute addresses the existing situation in the nation bringing the application for the geographic indication, areas of consumption, and the relevant national or community laws. *Id.* at art. 15(3).

132. Council Regulation 110/2008, *supra* note 21, at art. 15(3).

133. *Roquefort v. William Faehndrich, Inc.*, 303 F.2d 494, 497 (2d Cir. 1962).

134. *See* 27 C.F.R. § 4.24(a) (2) (2006).

135. *Kellogg Co. v. Nat'l Biscuit Co.*, 305 U.S. 111, 113 (1938).

136. Council Regulation 110/2008, *supra* note 21, at Annex III (15).

137. *Id.*

goods/place association, and rather has become the common name of the product, be construed as generic.¹³⁸

Therefore, even if the term vodka were synonymous with a specific region, in light of the fact that there are registered geographic indications for vodka in seven different countries within the European Union,¹³⁹ vodka has lost any specific affiliation with the geographic region where the drink originated. The fact of the matter is that the term is used as the common name of the spirit throughout the European Union, again evidenced by the fact that of the nine currently registered vodka geographic indications, over half use the term vodka or the local language equivalent within the geographic indication.¹⁴⁰ This suggests that the term vodka is used throughout the European Union to denote the name of the spirit and as such must be generic.

C. The Feta Case: Vodka's Best Hope?

While it would seem that vodka is a generic term, for the reasons noted above, there is case law within the European Union that suggests that vodka may not be as generic as initially indicated. The European Court of Justice has exclusive jurisdiction over all actions brought between the governments of the European Union member states and the European Union government.¹⁴¹ In “actions for annulment”, such as the Feta Case,¹⁴² the plaintiff, either a national government or an individual, can bring suit against the European Union government to annul an active statute.¹⁴³ It should be noted that because Feta is a foodstuff and not a spirit, the legal standards for generics and geographic indications are slightly different.¹⁴⁴ For that reason, the court’s analysis may not be identical if the issue concerned the geographic indication of a spirit. However, the laws concerning geographic indications and generics are

138. *Id.* at art. 15(3).

139. *Id.* at Annex III (15).

140. Council Regulation 110/2008, *supra* note 21, at Annex III (15).

141. *Court of Justice of the European Union*, EUROPEAN UNION, available at http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm (last visited Jan 2, 2017).

142. Joined Cases C-465/02 and C-466/02, *Germany v. Comm’n*, 2005 E.C.R. I-09115.

143. *Court of Justice of the European Union*, EUROPEAN UNION, *supra* note 141; *Presentation*, CURIA, available at http://curia.europa.eu/jcms/jcms/Jo2_7024/#competences (last visited Nov. 3, 2016).

144. Council Regulation 510/2006, *supra* note 123, at art. 2-3; *contra* Council Regulation 110/2008, *supra* note 21, at art. 3 (1), (3).

similar enough between foodstuffs and spirits that the court's analysis can still be of some use in considering vodka.

1. The Law under Review by the Court: Designations of Origin

The regulation on foodstuffs defines a designation of origin as follows:

“‘[D]esignation of origin’ means 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, 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. . .”¹⁴⁵

This definition is nearly identical to that used to define a geographic indication for spirits.¹⁴⁶ The foodstuffs regulation has a safety net provision to the extent in that the law further adds that a designation of origin, which does not fit within the definition above, can still be applied to certain “non-geographical names.”¹⁴⁷ This protection of non-geographical names is not part of the spirits regulation.¹⁴⁸ It should also be noted that within the European Union's greater body of law on geographic origins relating to agricultural goods and foodstuffs, there are three different types of protections: (1) protected geographic indications,¹⁴⁹ (2) protected designations of origin,¹⁵⁰ and (3) traditional specialties guaranteed.¹⁵¹

2. Prelude to the Lawsuit

In 1994, the government of Greece submitted to the European Commission an application for a protected designation of origin for the word “feta.”¹⁵² The word was registered as such in 1996.¹⁵³ In 1999, the Court of Justice annulled the 1996 designation of origin for the word feta

145. Council Regulation 510/2006, *supra* note 123, at art. 2(1) (a).

146. See Council Regulation 110/2008, *supra* note 21, at art. 15(1).

147. Council Regulation 510/2006, *supra* note 123, at art. 2(3); Joined Cases C-465/02 and C-466/02, *Germany v. Comm'n*, 2005 E.C.R. I-09115, ¶ 46.

148. See Council Regulation 1576/89, *supra* note 21.

149. MCCARTHY, *supra* note 27, at § 14:1.50.

150. *Id.*

151. Council Regulation 509/2006, art. 2, 2006 O.J. (L 93/1) (EC); MCCARTHY, *supra* note 27, at § 14:1.50.

152. Joined Cases C-465/02 and C-466/02, *Germany v. Comm'n*, 2005 E.C.R. I-09115, ¶ 11.

153. *Id.* ¶ 12.

after the Commission was sued by several European Union member states.¹⁵⁴ However, in 2002 feta was re-registered by the Commission, despite opposition.¹⁵⁵ Germany and Denmark supported by France and the United Kingdom, brought suit against the Commission to have the designation of origin for feta annulled a second time.¹⁵⁶

3. Arguments of the Parties

The European Union Commission, supported by the Greek government, supported the regulation of feta as a protected designation of origin under the theory that feta was a traditional non-geographical name.¹⁵⁷ They argued that true feta had to be derived from goat's milk, which comes exclusively from mainland Greece and the department of Lesbos.¹⁵⁸ The milk must come from goats raised using traditional methods that graze on the flora of this particular geographic region.¹⁵⁹ The amount of sunshine, humidity, weather patterns, and the local flora were collectively cited as the natural features that make Greek feta different from other similar cheeses.¹⁶⁰

Germany, Denmark, France, and the United Kingdom collectively claimed that feta could not be a traditional non-geographical name.¹⁶¹ In support of this claim, it was noted that the term feta is not only used in Greece, but in many countries of the Balkans and the Middle East to refer to "cheese in brine."¹⁶² Furthermore, they asserted that the geographic region within Greece, which had been established as the traditional feta-producing region, was arbitrary in that it had no unique geographical

154. *Id.* ¶ 13; Joined Cases C-289/96, C-293/96 and C-299/96, Denmark v. Comm'n, 1999 ECR I-1541, ¶¶ 101-03. The judgment of the court determined that the name feta was generic, citing in part the fact that the name had been used for a considerable amount of time for cheeses made outside of Greece. Germany v. Comm'n, 2005 E.C.R. I-09115, ¶¶ 13-15.

155. Joined Cases C-465/02 and C-466/02, Germany v. Comm'n, 2005 E.C.R. I-09115, ¶ 19. The Commission's Scientific Committee after the 1999 annulment suit sent a questionnaire to consumers within the European Union on the manufacture and consumption of feta. *Id.* ¶ 17. It was unanimously concluded by the Scientific Committee that the term feta was in fact not considered generic. *Id.* ¶¶ 18-19.

156. *Id.* ¶¶ 23-26.

157. See *id.* ¶ 22; Council Regulation 510/2006, *supra* note 123, at art. 1(2).

158. Joined Cases C-465/02 and C-466/02, Germany v. Comm'n, 2005 E.C.R. I-09115, ¶ 53.

159. *Id.* ¶ 56.

160. See *id.* ¶ 57.

161. *Id.* ¶¶ 42-46.

162. *Id.* ¶¶ 42-43.

environment which related to the quality or characteristic of feta produced there¹⁶³ or the tradition of the feta producers in the region.¹⁶⁴ It was also argued that the feta-producing region covered a massive section of the country of Greece and was therefore too expansive.¹⁶⁵

Germany and Denmark further asserted that feta has in fact become a generic term within the European Union.¹⁶⁶ In support of this assertion, it was noted that feta is a term used throughout the Balkans and is not originally from the Greek language.¹⁶⁷ In Greece, cheeses made with cow's milk other than by the traditional Greek method were imported under the name feta until 1988.¹⁶⁸ Feta cheese continued to be produced using non-traditional methods until 1987,¹⁶⁹ and it was not until 1988 when the Greek government began to create, under national law, a geographic area and specific production requirement for feta.¹⁷⁰ Since the 1930's, feta had been produced in France and Denmark, and in Germany since 1972.¹⁷¹ Lastly, it was noted that several European Union countries other than Greece produce large amounts of feta.¹⁷²

4. *Opinion of the Court*

The court determined that the word "feta" was not of Greek origin, but rather, an Italian word, adopted into the Greek language.¹⁷³ Feta is not the name of a region, town, or county so it could not fit into the definition of a designation of origin, but rather could be registered as a traditional non-geographic name.¹⁷⁴ The geographical area defined as the feta-producing region, while covering large parts of Greece, does not cover the entirety of the country, notably excluding the islands of Crete

163. Joined Cases C-465/02 and C-466/02, *Germany v. Comm'n*, 2005 E.C.R. I-09115, ¶¶ 42-46.

164. *Id.* ¶¶ 43-46.

165. *Id.* ¶ 44.

166. *Id.* ¶¶ 70, 74.

167. *Id.* ¶ 73.

168. Joined Cases C-465/02 and C-466/02, *Germany v. Comm'n*, 2005 E.C.R. I-09115, ¶ 77.

169. *Id.*

170. *Id.* ¶ 78.

171. *Id.* ¶ 81.

172. *Id.* ¶ 80. In 1998, Denmark produced over 27,000 tons of feta; from 1988 to 1998 France produced between 7,000 and 19,000 tons, and Germany produced between 19,000 and 39,000 tons. Joined Cases C-465/02 and C-466/02, *Germany v. Comm'n*, 2005 E.C.R. I-09115, ¶ 80.

173. *Id.* ¶ 46. Feta is derived from the Italian word 'fetta' meaning slice which was adopted into the Greek language in the 1600s. *Id.*

174. *Id.*

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and various archipelagos.¹⁷⁵ These regions collectively have “homogenous natural features which distinguish it from the adjoining areas . . . of Greece which . . . do not display the same natural features. . . ,”¹⁷⁶ and as such, the geographic regions selected were not determined in an artificial or overly-broad manner.¹⁷⁷ Lastly, the court found that the production of feta within these regions, due to natural factors of the environment, gave feta a specific characteristic.¹⁷⁸ The court then determined that feta could in fact be a protected designation of origin under the theory that feta is a non-geographical name.¹⁷⁹

Regarding the assertion that feta is a generic term, the court noted that despite foreign production, the majority of feta production and consumption remained in Greece.¹⁸⁰ Within Greece, consumers felt the word “feta” had a geographical connotation and did not consider it a generic term.¹⁸¹ The court further noted that most feta, even feta not produced in Greece, was marketed with labels indicative of Greek cultural traditions and civilization.¹⁸² This suggests that the consumers of the European Union generally associate feta with Greece even if it is not actually produced there.¹⁸³ The court also noted that Greece has entered into at least one treaty since the 1970’s to ensure that feta is a protected term reserved only for Greek products.¹⁸⁴ Lastly, the court gave deference to the European Commission’s scientific committee, which had determined that feta was not a generic term in the eyes of most European Consumers.¹⁸⁵ The court, in a complete reversal of its 1999 decision,

175. *Id.* ¶ 53.

176. *Id.* ¶ 58.

177. Joined Cases C-465/02 and C-466/02, *Germany v. Comm’n*, 2005 E.C.R. I-09115, ¶ 58.

178. *See id.* ¶¶ 66-68.

179. *See id.* ¶¶ 49, 69.

180. *Id.* ¶¶ 83, 85. Greece produces around 115,000 tons of feta annually and consumes 85% of the total feta produced within the European Union. *Id.* ¶¶ 80, 85.

181. Joined Cases C-465/02 and C-466/02, *Germany v. Comm’n*, 2005 E.C.R. I-09115, ¶ 86.

182. *Id.* ¶ 87.

183. *Id.*

184. *Id.* ¶ 93 (noting that Greece had in 1972 entered into a treaty with Austria in which Greek products would have the exclusive right to use the term feta in Austria in relation to foodstuffs).

185. *See id.* ¶ 85. A notable exception to this was the majority of the feta consuming population of Denmark, which believed that feta was a generic term. Joined Cases C-465/02 and C-466/02, *Germany v. Comm’n*, 2005 E.C.R. I-09115, ¶¶ 103-107.

concluded that feta was not generic,¹⁸⁶ and dismissed the complaints of Denmark, France, the United Kingdom, and Germany.¹⁸⁷

D. Application to Vodka

Concerning the feta producing region, the European Court of Justice was satisfied that there was some natural environmental feature which gave Greek feta a unique taste.¹⁸⁸ The court did not object to simple features such as weather patterns, sunshine, and native flora.¹⁸⁹ If the natural environmental features required for a protected designation of origin are so easily met, it becomes clear how countries like Poland and Sweden have registered geographic indications for vodka coming from their countries.¹⁹⁰ If another country seeks registration of a geographic region as a vodka-producing region, so long as it shows that there is some correlation between the quality of the drink and the environment,¹⁹¹ then it can, in a relatively simple manner, qualify for a geographic indication under European Union law.

The second issue the court addresses, concerning the identification of feta as a non-generic term, is more pertinent to producers of vodka. The court recognized that if Greece's practices before 1988, of producing feta cheese without traditional ingredients and using non-traditional methods, were to persist, "they would tend to confer a generic nature on the name 'feta.'"¹⁹² However, the court looked past this fact, perhaps in part because Greece passed laws ending these practices, albeit only recently.

For the sake of argument, consider if Russia were to enact laws requiring all vodka to be produced from potatoes (the traditional ingredients) grown within the area immediately outside Moscow. Let us say that the soil around Moscow has large amounts of minerals and a cool climate, (a natural environmental factor contributing to the character of the product) so the potatoes would possess flavors superior to potatoes grown in other localities, resulting in a more flavorful vodka. Also, the

186. *Id.* ¶ 108; see Joined Cases C-289/96, C-293/96 and C-299/96, Denmark v. Comm'n, 1999 ECR I-1541, ¶¶ 101-03.

187. Joined Cases C-465/02 and C-466/02, Germany v. Comm'n, 2005 E.C.R. I-09115, ¶ 110.

188. *See id.* ¶¶ 66-69.

189. *See id.* ¶¶ 57-58.

190. *See* Council Regulation 110/2008, *supra* note 21, at annex III (15).

191. *See id.* art. 17.4(e).

192. Joined Cases C-465/02 and C-466/02, Germany v. Comm'n, 2005 E.C.R. I-09115, ¶¶ 77-78.

new laws would require that Russian vodka be triple distilled (the traditional production method), even if Russian distillers had, in years prior, only distilled their vodka once. Regardless of how vodka had been produced in the past, under the feta decision, these reforms would be enough to prevent vodka from becoming generic. It would not matter that the word “vodka” is not clearly derived from the Russian language, nor that other countries have produced and continue to produce vodka, which was sold, until recently, in Russian markets under the term “vodka.”

The feta court took into consideration that non-Greek feta manufacturers have essentially capitalized on the Greek origin of feta in their advertising by referencing Greek culture and civilization.¹⁹³ Likewise, vodka producers often choose Russian names for their brands, or use images or names of iconic Russian and Eastern European places.¹⁹⁴ Consider, for example, that in *In re Spirits Int’l N.V.*, the plaintiff was seeking to register a trademark for the term “moskovskaya,” meaning “from Moscow” in Russian, for vodka produced outside of Russia.¹⁹⁵ Clearly, Russia could argue that some foreign producers of vodka have tried to capitalize on Russia’s historical and cultural roots relating to the spirit.

These facts present the strongest arguments that a country could assert if that country were to claim an exclusive right to the word “vodka”. However, while Feta is widely known by European consumers as coming from exclusively from Greece,¹⁹⁶ there is no multinational consensus amongst a majority of consumers that vodka is a product coming exclusively from Russia. Furthermore, no country has ever entered into a trade agreement or treaty with another country creating exclusive use of the term “vodka,” unlike the Greek-Austria accord on

193. *Id.* ¶ 87.

194. For example, Smirnoff is produced in the United States and in England. *Q&A: EU Vodka Arguments*, BBC (June 19, 2007), available at <http://news.bbc.co.uk/2/hi/europe/5333756.stm> (last visited Nov. 7, 2016). Romanov Vodka is owned by an Indian company; UNITED SPIRITS: A DIAGO GROUP COMPANY, available at <http://www.unitedspirits.in/> (last visited Feb. 7, 2017). Until 2015, Stolichnaya vodka was owned by Spirits International, a Dutch company. Sterling, *supra* note 68.

195. *In re Spirits Int’l, N.V.*, 563 F.3d 1347, 1349-50 (Fed. Cir. 2009); *see also* *In re Joint-Stock Co.*, 84 U.S.P.Q.2d (BNA) 1921, 1-3 (T.T.A.B. 2006) (addressing an application by a vodka manufacturer for a trademark registration for the term ‘Baikalskaya,’ meaning “from Baikal,” the name of a Russian lake).

196. *See* Joined Cases C-465/02 and C-466/02, *Germany v. Comm’n*, 2005 E.C.R. I-09115, ¶87.

the use of the term “feta.”¹⁹⁷ Today, if a country, such as Russia or Poland, were to create laws limiting production methods and use of the term “vodka” to only nationally-produced spirits, and the European Commission’s scientific committee were to find that within the European Union vodka is not a generic term but rather almost always associated with that country’s product, that country would likely gain an exclusive right to the term “vodka.”

V. INTERNATIONAL TREATIES AND THE LAWS OF GEOGRAPHIC INDICATIONS

Instead of seeking to acquire an exclusive right to the term “vodka” by virtue of providing legal protections under the national laws of various states, perhaps one of the best ways for a country to find success in establishing an exclusive right to a term is through the political process of trade negotiations and treaties. As earlier noted, Greece acquired an exclusive right to the term “feta” under Austrian law, not through an application for a trademark or geographic indication mark within the Austrian legal system, but through a treaty.¹⁹⁸ This tactic was used by Mexico, which, through NAFTA, gained an exclusive right to the term “tequila” within the United States and Canada.¹⁹⁹ Similarly, under the Bourbon-Cognac Accord, France ensured that within the United States, the term “cognac” would only be used for spirits coming from the Cognac region of France.²⁰⁰

Two of the main international treaties concerning the protection of geographic indications are the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) and the Lisbon Agreement. Membership in the WTO requires the adoption of TRIPS and the enactment of relevant domestic intellectual property laws.²⁰¹ As such, when the WTO agreement took effect in 1995, all 146 member-countries had to ensure that their national laws would eventually comply with the TRIPS requirements.²⁰² Accession to the Lisbon Agreement, on the other

197. See Joined Cases C-465/02 and C-466/02, *Germany v. Comm’n*, 2005 E.C.R. I-09115, ¶93.

198. See *id.*

199. NAFTA, *supra* note 3, at Annex 313.

200. *Institut Nat’l Des Appellations d’Origine v. Brown-Forman Corp.*, 47 U.S.P.Q.2d 1875, 1877 (T.T.A.B. 1998).

201. DAVID C.K. CHOW & THOMAS J. SCHOENBAUM, *INTERNATIONAL BUSINESS TRANSACTIONS* 553 (Erwin Chemerinsky et al. eds., 3rd ed. 2015); Rachel Brewster, *The Surprising Benefits to Developing Countries of Linking International Trade and Intellectual Property*, 12 CHI. J. INT’L L. 1, 2, 21 (2011).

202. CHOW & SCHOENBAUM, *supra* note 201, at 553.

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hand, is entirely voluntary.²⁰³ As a result, the Lisbon Agreement is relatively small with only twenty-eight contracting parties as of 2016.²⁰⁴ Notably, major vodka producing countries such as Russia, the United States, Sweden, Poland, and Finland are not parties to this convention.²⁰⁵ Despite the limited membership of the Lisbon Agreement, as of 2008, there were 887 appellations of origin registered.²⁰⁶ An appellation of origin is no different from the definition of a geographic indication established by the European Union laws already mentioned.²⁰⁷

Of particular relevance to the protection of geographic indications involving spirits is Article 23 of the TRIPS agreement, which grants heightened protections for wines and spirits.²⁰⁸ This article states in part that:

Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying . . . spirits for spirits not originating in the place indicated by the geographical indication in question, 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.²⁰⁹

This language is nearly identical to the European Union statute protecting geographic indications for spirits and wines²¹⁰ and the Lisbon Agreement’s requirements for protections of appellations of origin.²¹¹ Therefore, if a country were to claim an exclusive right over the term “vodka,” such that “vodka” could only be produced in that one country, in theory, all other members of the WTO would be compelled to enforce this right to the detriment of their own domestic vodka producers.

203. See *Summary of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration*, WIPO, available at http://www.wipo.int/treaties/en/registration/lisbon/summary_lisbon.html (last visited Oct. 31, 2016).

204. *Contracting Parties: Lisbon Agreement*, WIPO, available at http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=10 (last visited Oct. 31, 2016).

205. See *id.*

206. Daniel Gervais, *Traditional Knowledge: Are we Closer to the Answer(s)? The Potential Role of Geographic Indications*, 15 ILSA J. INT’L & COMP. L. 551, 566 (2009).

207. See Lisbon Agreement, *supra* note 4, at art. 2(1); Council Regulation 110/2008, *supra* note 21, at art. 15(1); Council Regulation 510/2006, *supra* note 123, at art. 2.

208. TRIPS, *supra* note 5, at art. 23.

209. *Id.*

210. Council Regulation 110/2008, *supra* note 21, at art. 16(a), (b).

211. Lisbon Agreement, *supra* note 4, at art. 3.

Similarly, under the Lisbon Agreement, once a geographic indication has been registered for a product in one country, all other contracting parties must treat that product as protected.²¹² This clause is one of the reasons the United States has chosen not to sign the Lisbon Agreement, as terms that are semi-generic or generic in America may be appellations of origin in another country, and therefore would have to be treated as such in the United States too.²¹³

However, there is a provision within TRIPS which governs exceptions to the general protections of geographic indications and appellations of origin, respectively. Article 24 of TRIPS states in part that:

Nothing 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.²¹⁴

This means that a country that does not consider a certain term to be indicative of a specific geographic indication, but rather has considered the term within the common parlance to be a generic term, then within that country, the term can remain generic. For example, the term “cheddar” is generally associated with a type of cheese, but is not specifically associated with cheese that comes from Cheddar, England, where it originated.²¹⁵ This means that if Cheddar is a registered geographic indication within England, but becomes a generic term within the United States, then the United States does not have to change its own laws and harm its own cheese producers by forcing them to cease using of the word “cheddar.” Similarly, if a country creates a geographic indication for the term “vodka,” such that all other spirits of the same type produced elsewhere could no longer be called “vodka,” such a limit would have no impact in countries where the term “vodka” is a generic connotation.

A similar regime exists under Article 5(3) of the Lisbon Agreement, which allows, in summation, contracting states to reject future and current

212. *Id.* art. 6; BENDEKGEY & MEAD, *supra* note 24, at 782.

213. See BENDEKGEY & MEAD, *supra* note 24, at 781-82; Lisbon Agreement, *supra* note 4, at art. 3; 27 C.F.R. § 4.24 (b) (1) (2006)

214. TRIPS, *supra* note 5, at art. 24 (6).

215. *Background and the Current Situation*, WTO, available at https://www.wto.org/english/tratop_e/trips_e/gi_background_e.htm (last visited Nov. 1, 2016); See *Separating the Curds from the Whey*, BBC NEWS (Aug. 21, 2006), available at <http://news.bbc.co.uk/2/hi/business/5241544.stm> (last visited Jan. 24, 2017).

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registered appellations of origin if the country declares that it cannot ensure the protection of the appellation of origin in question.²¹⁶ The disclaiming country must give notice within one year of the registration of the appellation of origin and include a reason for not being able to ensure the integrity of the registered appellation of origin.²¹⁷ An appellation of origin that becomes generic within a contracting party to the Lisbon Agreement is a valid basis for declaring a reservation,²¹⁸ which excuses the disclaiming state from the normal requirements of Article 6 of the Lisbon Agreement.²¹⁹ However, the country holding the disclaimed appellation of origin, which has been disclaimed as generic, can still attempt to seek redress in the national courts of the disclaiming country for any harms relating to the appellation of origin.²²⁰ Therefore, a country that establishes an appellation of origin for vodka will have difficulty enforcing that registration with the member states of the Lisbon Agreement due to this disclaimer clause. Rather the country claiming an appellation of origin for vodka would have to constantly litigate cases harming the appellation of origin in foreign courts, which may be opposed to taking a generic term and making it a protected appellation of origin to the detriment of local producers.

CONCLUSION

Poblenkin's rumored lawsuit between Poland and the Soviet Union over the term 'vodka' is an interesting starting point for examining the means by which a nation could try to establish international intellectual property rights in a term which is used widely to refer to a type of good; but at the same time is often associated with a specific part of the globe. Considering that the European Court of Justice has taken seemingly generic terms such as feta, and determined that, as related to cheese, feta is exclusively under the control of Greece, it appears that the notion that vodka can be a term exclusively controlled by Poland or Russia is not as impossible as it may initially seem. Furthermore, within the European Union itself, several nations have created national geographic indications for their own domestic vodkas. However, the intellectual property laws of the European Union only extend as far as the Union's borders.

216. See Lisbon Agreement, *supra* note 4, art. 5(3); Gervais, *supra* note 206, at 565.

217. See Lisbon Agreement, *supra* note 4, art. 5(3); Gervais, *supra* note 206, at 565.

218. Gervais, *supra* note 206, at 565.

219. Lisbon Agreement, *supra* note 4, art. 6.

220. See Gervais, *supra* note 206, at 565.

The limited impact of the European Union's laws on geographic indications is made evident by the laws of the United States, where certain geographic indications which are fully protected under European Union law, are ignored or considered semi-generic. Today, the difficulty a country faces, in taking a drink or foodstuff that is disseminated across the globe to the point that it loses any relation to the place where it originated and making it an exclusive product of a single nation is clearly monumental. The task involves considerable diplomatic maneuvering and possibly extensive amounts of litigation. It seems that the best option for a country seeking to ensure that its national product is protected in other countries from knockoffs and generic competitors is to try to create treaties with other nations on an ad hoc basis.

While large multinational treaties governing intellectual property are commendable in their vision, they are lacking in execution, as these treaties often allow contracting parties to circumvent the entirety of the treaty in instances where a generic term is involved. It seems that the only way to claim an exclusive right to a spirit or foodstuff is to prove to the world that the country has historically produced this product in a superior quality using traditional methods. In the absence of this historical record, it is increasingly difficult for a country to gain an exclusive right to a term such as "vodka."