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THE PROOF IS ON THE LABEL? PROTECTING KENTUCKY BOURBON IN THE GLOBAL ERA

*James Bonar-Bridges**

“I was brought up to believe that Scotch whisky would need a tax preference to survive in competition with Kentucky bourbon.”

-Justice Hugo Black¹

I. INTRODUCTION: THE SPIRIT OF THE PAPER

Most beer, wine, or spirit enthusiasts² can faithfully recite the history (or, more often, the mythology) of their drink of choice. For those who prefer the Tripels or Saisons of Belgium, the story may be of recipes surviving cloistered in abbeys tended by Catholic monks.³ For Champagne, the legend involves another monk—Dom Pierre Pérignon—technological accretion over time, and the chalk of the northern region of France from which the drink derives its name.⁴ Scotch whisky,⁵ on the other hand, appears to carry a thoroughly pagan origin, its name deriving from the word Gaelic chiefs used for the liquid—*uisge beatha*, or “water of life”.⁶ These stories serve a higher purpose than fodder for cocktail hour, however. They connect these drinks to a region and a production process, which guarantee consistency to

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¹ *Dep’t of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 348-49 (1964) (Black, J., dissenting).

² The term “enthusiast” here should be read as “one who tends to be ardently absorbed in an interest,” and not “one who drinks an entire case of Milwaukee’s Best over the course of an afternoon.” See *Enthusiast*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/enthusiast> (last visited Mar. 26, 2016).

³ See generally MICHAEL JACKSON, *MICHAEL JACKSON’S GREAT BEERS OF BELGIUM* (6th ed. 2008).

⁴ See generally John McPhee, *Season on the Chalk: From Ditchling Beacon to Épernay*, NEW YORKER (Mar. 12, 2007), <http://www.newyorker.com/magazine/2007/03/12/season-on-the-chalk>.

⁵ See *Whisky or Whiskey?*, WHISKY FOR EVERYONE (2011), http://www.whiskyforeveryone.com/whisky_basics/whisky_or_whiskey.html (stating that the word “whisky” refers only to the drink produced in Scotland. Ireland adds an “e,” making it “whiskey.” This tradition was carried over to America by Irish immigrants in the Eighteenth Century.).

⁶ See generally MICHAEL JACKSON, *MICHAEL JACKSON’S COMPLETE GUIDE TO SCOTCH* (4th ed. 1999).

savvy consumers and protect generations of investment and reputation for the producer.

The law protects this interest through two related concepts: geographic indicators (GIs), which denote that a product originates in a certain place (e.g. “Idaho potatoes” or “Swiss Chocolate”); and appellations of origin, which go a step past GIs and indicate an adherence to a specific set of requirements and bind the product to a much more specific region (e.g. “Roquefort cheese” or “Champagne”).⁷ “Old world” nations like France and Italy have had legally enforceable standards attached to these concepts for well over a century.⁸ The United States, on the other hand, has generally rejected broader GI protections because it is a net *consumer* of products like champagne, cognac, and Roquefort, and *produces* relatively few of the foods or drinks which have protectable regional associations.⁹

In recent years, however, at least one distinctly American product has become extremely popular worldwide: bourbon whiskey. In the last five years, domestic sales of bourbon have increased by forty percent, while exports have increased by thirty-three percent.¹⁰ The process for making bourbon has been protected in the United States for a century, and is recognized throughout most of the world as a uniquely American product.¹¹ Most would also associate the product with one state—Kentucky—where bourbon was first made, and where about ninety-five percent of it is still made today.¹² Sipping a good Kentucky bourbon can inspire scenes as rich as the old world drinks mentioned above, whether they include secret prohibition-era stills hidden near a babbling brook, southern gentlemen sitting on grand porches in the thick summer air, or ladies in big hats clinking

⁷ A third, less specific level of geographic labeling is “indication of source,” which manifests itself as “Made in . . .” or “Product of . . .” on a product. The legal framework for requiring these labels is well established and generally not controversial, and it is not discussed in this paper. See *Frequently Asked Questions: Geographical Indications*, WORLD INTELLECTUAL PROP. ORG., http://www.wipo.int/geo_indications/en/faq_geographicalindications.html (last visited Mar. 26, 2016).

⁸ See Mark J. Calaguas, *A Rosé by Any Other Name: Protecting Geographical Indications for Wines and Spirits in China*, 3 LOY. U. CHI. INT’L L. REV. 257, 260–61 (2006); *id.* at 260 n.28.

⁹ See Lee Bendekgy & Caroline H. Mead, *International Protection of Appellations of Origin and Other Geographic Indications*, 82 TRADEMARK REP. 765, 766, 791 (1992).

¹⁰ *Last Five Year Annual Imports Exports*, DISTILLED SPIRITS COUNCIL OF THE U.S., http://www.discus.org/assets/1/7/DS_Exports_Imports_2010_2014.pdf (from \$769,000,000 in 2010 to \$1,022,000 in 2014). These figures probably underestimate the demand, since most bourbon goes through an aging process that keeps the supply a few years behind. See Clay Risen, *The Billion Dollar Bourbon Boom*, FORTUNE.COM (Feb. 6, 2014, 12:14 PM), <http://fortune.com/2014/02/06/the-billion-dollar-bourbon-boom/>.

¹¹ See *infra* Sec. III, IV.

¹² Ryan Valentin, *Milk and Other Intoxicating Choices: Official State Symbol Adoption*, 41 N. KY. L. REV. 1, 24 (2014).

mint juleps at the derby.¹³ The current legal regime protects a hollow, mechanical understanding of the drink. But “bourbon” under the current standards of identity can be made in any state so long as the mash bill¹⁴ is more than fifty-one percent corn, and the distillate, aged in charred oak barrels, is at least eighty proof when bottled.¹⁵ Meanwhile, “Tennessee whiskey” is given further legal protections, and can only be made in the state of Tennessee.¹⁶

This paper suggests a two-tiered approach aimed at protecting both bourbon drinkers and the industry, given the lacking protections provided by the law. First, it advocates registering “Kentucky bourbon” as a mark of certification within the United States. Second, it argues that the definition of “bourbon” in various international agreements to which the U.S. is a party could be amended to specify “Kentucky bourbon,” as has already been done with “Tennessee Whiskey.” Part II presents a background, which looks at the historical roles of bourbon and geographic indications (GIs) on spirits and their current economic significance. Part III proposes using certification marks to delineate “Kentucky bourbon,” noting that simply requiring all “bourbon” to be made in Kentucky is probably no longer possible due to trademark erosion (or “genericization”). Part IV places “Kentucky bourbon” in the context of the global discussion on GIs, suggesting that the treaties the U.S. is already a party to could be amended to protect the future of “Kentucky bourbon,” as has already been done with “Tennessee Whiskey.” Finally, Part V concludes with a look at the political reality of what the paper has proposed, with hope for some implementation.

¹³ For an interesting look into the history of bourbon advertising, see *Bourbon Advertising Feature*, BOURBON & BANTER (Feb. 22, 2012), <http://www.bourbonbanter.com/banter/bourbon-advertising/#.VtThwvkrLIU>; see also Lawrence S. Thompson, *Bluegrass and Bourbon: The Colonel of Kentucky Fiction*, 7 GA. REV. 1, 107 (1953).

¹⁴ “Mash bill” refers to the proportion of different grains used to extract fermentable starch, and includes corn as well as some combination of rye, malted barley, and/or wheat. See *Whisky Glossary: Mash Bill*, WHISKY MAGAZINE (2016), http://www.whiskymag.com/glossary/mash_bill.html.

¹⁵ 27 C.F.R. § 5.22 (b)(1)(i) (2013).

¹⁶ See North American Free Trade Agreement, U.S.-Can.-Mex., Annex 313, ¶ 1, Dec. 17, 1992, 32 I.L.M. 289, available at <http://www.sice.oas.org/trade/nafta/chap-034.asp> (“Tennessee Whiskey . . . is a straight Bourbon Whiskey authorized to be produced only in the State of Tennessee.”).

II. BACKGROUND NOTES: A BRIEF HISTORY OF BOURBON AND GEOGRAPHIC INDICATORS

A. Still Number One: The Quintessential American Drink and Its Role in the Global Economy

To make any whiskey, a mash composed of grains (in the case of bourbon, at least fifty-one percent corn) and water is heated to release some of the sugars contained in those grains.¹⁷ Yeast is then added so as to convert the sugar into alcohol, and the resulting liquid is distilled to concentrate the alcohol.¹⁸ If bourbon is the desired product, the distilled liquid (often called “white dog”) is then aged in charred new oak barrels.¹⁹

The origin of the name “bourbon” has become clouded by time. The most common explanation is that it simply comes from Bourbon County, Kentucky, which was near the site of Baptist minister Elijah Craig’s apparent invention of the spirit shortly before Kentucky became a state in 1792.²⁰ Another theory is that the drink was invented around that same time in the Central Kentucky region by Scotch-Irish immigrants who happened upon storage in charred oak barrels as a way to make their perishable products (corn and other grains) last indefinitely.²¹ In this story, the name comes from two enterprising French brothers who had set up a shipping company in Louisville and needed a name that would appeal to their market in New Orleans.²² The drink, which mellowed and gained a deep hue in the wood barrels, reminded the Frenchmen of their native cognac, and its name—bourbon—probably did the same.²³

¹⁷ *Maker’s Mark Distillery, Inc. v. Diageo N. Am., Inc.*, 679 F.3d 410, 414-15 (6th Cir. 2012) (citing GARY REGAN & MARDEE HADDIN REGAN, *THE BOURBON COMPANION* 32-33 (1998)).

¹⁸ *Id.*

¹⁹ *Id.*; *Bourbon - Distillation*, WHISKY.COM, <https://www.whisky.com/information/knowledge/production/overview/how-bourbon-whiskey-is-made/bourbon-distillation.html> (last visited Mar. 27, 2016); Camper English, *Distillery Visit: George Dickel*, ALCADEMICS (June 8, 2012, 8:09 AM), <http://www.alcacademics.com/2012/06/distillery-visit-george-dickel.html> (stating that most Tennessee Whiskey is made through the “Lincoln County Process” that involves allowing the distillate to drip over maple charcoal, which proponents claim adds another level of filtering to the process).

²⁰ For an excellent history of the development of the bourbon industry, see *Maker’s Mark*, 679 F.3d at 415 (holding that Maker’s Mark’s practice of dipping their bottles in wax was a valid trademark).

²¹ *Id.*

²² Laura Kiniry, *Where Bourbon Really Got Its Name and More Tips on America’s Native Spirit*, SMITHSONIAN (June 13, 2013), <http://www.smithsonianmag.com/arts-culture/where-bourbon-really-got-its-name-and-more-tips-on-americas-native-spirit-145879/?no-ist>.

²³ See *id.*

Since that time, bourbon has cemented itself as the quintessential American spirit. In 1964, Congress declared bourbon a “distinctive product of the United States,” on par with other protected spirits like scotch, cognac, and Canadian whisky.²⁴ In 2007, the United States Senate adopted a resolution celebrating bourbon as “America’s Native Spirit,” and proclaimed September of that year “National Bourbon Heritage Month.”²⁵ Demand in the United States has increased in the last few years, with gross revenues of Kentucky distillers reaching \$1.25 billion in 2013.²⁶

In Kentucky—where barrels of bourbon outnumber people—the drink and the process itself are vital to the state’s economy.²⁷ A 2014 report found that bourbon contributed \$3 billion annually to the state’s economy every year (up \$1.2 billion from 2012), and that 15,400 people worked in jobs either directly or indirectly tied to bourbon distilling.²⁸ In 2013, about 630,000 people visited the Kentucky Bourbon Trail, which takes enthusiasts through the countryside of the bluegrass region of the state and into the bourbon distilleries.²⁹ There are now thirty-one distilleries in Kentucky—the most since prohibition—producing the most bourbon in forty years to meet an increased domestic and global demand.³⁰

Finally, within the last decade bourbon has become an international luxury.³¹ Kentucky’s whiskey exports have grown in value by fifty-five percent since 2010, and the state is the second largest exporter of distilled spirits in

²⁴ Eric Gregory, *1964 Congressional Resolution Declaring Bourbon ‘America’s Native Spirit’ Comes to Kentucky*, KY. DISTILLERS’ ASS’N (May 9, 2014), <http://kybourbontrail.com/1964-congressional-resolution-declaring-bourbon-americas-native-spirit-comes-kentucky/>.

²⁵ S. Res. 294, 110th Cong. (2007) (enacted). Somewhat ironically, however, intense lobbying efforts have meant that milk—and not bourbon—is the state drink of Kentucky. See Valentin, *supra* note 12, at 1.

²⁶ See Barry Kornstein, *The Economic and Fiscal Impacts of the Distilling Industry in Kentucky*, KY. DISTILLERS’ ASS’N 4 (Oct. 2014), http://kybourbon.com/wp-content/uploads/2014/08/economic_impact_2014.pdf.

²⁷ *Bourbon Facts*, KY. DISTILLERS’ ASS’N (2015), http://kybourbon.com/bourbon_culture/key_bourbon_facts/ (claiming that in 2014, there were 5.6 million barrels of bourbon aging in the state and 4.4 million people in the state).

²⁸ Kornstein, *supra* note 26, at 2 (stating that about 3,800 of these jobs are directly related to the industry, good for more than forty percent of the total distilling jobs in the United States).

²⁹ *Where the Spirit Leads You: Kentucky Bourbon Trail Experience Sets New Attendance Record*, KY. DISTILLERS’ ASS’N (2013), <http://kybourbontrail.com/spirit-leads-kentucky-bourbon-trail-experience-sets-new-attendance-record/>.

³⁰ Associated Press, *Kentucky Has the Most Distilleries Since Prohibition Ended, Report Says*, WFPL (Oct. 21, 2014), available at <http://wfpl.org/kentucky-has-the-most-distilleries-since-prohibition-ended-report-says/>.

³¹ David Serchuk, *KY Spirits Have Record Export Year as Bourbon Continues to Rise*, INSIDER LOUISVILLE (Mar. 5, 2015, 6:00 AM), <http://insiderlouisville.com/business/ky-spirits-record-export-year-bourbon-rise/> (showing that in Spain, for example, bourbon imports grew by 4,532 percent to \$49.9 million from 2010 to 2014).

America, after Tennessee.³² In January of 2014, Jim Beam was acquired by Japan's Suntory holdings for \$13.6 billion.³³

B. Rye Crimes and Misdemeanors: Adulteration Cements the Modern Definition of Bourbon

At the turn of the twentieth century, American whiskey faced an identity crisis. Distillers were skirting the traditional barrel aging process (which produced "straight whiskey") in favor of adding flavoring and coloring to clear, un-aged distillate (which was increasingly being made from molasses in New Orleans), or diluting aged product with un-aged distillate to decrease barreling times and increase profits.³⁴ Shortly after the adoption of the Pure Food and Drug Act of 1906, the Dr. Harvey Washington Wiley Act (Dr. Wiley was the Chief Chemist in the Department of Agriculture and the leading individual behind the passage of the act) ruled that the definition of "blended" in the act only covered blends of like substances.³⁵ As such, a blend of fifty-one percent straight whiskey and forty-nine percent neutral spirits could not be labelled whiskey.³⁶ President Theodore Roosevelt agreed to this interpretation of the act,³⁷ but felt it had one flaw: the imposition of such rigid standards worried importers of Irish, Scottish, and Canadian products who thought the new regulations would lead to their products being labeled "imitation whiskeys."³⁸

A few months later, newly elected President William Howard Taft decided to revisit the issue, rendering a decision that some consider to be as important as any he made as Chief Justice.³⁹ Taft's decision allowed for more options in labeling, promising that: "the public will be made to know exactly

³² Kornstein, *supra* note 26, at 4.

³³ Maggie McGrath, *Jim Beam Maker Gets \$13.6 Billion Buyout from Japan's Suntory*, FORBES (Apr. 27, 2015), <http://www.forbes.com/sites/maggiemcgrath/2014/01/13/jim-beam-maker-gets-13-6-billion-buyout-from-japans-suntory/>.

³⁴ Mike Veach, *The Taft Decision*, THE BOURBON REVIEW (2009), <http://gobourbon.com/the-taft-decision/>.

³⁵ *Id.*

³⁶ Clark Byse, *Alcoholic Beverage Control Before Repeal*, 7 LAW & CONTEMP. PROBS. 544, 553 (1940).

³⁷ *Id.* at 553-54.

³⁸ Veach, *supra* note 34.

³⁹ Byse, *supra* note 36, at 554; Jack High & Clayton A. Coppin, *Wiley and the Whiskey Industry: Strategic Behavior in the Passage of the Pure Food Act*, 62 BUS. HIST. REV. 286, 290-91 (1988) (showing the connection between Dr. Wiley and several manufacturers of "straight" whiskey, indicating that—contrary to the common historical narrative—regulatory pressure played some role in the adoption of the Pure Food and Drug Act).

the kind of whisky they buy and drink.”⁴⁰ The new requirements stated that blends of different types of whiskies would be labeled a “Blend of whiskies,” and that the grains had to be used to distill any neutral spirits, not molasses (since alcohol distilled from molasses was technically rum).⁴¹ From this decision came the definition of bourbon which still exists basically unchanged in the modern standards of identity: “Bourbon whisky’ . . . is whisky produced at not exceeding 160° proof from a fermented mash of not less than fifty-one percent corn...and stored at not more than 125° proof in charred new oak containers; and also includes mixtures of such whiskies of the same type.”⁴²

This definition most likely omits the distinction of place because bourbon was just *assumed* to be from Kentucky during this time. Several adulteration cases brought in federal courtrooms around this time have crystallized what the law’s understanding of bourbon was at the turn of the last century. In *United States v. Fifty Barrels of Whisky*, a seizure case involving an adulterated product made from molasses in New Orleans, the Maryland District Court found that affixing the label of “bourbon” to a product signaled to consumers that they were buying Kentucky whiskey for several reasons:⁴³ First, because the public conception was that “Bourbon Whisky’...indicates a liquor containing all the congeneric substances obtained by distillation from a fermented mixture of grain, of which Indian corn forms the chief part, and confined to whisky distilled in the state of Kentucky”;⁴⁴ Second, as is still the case today, “more than 90 percent. of all whisky branded ‘Bourbon Whisky’ produced in this country was produced in Kentucky.”⁴⁵ In another case before the D.C. Circuit Court, the court took notice that “it is well understood that Bourbon whiskey is a Kentucky product made principally out of corn, with sufficient rye and barley malt added to distinguish it from straight corn whiskey.”⁴⁶

C. Old Fashioned Intellectual Property: The Role of Geographic Indicators in Protecting Customers and Industries.

Geographic indicators serve at least two purposes in the spirit industry: they inform consumers of the product’s origins and they protect investment

⁴⁰ *Blended ‘Whisky’ Must Be Labeled*, CHICAGO TRIBUNE (Dec. 27, 1909), available at <http://archives.chicagotribune.com/1909/12/27/page/4/article/blended-whisky-must-be-labeled>.

⁴¹ Byse, *supra* note 36, at 554.

⁴² 27 C.F.R. § 5.22(b)(1)(i) (2013); Veach, *supra* note 34.

⁴³ *United States v. Fifty Barrels of Whisky*, 165 F. 966, 967 (D. Md. 1908).

⁴⁴ *Id.*

⁴⁵ *Id.* at 968.

⁴⁶ *Levy v. Uri*, 31 App. D.C. 441, 445 (D.C. Cir. 1908).

and innovation by local regional industries.⁴⁷ Some scholars have noted that the consumer protection interests have taken a backseat to the protection of economic interests as time has gone on, and this can be explained in part by the loss of several brands to genericization.⁴⁸

The desire know where your food comes from is not a recent trend. Geographic indicators may have been the historic precursor of trademarks, and Greek Amphoras carrying olive oil or wine were commonly inscribed with the region and producer of the contents.⁴⁹ By the fourteenth and fifteenth centuries, there were laws in Central Europe regulating wine labeling.⁵⁰ France passed a law criminalizing false GIs in 1824.⁵¹ In 1919, France began requiring intensive appellations of origin, which required specific elements of process in addition to the geographical source.⁵²

France also led the way in international agreements, starting with the Paris Convention for the Protection of Industrial Property in 1883.⁵³ This made it illegal for any signatory nation, including the United States, to import or sell any goods that fraudulently indicated their source or producer.⁵⁴ In 1891, the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods was rejected by the United States because of the higher level of protection for GIs, which hurt burgeoning American industries.⁵⁵ The 1958 Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration was the first to define “appellation of origin,” but the United States found that agreement too strict to join.⁵⁶ The reticence of the United States is common to countries

⁴⁷ Justin Hughes, *Champagne, Feta, and Bourbon: The Spirited Debate About Geographical Indications*, 58 HASTINGS L. J. 299, 303 (2006) (showing one scholar viewed the benefits from a different perspective and finding that the purposes were: “(1) to communicate geographic source, (2) to communicate (non-geographic) product qualities, and (3) to create evocative value.”); Emily Nation, *Geographical Indications: The International Debate over Intellectual Property Rights for Local Producers*, 82 U. COLO. L. REV. 959, 970 (2011).

⁴⁸ Bendekgey & Mead, *supra* note 9, at 765-66.

⁴⁹ See Hughes, *supra* note 47, at 300; Richard N. Brown, *The Archaeology and History of Intellectual Property*, 46 LES NOUVELLES 48 (2011).

⁵⁰ Hughes, *supra* note 47, at 306-07.

⁵¹ Leigh Ann Lindquist, *Champagne or Champagne? An Examination of U.S. Failure to Comply with the Geographical Provisions of the TRIPS Agreement*, 27 GA. J. INT'L & COMP. L. 309, 312-13 (1999).

⁵² *Id.*

⁵³ Molly Torsen, *Apples and Oranges: French and American Models of Geographic Indications Policies Demonstrate an International Lack of Consensus*, 95 TRADEMARK REP. 1415, 1417-18 (2005).

⁵⁴ *Id.* at 1418.

⁵⁵ *Id.* at 1419.

⁵⁶ See *id.* (defining “appellation of origin” as “the geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors . . .”).

with more recently developed economies, which did not generally have distinct products that would benefit from protection.⁵⁷

In Europe (especially France), the historical justification for using GIs—particularly for wines—has been the concept of *terroir*.⁵⁸ *Terroir* is without a direct English translation, but can be understood to mean the geophysical characteristics of the land where a product is harvested.⁵⁹ For wine, the most important geophysical considerations are the climate and the soil type nurturing the grapes.⁶⁰ The *terroir* of bourbon is influenced by six different factors: the water, the grain, the yeast, the barrels, the still, and the aging.⁶¹ Besides the mandated fifty-one percent corn, the proof requirements, and the charred oak barrels, these factors are unregulated.⁶²

Various distillers claim different sources for their product's unique identity. Although it has never been a legal requirement, bourbon has been made with limestone water since the beginning.⁶³ The corn used in the distillation process is sourced from specific farms in most cases, and the rest of the mash bill (let alone the origins of the grain) can be a mystery.⁶⁴ Some bourbon distilleries use the same yeast strain, at least since the end of prohibition, and closely guard their starter jugs, while others use combinations of several strains of yeast to achieve the desired taste.⁶⁵ The oak used in the barrels is often carefully sourced, and at least one distillery still maintains their own cooperage.⁶⁶ Two main types of stills, squat “pot stills”

⁵⁷ Bendekgey & Mead, *supra* note 9, at 765.

⁵⁸ Calaguas, *supra* note 8, at 258.

⁵⁹ Stephen M. Jurca, *What's in A Name?: Geographical Indicators, Legal Protection, and the Vulnerability of Zinfandel*, 20 IND. J. GLOBAL LEGAL STUD. 1445, 1457 (2013).

⁶⁰ *Id.*

⁶¹ Janet Patton, *The Spirit of Kentucky: To Make Bourbon, Distillers Must Harness the Elements*, LEXINGTON HERALD LEADER (June 9, 2013, 12:00 AM), <http://www.kentucky.com/news/business/bourbon-industry/article44428209.html>.

⁶² 27 C.F.R. § 5.22(b)(1)(i) (2013).

⁶³ Erica Pcterson, *Is Kentucky Limestone Water Indispensable for Bourbon?*, WFPL (Nov. 27, 2013), <http://wfpl.org/kentucky-limestone-water-indispensable-bourbon/> (discussing the same calcium-rich elixir that gives the thoroughbreds of the Commonwealth uncommonly strong bones); see Hillary Busis, *The Mane Event*, SLATE (Apr. 30, 2010, 4:05 PM), http://www.slate.com/articles/news_and_politics/explainer/2010/04/the_mane_event.html.

⁶⁴ Patton, *supra* note 61.

⁶⁵ *The Secret Is Yeast*, JIM BEAM, <http://www.jimbeam.com/en-us/behind-the-bourbon/process>; Patton, *supra* note 61.

⁶⁶ Tom Kimmerer, *Bourbon, Barrels, And Climate*, THE BOURBON REVIEW, <http://gobourbon.com/bourbon-barrels-climate/> (last visited Mar. 27, 2016) (“Wood is a highly variable, complex material, whose chemistry depends on where the tree grew, what kinds of stresses it experienced and all the events in its long life. When you take a sip of bourbon, you are tasting the entire history of an oak tree. Some distilleries are now experimenting with barrels made from individual trees from known locations to see what effect the tree’s site and history have on bourbon flavor.”); Patton, *supra* note 61 (discussing how Brown-Forman distillery operates their own cooperage and makes all of their own barrels).

and taller “column stills,” result in different organic compounds appearing in the distillate in different concentrations.⁶⁷ Finally, there is the aging process, where the charred wood of the barrel absorbs and releases the bourbon as the seasons change.⁶⁸ Tennessee state law already reflects these complex considerations by prohibiting “Tennessee Whiskey” from being aged any further than one county away from where it was distilled, in order to intensely connect the product to a specific region.⁶⁹

III. THE BOURBON KINGS? PROTECTING “KENTUCKY BOURBON” DOMESTICALLY

Despite its unique and rich history, the only protections the bourbon industry receives from the Federal Government are the requirements in the standards of identity mentioned above.⁷⁰ There are no recognized intellectual property rights acknowledging bourbon as a distinctly Kentucky industry.⁷¹ Unlike old world nations, which recognize separate property interests in GIs, the United States has regulated GIs as an aspect of trademark law.⁷² The Lanham Act creates two rights similar to trademarks: certification marks and collective marks.⁷³ Of these, a certification mark would better protect “Kentucky bourbon” as a product, for reasons outlined below.

Certification marks are typically owned by non-producer groups or state departments of agriculture, who then license others to use the mark “to

⁶⁷ HANDBOOK OF ALCOHOLIC BEVERAGES: TECHNICAL, ANALYTICAL AND NUTRITIONAL ASPECTS 523-524 (Alan J. Buglass ed., 2010) (stating there are at least forty-five different organic compounds have been connected to the complicated flavor profiles of bourbon).

⁶⁸ Patton, *supra* note 61; Ky. Rev. Stat. Ann. § 244.370 (West 2012) (explaining that Kentucky state law takes the issue of aging seriously and prohibits any whiskeys from being labeled as “Kentucky” whiskey or bourbon unless they have been aged at least a year.).

⁶⁹ Camila Domonoske, *It’s Not Tennessee Whiskey if It’s Aged in Kentucky, State Says*, NPR (June 24, 2014, 12:10 PM), <http://www.npr.org/sections/thesalt/2014/06/19/321080522/its-not-tennessee-whiskey-if-its-aged-in-kentucky-state-says> (Joe Barnes, founder of the Tennessee Whiskey Trail: “If you ask anyone in Tennessee, if they take their barrel down the street — much less across the state they’re going to get a different product, just by fluctuations in temperature and humidity . . . Aging a product in Giles County is different from aging a product in Sevier County.”).

⁷⁰ *See supra* Sec. IIB; 27 C.F.R. § 5.22(k)(1) (2015) (“Geographical names for distinctive types of distilled spirits shall be used to designate only distilled spirits conforming to the standard of identity, if any, for such type specified in this section, or if no such standard is so specified, then in accordance with the trade understanding of that distinctive type.”).

⁷¹ The Kentucky Bourbon Trail, however, is protected by a Service Mark registered by the Kentucky Distillers’ Association. *See* Bruce A. Babcock & Roxanne Clemens, *Geographical Indications and Property Rights: Protecting Value-Added Agricultural Products*, MIDWEST AGRIBUSINESS TRADE RESEARCH & INFO. CTR., at 23 (MATRIC Briefing Paper 04-MBP 7, 2004), available at <http://www.card.iastate.edu/publications/DBS/PDFFiles/04mbp7.pdf>.

⁷² Hughes, *supra* note 47, at 308-09.

⁷³ Nation, *supra* note 47, at 972.

certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics.”⁷⁴ Once a mark is created, the certifying group must affix it to every product meeting their original standards, which protects against the formation of cartels.⁷⁵ In addition, the certifying group is expected to conduct quality-control checks of the goods bearing the mark.⁷⁶ Finally, certification marks must have acquired secondary meaning.⁷⁷ Examples of these marks include “Idaho potatoes” and “grown in Idaho” (registered by the Idaho Potato Commission), “Wisconsin Real Cheese” (registered by the Wisconsin Milk Marketing Board), and “Vidalia onions” (registered by the Vidalia Onion Committee).⁷⁸ Bourbon could easily be protected with a “Kentucky Bourbon” label, since the term has acquired sufficient secondary meaning for over two-hundred years, and the method of production is already protected by both state and federal law.⁷⁹

Collective marks are far less restrictive than certification marks, and do not require an oversight of product quality or production methods.⁸⁰ Collective marks are used to indicate members of “cooperative[s], . . . association[s], or other collective group[s] or organization[s],” and nothing more.⁸¹ Collective marks can be used not only to advertise or promote goods, but also to produce, manufacture, and sell them.⁸² When used to protect agricultural products, however, collective marks may present several issues.⁸³ To be recognized, the mark itself must be distinct.⁸⁴ This requires investing large amounts of time and money on advertising and promotion, even in instances where the *product itself* is well-recognized.⁸⁵ This may be an unrealistic option for the bourbon industry in Kentucky, and the quality control of certification marks would only increase the protection of consumer interests which should be at the heart of any GI scheme.

⁷⁴ *Id.*; Calaguas, *supra* note 8, at 260-61.

⁷⁵ Nation, *supra* note 47, at 972-73.

⁷⁶ *Id.*

⁷⁷ JOHN GLADSTONE MILLS III ET AL., 1 PATENT LAW FUNDAMENTALS § 5.5 (2d ed. 2016).

⁷⁸ Nation, *supra* note 47, at 972-73; Calaguas, *supra* note 8, at 260-61.

⁷⁹ *Supra* Sec. IIC.

⁸⁰ Nation, *supra* note 47, at 972-73.

⁸¹ *Id.*

⁸² Daisuke Kojo, *The Importance of the Geographic Origin of Agricultural Products: A Comparison of Japanese and American Approaches*, 14 MO. ENVTL. L. & POL'Y REV. 275, 309 (2007).

⁸³ *See id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 310.

A. Whisk(e)y Business: Challenging Mislabeling Under United States Law

Several legal avenues exist for products that fraudulently advertise their origins. Section 2(a) of the Lanham Act allows holders of GIs to challenge trademarks that contain inaccurate geographical terms, but they must show that the holder of the trademark has intentionally deceived the public.⁸⁶ Section 43(a) of the Lanham Act grants a cause of action to parties “who believe that [they are] likely to be damaged” by products with fraudulent geographic labels.⁸⁷ In *Forschner Group, Inc. v. Arrow Trading Co.*, the Second Circuit vacated the lower court’s injunction order of a company importing “Swiss Army Knives” from China.⁸⁸ Forschner, an importer of genuine Victorinox knives, saw their profits being undercut.⁸⁹ The court found that two necessary prongs must be met in proving a geographical origin claim under section 43(a): first, the phrase at issue must be geographically descriptive; second, it must be likely to confuse the public as to the item’s origins.⁹⁰

At first glance, this would seem to hypothetically cover whiskey from another state called “Kentucky Bourbon” or “Louisville Bourbon,” but not product names meant to *evoke* Kentucky (like “Bluegrass Bourbon” or “Secretariat Bourbon”). In another case, however, *Scotch Whiskey Ass’n v. Consol. Distilled Products, Inc. and In Re Spirits Int’l N.V.*, the U.S. District Court for the Northern District of Illinois held that “Loch-a-moor” scotch and “Moskovskaya” vodka violated sections 2(a) and 43(a) of the Lanham Act.⁹¹ In that case, a survey was conducted of spirit-buying public, and the results—which showed a strong likelihood of confusion—were presented as evidence.⁹² Under the “Loch-a-moor” standard, confusing products that may damage Kentucky’s hypothetical property interest might already be on the

⁸⁶ Nation, *supra* note 47, at 981 (citing 15 U.S.C. § 2(a) (2006)).

⁸⁷ *Id.* at 982 (citing 15 U.S.C. § 1125(a)(1) (2006)).

⁸⁸ *Id.* (citing *Forschner Grp., Inc. v. Arrow Trading Co.*, 30 F.3d 348, 350 (2d Cir. 1994)).

⁸⁹ *See id.*; *Forschner Grp., Inc. v. Arrow Trading Co.*, 30 F.3d 348, 350 (2d Cir. 1994).

⁹⁰ *Id.*

⁹¹ *Scotch Whiskey Ass’n v. Consol. Distilled Prods., Inc.*, 210 U.S.P.Q. 639, 642-45 (N.D. Ill. 1981).

⁹² *See id.* (arguing that the “whisky” that was being produced in Illinois implied Scottish origins for four key reasons: 1.) “loch” was the Scottish word for lake; 2.) “moors” were geographic features unique to that area; 3.) the label on the product featured a castle (which are rare in Illinois); 4.) the label declared that the product followed an old Isle of Skye recipe); *See Linda E. Prudhomme, The Margarita Wars: Does the Popular Mixed Drink “Margarita” Qualify As Intellectual Property?*, 4 SW. J. L. & TRADE AM. 109, 137-40 (1997).

market.⁹³ However demonstrating an intentional deception under section 2(a) may prove difficult.⁹⁴

Using “Kentucky bourbon” as a protective mark even while the Commonwealth produced over ninety-five percent of all bourbon may seem unnecessary, but this discounts the genericide that has probably happened through the years.⁹⁵ Genericization occurs when a third party’s use of the word (here, the five percent of bourbon produced outside of Kentucky) is extensive enough to eliminate the geographical associations from the meaning of the word, as has happened to Swiss cheese, English muffins, or camembert (any of which can be produced anywhere).⁹⁶ The United States Patent and Trademarks Office, and the courts, will not recognize certifications or collective marks for generic products.⁹⁷ In a classic ruling on genericide in 1921, Judge Learned Hand refused to allow Bayer to register the trade name “aspirin,” finding that its common use for all painkillers had eroded its distinctiveness.⁹⁸ Similarly, Sake and Vermouth were both originally used as geographic distinctions, but these became generic names over time for rice wine and a class of fortified aperitifs.⁹⁹ In the United States, most unprotected terms are presumed to be generic.¹⁰⁰

In the United States, terms like “champagne,” “chablis,” and “burgundy” are in the purgatory of “semi-generic” designations.¹⁰¹ This means that indicators can appear on a wine label even if the grapes in the bottle did not originate in one of those regions, provided there is an actual geographic origin (e.g. “Kentucky State Champagne”) on the bottle.¹⁰² This category of labeling was established after a 2006 agreement between the European Union and the United States, and only applies to brands established before

⁹³ See *UHDCO. Reserve Straight Bourbon Whiskey*, UNION HORSE DISTILLING CO., <http://www.unionhorse.com/uhd-reserve-straight-bourbon-whiskey/> (last visited Mar. 27, 2016) (Union Horse Reserve Straight Bourbon—a Kansas spirit attaching horses to their product); see also *Yearling*, SMOOTH AMBLER SPIRITS, <http://smoothambler.com/spirits/yearling/> (last visited Mar. 27, 2016) (Yearling Bourbon—a West Virginia spirit attempting the same); see also BRECKENRIDGE DISTILLERY, <http://www.breckenridgedistillery.com/products/> (last visited Mar. 27, 2016) (Breckenridge Bourbon—putatively named for Breckenridge, Colorado, which itself was named after John C. Breckenridge, a Senator from Kentucky and the Fourteenth U.S. Vice President).

⁹⁴ *Id.*

⁹⁵ Valentin, *supra* note 12, at 24.

⁹⁶ Hughes, *supra* note 47, at 300.

⁹⁷ Nation, *supra* note 47, at 973-74 (“[B]efore the USPTO or the courts will recognize a GI as a certification or collective mark, the GI holder must prove that the GI is not generic.”).

⁹⁸ See *Bayer Co. v. United Drug Co.*, 272 F. 505 (S.D.N.Y. 1921).

⁹⁹ 27 C.F.R. § 4.24(a)(2) (2016).

¹⁰⁰ Stacy D. Goldberg, *Who Will Raise the White Flag? The Battle Between the United States and the European Union over the Protection of Geographical Indications*, 22 U. PA. J. INT’L ECON. L. 107, 137 (2001).

¹⁰¹ MILLS, *supra* note 77.

¹⁰² *Id.*

the agreement; a new vintner could not use any of these designations if they had not been grandfathered in.¹⁰³ If bourbon is still widely assumed to be a product of Kentucky, requiring labels to say “Colorado Bourbon” (as opposed to just “Bourbon” for Kentucky products) may still be a viable tactic.

Finally, many of the new bourbon distilleries are smaller operations, and allegations of regulatory capture could arise from new certification marks or collective marks, given that some of the larger distillers are parts of giant multinational groups.¹⁰⁴ Protecting the industry has always been a key impetus behind GIs and regulating the standards of identity in this country and abroad, however.¹⁰⁵ For example, the requirement for “new” barrels was urged in the late 1930s by eight states that dominated the cooperage industry (including Kentucky), and a Kentuckian was among the five representatives who urged the Federal Government to mandate age standards for whiskeys (which ultimately did not happen).¹⁰⁶

IV. ONE BOURBON, ONE SCOTCH, AND ONE . . . COGNAC?: PROTECTING BOURBON ABROAD

A. Geographic Indicators Make the Rounds: Bourbon in the TRIPs Agreement

In a global market, protecting the image of an industry requires more than careful vigilance at home. Though they have been increasingly criticized as handouts to deep-seated industries, international agreements bring important benefits to consumers as well. Pointedly, most people would feel the same way about drinking French Bourbon as they would Kentucky Cognac. Historically, new world nations (and particularly the United States) have refused to sign international treaties like the Madrid and Lisbon

¹⁰³ 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 14:19 (4th ed. 2016).

¹⁰⁴ *Brands*, BROWN-FORMAN, <https://www.brown-forman.com/brands/> (last visited Mar. 27, 2016) (Brown-Forman makes Woodford Reserve Bourbon and Jack Daniels, but also produces Chambord, Finlandia Vodka, Southern Comfort, and Korbel); *Our Brands*, DIAGEO, <http://www.diageo.com/en-row/ourbrands/Pages/StrategicBrands.aspx> (last visited Mar. 27, 2016) (Diageo owns Johnny Walker, at least twenty-four other brands of scotch, Crown Royal Canadian Whisky, Bulleit Bourbon, Captain Morgan, Smirnoff, Tanqueray, and Guinness. They also own thirty-four percent of Moët & Chandon).

¹⁰⁵ Nation, *supra* note 47, at 970.

¹⁰⁶ Raymond Urban & Richard Mancke, *Federal Regulation of Whiskey Labelling: From the Repeal of Prohibition to the Present*, 15 J.L. & ECON. 411, 423-26 (1972).

Agreements,¹⁰⁷ arguing that extensively recognizing GIs acted as a barrier to free trade and harmed domestic interests.¹⁰⁸

The tide seems to have turned on this policy of non-interventionism as countries like the United States have found that they have unique interests worth protecting and that unique items of commerce are a key way to cultivate cultural diplomacy.¹⁰⁹ The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), signed in 1994, applied to all members of the General Agreement on Tariffs and Trade (GATT), which has since become the World Trade Organization (WTO).¹¹⁰ The Agreement protected copyrights, trademarks, and patents, as well as GIs.¹¹¹ The United States was essentially handcuffed into agreeing to TRIPS, since they stood to lose valuable IP protections abroad and membership in the WTO.¹¹² One compromise that they were able to make during negotiations was a two-tiered system that afforded higher protections to wine and spirits than to food products, which was not as troubling to the United States because of preexisting protections on foreign alcohol.¹¹³

Geographic indications under TRIPS follow the concept of terroir to its legal conclusions. Qualifying GIs must link a product not just with a place, but with specific qualities attributable to the place.¹¹⁴ Enforcement under TRIPS goes further than the Lanham Act, removing subjective opinions from the equation and placing an affirmative duty on member nations to regulate goods within their borders.¹¹⁵ Articles 23 and 24 of the agreement require party nations to prevent the use or registration of geographical indications for wines and spirits that identify a place which is not the origin of the product, regardless of whether that label is misleading.¹¹⁶ Similar to the Lanham Act, however, TRIPS does not apply to products whose marks have been eroded.¹¹⁷

On the whole, wine and spirit makers in the United States have opposed TRIPS, fearing that it would strip many of them of their trademark-

¹⁰⁷ See *supra* Sec. IIC.

¹⁰⁸ Michelle Agdomar, *Removing the Greek from Feta and Adding Korbelt to Champagne: The Paradox of Geographical Indications in International Law*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 541, 580 (2008).

¹⁰⁹ *Id.* at 574.

¹¹⁰ Kevin M. Murphy, *Conflict, Confusion, and Bias Under TRIPs Articles 22-24*, 19 AM. U. INT'L L. REV. 1181, 1227 (2004); Agdomar, *supra* note 108, at 548.

¹¹¹ Agdomar, *supra* note 108, at 548.

¹¹² *Id.*

¹¹³ Steven A. Bowers, *Location, Location, Location: The Case Against Extending Geographical Indication Protection Under the TRIPS Agreement*, 31 AIPLA Q.J. 129, 131-32 (2003).

¹¹⁴ MCCARTHY, *supra* note 103, § 14:1.50.

¹¹⁵ See *id.* § 14:19.

¹¹⁶ *Id.*

¹¹⁷ Jurca, *supra* note 59, at 1448.

protected names and brands found to be in violation of another nation's GIs, even if they were using semi-generic labelling.¹¹⁸ If "Kentucky bourbon" is protected by the United States, however, the product would have similar protections worldwide, since the terroir of bourbon would be enough to qualify for the stringent GI requirements in TRIPS.¹¹⁹

B. A Few Drinks Among Friends: Is Changing the Definitions in Bilateral and Trilateral Agreements Necessary or Possible?

The United States has actively pursued bourbon's status as a uniquely American product, and it has been recognized in trade agreements with Australia,¹²⁰ Brazil,¹²¹ Chile,¹²² Germany,¹²³ South Korea,¹²⁴ and several other nations.¹²⁵ The United States even agreed to a bilateral trade agreement in 1970 with France, which states that France would protect the terms "bourbon," "bourbon whiskey," and "Tennessee whisky/Tennessee whiskey" if the US protected "Cognac," "Armagnac," and "Calvados."¹²⁶ The unique protection for Tennessee actually appears in every one of these bilateral treaties, as well as in the most important multilateral treaty of the last thirty years, the North American Free Trade Agreement (the Trans-Pacific Partnership, which has not been ratified but will likely assume this mantle from NAFTA, also contains clauses that will safeguard bourbon and Tennessee whiskey in Asian markets).¹²⁷

The North American Free Trade Agreement, which went into effect in the United States on January 1, 1994, specifically protects several "distinctive

¹¹⁸ See *supra* Sec. III.

¹¹⁹ *Id.*

¹²⁰ Valentin, *supra* note 12, at 22.

¹²¹ Proposed Amendment to the Standards of Identity for Distilled Spirits; Comment Period Extension, 77 Fed. Reg. 38758-01 (proposed June 29, 2012) (to be codified at 27 C.F.R. pt. 5) (protecting bourbon in exchange for protecting a type of rum called Cacha[ccedil]a).

¹²² Standards of Identity for Pisco and Cognac, 78 Fed. Reg. 28739-01 (May 16, 2013) (to be codified at 27 C.F.R. pt. 5) (protecting bourbon in exchange for recognizing a type of fortified wine produced in Chile and Panama called Pisco).

¹²³ Goldberg, *supra* note 100, at 137 fn.168.

¹²⁴ Louis D. Victorino & Donald P. Arnava, *The U.S.-Korea Free Trade Agreement—Expanding U.S. Business Opportunities in Asia*, 54 NO. 28 Gov't Contractor ¶ 231 (West 2012).

¹²⁵ One would assume that similar protections are in place with the Irish and Scottish governments, 27 C.F.R. § 5.22(b)(7),(8) protect those drinks. See 27 C.F.R. § 5.22(b)(7),(8) (2016).

¹²⁶ Jurca, *supra* note 59, at 1462. This protection is covered by 27 C.F.R. § 5.22(d)(2). See 27 C.F.R. § 5.22(d)(2).

¹²⁷ See Chuck Cowdery, *DISCUS Says TPA and TPP Are Good for American Booze*, THE CHUCK COWDERY BLOG (Apr. 16, 2015, 3:55 PM), <http://chuckcowdery.blogspot.com/2015/04/discus-says-tpa-and-tpp-are-good-for.html>.

products” under Annex 313.¹²⁸ All three countries who are party to the agreement (Canada, Mexico, and the United States) are required to recognize the endemic spirits of their neighbors.¹²⁹ For the United States, this means Canadian Whisky, Tequila, and Mezcal.¹³⁰ For Canada and Mexico, this means “Bourbon Whiskey and Tennessee Whiskey, which is a straight Bourbon Whiskey authorized to be produced only in the State of Tennessee.”¹³¹

These agreements go a long way to protect bourbon abroad, but how does the failure in the United States to protect “Kentucky bourbon” at the same level as “Tennessee whiskey” affect the industry or consumer protection abroad? Currently, the answer is that it probably isn’t having a detrimental effect. Most of the bourbon that is made outside of Kentucky (and Tennessee) is currently being made by small distilleries, who can’t compete on the scale of multinational companies like Diageo, Brown-Forman, and Beam Suntory.¹³² In addition, most of these bilateral and multilateral agreements seem much more interested in protecting a country’s industry than any sense of terroir attached with the product (as with the TRIPS agreement). In the future this could change, however, and thus establishing a “Kentucky bourbon” identity to match the public’s understanding of bourbon could be necessary to avoid trademark erosion at home and a weakening of exported product.

V. CONCLUSION: THE BOTTOM OF THE BARREL

Why haven’t products in Kentucky been extended the same level of protection as Tennessee whiskeys? One answer is political palatability. It costs relatively little political capital to pass Senate resolutions extolling the American spirit of a product or making September “National Bourbon Heritage Month.”¹³³ Placing restrictions on trade which could affect small businesses in someone else’s district, however, is another story. Trade associations and lobbying groups have to worry about products besides Kentucky bourbon, and have thus been reluctant to protect one state’s

¹²⁸ North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 48 (1993).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See BEAM SUNTORY, <http://www.beamsuntory.com/> (last visited Mar. 27, 2016); DIAGEO, <http://www.diageo.com> (last visited Mar. 27, 2016); BROWN-FORMAN, <http://www.brown-forman.com/> (last visited Mar. 27, 2016).

¹³³ S. Res. 294, 110th Cong. (2007) (enacted).

claim.¹³⁴ The Kentucky Bourbon Distillers Association, which has existed since 1880, is a well-organized political force with their own political action committee.¹³⁵ At present, however, their concerns seem to be lowering alcohol taxes in Kentucky, allowing sales in the third of the state's counties (39 of 120) which still prohibit serving alcohol, and promoting the Kentucky Bourbon trail.¹³⁶ In the short term, any one of those routes is less controversial and more lucrative than lobbying Congress.

Creating *new* categories ("Kentucky bourbon") rather than limiting older ones ("bourbon") would only minimally harm the growing micro-distillery movement going on in other states.¹³⁷ It would also curb the scholarly observation that retroactively limits the rights of existing trademark holders, and is politically unsavory and economically wasteful.¹³⁸ Delineating "Kentucky bourbon," on the other hand, could actually "promote the Progress of Science and useful Arts," and encourage smaller distillers to experiment and distinguish their product from the old styles.¹³⁹ The United States and the rest of the world has long recognized the merits of a fine sip of Kentucky bourbon, but protecting this institution would also allow future enthusiasts to try the whiskeys ("Wisconsin bourbon?", "Hawaii bourbon?") that are given the chance to step out from its shadow.

¹³⁴ See DISTILLED SPIRITS COUNCIL OF THE U.S., <http://www.discus.org/> (last visited Mar. 27, 2016).

¹³⁵ See KENTUCKY DISTILLERS' ASS'N, <http://kybourbon.com/> (last visited Mar. 27, 2016); FED. ELECTION COMM'N, <http://www.fec.gov/fecviewer/CandidateCommitteeDetail.do?candidateCommitteeId=C00553701&tabIndex=1> (last visited Mar. 27, 2016).

¹³⁶ *Id.*; *Kentucky's Wet and Dry Counties*, RAMPANT BRANDS (Mar. 19, 2012), <http://www.rampantbrands.com/wordpress/wp-content/uploads/areas-we-serve-ky.pdf>; Babcock & Clemens, *supra* note 71, at 23.

¹³⁷ See Sku, *The Complete List of American Whiskey Distilleries & Brands*, SKU'S RECENT EATS BLOG, <http://recenteats.blogspot.com/p/the-complete-list-of-american-whiskey.html> (last visited Mar. 27, 2016) (listing bourbon distillers across the United States).

¹³⁸ Bendekgey & Mead, *supra* note 9, at 766.

¹³⁹ U.S. CONST. art. I, § 8, cl. 8.