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## Cured Meat and Idaho Potatoes: A Comparative Analysis of European and American Protection and Enforcement of Geographic Indications of Foodstuffs

Lilian V. Faulhaber

*Georgetown University Law Center*, lvf6@georgetown.edu

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# NOTES

## CURED MEAT AND IDAHO POTATOES: A COMPARATIVE ANALYSIS OF EUROPEAN AND AMERICAN PROTECTION AND ENFORCEMENT OF GEOGRAPHIC INDICATIONS OF FOODSTUFFS

*Lilian V. Faulhaber\**

### I. INTRODUCTION

Twelve centuries after monks living near the French village of Roquefort-sur-Soulzon presented Charlemagne with a wedge of “soft, fat, somewhat friable cheese, showing veins and dots of greenish black and white color,”<sup>1</sup> Roquefort continues to be considered the “king of cheeses” by many.<sup>2</sup> This foodstuff is still produced in the natural caves of Le Combalou, adjacent to the town of Roquefort-sur-Soulzon, primarily by members of La Société Anonyme des Caves et des Producteurs Réunis de Roquefort (“La Société”).<sup>3</sup> Approximately 1600 tons of this foodstuff are produced annually.<sup>4</sup> According to various culinary experts, the unique flavor of Roquefort requires three elements: the use of sheep’s milk, the inoculation with the *Penicillium roqueforti* that grows inside the caves of Le Combalou, and the special maturing conditions of these caves.<sup>5</sup> Over the years, however, many producers of blue-veined cheeses that do not meet these requirements have attempted to profit from the reputation of this celebrated cheese by labeling their own products “Roquefort.” In 1925, the French government endeavored to prohibit such free-riding through the passage of a law limiting the Roquefort designation to cheese

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<sup>1</sup> *Douglas v. Newark Cheese Co.*, 274 N.Y.S. 406, 407 (N.Y. Spec. Term 1934).

<sup>2</sup> See “Roquefort,” in *The Food Lover’s Companion*, at [www.epicurious.com](http://www.epicurious.com) (last visited April 4, 2004) (“If not the “king of cheeses” as many proclaim, Roquefort is at least one of the oldest and best known in the world”). Epicures differ on which cheese is worthy of this title, with some arguing for Roquefort, others for Stilton, and still others for Parmigiano-Reggiano. See, e.g., Alan Davidson, Roquefort, in *The Oxford Companion to Food* 670, 670 (1999) (referring to Stilton as “one of the three most famous blue cheeses of the world” along with Roquefort and Gorgonzola); Jeffrey Steingarten, *Fear of Formaggio*, in *It Must Have Been Something I Ate* 77, 81 (2002) (referring to Parmesan as “this most perfect of cheeses”).

<sup>3</sup> See Davidson, *supra* note 2, at 670. La Société was formed in 1842. *Id.*

<sup>4</sup> See *id.*

<sup>5</sup> *Id.*

produced in the region of Roquefort-sur-Soulzon.<sup>6</sup> Thus was born one of the earliest geographic indications.

Geographic indications, as defined by the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”), are “indications which identify a good as originating in the territory of a member or region or locality in that territory where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”<sup>7</sup> While Roquefort may be one of the more famous examples, geographic indications abound, including “Idaho” for potatoes, “Parma” for prosciutto and “Vidalia” for onions.

The term “geographic indications” will be used in this Note to include both protected designations of origin (“PDOs”) and protected geographic indications (“PGIs”). Although the European Union defines PDOs as having a more direct link between the geographical region and the quality of the good produced there,<sup>8</sup> producers and consumers of all foodstuffs protected by geographic indications argue that the quality of the foodstuff is directly attributable to the geographical region.<sup>9</sup> Furthermore, even those regimes that differentiate between PDOs and PGIs extend protections to both, thereby effectively conflating the two into one category of geographic indications.

Geographic indications are often used to sell wine, spirits and foodstuffs, but they can also distinguish certain human factors associated with a geographical area, such as traditional methods of manufacture.<sup>10</sup> Their value to producers lies in three primary areas: as source identifiers, identifying goods as originating in a particular region; as indicators of quality, alerting consumers to the fact that goods originate from an area known for its quality or reputation; and as business interests, promoting

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<sup>6</sup> See Douglas, 274 N.Y.S. at 407. While Roquefort obtained its designation of origin in 1925, it was initially protected by the Law for the Protection of the Place of Origin of May 6, 1919, which created the system of appellations d’origine contrôlée (AOCs). Kazuko Masui and Tomoko Yamada, *French Cheeses* 77 (1996).

<sup>7</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 14, 1994, art. 22(1), LT/UR/A-1C/IP/1 [hereinafter TRIPS Agreement].

<sup>8</sup> See *infra* text accompanying notes 44-48.

<sup>9</sup> While the characteristics and quality of certain foodstuffs may initially appear to be less directly linked to the geographic region from which they originate, a study of literature addressing such characteristics and quality contradicts this initial appearance. See, e.g., James Beard, *The New James Beard* 584 (1981) (“The brown-skinned Idaho is our most dependable potato. Grown in lava soil, it is extremely mealy and bakes perfectly.”); R.W. Apple Jr., *For Baking, For Mashing*, *Forever*, N.Y. Times, Nov. 19, 2003, at F1 (“With cool nights, warm days, volcanic soil, low rainfall and ample water for irrigation, Idaho proved to be the ideal place to grow....Burbank russets, known today to most Americans simply as Idahos.”); Davidson, *supra* note 2, at 670 (attributing the unique flavor of Roquefort to the use of sheep’s milk, the inoculation with the *Penicillium roqueforti* that grows only inside the caves of Le Combalou and the special maturing conditions of these caves); Davidson, “Wild Rice,” in *The Oxford Companion to Food*, *supra* note 2, at 848, 848 (quoting Artemas Ward as describing the “peculiar, slightly smoky flavor” wild rice and as describing its harvesting “[i]n northern Minnesota”); Davidson, “Onions,” in *The Oxford Companion to Food*, *supra* note 2, at 556, 556 (“hybrid onions include a couple of American favourites, both of the Yellow Granex type: Vidalia, named for the town in Georgia around which growing is concentrated; and Maui, named for the Hawaiian island in whose volcanic soil and cool climate this onion is at its sweetest”); Irma S. Rombauer and Marion Rombauer Becker, *Joy of Cooking*, 297 (1997) (defining Parmigiano-Reggiano as a “mouth-filling cow’s milk cheese with a complex and pleasing aftertaste [that] is made in a small, legally-designated area of Emilio-Romagna in northern Italy”).

<sup>10</sup> P. Kanagavel, *Intellectual Property Rights: A Comprehensive Overview*, 85 *J. Pat. & Trademark Off. Soc’y* 663, 78 (2003).

the goods of a particular area.<sup>11</sup> As a press release from the European Union emphasized, the protection of geographic indications is necessary “to ensure that producers and consumers get a fair deal.”<sup>12</sup>

While the general concept of protecting geographically-significant products from competition has existed for centuries,<sup>13</sup> the protection provided to geographic indications varies significantly, both between countries and according to the product being protected. Although the TRIPS Agreement, which entered into force on January 1, 1995, has moved toward harmonizing the standards of protection and enforcement at the international level,<sup>14</sup> the effects of this agreement are still fairly limited in that it offers a two-tier system of protection. Wines and spirits are offered additional protection under Article 23, which protects against any use for products not originating in the location indicated by the geographic indication.<sup>15</sup> All other products, including foodstuffs, fall under Article 22, which only protects against the misleading use of a geographic indication.<sup>16</sup> This difference means that, while any use of the term “Cognac” to refer to a product that does not originate in the protected region is per se unlawful, use of the term “Parmigiano Reggiano” will not be deemed unlawful until it has been proven that the specific designation misled consumers.<sup>17</sup> Protection of geographically significant foodstuffs thus requires that producers meet a burden of proof not required of producers of geographically-significant wines and spirits.

Two entities that offer greater protection to geographic indications of foodstuffs than that provided under Article 22 are the European Union (“EU”) and the United States. Since the protection of foodstuffs in both Europe and America is a less settled area of law than the protection of wines and spirits,<sup>18</sup> this Note will explore the different protection and enforcement of geographic indications of foodstuffs in the European Union and the United States. While this comparison is itself valuable given current uncertainty as to whether the EU or U.S. approach would prevail if the TRIPS Agreement was expanded to grant foodstuffs greater international protection, it also highlights fundamental differences between Europe and America – and predicts significant changes that could arise in the event of future harmonization of the protection of geographic indications.

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<sup>11</sup> *Id.* at 677-78.

<sup>12</sup> Press Release, European Union, WTO Talks: EU steps up bid for better protection of regional quality products (Aug. 28, 2003) (on file with author).

<sup>13</sup> See “When is a Trademark not a Trademark? When is it a Geographical Indicator?” INTA International Meeting 3 (referring to the seventeenth-century East India Company profiting from geographic indications).

<sup>14</sup> Kanagavel, *supra* note 10, at 685-86.

<sup>15</sup> Burkhart Goebel, *Geographical Indications and Trademarks – The Road from Doha*, 93 *Trademark Rep.* 964, 968 (2003).

<sup>16</sup> *Id.* at 967.

<sup>17</sup> See *id.* at 967.

<sup>18</sup> Both Europe and America are similar to the TRIPS Agreement in that they both have two-tier approaches that favor the protection of wines and spirits over that of foodstuffs. See Council Regulation 2081/92, 1992 O.J. (L 208), preamble [hereinafter 2081/92] (referring to “existing Community legislation on wines and spirit drinks, which provide for a higher level of protection”); Jim Chen, *A Sober Second Look at Appellations of Origin: How the United States Will Crash France’s Wine and Cheese Party*, 5 *Minn. J. Global Trade* 29, 42 (1996) (noting that “the United States confines appellations of origin to wine,” which is regulated by the Bureau of Alcohol, Tobacco, and Firearms, within the Department of the Treasury).

Although both the United States and the European Union have chosen to protect these designations at the federal or EU level, both have approached this area of intellectual property quite differently. The distinct systems they have developed to protect geographic indications reveal more than just different approaches to foodstuff protection. By comparing these two systems, this Note provides insights on continuing differences in European and American approaches to federalism, as well as the treatment of consumers and producers in these two entities. While a comparison of intellectual property protection may not appear to implicate federal issues, marks protecting geographic indications are unique in that they are by their definition localized. By permitting sub-federal entities such as states and Member States to protect such products, the United States and the European Union must consequently address issues of state and federal power that are not necessarily associated with the protection of other marks. Moreover, the issue of whether to grant any protection raises the issues of consumer and producer protection. While producers generally want the highest possible level of protection for their own products, consumers prefer a market free of protection, where competition ideally lowers prices and ensures consumer choice. In choosing between these demands, the EU and U.S. have also revealed their preference for either consumer or producer protection. As will be shown in this Note, however, this preference is tied to the aforementioned attitudes toward federalism and must be considered when creating an international regime for geographic indications of foodstuffs.

As will be outlined in Parts II and III, the European Union and the United States have each adopted a system to protect geographic indications at the federal level that combines government regulation with judicial enforcement. In order to account for this combined judicial-regulatory approach, this Note will outline the regulatory schemes before focusing on representative cases brought before the European Court of Justice ("ECJ") and various American federal courts in order to determine how these schemes are implemented, applied and enforced in actuality. Part II will address the European Union, while Part III will focus on the United States. Each of these sections will analyze the respective European and American cases and regulations in order to glean general lessons from each region, before Part IV compares the two approaches in order to shed light on the larger lessons of federalism and producer protection that can be seen through the lens of geographic indication protection. Part V will conclude the Note.

## II. EUROPEAN PROTECTION OF GEOGRAPHIC INDICATIONS

Prior to 1993, protection of geographic indications within Europe took place on a national level. In the words of the ECJ, geographic indications were historically protected "by national provisions which were published and applied, in principle, only on the territory of the Member State which had adopted them, subject to international conventions extending protection to the territory of other Member States by common agreement of the contracting parties."<sup>19</sup> In 1993, Regulation 2081/92 entered into force and shifted this protection to the European level, thereby involving the ECJ in the enforcement of geographic indications. After detailing the

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<sup>19</sup> *Consorzio del Prosciutto de Parma and Salumificio S. Rita SpA v. Asda Stores Ltd. and Hygrade Foods Ltd.*, Case C-108/01, 2003 E.C.R. 00, para. 98.

historical enforcement of geographic indications, Part II will first outline the protections available under Regulation 2081/92 and will then present the cases before the ECJ relating to this legislation. This section will conclude with a comparison of the European cases in order to ascertain the lessons to be learned from the EU's approach.

### *A. Historical Background*

Throughout the twentieth century, nations within Europe attempted to protect producers of foodstuffs with a particular connection to the country of origin. In 1925, in order to prevent competitors from unfairly benefiting from the reputation acquired by one such foodstuff, the French Republic passed a law that prohibited any manufacturer from labeling a cheese as "Roquefort" unless such cheese had been manufactured entirely from sheep's milk in the Roquefort District of France.<sup>20</sup> This law, which grew out of the Law for the Protection of the Place of Origin of May 6, 1919,<sup>21</sup> then expanded into France's system of appellations d'origine contrôlée ("AOCs").<sup>22</sup> Under this system, the use of an AOC, which often confers significant economic benefits to the foodstuffs to which it is attached, is restricted to products processed in the same region where the raw agricultural commodity is produced.<sup>23</sup> In order to be labeled Roquefort under the AOC system, a blue-veined cheese thus must be both made from the milk of sheep in the region of Roquefort-sur-Soulzon and must itself be processed and aged in that region.<sup>24</sup>

Once a producer is found to qualify for an AOC, that producer is entitled to certain rights relative to those who do not meet the requirements of the AOC. According to France's Code de la Consommation, favored producers are granted the right to produce and market an AOC-protected foodstuff; rights and claims against producers who misappropriate the AOC; the power to challenge an AOC not granted in accordance with previously established geographic criteria; and immunity against the transformation of an AOC into a generic label.<sup>25</sup> Under this fourth benefit, once a foodstuff is granted AOC status, it can never fall into the public domain.<sup>26</sup>

While AOCs were not unique to France,<sup>27</sup> such strong protection was not uniformly present throughout the European Union. In the United Kingdom, for example, producers of geographically-significant foodstuffs had little protection under national law. Not only did England not have a specific system for the protection of geographic indications, but it did not even have a general law of unfair competition.<sup>28</sup>

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<sup>20</sup> See *Douglas v. Newark Cheese Co.*, 274 N.Y.S. 406 (N.Y. Spec. Term 1934).

<sup>21</sup> Masui and Yamada, *supra* note 6, at 77.

<sup>22</sup> Note that AOC protection now takes place by way of the EU registration system. See *infra* text accompanying notes 104-09.

<sup>23</sup> See Chen, *supra* note 18, at 29.

<sup>24</sup> This requirement explains why culinary experts are able to credit the flavor of Roquefort to three elements: the use of sheep's milk, the inoculation with the *Penicillium roqueforti* that grows inside the caves of Le Combalou, adjacent to Roquefort-sur-Soulzon, and the special maturing conditions within these caves. See Davidson, *supra* note 2, 670.

<sup>25</sup> Chen, *supra* note 18, at 37-38.

<sup>26</sup> See *id.* at 38.

<sup>27</sup> See *id.* at 30 ("AOCs are commonplace in the civilian legal systems of Catholic Europe").

<sup>28</sup> See Norma Dawson, *Locating Geographical Indications – Perspectives from English Law*, 90 *Trademark Rep.* 590, 593 (2000). Although Dawson suggests that this weak protection may be due to

Due to the principle of territoriality, such national differences posed a severe limitation to the protection of geographic indications beyond national borders. Before 1993, ECJ case law stated that protection of geographic indications was limited to the state that granted the protection.<sup>29</sup> The French AOC system could not, therefore, prevent an English producer of a cheese that did not meet the AOC specifications for Roquefort from marketing this product as Roquefort within England. Only when this producer attempted to export the cheese to France would France's stringent protections take effect.<sup>30</sup>

Further complicating the purely national regimes existing in Europe was the two-tiered form of protection that many of these systems provided. In strongly protective countries such as France and Spain, geographic indications as such were never defined in statutes or regulations. Instead, protection of these labels was divided into two separate approaches: protection of indications of provenance and protection of designations of origin.<sup>31</sup> Indications of provenance ["Indication of provenance," like "designation of origin," is a term of art, which I'm defining in this sentence. This should not be changed.] , which were meant merely to inform consumers of the place from which the product originated, were protected by "rules designed to suppress misleading advertising, or indeed the abusive exploitation of another's reputation."<sup>32</sup> Designations of origin, in contrast, informed consumers that the product originated in a certain geographical area and that it adhered to certain quality standards.<sup>33</sup> These latter indications, which included French AOCs, were protected by stricter regimes.<sup>34</sup>

In response to the problems inherent in the existence of multiple regimes within Europe, a network of international agreements arose to supplement these national protections. Under the 1951 International Convention on the Use of Designations of Origin and Names for Cheeses, known as the Stresa Convention, producers are prohibited from using "all specifications which constitute false information as to the origin, variety, nature or specific qualities of...cheeses."<sup>35</sup> More broadly, the 1958 Lisbon Agreement for the Protection of Appellations of Origin and their

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England "possessing few native geographic indications of major economic significance," it is instructive to note that the United Kingdom registered sixteen foodstuffs such as White Stilton cheese and Buxton blue under Regulation 2081/92. Dawson, *supra* note 28, at 593; see Council Regulation 1107/96, 1996 O.J. (L 148) [hereinafter 1107/96].

<sup>29</sup> See *Kingdom of Denmark, Federal Republic of Germany and French Republic v. Commission*, Joined Cases 289/96, C-293/96 and C-299/96, 1999 E.C.R. I-01541, para. 69, citing *Exportur SA v. LOR SA and Confiserie du Tech SA*, Case C-3/91, 1992 E.C.R. I-5529, para. 12.

<sup>30</sup> See *Exportur*, 1992 E.C.R. I-5529 at para. 12 ("...protection of indications of provenance and designations of origin is governed by the law of the country where protection is sought (the country of importation) and not by that of the country of origin. Protection is thus determined by the law of the country of importation").

<sup>31</sup> See *id.*, para. 11.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> See *id.* (referring to "special rules laid down in the statutes or regulations by which they [the designations of origin] are established").

<sup>35</sup> Jenny Mosca, *Recent Development. The Battle Between the Cheeses Signifies the Ongoing Struggle to Protect Designations of Origin within the European Community and in the United States in Consorzio per la Tutela del Formaggio Gorgonzola v. Kaserei Champignon Hofmeister GmbH & Co. KG*, 8 Tul. J. Int'l & Comp. L. 559, 570 (2000).

International Registration established an international registration system for AOCs.<sup>36</sup>

Alongside these multilateral agreements, many nations within Europe signed bilateral accords granting recognition to one another's national protections. These agreements included a 1952 agreement between the Austrian and Italian governments to protect substantial and compelling national interests in preventing unfair competition between Member States;<sup>37</sup> a 1972 convention between the Republic of Austria and the Kingdom of Greece relating to the protection of indications of provenance, designations of origin and names of agricultural, craft and industrial products;<sup>38</sup> and a 1973 convention between the French Republic and the Spanish State on the protection of designations of origin, indications of provenance and names of certain products.<sup>39</sup>

These international agreements were not sufficient to harmonize the disparate national systems within the European Union. Instead, by the 1990s, some Member States still protected geographic indications much more strongly than did others and, apart from those situations in which the country of origin was party to an applicable international convention or bilateral agreement, these protections applied only to products sold within the country. It was in this context that the institutions of the European Union created a Community approach to the protection of geographic indications of foodstuffs.

### *B. Regulation 2081/92*

On July 14, 1992, the Council of Ministers of the European Union passed Regulation 2081/92 on the protection of geographic indications and designations of origin for agricultural products and foodstuffs ("2081/92").<sup>40</sup> The Regulation went into effect on July 25, 1993.<sup>41</sup> This regulation was based on the agricultural protection power conferred to the Council under Article 37 (ex Article 43) of the Treaty Establishing the European Community ("EC Treaty").<sup>42</sup> The Council justified

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<sup>36</sup> See *id.* at note 90.

<sup>37</sup> See *id.* at 570.

<sup>38</sup> See *Kingdom of Denmark, Federal Republic of Germany and French Republic v. Commission*, 1999 E.C.R. I-01541 at para. 27.

<sup>39</sup> See *Exportur*, 1992 E.C.R. I-5529 at para. 4.

<sup>40</sup> See Council Regulation 2081/92.

<sup>41</sup> See *Kingdom of Denmark, Federal Republic of Germany and French Republic v. Commission*, 1999 E.C.R. I-01541 at para. 6.

<sup>42</sup> For the sake of clarity, after providing readers with one parenthetical reference to an Article's old numbering, this Note will refer to Articles in the EC Treaty according to their numbering in the Treaty of Amsterdam that went into effect on May 1, 1999. Although many of the cases and regulations discussed herein were written prior to this date, and thus refer to the Articles according to the previous numbering system, all Articles will be numbered according to the new system. Article 37 established the EU's Common Agricultural Policy (CAP). See 2081/92, preamble. The Council stated that "as part of the adjustment of the common agricultural policy the diversification of agricultural production should be encouraged so as to achieve a better balance between supply and demand on the markets [and that] the promotion of products having certain characteristics could be of considerable benefit to the rural economy, in particular to less-favored or remote areas, by improving the incomes of farmers and by retaining the rural population in these areas." 2081/92, preamble. The Council also noted that "it has been observed in recent years that consumers are tending to attach greater importance to the quality of foodstuffs [and that] this quest for specific products generates a growing demand for agricultural products or foodstuffs with an identifiable geographical origin." 2081/92, preamble.



the passage of the regulation by arguing that “a framework of Community rules on protection will permit the development of geographic indications and designations of origin since, by providing a more uniform approach, such a framework will ensure fair competition between the producers of products bearing such indications and [enhance] the credibility of the products in the consumer’s eye.”<sup>43</sup>

Following the precedent set by national regulations, 2081/92 protects two different levels of geographic indications: protected designations of origin (“PDOs”) and protected geographic indications (“PGIs”).<sup>44</sup> Both PDOs and PGIs refer to “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.”<sup>45</sup> PDOs, however, are limited to products whose qualities are “essentially or exclusively due to a particular geographical environment with its inherent natural and human factors” and which are produced, processed and prepared in the defined geographic area.<sup>46</sup> PGIs, in contrast, may describe any foodstuffs that “possess a specific quality, reputation or other characteristics attributable to that geographical origin” and that are either produced, processed or prepared in the defined geographic area.<sup>47</sup> Despite this differentiation, both PDOs and PGIs are afforded the same level of protection under 2081/92.<sup>48</sup>

2081/92 sets out a procedure under which products that are registered as geographic indications at the Community level enjoy protection in every Member State.<sup>49</sup> As of July 25, 1993, an association of producers or processors of a geographically-significant foodstuff may apply for registration.<sup>50</sup> In certain circumstances, a natural or legal person may also be an applicant.<sup>51</sup> As part of the application, the applicant must draft a product specification, which outlines the requirements with which foodstuffs must comply to be eligible to use a geographic indication.<sup>52</sup> This application will then be sent to the Member State in which the geographical area is located and the Member State will be responsible for verifying that the application is justified and forwarding it to the Commission.<sup>53</sup> Upon

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at Art. 2(2).

<sup>45</sup> *Id.* at Art. 2(2)(a) and Art. 2(2)(b).

<sup>46</sup> *Id.* at Art. 2(2)(a).

<sup>47</sup> *Id.* at Art. 2(2)(b).

<sup>48</sup> The rest of 2081/92 does not differentiate between the protection of PDOs and PGIs. Instead, the distinction between these two categories must be made by the producer or group of producers initially registering the geographic indication. See 1107/96 (with parenthetical references to each geographic indication’s designation as a PDO or a PGI).

<sup>49</sup> See 2081/92, preamble.

<sup>50</sup> *Id.* at Art. 5(1).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at Art. 4(1). The product specification must include at least the following nine requirements: 1) the name of the agricultural product or foodstuff, including the geographic indication; 2) the description of the agricultural product or foodstuff; 3) the definition of the geographical area; 4) evidence that the agricultural product or foodstuff originates in the geographical area; 5) a description of the method of obtaining the agricultural product or foodstuff; 6) the details bearing out the link with the geographical environment or the geographical origin, depending on the product’s designation as a PDO or PGI; 7) details of the inspection structures to be provided; 8) the specific labeling details; and 9) any requirements laid down by Community and/or national provisions. 2081/92, Art. 4(2).

<sup>53</sup> *Id.* at Arts. 4-5. If the name refers to a geographical area located in more than one Member States, all interested Member States will be consulted before forwarding the application on to the Commission. See *Id.* at Art. 5(5).

receiving the application, the Commission is given six months to verify the application, after which the Commission will enter the product's name in a register of protected designations of origin and protected geographic indications.<sup>54</sup>

During this process, and for six months following the publication of the protected name, Member States and natural or legal persons who can demonstrate a legitimate economic interest are permitted to object to the registration.<sup>55</sup> Objection is permitted on three grounds: that the name does not meet the definition of either a PDO or a PGI, that the name would jeopardize an existing trademark or that the name is generic.<sup>56</sup> As the regulation explicitly warns, "names that have become generic may not be registered."<sup>57</sup> Genericization is defined as becoming "the common name of an agricultural product or foodstuff," regardless of whether the name relates to the place or region where the product of foodstuff was originally produced or marketed.<sup>58</sup>

Once a name is registered as a geographic indication, the consequences of such registration are quite far-reaching. Throughout Europe, geographic indications may only appear on agricultural products and foodstuffs that comply with 2081/92.<sup>59</sup> In order to ensure compliance and determine whether foodstuffs bearing a protected name meet the specific requirements outlined in the product specification, Member States are required to have inspection structures,<sup>60</sup> the cost of which is borne by the producers using the protected geographic indication.<sup>61</sup>

Registered names are explicitly protected against the following four encroachments: 1) any direct or indirect commercial use of a registered name by similar products not covered by the registration insofar as using the name exploits the reputation of the protected name; 2) any misuse, imitation or evocation, even if the true origin is indicated or the protected name is translated or accompanied by an expression such as "style," "type," etc.; 3) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product; and 4) any other practice liable to mislead the public as to the true origin of the product.<sup>62</sup> A registered geographic indication also invalidates any future attempt to register that same name as a trademark.<sup>63</sup> Finally, registered names are protected from ever becoming generic, meaning that registration under 2081/92 protects a foodstuff for perpetuity, regardless of changing consumer perceptions.<sup>64</sup>

2081/92 does not provide any specific remedies to protect against the infringement of a geographic indication. Instead, since cases involving misuse of a

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<sup>54</sup> Id. at Arts. 6(1) – 6(3).

<sup>55</sup> Id. at Arts. 7(1)-7(3).

<sup>56</sup> Id. at Art. 7(4).

<sup>57</sup> Id. at Art. 3(1).

<sup>58</sup> Id.

<sup>59</sup> Id. at Art. 8.

<sup>60</sup> Id. at Art. 10.

<sup>61</sup> Id. at Art. 10(7).

<sup>62</sup> Id. at Art. 13(1).

<sup>63</sup> Id. at Art. 14. A pre-existing trademark does not, however, automatically pre-empt the registration of a name as a geographic indication. See id. at Art. 14(2). Only when such registration is liable to mislead the consumer "in the light of a trade mark's reputation and renown and the length of time it has been used" is such subsequent registration disallowed. Id. at Art. 14(3).

<sup>64</sup> Id. at Art. 13(3).

registered name are heard by national courts rather than the ECJ,<sup>65</sup> the available relief depends on national legislation.<sup>66</sup> National courts have shown themselves in recent cases to be willing to hear claims for injunctive relief under 2081/92.<sup>67</sup>

Registration under 2081/92 is not limited to Member States. Countries outside the European Union may also register for protection of geographic indications as long as they are able to provide the product specification and inspection regime required by the regulation and as long as the name of the country of origin is clearly indicated on the product's label.<sup>68</sup>

In order to guarantee this protection, national and Community courts alike are authorized to consider claims under 2081/92,<sup>69</sup> and cases in both systems show the variety of claimants who have standing in such cases. States, private associations, and private individuals may all bring claims under 2081/92, and private parties have even used interpretations of the regulation as a defense in criminal cases.<sup>70</sup>

Although this regulation went into effect in 1993, the Council did provide certain Member States with a derogation procedure. Under Article 13(2) of 2081/92, those Member States that had previously permitted the use of a registered geographic indication on products that did not meet the specifications laid out under 2081/92 would be granted a five-year extension during which such use would not be deemed illegal.<sup>71</sup> This derogation was limited, however, in that it only applied to Member States other than the one in which the geographic indication originated and in that, even during the derogation period, the product's label must clearly indicate its true origin.<sup>72</sup> In March 1996, this derogation was extended for five more years under Regulation 535/97.<sup>73</sup>

After the entry into force of 2081/92, Member States were required to provide the Commission with a list of legally protected names or, for those Member States that did not have a system of protection, a list of names they wished to register.<sup>74</sup> This list later became Commission Regulation 1107/96, which lists those geographic

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<sup>65</sup> Cases between two private parties only appear before the ECJ as preliminary references from national courts. See generally Article 220 (ex Article 165) through Article 245 (ex Article 188) (defining the Court's jurisdiction). The cases over which the Court has original jurisdiction that refer to geographic indications are not those concerned with one private party's charge that the other violated a registered name. See, e.g., *infra* text accompanying notes 81-132.

<sup>66</sup> See *Schutzverband gegen Unwesen in der Wirtschaft EV v. Warsteiner Brauerei Haus Cramer GmbH & Co. KG*, Case C-312/98, 2000 E.C.R. I-9187 (referring to Germany's Law on Protection of Trade Marks and Other Signs, which sets out "the procedure to be followed for the registration of geographic indications and designations of origin within the meaning of Regulation No. 2081/92, the arrangements for supervision and monitoring laid down by that regulation, the remedies available and their limitation period").

<sup>67</sup> See *Consorzio del Prosciutto de Parma*, 2003 E.C.R. 00 at para. 25.

<sup>68</sup> See 2081/92, Art. 12.

<sup>69</sup> This authorization depends on courts' jurisdiction. The ECJ, for example, hears cases brought against the Commission, while national court hear cases between private parties. See *supra* note 65.

<sup>70</sup> See *Kingdom of Denmark, Federal Republic of Germany and French Republic v. Commission*, 1999 E.C.R. I-01541 (Member States suing the Commission); Case C-108/01 (Italian producers suing to protect their own protected geographic indication); Criminal proceedings against Dante Bigi, Case C-66/00, 2002 E.C.R. I-5917 (private criminal defendant using conflict between Article 28 and 2081/92 as a defense).

<sup>71</sup> See 2081/92, Art. 13(2).

<sup>72</sup> See *id.* at Art. 13(2). See also *Bigi*, 2002 E.C.R. I-5917, at ruling.

<sup>73</sup> See *Kingdom of Denmark, Federal Republic of Germany and French Republic v. Commission*, 1999 E.C.R. I-01541 at para. 18.

<sup>74</sup> See 2081/92, Art. 17(1).

indications that the Commission determined fulfilled the requirements of 2081/92. Each product is designated as either a PDO or a PGI and categorized according to its primary ingredients.<sup>75</sup> 1107/96 also lists names for which Member States did not seek protection, such as Camembert, Emmental, Brie, Gouda and Cheddar.<sup>76</sup>

The creation of a supranational system of registration for geographic indications had far-ranging consequences for protection of geographically significant names within the European Union. First, this form of protection for geographic indications is much less restrictive than the granting of a trademark. Whereas the latter can be used only by its owner, 2081/92 confers a collective monopoly on all producers who meet the product specifications of a particular geographic indication.<sup>77</sup> Second, 2081/92 effectively harmonizes the many disparate systems of regulations that had previously existed throughout Europe. It is no longer necessary that individual countries sign agreements to recognize one another's protections. Instead, a name that was previously protected in one Member State is now protected throughout the European Union. While offering greater protection to producers from the protected geographic area, this also means that producers from other Member States that were not previously subject to a protection are now barred from using a label that may have conferred significant commercial advantage.

Finally, 2081/92 had the effect of eliminating Member State protection regimes that were not compatible with 2081/92. While Member States are permitted to grant transitional national protection to a geographic indication that has been proposed to the Commission for registration under 2081/92, this protection ends on the date the Commission makes its decision on registration.<sup>78</sup> Even during the transition period, such national protections must only affect trade within the Member State and cannot impair intra-Community trade.<sup>79</sup> 2081/92 thus either subsumed national regimes, such as the French AOC system, by registering their protected products, or invalidated those that could not be incorporated into the supranational system.

2081/92 is not, however, the only system of protection in force in the EU. Many Member States, while not permitted to have their own separate regimes for protecting specific geographic indications, have still retained criminal laws forbidding fraudulent or misleading labeling. These laws, combined with the fact that the ECJ does not have original jurisdiction over cases between private parties, mean that national courts are often responsible for deciding cases on the misuse of

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<sup>75</sup> See 1107/96 (categorizing products as fresh meat (and offal); meat-based products; cheeses; other products of animal origin (eggs, honey, milk products excluding butter, etc.); oils and fats; olive oils; fruits, vegetables and cereals; ciders; beer; natural mineral waters and spring waters; bread, pastry, cakes, confectionery, biscuits and other baker's wares; essential oils).

<sup>76</sup> See 1107/96. Note that, while Camembert is not a protected term, France did register Camembert de Normandie as a protected designation of origin. See *id.*

<sup>77</sup> See Opinion of Mr. Advocate General Ruiz-Jarabo Colomer, *Canadane Cheese Trading AMBA and Adelfi G. Kouri Anonymos Emoriki Kai Viomichaniki Etaireia v. Hellenic Republic*, Case C-317/95, 1997 E.C.R. I-4681, para. 36.

<sup>78</sup> See *Commission v. French Republic*, Case C-6/02, 2003 E.C.R. I-2389, para. 6. Note that the derogation discussed above tolls from the date of the decision. See *infra* text accompanying notes 104-08.

<sup>79</sup> See *id.* at para. 6. In a judgment handed down in 2000, the Court did let stand national protection of geographic labels for products where there was no link between the product's characteristics and its geographical provenance. *Schutzverband gegen Unwesen in der Wirtschaft EV*, 2000 E.C.R. I-9187. Such designations, however, are not geographic indications by definition. See *supra* text accompanying note 7.

geographic indications.<sup>80</sup> Furthermore, the transitional national measures discussed above, along with the derogation procedure laid out in the regulation itself, led to the existence of parallel national regulations for several years after 2081/92 went into effect.

### *C. Case Law Under Regulation 2081/92*

The passage of 2081/92 has therefore not necessarily limited the cases before Europe's national courts that address the protection of geographic indications. It has, however, created a whole new category of cases: those that reach the European Court of Justice, either by originating before the Court or by being referred by national courts under Article 234 (ex 177) of the Treaty of Rome.<sup>81</sup> While 2081/92 has so far led to only a limited number of ECJ rulings, representative cases can be divided into three fairly distinct groups: those that focus on the validity of 2081/92 in relation to the fundamental principles of the European Union, those that focus on the validity of national regulations after the passage of 2081/92, and those that challenge geographic indications within the framework of 2081/92. This Note will consider these three categories of cases separately.

#### 1. Challenges to the European protection of geographic indications

One of the fundamental principles of the European Union is the free movement of goods. As laid out in Article 28 (ex 30) of the Treaty of Rome, this principle means that "[q]uantitative restrictions on imports and all measure having equivalent effect shall be prohibited between Member States."<sup>82</sup> Article 29 (ex 34) imposes the same prohibition on restrictions on exports.<sup>83</sup> After the formation of the European Communities in 1957, the ECJ became increasingly skeptical of any restrictions that could hinder the free movement of goods and prevent the creation of a true common market, free of internal trade barriers. In its 1974 judgment in *Procureur du Roi v. Dassonville*,<sup>84</sup> the Court stated that "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having equivalent effect to quantitative restrictions."<sup>85</sup> This definition was then clarified in 1979, in the Court's landmark ruling in *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* ("*Cassis de Dijon*"),<sup>86</sup> in which the Court stated that restrictions on intra-Community trade resulting from disparate national marketing laws are only permissible when "those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to...the fairness of commercial

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<sup>80</sup> See *Bigi*, 2002 E.C.R. I-5917 (Italian criminal case); Criminal proceedings against Yvon Chiciak and Fromagerie Chiciak, Case C-129/97, 1998 E.C.R. I-3315 (cited in Mosca, *supra* note 35, at 580) (French criminal case).

<sup>81</sup> Article 234 grants the ECJ jurisdiction over certain preliminary references from national courts. See TEC Art. 234.

<sup>82</sup> TEC Art. 28.

<sup>83</sup> TEC Art. 29.

<sup>84</sup> *Procureur du Roi v. Dassonville*, Case 8/74, 1974 E.C.R. 837.

<sup>85</sup> *Colomer Opinion*, 1997 E.C.R. I-4681 at para. 48.

<sup>86</sup> *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, C-120/78, 1979 E.C.R. 649.

transactions and the defence of the consumer.”<sup>87</sup> As explained by Advocate General Ruiz-Jarabo Colomer, *Cassis de Dijon* and its successors mean that “measures of equivalent effect prohibited by Article [28] are only permissible if [ ] justified by a public-interest objective that takes precedence over the free movement of goods.”<sup>88</sup>

Such permissible objectives are outlined in Article 30 (ex 36) of the Treaty of Rome, which permits restrictions that would otherwise be prohibited by Articles 28 and 29 if they are justified “on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.”<sup>89</sup> Courts must thus apply a two-step inquiry to determine the permissibility of an apparent restriction on the free movement of goods. First, they must determine whether it is prohibited by either Article 28 or 29 as interpreted by the ECJ. If so, the regulation may still be valid if it is found to fall under the Article 30 (ex 36) derogation.

Given the significance of the principle of the free movement of goods to the establishment of the EU, it comes as little surprise that many of the cases addressing 2081/92 deal with the question of whether the protection of geographic indications constitutes a measure of equivalent effect prohibited by Articles 28 and 29. Most of these are references for preliminary rulings, suggesting that national courts are in a state of confusion regarding the permissible tradeoff between the value of protecting consumers and producers and that of prohibiting any intra-Community trade barriers.

The case that established the background for many of these cases was decided just as 2081/92 was being considered. Although it refers only to national protection of geographic indications, it still provides a valuable introduction to the ECJ’s case law on geographic indications both because it refers to a bilateral convention, thereby raising similar issues to those that now arise in the context of 2081/92, and because it approaches these issues similarly to later cases. *Exportur SA v. LOR SA and Confiserie du Tech SA* came to the ECJ as a reference for a preliminary ruling from the Cour d’appel de Montpellier in France.<sup>90</sup> In 1973, France and Spain had signed a bilateral convention under which both countries agreed to recognize and protect the geographic indications of the other country in accordance with the latter’s laws. *LOR* and *Confiserie du Tech* were two French confectioners who produced nougat that they labeled as “touron Alicante” and “touron Jijona.” “Alicante” and “Jijona” are the names of Spanish towns known for their nougat and *Exportur*, a Spanish producer, brought suit against the defendants for violating the 1973 convention. In deciding this case, the French court referred two questions to the ECJ: whether Articles 28 and 29 prohibit the measures for the protection of geographic indications laid out in the 1973 Franco-Spanish Convention, and, if so, whether Article 30 authorizes the protection of these geographic indications despite such a prohibition.<sup>91</sup>

In its ruling in *Exportur*, the Court found that, while the protection of geographic indications provided for in the 1973 convention did constitute a

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<sup>87</sup> Mosca, *supra* note 35, at 568 (quoting *id.*).

<sup>88</sup> *Colomer Opinion*, 1997 E.C.R. I-468 at para. 48 (referring to Criminal proceedings against Bernard Keck and Daniel Mithouard, Cases C-267/91 and C-268/91, 1993 E.C.R. I-6097).

<sup>89</sup> TEC Art. 30.

<sup>90</sup> *Exportur*, 1992 E.C.R. I-5529.

<sup>91</sup> See *id.* at para. 6.

prohibited measure under Articles 28 and 29, Article 30 justified this protection so long as such names had not become generic in the country of origin.<sup>92</sup> The Court did not, however, specify exactly what aspects of either Article 30 or the Spanish protections warranted this finding, thereby laying the groundwork for further questions about the interaction between Articles 28, 29 and 30 in the context of geographic indications.

In 1995, this question was raised when the Greek Council of State referred a request for a preliminary ruling to the ECJ. In *Canadane Cheese Trading AMBA and Adelfi G. Kouri Anonymos Emoriki Kai Viomichaniki Etaireia v. Hellenic Republic*,<sup>93</sup> Danish and German producers sought the annulment of Greek regulations regarding the designation of "feta" as a geographic indication. Although this case concerned a national regulation and did not refer specifically to 2081/92, it provided the Court with an opportunity to clarify its *Exportur* ruling. Due to the fact that the Council of State withdrew the preliminary reference in 1997, the Court never issued a ruling on the case.<sup>94</sup> It did, however, publish the opinion of one of its Advocates General that provides significant guidance as to the Court's approach to geographic indications.<sup>95</sup>

Advocate General Ruiz-Jarabo Colomer found that, while restrictions on a label such as "feta" do have equivalent effect to a quantitative restriction under Article 28, they are still justified under the Article 30 derogation for protection of industrial and commercial property.<sup>96</sup> This reasoning, if followed by the Court, would mean that the protection of geographic indications, although having effects equivalent to a trade barrier, is justified by the EU's countervailing desire to protect the commercial property of producers of geographically-significant foodstuffs.

The most recent case addressing the interplay between geographic indications and Articles 28, 29 and 30 was a preliminary ruling from the United Kingdom's House of Lords. *Consorzio del Prosciutto di Parma and Salumificio S. Rita SpA v. Asda Stores Ltd. and Hygrade Foods Ltd.* involved a suit brought by Italian producers to protect their registered geographic indication against distributors within the United Kingdom.<sup>97</sup> Italy registered "Prosciutto di Parma" under 1107/96 and restricted this designation to "ham marked with a distinguishing mark allowing it to be identified at any time, obtained from fresh legs of pigs raised and slaughtered in mainland Italy, produced in accordance with provisions laid down in the law, and aged in the typical production area for a minimum period laid down in the law."<sup>98</sup>

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<sup>92</sup> See *id.* at ruling.

<sup>93</sup> *Canadane Cheese Trading AMBA and Adelfi G. Kouri Anonymos Emoriki Kai Viomichaniki Etaireia v. Hellenic Republic*, Case C-317/95, 1997 E.C.R. I-4681.

<sup>94</sup> See *id.*, Order of 8 August 1997.

<sup>95</sup> Although not justices themselves, the Advocates General of the ECJ are often seen as expressing the views of the Court in cases that do not receive a decision. They have been described as "a high-level group of friends of the court independent of the Commission and of the litigants. Typically, the Advocates General have provided more thorough scholarship and more closely reasoned analysis than are evident in the decisions of the Court of Justice." Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 Am. J. I.L. 477, 485 (1994). The Court does not, however, always agree with the Advocates General, who are charged with making a presentation to the Court after the litigants' pleadings, and their opinions can sometimes play a role closer to that of a dissenting opinion than a restatement of the Court's approach.

<sup>96</sup> See *Colomer Opinion*, 1997 E.C.R. I-4681 at para. 79.

<sup>97</sup> *Consorzio del Prosciutto de Parma*, 2003 E.C.R. 00.

<sup>98</sup> *Id.* at para. 3.

Defendant distributors purchased ham that fulfilled these requirements, but then sliced and packaged the ham themselves and sold this as “Prosciutto di Parma.” Plaintiff producers sued for violation of 2081/92, arguing that the product specification for this geographic indication required that the slicing and packaging of hams take place in the region of production in order for the designation to be used.<sup>99</sup> The House of Lords referred several questions to the ECJ, including whether such a slicing and packaging requirement constituted a measure having equivalent effect under Article 29 and, if so, whether such a measure would nonetheless be justified.<sup>100</sup>

The Court, following the reasoning of the Advocate General in *Canadane*, found that, although such requirements did constitute measures having equivalent effect under Article 29, such protections of geographic indications were justified under Article 30 in that they protected regional producers.<sup>101</sup> The Court did not, however, find that this warranted an injunction against the UK producers because the principle of legal certainty required that the slicing and packaging requirements be better publicized in order to create a right of action against economic operators.<sup>102</sup>

In finding the violation of Article 29 justified under Article 30, the Court in *Consorzio del Prosciutto di Parma* effectively prioritized the property rights of a small number of producers over the competition and trade protection concerns embodied in the free movement of goods. Under the Italian law on which the registration of Prosciutto di Parma as a geographic indication was based, ham could only benefit from this designation if it was produced in one particular area in the province of Parma, if it met specific requirements for weight, color, aroma, and flavor, and if it had been sliced and packaged in this same area of production.<sup>103</sup> While the effect of such limitations was to restrict intra-Community trade and grant a collective monopoly to the relatively small number of producers able to meet these specifications, the Court permitted such consequences by finding the protection of commercial property to outweigh its competition and trade concerns. Taken together, *Exportur*, *Canadane* and *Consorzio del Prosciutto di Parma* show that the Court has been quite willing to uphold protections of geographic indications, both under national regulations and under 2081/92. European enforcement thus means that certain small groups of producers of geographically-significant foodstuffs are permitted to shield themselves from competition despite the Community principle of the free movement of goods.

## 2. Challenges to national protection of geographic indications

One recent case decided by the ECJ falls in a category unto itself in that it addresses not the validity of registration under 2081/92, but that of registration alongside 2081/92. In *Commission v. French Republic* (“*Salaisons d’Auvergne*”),<sup>104</sup> the Court addressed the interaction between national protections and 2081/92, thereby raising fundamental issues of federal and state power in the regulation and

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<sup>99</sup> *Id.* at paras. 2-35.

<sup>100</sup> *Id.* at paras. 36-37.

<sup>101</sup> *Id.* at para. 81.

<sup>102</sup> *See id.* at paras. 95-96.

<sup>103</sup> *See id.* at paras. 4-5.

<sup>104</sup> *Commission v. French Republic*, 2003 E.C.R. I-2389.



enforcement of geographic indications. In this case, the Commission initiated an Article 226 (ex 169) enforcement proceeding, charging that France's 1994 law granting national legal protection to the name "salaisons d'Auvergne,"<sup>105</sup> as well as to regional labels such as "Savoie" and "Franche-Comté" without registering them under 2081/92 violated France's obligations under Article 28.<sup>106</sup> The Court found for the Commission, writing that such national protections are only permitted as transitional measures while the Commission decides on a 2081/92 application and that France had failed to file such an application within a timely period.<sup>107</sup> In fact, no such application was likely to be filed due to the Commission's belief that the terms were too broad to be granted protection under 2081/92.<sup>108</sup>

This ruling means that national regulations that, unlike France's continuing AOC system, have not been subsumed into the EU regime via registration under 2081/92 are no longer valid. As the Court paraphrased the Commission's argument in *Salaisons d'Auvergne*, "since the entry into force of Regulation No 2081/92, ... protection for designations of origin and geographic indications may now ... be afforded only within the framework laid down by that regulation."<sup>109</sup> With this judgment, the ECJ clearly highlighted the federal nature of the EU's protection of geographic indications of foodstuffs. Whereas it is unlikely that a national regulation such as that addressed in *Salaisons d'Auvergne* would have even been considered by the ECJ prior to 1992, the existence of the European-wide registration system under 2081/92 effectively eliminated the authority of Member States to pass such regulations to protect their own geographically-significant foodstuffs.

### 3. Challenges to particular registrations

The ECJ's consideration of geographic indications has not been limited to cases questioning the overall validity of the principle of protecting these names. A separate group of cases has arisen that focus on the validity of specific registrations under 2081/92. In these cases, most notably Criminal proceedings against Dante Bigi<sup>110</sup> and Kingdom of Denmark, Federal Republic of Germany and French Republic v. Commission ("Feta"),<sup>111</sup> the parties do not question the validity of protecting geographic indications in general. Instead, they assert that the registration of the geographic indication in question violated the requirements of 2081/92 in that the registered name was generic.

Article 3 of 2081/92 disallows the registration of names that have become generic prior to registration.<sup>112</sup> In order to determine whether a name has become the "common name of an agricultural product or a foodstuff," the Commission must take

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<sup>105</sup> "Salaisons d'Auvergne" refers to a group of seasonings used for curing meats and fish, produced in the Auvergne region of France.

<sup>106</sup> *Commission v. French Republic*, 2003 E.C.R. I-2389 at paras. 1, 3.

<sup>107</sup> *Id.* at ruling and para. 20.

<sup>108</sup> *Id.* at para. 10 ("the Commission doubts whether [Salaisons d'Auvergne] can be registered since the regulation allows the registration of a particular product or foodstuff but not a category of products such as those covered by the term "salaisons").

<sup>109</sup> *Id.* at para. 13.

<sup>110</sup> *Bigi*, 2002 E.C.R. I-5917.

<sup>111</sup> *Kingdom of Denmark, Federal Republic of Germany and French Republic v. Commission*, 1999 E.C.R. I-01541.

<sup>112</sup> 2081/92, Art. 3(1).

account of all factors, including: “the existing situation in the Member State in which the name originates and in areas of consumption, the existing situation in other Member States, [and] the relevant national or Community laws.”<sup>113</sup> In order to illustrate its definition of genericness, the Commission required Member States to produce an indicative list of product names that, while otherwise qualifying as geographic indications, were deemed generic.<sup>114</sup> This non-exhaustive list was not, however, sufficient to prevent the ECJ from being presented with cases involving questions of genericness.

In *Feta*, the three plaintiff Member States brought suit against the Commission, arguing that the latter incorrectly permitted Greece to register “feta” as a geographic indication.<sup>115</sup> In 1994, the Hellenic Republic sought registration of the term “feta” as a PDO under 2081/92, providing the specification that feta is a “salted white cheese traditionally produced in Greece...from sheep’s milk or a mixture of sheep’s milk and goats’ milk.”<sup>116</sup> The specifications went on to require that the milk used to produce feta “must come exclusively from the regions of Macedonia, Thrace, Epirus, Thessaly, Central Greece, Peloponnese and Lesbos,” that this milk must meet certain conditions and that the cheese itself must meet certain organoleptic and taste characteristics.<sup>117</sup> In order to verify that this geographic indication was not generic, the Commission conducted an opinion poll of 12,800 nationals of EU Member States, known as a Eurobarometer survey.<sup>118</sup> The Commission also consulted the Scientific Committee for Designations of Origin, Geographic indications and Certificates of Specific Character, which based its findings on the Eurobarometer survey.<sup>119</sup> In 1996, after the completion of these various procedures, “feta” was included as a protected name under 1107/96.<sup>120</sup>

Denmark, Germany and France responded to this registration by arguing both that “feta” did not fit the definition of a geographic indication set out in 2081/92 and that it had become generic prior to the application for registration.<sup>121</sup> The Court concurred, ruling that 1107/96 must be annulled to the extent that it registered “feta” as a PDO.<sup>122</sup> The Court found that the Commission erred in determining genericness based only on the Eurobarometer survey and the findings of the Scientific Committee, both of which were founded entirely on consumer perceptions.<sup>123</sup> Instead, genericness must be determined according to the procedure set out in

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<sup>113</sup> Id. at Art. 3(1).

<sup>114</sup> See supra note 76.

<sup>115</sup> The three governments alleged infringement of 2081/92, Articles 2(3), 3(1), and 17(2). *Kingdom of Denmark, Federal Republic of Germany and French Republic v. Commission*, 1999 E.C.R. I-01541 at para. 48.

<sup>116</sup> Id. at para. 31.

<sup>117</sup> Id. at para. 32-34.

<sup>118</sup> See id. at para. 36-37. These citizens were asked whether they had seen or heard the name “feta,” with what they associate this name, whether the name evokes a country or region, and whether they consider it a common name. Id. at para. 37.

<sup>119</sup> See id. at paras. 39-41, 64.

<sup>120</sup> See 1107/96.

<sup>121</sup> See *Kingdom of Denmark, Federal Republic of Germany and French Republic v. Commission*, 1999 E.C.R. I-01541 at paras. 49-50.

<sup>122</sup> Id. at ruling.

<sup>123</sup> Id. at paras. 85-88.

2081/92, namely by taking into account all factors rather than just consumer perceptions throughout the European Union.<sup>124</sup>

This question of genericness was again raised in *Bigi*, a case the Court decided in 2002. In this criminal proceeding before Italy's Tribunale di Parma, Dante Bigi was accused of violating Italian laws on fraudulent trading, on the marketing of products bearing misleading marks or signs, and on the use of PDOs.<sup>125</sup> Bigi produced a grated cheese that did not comply with the specifications for use of the term "Parmigiano Reggiano." He sold this cheese exclusively outside Italy and labeled it as "parmesan."<sup>126</sup> The Consorzio del Formaggio Parmigiano Reggiano issued a complaint, which led to the seizure of this "parmesan" intended for export, and criminal charges were levied against Bigi.<sup>127</sup> Bigi countered that his actions fell under the derogation regime of Article 13(2) of 2081/92 since his product was intended only for export to other Member States, and that he was therefore not required to meet the specifications for use of a protected name.<sup>128</sup>

During its deliberations, the Tribunale di Parma referred this case to the ECJ for a preliminary ruling and it was as part of this referral that the question of genericness arose. In response to the questions posed by the Tribunale di Parma, the German government intervened to assert that the entire referral was inadmissible because the term "parmesan" had become a generic name and consequently was not a valid geographic indication.<sup>129</sup> The Court, however, rejected this argument, finding instead that "it is far from clear that the designation 'parmesan' has become generic."<sup>130</sup> The Court then went on to address the Italian court's questions regarding 2081/92's derogation regime, finding that this system of derogations does not apply to products originating in the Member State of the protected name.<sup>131</sup> Bigi was not, therefore, permitted to use the derogation provisions of 2081/92 as a defense since the geographic indication he allegedly misused originated in the Member State in which he was producing.<sup>132</sup>

#### 4. Similarities between cases

All of these cases before the ECJ, whether they address the validity of the registration regime, the validity of national regimes, the generic nature of a particular name or the applicability of the derogation regime, share certain similarities. Most are notable for the level of state involvement, and most share similar rhetoric, regardless of the facts or issues involved.

##### a. Public involvement

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<sup>124</sup> *Id.* at para. 88. See also *supra* text accompanying note 64.

<sup>125</sup> *Bigi*, 2002 E.C.R. I-5917 at para. 2.

<sup>126</sup> *Id.* at para. 10.

<sup>127</sup> *Id.* at paras. 11-12.

<sup>128</sup> *Id.* at para. 13.

<sup>129</sup> *Id.* at para. 15.

<sup>130</sup> *Id.* at para. 20 (referring to other governments' contention that "parmesan" is the correct French translation of "Parmigiano Reggiano," which is a valid PDO).

<sup>131</sup> *Id.* at ruling.

<sup>132</sup> *Id.*

Of the cases described above, all had Member State involvement to a varying degree. Although *Canadane* had no Member States submitting observations, the Greek government was involved as a defendant.<sup>133</sup> In *Feta*, the plaintiffs were Member State governments, while the defendant was the Commission, itself a public body. *Salaisons d'Auvergne* represented the reverse, with the Commission bringing charges against a Member State. In *Consorzio*, ostensibly a case between private producers, four Member State governments and the Commission all submitted observations, with the Commission and the Spanish, French and Italian governments arguing on behalf of the plaintiffs and the United Kingdom government defending the British producers.<sup>134</sup> Public parties also submitted observations in *Exportur* and *Bigi*, with the Commission taking part in both and the German, Spanish and United Kingdom governments playing a role in the first and the Italian, German, Greek, French, Austrian and Portuguese governments taking part in the second.<sup>135</sup>

This level of state involvement is noteworthy for two reasons. On the one hand, it highlights the ECJ's independence. Although the Court will cite Member States' arguments and refer to their observations, the mere fact of Member State involvement is not enough to determine the outcome of a case. While the Court did, for example, use the fact that the majority of Member States believed "parmesan" not to be a generic term as a reason to reject the German government's claim to that effect in *Bigi*,<sup>136</sup> the involvement of multiple Member States did not appear to have such a clear effect on the *Exportur* decision. Nor is the argument of another EU institution sufficient to convince the ECJ, as shown by its willingness to reject the Commission's arguments in *Exportur*.<sup>137</sup>

On the other hand, this Member State involvement also highlights the continuing protection of national interests in the European Union. In those cases in which Member States submitted observations, many clearly did so in order to protect their own nationals. In *Consorzio* it is unlikely that the United Kingdom's involvement was unrelated to the fact that the defendants in the case were United Kingdom distributors who, prior to the supranational registration system of 2081/92, would not have been subject to Italy's national requirements for the use of the term "Prosciutto di Parma." In *Exportur*, Spain's involvement was likely connected to the fact that a finding in favor of the French defendants would severely harm Spanish nougat producers who had heretofore been shielded from competition under the Franco-Spanish convention. In their observations in *Bigi*, it is also likely that the German and Austrian governments believed that their national cheese producers could benefit were "parmesan" found to be generic, and thus not limited to use by producers in a small region in Italy.<sup>138</sup> Finally, the countries that are actually parties in cases involving geographic indications are undoubtedly taking part in litigation to protect their national producers. The involvement of Denmark, France and Germany in *Feta* was directly linked to the fact that cheese producers in all three countries had

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<sup>133</sup> It is also possible that observations would have been submitted later had the Council of State not withdrawn its preliminary reference.

<sup>134</sup> See *Consorzio del Prosciutto de Parma*, 2003 E.C.R. 00 at para. 60-61.

<sup>135</sup> See *Exportur*, 1992 E.C.R. I-5529; *Bigi*, 2002 E.C.R. I-5917.

<sup>136</sup> See *supra* text accompanying notes 129-30.

<sup>137</sup> See *Exportur*, 1992 E.C.R. I-5529 at para. 28 ("The Commission's position...cannot be accepted").

<sup>138</sup> *Bigi*, 2002 E.C.R. I-5917, at para. 20.

produced feta prior to the passage of 1107/96,<sup>139</sup> and Greece's involvement in *Canadane* was due entirely to its attempt to protect its own cheese producers. Thus, while certain Member States may view themselves as neutral observers in cases regarding geographic indications, the majority of their observations are directly tied to assertions of the interests of their own national producers, either against other Member State nationals or against encroaching EU or national regulations.

#### b. Consumer-producer rhetoric

A further similarity between these cases, apart from the involvement of Member States and EU institutions, is the rhetoric used by the Court. Throughout these cases, the ECJ chooses to couch its approach to geographic indications in terms of the protection of both consumers and producers, not clearly favoring either side. As early as *Exportur*, the Court referred to names that “enjoy a high reputation amongst consumers and constitute for producers...an essential means of attracting custom.”<sup>140</sup>

This rhetoric of dual interests was then picked up by the Council when drafting 2081/92. Throughout the preamble to the regulation, reference is made to both consumers and producers. The diversification of agricultural production is to be encouraged both to “improve[e] the incomes of farmers” and to assist consumers who are “tending to attach greater importance to the quality of foodstuffs.”<sup>141</sup> A Community-wide approach is particularly encouraged in order to “ensure fair competition between the producers of products bearing such indications and enhance the credibility of the products in the consumers’ eyes.”<sup>142</sup> In short, “entry in a register should...provide information to those involved in trade and to consumers.”<sup>143</sup> Geographic indications, therefore, are justified on the grounds of both consumer protection and producer protection: consumers are assured of the quality of a reputable product, while producers are shielded from unfair competition making use of their product’s name. Following the rhetoric of 2081/92, neither of these principles is prioritized; rather, they complement one another in upholding the protection of geographic indications throughout Europe.

After the passage of 2081/92, the ECJ adhered to this rhetoric favoring both consumers and producers, but did so through one particular conception: “quality.” In *Consorzio del Prosciutto di Parma*, for example, the Court referred on multiple occasions to the quality guarantee inherent in protected names,<sup>144</sup> and justified its finding by pointing to 2081/92 and its intention “to meet consumers’ expectations as regards products of quality and an identifiable geographical origin and to enable producers, in conditions of fair competition, to secure higher incomes in return for a genuine effort to improve quality.”<sup>145</sup> The opinion of the Advocate General in *Canadane* echoed this focus on quality, referring to a product’s “good

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<sup>139</sup> See, e.g., *Kingdom of Denmark, Federal Republic of Germany and French Republic v. Commission*, 1999 E.C.R. I-01541 at para. 63.

<sup>140</sup> *Exportur*, 1992 E.C.R. I-5529 at para. 28. The Court continued, “They are therefore entitled to protection.” *Id.*

<sup>141</sup> 2081/92, preamble.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> See, e.g., *Consorzio del Prosciutto de Parma*, 2003 E.C.R. 00 at para. 48 (referring to the “criterion of quality to which...consumers have in recent years tended to attach greater importance”).

<sup>145</sup> *Id.* at para. 63.

reputation...amongst consumers because the geographical name guarantees...the prescribed quality of the product” and supporting the legal protection of geographical names based on the principles of “safeguard[ing] producers’ interests against unfair competition and protect[ing] consumers against information which may mislead them.”<sup>146</sup>

This balance between a consumer focus and a producer focus was reinforced in *Feta*, where the Court criticized the Commission for its myopic focus on the consumer. Whereas the Commission effectively based its findings on the Eurobarometer opinion poll, the Court argued that the genericness of a name must be determined by the totality of relevant factors, not just the perception of European consumers.<sup>147</sup> The ECJ, therefore, adheres even more strongly to the two-part focus of 2081/92 than did the Commission in its application of the regulation. Geographic indications are not, in the view of the Court, to be protected just in order to protect consumers from false or misleading information about low-quality products. Instead, geographic indications exist in Europe both for such consumer protection and for the protection of producers against tarnishment of their product and unfair competition.

### III. AMERICAN PROTECTION OF GEOGRAPHIC INDICATIONS

Federal protection of geographic indications in the United States emerged approximately five decades prior to the passage of Regulation 2081/92 in the European Union. Before 1946, such protection was limited to general provisions on mislabeling and general legal doctrines used by some courts on behalf of the producers of geographically-significant foodstuffs. In 1946, however, Congress passed the Lanham Act, within which it created certification marks. Although not limited to geographic indications, certification marks proved to be the way that most geographically-significant foodstuffs were, and still are, protected through court enforcement. This Part will first present the historical protection of geographic indications before outlining the provisions of the Lanham Act with regard to certification marks and then discussing representative American court cases addressing geographic indications. It will conclude with a comparison of the selected American cases.

#### *A. Historical Background*

Prior to 1946, federal protection of geographical names for foodstuffs was limited to general laws that forbade the labeling of products with misleading names, regardless of whether these names were geographically-significant. Even these laws were oftentimes not applicable to Roquefort, Idaho potatoes or other such foodstuffs: the 1935 Federal Alcohol Administration Act (FAAA), while establishing a strict ban on “statements [on the label] that are...false [or] misleading,” applied only to wine labels.<sup>148</sup> Nor could producers use the common law of intellectual property to

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<sup>146</sup> *Colomer Opinion*, 1997 E.C.R. I-4681 at para. 35.

<sup>147</sup> See *Kingdom of Denmark, Federal Republic of Germany and French Republic v. Commission*, 1999 E.C.R. I-01541 at paras. 73, 88.

<sup>148</sup> *Chen*, supra note 18, at 42-43 (brackets in the original).

protect geographic indications. Until 1946, fear of monopolies meant that geographical names were prohibited from being registered as trademarks.<sup>149</sup>

Furthermore, states did very little to protect geographic indications within their borders. Most state regulation of such labels arose after 1946;<sup>150</sup> earlier protections, such as the creation of an Idaho Potato Commission in 1939, were few and far between.<sup>151</sup> These were also territorially limited and applied only within the state in which they were passed.

This lack of protection directed specifically at geographic indications did not mean that such names were never protected in the United States. Any protection that did occur, however, depended entirely on judicial discretion. In the 1930s, two cases were brought before the Supreme Court of New York to protect the name "Roquefort." Both cases found for the parties seeking protection. In *Douglas v. Newark Cheese Co.*,<sup>152</sup> a French corporation and one of its American sales representatives brought suit against two American corporations, seeking an injunction to prevent the defendants from representing their blue cows' milk cheese as genuine Roquefort. The court, after describing the requirements for a cheese to be designated as Roquefort,<sup>153</sup> focused on the packaging of the cheese in this case. Although the plaintiffs were not permitted to register the geographical name "Roquefort" as a trademark, they had registered the triangular packaging of Roquefort in 1932.<sup>154</sup> Without confirming that this exclusive trademark was necessarily valid, the court still found for the plaintiffs, contending that the defendants "must not indulge in acts which will deceive the public into buying the substitute as the original Roquefort."<sup>155</sup> Furthermore, the court found that the name "Roquefort" had acquired a secondary meaning and was thus subject to protection.<sup>156</sup>

Two years later, the same plaintiffs brought a second suit against a new set of defendants. In *Douglas v. Mod-Urn Cheese Packing Co.*,<sup>157</sup> the defendants were distributors of a cheese mixture containing fifty percent cream cheese and fifty percent genuine Roquefort cheese, which they labeled as "Mod-Urn Roquefort Spread" and further designated as being "Genuine French Roquefort."<sup>158</sup> Plaintiffs brought an action for an injunction, claiming that this use of the term "Roquefort" was unfair competition. The court found that that "Roquefort" has acquired a secondary meaning" such that a "buyer of Roquefort cheese naturally assumes that he is receiving the cheese made in the Roquefort, France, district, in accordance with the peculiar process there employed."<sup>159</sup> In order to prevent the defendants "from

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<sup>149</sup> See *Community of Roquefort v. William Faehndrich, Inc.*, 303 F.2d 494, 496 (2d Cir. 1962) (quoting a commentator on the Lanham Act as writing, "If the name was to be found in an atlas..., that was sufficient to preclude registration").

<sup>150</sup> See *infra* text accompanying 196-207.

<sup>151</sup> See ID ST 22-1207 (1939 state statute defining the powers of the Idaho Potato Commission); ID ST 22-912 (1941 state statute providing for fine or imprisonment for misuse of the designation "Idaho potato").

<sup>152</sup> *Douglas v. Newark Cheese Co.*, 274 N.Y.S. 406 (N.Y. Spec. Term 1934).

<sup>153</sup> See *supra* note 24.

<sup>154</sup> *Newark Cheese Co.*, 274 N.Y.S. at 409.

<sup>155</sup> *Id.* at 413.

<sup>156</sup> See *id.*

<sup>157</sup> *Douglas v. Mod-Urn Cheese Packing Co.*, 290 N.Y.S. 368 (N.Y. Spec. Term 1936).

<sup>158</sup> *Mod-Urn Cheese Packing Co.*, 290 N.Y.S. at 369.

<sup>159</sup> *Id.* at 369.

enrich[ing] themselves at the plaintiff's expense" and "prevent fraud upon the public," the court granted the injunction.<sup>160</sup>

While *Newark Cheese* and *Mod-Urn* both constituted victories for French producers of Roquefort, these judicial holdings still did not guarantee the protection of the term "Roquefort," let alone any other geographic indication for which protection might be desired. Instead, they depended on the discretion of judges. While the judges in these two cases were willing to find a secondary meaning and view the misuse of a geographically-significant designation as a threat to consumers and producers alike, such findings were not assured. With no clear registration system, producers could not be certain that their foodstuffs would be protected from unfair competition in the United States before 1946.

### *B. Lanham Act*

On July 5, 1946, this uncertainty changed with the passage of the Trademark Act of 1946 (hereinafter "Lanham Act").<sup>161</sup> The trademark rights protected in the Lanham Act grew out of the common law of unfair competition and were enshrined by Congress under its commerce power.<sup>162</sup> Most relevant to geographic indications was a "special creature" in trademark law created with the passage of the Lanham Act:<sup>163</sup> the certification mark, which identifies both products and services as complying with a uniform standard or quality established by the certifying individual or entity.<sup>164</sup>

Certification marks are protected under Section 4 of the Lanham Act, which refers generally to "collective and certification marks" and specifically to "indications of regional origin."<sup>165</sup> Certification marks can be used to indicate the regional or other origin of a product; the material, mode of manufacture, quality, accuracy or other characteristics of a product; or the organization performing the work or labor on a product.<sup>166</sup> In order to be registered as a certification mark, a geographical name need not have a secondary meaning.<sup>167</sup> Examples of certification marks registered in the United States include Roquefort cheese,<sup>168</sup> Idaho potatoes,<sup>169</sup>

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<sup>160</sup> *Id.* at. 369-70.

<sup>161</sup> 15 U.S.C. §§ 1051 et seq.

<sup>162</sup> See Sheldon Klein, Introduction to Trademarks, in *Understanding basic Trademark Law* 99, 125 (Practising Law Institute, 2003) ("The Constitutional basis for federal trademark protection is the Commerce Clause, Article I, Section 8, Clause 8").

<sup>163</sup> Terry E. Holtzman, Tips from the Trademark Examining Operation, 81 *Trademark Rep.* 180, 180. See also *Community of Roquefort v. William Faehndrich, Inc.*, 303 F.2d 494, 497 (2d Cir. 1962) ("the Lanham Act created an entirely new registered mark which was denominated a 'certification mark'").

<sup>164</sup> Klein, *supra* note 162, at 103.

<sup>165</sup> 15 U.S.C. § 1054.

<sup>166</sup> Holtzman, *supra* note 163, at 181. These categories are not mutually exclusive. *Id.*

<sup>167</sup> See *Faehndrich*, 303 F.2d at 497. If a geographical name does have a secondary meaning, it can be registered as a trademark and may not qualify for registration as a certification mark. See Klein, *supra* note 162, at 115; Holtzman, *supra* note 163, at 189 (using the example of "Fontina," which is not registered as a certification mark, to note that the "primary significance of the term must be geographic. If the geographic term also describes the type of product certified....the geographic term will be subject to refusal or disclaimer, as appropriate.").

<sup>168</sup> See Holtzman, *supra* note 163, at 181.

<sup>169</sup> See *infra* text accompanying notes 225-36.



Vidalia onions,<sup>170</sup> Colombian coffee<sup>171</sup> and citrus products from California and Florida.<sup>172</sup>

Certification marks are not registered by producers of the goods they protect.<sup>173</sup> Instead, the owner of a certification mark is responsible for establishing the standards that products must meet to use the mark and licensing the mark to producers who meet these specifications.<sup>174</sup> Owners may be individuals, nations, states, municipalities or associations,<sup>175</sup> but they must meet the following four requirements: 1) they must exercise control over the mark; 2) they must not engage in the production or marketing of any goods or services under the mark; 3) they must not allow the mark to be used for purposes other than certification; and 4) they must not discriminately refuse to certify.<sup>176</sup> This latter requirement means that an owner must license the mark to a producer if that producer's goods or services meet the owner's standards.<sup>177</sup> Examples of certification mark owners in the United States include the Idaho Potato Commission and the Community of Roquefort.<sup>178</sup>

Although federal registration is not necessarily required for protection, it is generally recommended.<sup>179</sup> And, as shown by cases involving producers of foodstuffs that were not registered as certification marks, federal registration often provides the best form of protection for indications of geographical origin.<sup>180</sup>

Under Section 4 of the Lanham Act, registered certification marks are generally entitled to the same protections provided to trademarks.<sup>181</sup> Certification marks, however, are unique intellectual property rights in that they do not convey the exclusive rights of trademarks.<sup>182</sup> Since the owner of a certification mark may not produce goods protected by the mark and may not discriminately refuse to certify the mark, the rights provided by a certification mark are available to all those producers whose goods meet the standards set out by the owner of the mark.

A certification mark grants both the owner of the mark and "any person who believes that he or she is or is likely to be damaged by [infringement]" the right to bring a federal civil action against infringers.<sup>183</sup> The Lanham Act thus federalized the protection of geographic indications by creating a federal cause of action that could be brought against the misuse of such labels. In the words of one commentator, registration of a certification mark "confers a nationwide right of priority" over any

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<sup>170</sup> Holtzman, *supra* note 163, at 185. Vidalia onions have been described by the Eleventh Circuit Court of Appeals as being "world renown[ed], [having] a sweet taste, . . . indigenous to the South Georgia region, and [able to bring] a higher price than most other onions." *Scott v. DeMenna*, 840 F.2d 8, 9 (11th Cir. 1988).

<sup>171</sup> Holtzman, *supra* note 163, at 185.

<sup>172</sup> *Id.* at 185.

<sup>173</sup> See *id.* at 184 ("a certification mark is used only to certify the goods and services of others").

<sup>174</sup> See *id.* at 183 and 192. Part of the registration process includes identifying the specific qualities or characteristics associated with a certification mark and providing a copy of the standards. *Id.* at 192.

<sup>175</sup> *Id.* at 184-85. Umbrella organizations such as trade associations or governmental bodies or agencies may also be the owners of certification marks. *Id.* at 184-85.

<sup>176</sup> *Id.* at 186-88. See also 15 USC § 1054.

<sup>177</sup> See, e.g., *id.* at 183.

<sup>178</sup> See *Idaho Potato Commission v. Washington Potato Commission*, 410 F.Supp. 171 (D. Idaho 1975); *Community of Roquefort v. William Faehndrich, Inc.*, 303 F.2d 494 (2d Cir. 1962).

<sup>179</sup> Klein, *supra* note 162, at 103.

<sup>180</sup> See *infra* text accompanying notes 215-17.

<sup>181</sup> 15 U.S.C. § 1054.

<sup>182</sup> See *Faehndrich*, 303 F.2d at 497.

<sup>183</sup> 15 U.S.C. § 1125.

other use of the designation that does not meet the specified requirements.<sup>184</sup> This protection also has international ramifications in that it excludes entry into the United States by any goods infringing a registered mark.<sup>185</sup>

The Lanham Act specifically provides remedies for the infringement of any protected mark, meaning that misuse of a certification mark can lead to both injunctive relief and monetary damages.<sup>186</sup> Monetary recovery of profit and damages, however, is limited to situations in which the infringer knew that infringement of the certification mark was intended to be used to deceive or cause confusion or mistake.<sup>187</sup>

Since certification marks are subject to both the same benefits and the same prohibitions as trademarks,<sup>188</sup> the genericization of a mark can lead to its registration being cancelled by the Federal Trade Commission ("FTC").<sup>189</sup> Once a designation has become "the common descriptive name for the goods or services," it is no longer an indication of geographic origin and therefore may no longer be protected.<sup>190</sup> Such cancellation has not recently occurred, however, because the process requires funding that Congress has not appropriated for several years.<sup>191</sup>

Alongside the creation of a registration scheme for certification marks, the Lanham Act provides two other forms of protection for certain geographically-significant foodstuffs. The first provision, which applies more narrowly than certification marks, provides trademark rights to those geographic names that have developed a secondary meaning.<sup>192</sup> In certain circumstances, the producer of a foodstuff whose name refers to its geographic origin may be permitted to register for exclusive rights if this name has come to develop a secondary meaning while also meeting the general requirements for trademarks, such as not having also become generic.<sup>193</sup> The second provision applies much more broadly than granting either trademark or certification mark protection. Under Section 43 of the Lanham Act, civil actions are permitted when any description is used in a commercial context in such a way that it either misrepresents the "nature, characteristics, qualities, or geographic origin" of that good or is likely to cause confusion "as to the origin, sponsorship, or approval" of that good.<sup>194</sup> This false advertising provision is available to all persons who believe themselves "likely to be damaged by such act," regardless of the registration of a geographic indication.<sup>195</sup>

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<sup>184</sup> Klein, *supra* note 162, at 106.

<sup>185</sup> *Id.* at 113 (noting the requirement that marks be recorded with the U.S. Customs Service).

<sup>186</sup> See 15 U.S.C. § 1114 (Lanham Act, Section 32); 15 U.S.C. § 1116(a) (Lanham Act, Section 34, providing that the "several courts vested with jurisdiction arising under this Act shall have power to grant injunctions...to prevent the violation of any right of the registrant of a mark registered in the Patent and Trademark Office").

<sup>187</sup> 15 U.S.C. § 1114(1)(b). A question remains, however, as to whether monetary damages are permitted in the absence of evidence of counterfeiting. See *Idaho Potato Commission v. M & M Produce Farm & Sales*, 335 F.3d 130, 140-41 (2d. Cir. 2003) (questioning the district courts' "per se rule that absent counterfeiting a licensor of a certification mark may never recover profits from an infringing licensee," but declining to decide the issue).

<sup>188</sup> See Holtzman, *supra* note 163, at 189-91.

<sup>189</sup> See Klein, *supra* note 162, at 124-25.

<sup>190</sup> *Id.* at 124.

<sup>191</sup> *Id.* at 124-25.

<sup>192</sup> See *supra* note 167.

<sup>193</sup> For more on the requirements for trademarks, see generally 15 U.S.C. §§ 1051 et seq.

<sup>194</sup> 15 U.S.C. § 1125.

<sup>195</sup> 15 U.S.C. § 1125.

While it did establish a federal scheme for the protection of geographic indications, the Lanham Act did not foreclose the possibility of states also acting to protect the geographically-significant names of foodstuffs produced within their borders, as long as such protection does not impede interstate commerce.<sup>196</sup> Before 1946, Idaho passed legislation limiting the use of the word "Idaho" in connection with potatoes, but few other states had acted similarly.<sup>197</sup> As trade in foodstuffs has increased along with consumer willingness to pay more for products whose quality is believed to be linked to their geographical origin, states have become more involved in this field, creating a system of laws parallel to the Lanham Act.

Some states, such as California, have a blanket provision limiting the use of terms similar to "California-grown" in reference to any food or agricultural products.<sup>198</sup> Many other states, however, have much more specific provisions directed at criminalizing the geographic misrepresentation of specific foodstuffs. In Florida, which passed the Florida Citrus Code in 1949,<sup>199</sup> falsely shipping "foreign-grown fruit or oranges" as Florida-grown is a second-degree misdemeanor.<sup>200</sup> Georgia's Vidalia Onion Act of 1986 makes it unlawful to sell or label any onions as Vidalia onions or to use the term "Vidalia" in connection with such onions unless they meet the statute's definition of Vidalia onions and are grown within Georgia.<sup>201</sup> Violation of this statute is a felony that can lead to civil liability, fines of \$1000 to \$5000 and imprisonment for one to three years.<sup>202</sup> And the Hawaiian legislature has targeted coffee producers who use the label "100% Hawaiian coffee" for any coffee not from the state.<sup>203</sup>

As part of their regulation of geographic indications, some states also specify quality requirements that products must meet to be able to use the state's name in advertising and labeling. In 1981, for example, Minnesota passed legislation limiting the rice producers who could sell their product as "wild rice grown in Minnesota." Under its statute, not only must 100% of the rice be grown in Minnesota, but so too must it meet certain production conditions that vary depending on whether it is harvested according to traditional methods or cultivated.<sup>204</sup>

Along with the Idaho Potato Commission, which is charged both with the registration and oversight of Idaho's certification marks and with the general

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<sup>196</sup> See *infra* note 208 and accompanying text.

<sup>197</sup> See *supra* note 150-51 and accompanying text.

<sup>198</sup> See CA FOOD & AG § 43100 (defining "a deliberately misleading or unwarranted use of these items or terms [as] a misdemeanor punishable by a fine of not less than one hundred dollars (\$100) or more than three thousand dollars (\$3,000), or by imprisonment in the county jail for not more than six months, or by both the fine and imprisonment"). This law was passed in its original form in 1989. *Id.*

<sup>199</sup> FL ST 601.01.

<sup>200</sup> FL ST 865.02. A misdemeanor of the second degree is punishable by up to 60 days in prison. FL ST 775.082. This law was passed in its original form in 1971. FL ST 865.02.

<sup>201</sup> GA ST 2-14-134. Vidalia onions are defined as "varieties of *Allium Cepa* of the hybrid yellow granex, granex parentage, or other similar varieties" and the Vidalia onion production area "means a production area which encompasses only the State of Georgia or such lesser area as may be provided for." GA ST 2-14-134.

<sup>202</sup> GA ST 2-14-134, 2-14-135.

<sup>203</sup> HI ST § 486-120.6. This law was passed in its original form in 1991. HI ST § 486-120.6.

<sup>204</sup> MINN ST 30.49. Wild rice that is labeled as "natural lake or river wild rice" must be labeled differently than cultivated rice, the labeling of which also differs according to whether or not it is considered "paddy" rice. *Id.* See generally Juliana Gruenwald, *It Isn't Rice and It Isn't Always Wild*, *The Wash. Post*, Nov. 5, 2003, at F01.

oversight of the potato industry in the state,<sup>205</sup> many other state commissions have been established to monitor the quality and labeling of foodstuffs with geographical names. Georgia established a Vidalia Onion Advisory Panel,<sup>206</sup> while the Wisconsin legislature empowered the Department of Agriculture to design a logotype for “100% Wisconsin Cheese” and then monitor that its use conforms with the quality controls laid out in the state’s dairy statutes.<sup>207</sup>

The Lanham Act thus exists alongside these various state efforts to protect regional producers. The federal protections it offers, however, are much broader in scope than those offered by the states. First, the effective enforcement of state law is often territorially limited in practice, if not in theory. Second, state law provisions vary significantly by state, while the Lanham Act has the benefit of uniformity regardless of the state to which it is applied. Third, these state laws are limited by the Commerce Clause of the United States Constitution in that they cannot impose an excessive burden on interstate commerce.<sup>208</sup> Finally, while states have general laws against false advertising and mislabeling that can apply to foodstuffs from beyond their borders, the Lanham Act is much less limited in the products it can protect. In addition to protecting producers throughout the fifty states, the Lanham Act can also protect international producers selling foodstuffs within the United States; certification marks are not limited to American registrants.

### C. Case Law Under the Lanham Act

As shown by *Newark Cheese Co. and Mod-Urn Cheese Packing Co.*, state courts were protecting geographic indications prior to the Lanham Act.<sup>209</sup> Yet while both of these cases found Roquefort to be a protected designation, neither provided clear guidance for future protection, nor was either at the federal level. After 1946, cases came before the federal courts demanding specific protections under Section 4 of the Lanham Act. Protection of certification marks is not, however, the only theory under which cases have been brought. Given the variety of approaches that state and federal law has taken to geographic indications, court enforcement of these designations has also been quite varied.

#### 1. Cases outside of certification mark protection

In *re Montrachet S.A.*,<sup>210</sup> centered on the protection of trademark, rather than certification marks. In this case, a single French cheese producer appealed the decision of the Patent and Trademark Office Trademark Trial and Appeal Board denying its registration of “Montrachet” as a trademark.<sup>211</sup> According to the Trademark Trial and Appeal Board, “Montrachet,” which had originated as a

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<sup>205</sup> See ID 22-1207.

<sup>206</sup> GA ST 2-14-138.

<sup>207</sup> WI ST 93.07. The Department was empowered to create the Wisconsin logotype in 1975. WI ST 100-57.

<sup>208</sup> See, e.g., *Bridenbaug v. Freeman-Wilson*, 227 F.3d 848, 849 (7th Cir. 2000) (“the premise of dormant commerce clause jurisprudence is an inference that the grant of power to Congress in Art. I § 8 cl. 3 implies a limitation on state authority over the same subject”).

<sup>209</sup> See *supra* text accompanying notes 152-60.

<sup>210</sup> 878 F.2d 375 (Fed. Cir. 1989).

<sup>211</sup> *Id.* at 375.

geographic indication for the petitioner's product, had become a generic term for goat cheese.<sup>212</sup> The Court of Appeals for the Federal Circuit rejected this argument, writing that the genericization of a term is to be determined by looking at "how the mark is understood by the purchasing public."<sup>213</sup> Here, the Trademark Trial and Appeal Board had not met this burden, so the denial of a trademark to the producers of Montrachet was reversed.<sup>214</sup>

Whereas the petitioner in Montrachet turned to the more restrictive provisions of trademark law to protect its geographic indications, the petitioners in the more recent case of *Sugai Products, Inc. v. Kona Kai Farms, Inc.*<sup>215</sup> took an entirely different approach. In this case, petitioners had not registered their product, Hawaiian-based Kona coffee, as a certification mark, so they brought suit based on the more broadly applicable false advertising provision of the Lanham Act.<sup>216</sup> Over six hundred Kona coffee growers filed a class action suit against defendants for allegedly rebagging Central American coffee as Kona coffee. The District Court, however, denied class certification to these plaintiffs, finding, among other things, that they had not shown the "discernibly competitive injury" required to bring a false advertising claim.<sup>217</sup> This case thus highlights the difficulty of federally enforcing geographic indications that are not protected as certification marks. While *Montrachet* shows the willingness of federal courts to defend geographic indications when protected by the strong provisions of trademark law, *Sugai Products* represents the other side of the spectrum, where federal courts are not willing to interpret the broadest provisions of the Lanham Act to protect unregistered geographic indications.

## 2. Cases enforcing certification marks

Alongside cases such as these, from opposite extremes of the Lanham Act, federal courts have also considered many cases involving the actual certification mark provisions of Section 4. In *Community of Roquefort v. William Faehndrich, Inc.*,<sup>218</sup> a French municipality that had registered "Roquefort" as a certification mark in the United States filed a complaint against a New York cheese importer for infringement.<sup>219</sup> According to the certification mark, registered in 1953, "Roquefort" could only be used "to indicate that the [product] has been manufactured from sheep's milk only, and had been cured in the natural caves of the Community of Roquefort, Department of Aveyron, France, in accordance with the historic methods and usages of production, curing and development which have been in vogue there

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<sup>212</sup> See *id.* at 375-76 ("The issue thus is not whether MONTRACHET is capable of serving as a trademark or is capable of acquiring trademark significance, [but rather] whether MONTRACHET has lost its original trademark significance.").

<sup>213</sup> *Id.* at 376.

<sup>214</sup> *Id.* at 377.

<sup>215</sup> 1997 WL 824022 1 (D.Haw. 1997).

<sup>216</sup> *Id.* at 11. See also *supra* text accompanying note 194-95. Plaintiffs also brought claims under the Hawaii Uniform Deceptive Trade Practices Act and the Hawaii Unfair Practices Act. See 1997 WL 824022 at 1.

<sup>217</sup> 1997 WL 824022 at 11 and 17. The Court found that plaintiffs did not meet "the numerosity requirement of Fed.R.Civ.P. 23(a)(1), the adequacy requirement of Fed.R.Civ.P. 23(a)(4), or any of the alternative requirements of Fed.R.Civ.P. 23(b)." *Id.* at 17.

<sup>218</sup> 303 F.2d 494 (2d Cir. 1962).

<sup>219</sup> *Id.* at 495.

for a long period of years.”<sup>220</sup> The cheese that Faehndrich sold as “Roquefort” had been produced in Hungary and Italy,<sup>221</sup> and the district court judge found this fact sufficient to grant summary judgment to the Community of Roquefort and enjoin Faehndrich from further use of the protected term on products not meeting the certification mark’s requirements.<sup>222</sup> Before the court of appeals, Faehndrich argued that there was a genuine issue of material fact as to whether “Roquefort” had become a generic term.<sup>223</sup> The court rejected this argument and affirmed summary judgment, finding no evidence of consumer perceptions of “Roquefort” as a generic term and pointing to the fact that “producers of French Roquefort cheese have diligently protected the name from unfair competition in this country.”<sup>224</sup>

A later case regarding geographic indications centered not on the genericization of a certification mark, but rather on the party authorized to protect this mark. In *Idaho Potato Commission v. Washington Potato Commission*,<sup>225</sup> the Idaho Potato Commission (“IPC”) and the state of Idaho brought a suit against the Washington Potato Commission for infringement of the mark “Idaho” in reference to potatoes.<sup>226</sup> Although this case was dismissed for lack of personal jurisdiction,<sup>227</sup> the court established that the IPC, rather than the state of Idaho, had the authority to bring suit to protect against the infringement of its mark and unfair competition.<sup>228</sup>

Once granted this authority to bring suit on its own, without state involvement, the IPC appeared before the Second Circuit in 2003 to again protect its certification mark against infringement.<sup>229</sup> In 1990, the IPC licensed its certification marks to M & M Produce Farm & Sales (“M & M”), a New York farm that bought bulk potatoes from licensed Idaho potato vendors and repackaged them in smaller bags bearing the IPC’s certification marks.<sup>230</sup> In 1995, M & M returned the license, thereby losing the right to use these marks.<sup>231</sup> Upon learning that M & M was continuing to use bags bearing the certification marks, the IPC filed a suit in district court.<sup>232</sup> A jury granted monetary damages to the IPC, but the judge vacated this award as a matter of law, only upholding the verdict for IPC.<sup>233</sup> IPC appealed, and the Second Circuit

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<sup>220</sup> *Id.* at 496.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 494.

<sup>223</sup> *Id.* at 497 (referring to a genuine issue of fact as to “whether the term ‘Roquefort’ has acquired principal significance as a description of blue-mold sheep’s milk [cheese] regardless of its origin and without reference to the method of curing employed in the limestone caves of Roquefort, France”).

<sup>224</sup> *Id.* at 498.

<sup>225</sup> 410 F.Supp. 171 (D. Idaho 1975).

<sup>226</sup> *Id.* at 173. Although the claim in this case refers to trademarks as opposed to certification marks, the actual mark at issue appears to be a certification mark. This conclusion is drawn both from the type of protection sought and comparison to *Idaho Potato Commission v. M & M Produce Farm & Sales*, where the IPC again brought a claim based on “trademark,” but the court refers specifically to the IPC’s certification marks. See *infra* text accompanying notes 229-36.

<sup>227</sup> *Id.* at 183. The court found that its exercise of jurisdiction over individual member of the Washington Potato Commission, many of whom were never physically present in Idaho, would be against the principles of “fair play” and “substantial justice.” *Id.* at 182-83.

<sup>228</sup> *Id.* at 175 (concluding that “the State of Idaho is a nominal party and the I.P.C. is the real party in interest”).

<sup>229</sup> *Idaho Potato Commission v. M&M Produce Farm & Sales*, 335 F.3d 130 (2d Cir. 2003).

<sup>230</sup> *Id.* at 132. The certification marks in question are the word “IDAHO” in a distinctive font and the phrase “GROWN IN IDAHO” written inside an outline of the boundaries of the state of Idaho. *Id.*

<sup>231</sup> *Id.* at 132.

<sup>232</sup> *Id.* at 133.

<sup>233</sup> *Id.* at 134.

remanded the case, finding that M & M could not be contractually estopped from challenging the IPC's certification marks.<sup>234</sup> M & M had counterclaimed that the IPC's marks should be cancelled under the Lanham Act due to the IPC's discriminatory refusal to certify potatoes grown in Idaho, and the court found that the public interest in free and open competition justified this challenge.<sup>235</sup> According to the court, "the difference between the public interests in certification marks and trademarks compels [this] result."<sup>236</sup>

### 3. Similarities between cases

As shown by the above cases, geographic indications as such are not all protected by the same legal theory in the United States. Even after 1946, not every American case addressing the geographic origin of foodstuffs was based on claims brought under the same provisions of the Lanham Act. Instead, some of these cases refer to other protections provided under federal law for geographic indications, whether these protections are the narrower provisions of trademark law or the broader protections against false advertising. In the United States, therefore, producers do not consider Section 4 of the Lanham Act to provide the only federal protections of geographic indications. Along with the multitude of possible state claims,<sup>237</sup> a variety of federal claims also emerged after 1946.

Yet there are two similarities even among the very different cases discussed above. First, governmental involvement is extremely limited in the protection of geographical designations. Second, the rhetoric in these cases is quite similar to that in earlier American cases in its effort to strike a balance between consumer and producer protection.

#### a. Public involvement

In all of these cases, governmental bodies play quite a limited role. Even in *Montrachet*, the one case in which the Patent and Trademark Office made an appearance after having denied trademark registration due to alleged genericization, this federal agency was required to meet a significant burden of proof and the court showed little deference to its findings.<sup>238</sup>

As for states, the only case in which a state actually played a role is *Washington Potato Commission*, in which the State of Idaho was found to be no more than a "nominal party."<sup>239</sup> The IPC, a state agency, did bring suit in two cases, but this involvement was not itself direct state intervention. In *Washington Potato Commission*, in fact, the IPC was found to be "an independent self-governing state

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<sup>234</sup> *Id.* at 141.

<sup>235</sup> *Id.* at 133, 138.

<sup>236</sup> *Id.* at 138 ("Significantly, trademark owners are granted a monopoly over their marks and can choose to license the marks to others on whatever conditions they deem appropriate, so long as confusion does not result. The same is not true of certification marks. Certification mark licensing programs are a form of limited compulsory licensing...and the certifier has a duty to certify the goods or services of any person who meets the standards and conditions which the mark certifies.") (internal quotation marks omitted).

<sup>237</sup> See, e.g., *supra* text accompanying note 198-204.

<sup>238</sup> See 878 F.2d 375, 377 (Fed. Cir. 1989).

<sup>239</sup> 410 F.Supp. 171, 175 (D. Idaho 1975).

agency [that is] financially independent and does not perform an essential governmental function.”<sup>240</sup> In other cases, although states could be seen as having commercial interests in the issues at hand, no states intervened. The State of Hawaii was not involved in shielding its producers from misuse of the term “Kona” for coffee, nor did foreign states play any role in *Montrachet* or *Faehndrich*.

This low level of governmental involvement can be explained in two different ways, which are not necessarily mutually exclusive. First, the United States is generally less comfortable with state regulation than other industrialized nations. While other countries have accepted significant welfare states, America has historically disfavored such a level of state involvement. The United States is also seen as favoring private litigation over regulation,<sup>241</sup> again evidencing a discomfort with state involvement that could partially explain the almost purely private nature of these suits. Second, the low level of state involvement in America also reveals the country’s greater degree of comfort with federalism. Although states’ rights debates maintain currency in the United States, the federal government has also exerted its authority for over two hundred years, meaning that the overall concept of federalism is fairly uncontroversial in the U.S. American states, having accepted federalism centuries before, exhibit little concern over the Lanham Act’s potential to threaten their sovereignty, and the Patent and Trademark Office feels little need to prove its legitimacy by playing an active role in registration.

#### b. Consumer-producer rhetoric

A second internal similarity aligning these cases is their use of both consumer and producer rhetoric to justify protection of geographic indications. This rhetorical equilibrium was established even before the Lanham Act, in *Newark Cheese Co.* and *Mod-Urn Cheese Packing Co.* In these cases, New York’s Supreme Court validated the court’s protection of “Roquefort” by referring to the producers’ sales losses<sup>242</sup> and condemning the infringers for “enriching themselves at the plaintiff’s expense.”<sup>243</sup> The court also, however, justified its findings based on protection of the public against deception<sup>244</sup> and imposition.<sup>245</sup> Such rhetoric continued throughout the cases referring to geographic indications. While the *Montrachet* court focused slightly more on consumers, basing a determination of genericization on the purchasing public and defining a trademark’s function as “so identify[ing] a product that the consumer is assured of the quality and characteristics that it has come to associate with a particular source of that product,”<sup>246</sup> the *Sugai Products* court emphasized producers by requiring “discernibly competitive injury” for

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<sup>240</sup> *Id.*

<sup>241</sup> See, e.g., Robert A. Kagan, *Adversarial Legalism: The American Way of Law* 3 (2000) (“The United States more often relies on lawyers, legal threats, and legal contestation in implementing public policies, compensating accident victims, striving to hold governmental offices accountable, and resolving business disputes”).

<sup>242</sup> *Douglas v. Newark Cheese Co.*, 274 N.Y.S. 406, 411 (N.Y. Spec. Term 1934).

<sup>243</sup> *Douglas v. Mod-Urn Cheese Packing Co.*, 290 N.Y.S. 368, 369 (N.Y. Spec. Term 1936).

<sup>244</sup> *Newark Cheese Co.*, 274 N.Y.S. at 413 (“...they must not indulge in acts which will deceive the public into buying the substitute as the original Roquefort”).

<sup>245</sup> *Mod-Urn Cheese Packing Co.*, 290 N.Y.S. at 369 (referring to the “imposition upon the cheese-purchasing public”).

<sup>246</sup> 878 F.2d 375, 376-77 (Fed. Cir. 1989).



infringement.<sup>247</sup> Of the American cases discussed above, the court in Washington Potato Commission was the only one not to use such producer-consumer rhetoric, primarily because the focus in that case was the justice of exercising personal jurisdiction over certain defendants. American federal courts thus enforce the protection of geographic indications both in order to protect consumers from misleading labeling and in order to protect producers from potential free-riders.

Although most cases studied here did not explicitly refer to quality, this consumer-producer rhetorical balance suggests that U.S. courts view protection of geographic indications as a form of quality control. Such an interpretation is supported by the Lanham Act itself, which permits certification mark registrants to establish the standards producers must meet before becoming eligible for licensing.<sup>248</sup> Given that these specifications can include more than merely geographic origin, geographical indications in the United States protect consumers and producers alike by guaranteeing a level of quality in foodstuffs in addition to guaranteeing their actual origin.

#### IV. COMPARATIVE ANALYSIS OF AMERICAN AND EUROPEAN ENFORCEMENT OF GEOGRAPHIC INDICATIONS

In both the United States and the European Union, states and Member States have ceded much control over the protection of geographically-significant foodstuffs to a federal scheme that coexists with the international protections provided under the TRIPS Agreement. While EU Member States have retained criminal provisions on false labeling such as those under which Dante Bigi was charged, the decision of the European Court of Justice in *Salaisons d'Auvergne* effectively forbids any national protection regime as a violation of the principle of the free movement of goods now that an EU-wide regime exists. In the United States, states have also retained certain criminal provisions,<sup>249</sup> but they too are prohibited from passing any regulations that would impede interstate commerce.<sup>250</sup>

Despite the similar federal nature of the Lanham Act and 2081/92, however, these two regimes and their associated caselaw exhibit significant differences, which this section will examine in turn. First, the European Union and the United States have approached geographic indications of foodstuffs from markedly different angles, with the former establishing a comprehensive list and the latter deeming these designations to be a subset of trademark law. Second, the European approach implicates public involvement much more than does the American version, both in the registration process itself and litigation addressing geographic indications.

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<sup>247</sup> 1997 WL 824022 1, 11 (D. Haw. 1997).

<sup>248</sup> See *supra* notes 174-76 and accompanying text.

<sup>249</sup> See *supra* text accompanying notes 198-204.

<sup>250</sup> Dormant commerce clause jurisprudence suggests that a statute forbidding the importation of certain foodstuffs due to the protection of geographic indications would be found to run afoul of Art. I § 8 cl. 3 of the U.S. Constitution. See, e.g., *Great Atlantic and Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. 366, 371-72 (1976) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.") (internal citations omitted).

Finally, cases resolving disputes over geographic indications suggest that, while both entities have attempted to strike a balance between competition policy and intellectual property, the European Union is less willing than the United States to follow a robust competition policy in the protection and enforcement of geographic indications of foodstuffs. As will be addressed at the end of this section, these broad differences between the European and American approaches have important consequences for views of federalism on either side of the Atlantic, as well as for the balance struck between producer and consumer protection.

#### *A. Legal Frameworks*

Although both entities have succeeded at using federal law to create collective monopolies that shield a group of foodstuff producers from competition, each has done this through a very different legal framework. In the United States, geographic indications of foodstuffs are seen as a subset of trademark law, while the European Union protects these designations by way of a comprehensive list. Roquefort, for example, is protected in America by way of U.S. Trademark Reg. No. 571,798, a certification mark that requires any product so labeled to be a cheese that “has been manufactured from sheep’s milk only, and has been cured in the natural caves of the Community of Roquefort, Department of Aveyron, France.”<sup>251</sup> This mark carries with it both the remedies for infringement specified in § 32 of the Lanham Act<sup>252</sup> and a recognition of the label as the intellectual property of the mark owner, here the Community of Roquefort. In Europe, Roquefort is also protected, but there it is by way of its listing in Registration 1107/96. This listing, along with the associated standards that are on file with the Commission, neither creates a specific remedy nor conveys the idea of actual ownership on the part of the Community of Roquefort. Registration does, however, grant a protection that is explicitly restricted to foodstuffs.

#### *B. Public Involvement*

While both the Lanham Act and 2081/92 authorize private litigation, they do so within the context of public regulation. As outlined previously, both Section 4 of the Lanham Act and 2081/92 coexist with criminal provisions that provide for public litigation against certain forms of misuse or violation of geographic indications.<sup>253</sup> Despite the fact that both approaches aim to balance the public and the private, however, the U.S. and the EU arrived at very different equilibriums. In the European Union, registration of geographic indications is much more dynamic than its American counterpart. In Europe, the Commission is granted six months to verify an application for registration, during which any interested persons or Member States may also object.<sup>254</sup> In the U.S., in contrast, the Patent and Trademark Office appears to play a much more passive role. Although the Office must approve an application

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<sup>251</sup> U.S. Trademark Reg. No. 571,798, available at <http://www.uspto.gov/> (last visited Feb. 13, 2004).

<sup>252</sup> See supra notes 186-87 and accompanying text.

<sup>253</sup> See supra notes 80 and 194 and accompanying text.

<sup>254</sup> See supra text accompanying note 55.

for a certification mark, approved marks are only open to objection for thirty days.<sup>255</sup> The American registration process thus appears to be a process more strictly limited to private players than does its European counterpart.

The case law on geographic indications highlights this disparity between the extent of governmental involvement in the two processes. As shown by cases such as *Feta*, *Conorzio*, *Exportur* and *Bigi*, the Commission itself plays an active role in litigation, whether as an intervening party protecting the interests of the European Union or as a defendant. The Member States also play a significant role in cases brought before the ECJ. Whether suing the Commission for incorrectly registering a geographic indication or intervening to protect national interests they believed to be threatened, Member States are sufficiently involved in litigation to give European litigation over geographic indications a notably public character.

In the American cases studied in Part III, in contrast, the involvement of the Patent and Trademark Office was limited to its role as defendant in *Montrachet*, where an applicant appealed the office's rejection of its mark to the Trademark Trial and Appeal Board.<sup>256</sup> Unlike the Commission, the Patent and Trademark Office did not intervene to publicize its interests in cases addressing certification marks issued for geographic indications. Nor do states play nearly as large a role in the protection of geographic indications as do Member States. In fact, when the state of Idaho did attempt to bring a more public character to civil litigation under Section 4 of the Lanham Act by acting as plaintiff, the federal court discounted the state's involvement as "nominal" and found the Idaho Potato Commission to be the real party in interest.<sup>257</sup>

This differential state involvement can be partially explained by differences in civil procedure. Under the preliminary reference procedure, a case that is referred to the ECJ by a national court under Article 234 of the EC Treaty must be distributed to all Community institutions and Member States for possible intervention before being considered by the Court.<sup>258</sup> Although not required by the Treaty, the Commission has established the policy of intervening in all preliminary references.<sup>259</sup> No such procedure exists in the United States to make intervention easier for either the Patent and Trademark Office or any states, leading to their comparatively low level of involvement in the protection of geographic indications through the court system.

### *C. Principles of Competition Policy and Intellectual Property*

In both Europe and America, the protection of geographic indications pits two modern legal doctrines against one another: the competition principle of preventing monopolies and the protection of intellectual property. By limiting the right to use a

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<sup>255</sup> See "What Happens Next?," at <http://www.uspto.gov/web/trademarks/workflow/next.htm> (last visited January 17, 2004) (outlining the process for registering a trademark). Any party that believes it may be damaged by the mark has thirty days in which to object or request to extend this objection period. *Id.*

<sup>256</sup> See *In. re Montrachet S.A.*, 878 F.2d 375, 375 (Fed. Cir. 1989).

<sup>257</sup> *Idaho Potato Commission v. Washington Potato Commission*, 410 F.Supp. 171, 175 (D. Idaho 1975).

<sup>258</sup> TEC Art. 234.

<sup>259</sup> This policy decision is not codified in any regulation or Treaty provision, but it is firmly established in the Legal Service of the European Commission, according to Jean-François Verstryne, former Director-General for the Environment.

geographic indication, which would otherwise be freely available to all producers of the implicated foodstuff, to certain producers who meet specific requirements, both certification marks and registrations under 2081/92 create a collective monopoly that may initially appear to violate competition principles. However, by prohibiting exclusive control over these designations, these two schemes strike a balance between protecting intellectual property and preventing exclusive monopolies. By creating a collective monopoly within which actual competition is possible, both the European Union and the United States have made the decision to provide producers with only partial protection from competition.

This desire to strike a balance between these two conflicting doctrines is highlighted in the rhetoric of American and European courts alike in cases dealing with geographic indications. While a balance in favor of competition principles would be on the whole more likely to refer to consumer protection, mentioning consumers' interest in having a wide selection of products not controlled by one or two dominant producers, a balance in favor of intellectual property would likely refer to the interests of producers in protecting their initial investment and being shielded from free-riders.<sup>260</sup> In all of the cases referred to in Parts II and III, however, the courts consciously referred to both consumers and producers, often focusing on quality before all else. Such rhetoric suggests that, when deciding cases dealing with geographic indications, the ECJ and U.S. federal courts have interpreted the purposes behind 2081/92 and the Lanham Act as protecting both competition and intellectual property rather than clearly favoring one over the other.

Despite these rhetorical similarities, a closer look at the cases interpreting these different regimes suggests that the European Union and the United States actually do differ in the balance they have found between competition and intellectual property. As the courts have permitted these schemes to be implemented, Europe appears to favor intellectual property protection while America is more willing to prioritize competition principles, which corresponds to historical differences in competition enforcement between Europe and America.

The United States has always prioritized competition principles more highly than other countries, as shown by their early codification into American law with the passage of the Sherman Act in 1890.<sup>261</sup> And, while the European Union included strong competition provisions in the EC Treaty,<sup>262</sup> commentators have argued that it was not particularly active in competition enforcement until 1990, when its

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<sup>260</sup> This is, of course, a gross simplification. Competition principles can also be couched in terms favorable to producers, referring to the interest of potential new entrants into the market, and intellectual property protection can refer to consumers' interest in having the quality of their products guaranteed by limiting the market to certain producers. Overall, however, a consumer focus is normally associated with competition and a producer focus is normally associated with intellectual property. See, e.g., Why (and How) Fairness Matters at the IP/Antitrust Interface, 87 *Minn. L. Rev.* 1817, 1858 (2003) (promoting a compromise between "the consumer-oriented antitrust laws and the more producer-oriented intellectual property laws").

<sup>261</sup> Abbott B. Lipsky, Jr., *The Evolving Architecture of International Law: The Global Antitrust Explosion: Safeguarding Trade and Commerce or Runaway Regulations?*, 26 *Fletcher f. World Aff.* 59, 59 (2002).

<sup>262</sup> See TEC Articles 81 (ex 85) and 82 (ex 86). See generally Anu Piilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 *Stan. J. Int'l L.* 207, 227 (2003) ("European Community...competition law is the only example of a far-reaching, supranational competition architecture at the regional level. The E.U. Member States have, to a significant extent, ceded their sovereignty to this supranational body.").

competition rules changed to require pre-notification of major acquisitions.<sup>263</sup> The goals of U.S. and EU competition policies have also been seen as quite different, with American competition laws encouraging the efficient functioning of markets and maximizing consumer welfare and European competition laws also addressing issues such as distributional effects, fairness and market integration.<sup>264</sup> Recently, however, the EU has become much more activist in this arena, approaching and even surpassing the U.S. in its enforcement of competition.<sup>265</sup> As will be seen below, however, the passage and implementation of 2081/92 do not fit neatly into this historic trend. While the EU has become more willing to consider competition principles in recent years, the protection of geographic indications requires it do so at the expense of another fundamental value of the European Union – intellectual property protection, or, in the words of Article 30 of the EC Treaty, “the protection of industrial and commercial property.”<sup>266</sup> In passing 2081/92, the Council showed itself to be unwilling to prioritize competition principles above all others.

While the Lanham Act also struck a balance between competition principles and intellectual property, the caselaw interpreting certification marks appears far more willing to consider the former than do the cases before the ECJ. In *M & M*, for example, a U.S. court strongly enforced the principle of universal licensing under the Lanham Act. By refusing to permit a former licensee of the certification mark for Idaho potatoes to contract away its right to challenge the IPC’s licensing of the mark, the court highlighted the importance of protecting competition principles within the Lanham Act’s provisions for certification marks. Were IPC permitted to contractually estop *M & M* from challenging its allegedly discriminatory licensing practices, one of the major benefits of certification marks – their creation of a collective monopoly that must be opened up to any producer who meets the holder’s requirements – would no longer exist.

The cases before the ECJ, however, did not establish any such prioritization of competition principles. Instead, although 2081/92, like the Lanham Act, provides for universal licensing, its actual implementation appears to be quite favorable to producers and to permit the existence of a very limited collective monopoly. While the Court recognized concerns about a registration under 2081/92 granting monopoly power to too small a group of producers when it struck down the protected geographic indication at issue in *Feta*, other cases were decided much more clearly in favor of intellectual property protection. In *Consorzio*, the Court upheld the registration of a geographic indication that required producers not only to produce the Prosciutto di Parma in the region of production, but to slice and package this foodstuff in the region of production as well.<sup>267</sup> By permitting a geographic indication to be so specific, the Court effectively permitted the supposedly universal licensing of 2081/92 to be limited to a very narrow group of potential producers.

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<sup>263</sup> Lipsky, *supra* note 261, at 60.

<sup>264</sup> Piiola, *supra* note 262, at 223.

<sup>265</sup> See Lipsky, *supra* note 261, at 59 (referring to the European Commission’s 1997 near-rejection of the Boeing-McDonnell Douglas merger and its refusal to approve the GE-Honeywell merger in 2001, despite approval of the latter by the United States).

<sup>266</sup> TEC Article 30.

<sup>267</sup> See *Consorzio del Prosciutto di Parma*, 2003 E.C.R. 00 at ruling (interpreting 2081/92 “as not precluding the use of a protected designation of origin from being subject to the condition that operations such as the slicing and packaging of the product take place in the region of production, where such a condition is laid down in the specification”).

A further narrowing of 2081/92 was shown in *Bigi*, where the ECJ found that the derogation procedure was not as permissive as it at first appeared. In that ruling, the Court held that the producers who were permitted to use a registered designation for a finite period after the passage of 2081/92 did not include producers in the country of production, regardless of whether or not they had been producing the foodstuff in the past. Instead, this derogation only applied to producers who had previously produced the foodstuff and who operated in a Member State other than the country of production.

#### *D. Broader Lessons of Comparative Differences*

These above broad differences, as exhibited in both the protection regimes and the cases interpreting them, provide two fundamental lessons in comparative U.S. and EU law that extend beyond the smaller lens of geographic indications of foodstuffs. As will be discussed in Part IV(D)(1), the protection of these designations reveals significant differences in the perception and acceptance of federalism in Europe and America. Also, as will be discussed in Part IV(D)(2), differences in protection highlight the relative differences in producer protection favored by these two entities.

#### 1. Federalism

When the Treaty of Paris established the European Coal and Steel Community (“ECSC”) in 1951, many commentators were quick to envision a “United States of Europe.”<sup>268</sup> As the European Union has expanded in both competence and membership from its predecessor, however, it has become increasingly clear that the EU is a unique supranational body, with a quasi-federal structure that is far different from that established in the United States over two centuries ago. Although both the EU and the U.S. have approached protection of geographic indications through federal legislation, the many differences listed above highlight just how differently these two entities view federalism.

While Commission policy under Article 234 can explain that institution’s involvement in the cases outlined in Part II, Member State involvement in cases such as *Canadane*, *Feta*, *Conorzio*, *Exportur* and *Bigi* requires further explanation. As mentioned in Part II, this involvement highlights the continuing willingness of Member States to protect their national interests from what they perceive as the negative effects of the European Union.<sup>269</sup> Although initially willing to support the passage of 2081/92, Member States are clearly uncomfortable with the federalizing aspect of this regulation when it appears to contravene their national interests. Unlike in the United States, where over two centuries of federalism have led to state acceptance of legislation such as the Lanham Act and its consequences, EU Member States are evidently still coming to terms with the fact that the benefits of a Europe-wide approach to geographic indications can bring with them associated threats to

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<sup>268</sup> See, e.g., Draft Resolution of the United States Senate, January 1952, Box 1667, Harry S. Truman papers, available at Harry S. Truman Library, Independence, MO (referring to “a United States of Europe” collaborating with the United States of America).

<sup>269</sup> See *supra* text accompanying notes 138-39.

their national interests.<sup>270</sup> While one of the U.S. cases studied, *Washington Potato Commission*, did involve a state intervening to protect its interests, such state involvement was deemed unacceptable by the court. The ECJ, however, has not disallowed such involvement, thus highlighting the striking mix of national and supranational concerns that still interact within the European Union, regardless of quasi-federal regulations such as the registration system under 2081/92.

This continuing uncertainty regarding federalization is also shown by the greater politicization of the protection of geographic indications that occurs in the European Union relative to the United States. In cases such as *Bigi* and *Feta*, genericness became more than merely a technical question. In *Bigi*, the involvement of Member State governments transformed the issue of the genericness of parmesan cheese into a conflict between Germany and Austria on the one hand and Italy on the other. In *Feta*, a similar issue became even more of a political struggle, with Denmark, France and Germany all questioning the Commission's competence in registering feta cheese as a geographic indication and thus at least partially bringing the entire supranational registration system into question. *Exportur*, *Canadane* and *Consorzio* also highlight the political nature of the protection of geographic indications in that they all address whether such protection exceeds the authority granted to Community institutions by the EC Treaty.

The protection of geographic indications in the United States does not appear to have nearly as much of a political character. The cases outlined in Part III center on the protection of geographic indications – no more and no less. While the plaintiff cheese producer in *Montrachet* was French, the case says nothing that would suggest that the Patent and Trademark Office had political motivations in rejecting its application for the certification mark. Nor did *Faehndrich* appear to be addressing any issues of Franco-American diplomacy or trade; instead, the case at issue truly did revolve around Faehndrich's misuse of a registered certification mark. And, although M&M Produce Farm & Sales was a New York company, *M&M* did not center on conflicts between New York and Idaho. While the case between the Idaho Potato Commission and the Washington Potato Commission may have had an element of state commercial rivalry to it, *Washington Potato Commission* still primarily focused on the misuse of a registered certification mark, and was also eventually dismissed for lack of personal jurisdiction.

A further example of the European Union's lower level of comfort with federal authority can be seen in the lack of specific remedies available under 2081/92. Whereas the protection of geographic indications through the Lanham Act led to the provision of actual remedies – both injunctive and monetary – for infringement, 2081/92 lists no such remedies, instead delegating this determination to national courts. The combination of this national resolution of remedies and the generally high level of Member State involvement means that private parties in Europe often still experience the federal power of the European Union through their Member States, whereas private parties in America, where federalism is a far more accepted doctrine, experience this more directly.

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<sup>270</sup> This argument is furthered by the facts of *Salaisons d'Auvergne*, where France attempted to maintain a separate national regime for geographic indications. See *supra* text accompanying notes 104-08.

## 2. Protection of producers and consumers

A further dissimilarity highlighted by the many differences between 2081/92 and the Lanham Act is the relatively greater protection that the European Union appears to offer to its producers. The clearest example of this distinction was the European prioritization of intellectual property over competition policy discussed above, but other aspects of these two regimes support this thesis as well.

Although the U.S. approach of placing geographic indications under the rubric of trademark law would appear to be more favorable to producers than Europe's approach, in that trademark law both provides a defined remedy and recognizes geographic indications as the intellectual property of a producer, a closer look at the actual application of the Lanham Act shows that this is not as producer-driven as it would at first appear. While trademarks, such as that at issue in *Montrachet*, do create exclusive property rights vested in one specific producer, such as *Montrachet S.A.*, certification marks do not. In fact, as addressed above, certification mark owners are not permitted to produce or distribute the protected good.<sup>271</sup> In Europe, although producers may not be provided specific federal remedies, they are permitted to act affirmatively to register their foodstuffs under 2081/92<sup>272</sup> and, as shown by the cases above, state courts have been willing to accept the Council's delegation and create remedies of their own.

A further example of Europe's preferential treatment of producers can be seen in its prioritization of geographic indications vis-à-vis other intellectual property rights. As other commentators have previously argued, the European Union approach to the protection of geographic indications is quite different from that used in many other parts of the world. While TRIPS Article 16(1) prioritizes an earlier trademark against a later geographic indication, allowing the trademark owner to enforce its mark against a subsequent producer who attempts to register the mark as a geographic indication, 2081/92 establishes the opposite hierarchy.<sup>273</sup> In Europe, this earlier trademark would continue to exist, but it would lose its exclusivity upon its registration as a geographic indication under 2081/92 and would thus permit new competitors to enter the market.<sup>274</sup>

The greater level of public involvement in Europe also provides advantages to producers. Since Member State involvement in the cases outlined in Part III was on behalf of those Member States' national producers, producers trying to protect a geographic indication have more advocates – and more involved advocates, due to the politicization discussed above – than do their counterparts in the United States.

Finally, the European Union's approach to genericization is far more producer-friendly than is that of the United States. In the European Union, once a geographic indication is registered under 2081/92, it can never become generic.<sup>275</sup> Thus, while such a designation may not confer an exclusive monopoly, it does confer a perpetual monopoly on a collectivity of producers, regardless of whether their product loses its

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<sup>271</sup> See 15 U.S.C. §1054.

<sup>272</sup> See 2081/92, Art. 5(1).

<sup>273</sup> See Goebel, *supra* note 15, at 975.

<sup>274</sup> See *id.* at 973-94 (“...the European Communities traditionally pursue a concept of geographic indications protection which assumes a certain element of superiority of geographic indications over trademarks”).

<sup>275</sup> 2081/92, Art. 13(3).



specific character in the eyes of consumers. In the United States, in contrast, the registration of a certification mark can be cancelled if the product becomes generic.<sup>276</sup> Although such cancellation has not actually taken place in recent years due to a lack of funding, this provision still highlights the different approaches that the United States and Europe take in protecting geographic indications. In Europe, a registered geographic indication confers unending protection on its producers, regardless of consumer perceptions of the foodstuff. In America, registration only provides protection until the designation has become a "common descriptive name," after which producers lose any protection for their initial investment or goodwill.

Apart from the absence of specific forms of relief in 2081/92, it appears that manufacturers of foodstuffs from protected geographical areas are more favorably treated under the European approach. And, given that national courts have not foreclosed the possibility of granting injunctive relief in cases addressing the infringement of a geographic indication, even the area of remedies does not appear to eliminate this preferential treatment, thus meaning that producers would likely prefer the EU registration system over the American system of certification marks.

## V. CONCLUSION

The overarching similarities between the protection of geographic indications for foodstuffs in the European Union and the United States are striking, particularly given the many other approaches available. These entities could have permitted broad protection based only on geography, regardless of quality, or they could have established a high burden of proof or limited the available remedies to proven money damages. They could have relied on Member State laws, or made a definitive choice between producer protection or entirely free competition. Instead, both chose a fairly similar path. In both the European Union and the United States, protection of geographic indications acts as a quality-control measure, with registrants and certification mark owners able to restrict use of their labels to producers meeting more requirements than just geographical provenance. Although the relief provided to registrants under 2081/92 depends on national law, courts in both Europe and America have granted injunctive relief to parties affected by infringement of protected geographical names, thus not requiring the showing of damages that would be required were relief limited to monetary compensation. Both entities have chosen to approach this protection at a federal level, preempting more local protection and providing for a combination of public regulation and private judicial enforcement. Finally, Europe and America have both chosen to create collective monopolies, which offer a fairly unique solution to the choice between shielding producers from competition and promoting efficient markets by only partially accepting each of these seemingly contradictory goals.

Given these similarities, this Note has studied these two systems from a comparative perspective in order to highlight the larger lessons that can be learned from the different European and American approaches. Comparison of 2081/92 and the Lanham Act, and the judicial enforcement of each, sheds light on two broad areas of difference between the European Union and the United States. First, such an evaluation reveals the different approaches that these two entities take to federalism.

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<sup>276</sup> See *supra* text accompanying notes 189-91.

While EU Member States have become increasingly comfortable with regulation and administration at a supranational level, such comfort is far from unequivocal. Although they were willing, in 1992, to support the passage of a supranational registration system for geographic indications for foodstuffs, this support has not remained unquestioned. Instead, when registration under 2081/92 fails to protect national producers or threatens to upset Member States' preferred institutional balance within the European Union, Member States have been quite willing to challenge this system before the ECJ. Unlike in the United States, where controversies over certification marks implicate primarily commercial interests, European debates over geographic indications have a decidedly political feel. Yet, as shown by the cases before the ECJ that address these designations, this uneasiness with federalism is not sufficient to topple the supranational regime of 2081/92. Instead, while Member States and EU institutions continue to be more willing than their American counterparts to question federal regulation of geographic indications, the ECJ has upheld this system and thus forged ahead with integration despite the lingering concerns of the Union's members.

The second area in which comparison of these systems proves quite revealing is the different treatment of producers and consumers. While both the ECJ and the American federal courts have attempted to strike a balance between consumer and producer rhetoric in their cases addressing geographic indications, the actual outcomes of these cases, as well as the outlined requirements of 2081/92 and Section 4 of the Lanham Act, reveal that the European Union acts much more preferentially toward producers of geographically-significant foodstuffs than does the United States. In effect, the rhetoric of consumer protection acts as a screen for Europe's actual practice of shielding producers from competition. This finding in turn suggests that Europe, as has been true historically, is less willing to guarantee competitive markets than is America.

Two different explanations may account for the higher level of producer protection in the EU. First, food has historically occupied a higher level in Europe than in America, meaning that protection for producers of quality foodstuffs is less likely to be controversial in European countries. This traditional respect for quality ingredients bridges the divide from plate to politics, and is evidenced in everything from the focus on seasonal ingredients in French and Italian cooking to the current debate over genetically modified organisms.<sup>277</sup> A second explanation, however, may lie in Europe's looser form of federalism. As shown by the continued challenges to supranational exercises of EU authority, federalism in the European Union still requires support from Member States and their citizens. In approaching the treatment of geographic indications, the European Union has strengthened the allegiance of producers by providing them with strong protection. The United States, in contrast, does not need to shore up such political support for federalism and thus has not felt the need to cater to localized interests to the same degree.

This interplay between federalism and producer protection raises questions for the future harmonization of the protection of geographic indications for foodstuffs. If the TRIPS Agreement is expanded to provide greater protection to foodstuffs than

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<sup>277</sup> See Roger Cohen, *Schroder Visits Bush Today, Bearing Europe's New Concerns*, N.Y. Times, Mar. 29, 2001, at A9 (quoting German Chancellor Gerhard Schroder's chief diplomatic adviser as saying, "We are very concerned about the environment, where we see different values. And about food, where the attachment to quality and opposition to genetically modified products is very strong in Europe.").

that currently available under Article 22, negotiators must be aware of the many ramifications involved in choosing between a registration system modeled after the EU regime and a trademark system modeled after that of the United States. Alongside issues such as remedies and compatibility with other areas of the law, the selection between these two options could also have consequences for the EU itself. Were a U.S.-style approach chosen, would this necessarily be more favorable to consumers than the EU's current system? And would this in turn lead to the already weak support for EU federalism becoming even shakier? While these questions are beyond the reach of this Note, this comparative study has shown that the protection of geographic indications of foodstuffs raises many more issues than just variations in attitudes toward the importance of quality ingredients. Instead, this area provides a lens into much greater concerns that must be seriously considered as part of any future attempt at international harmonization.