

GIs Beyond Wine: Time to Rethink the Link?

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1 Wine as the Epistemological Model

Despite claims to universalism and open-endedness, intellectual property regimes have tended to develop around specific archetypes of subject matter. If literary and artistic works provided the basic template for much of copyright's structure and doctrine, wine has formed the subject matter kernel for *sui generis* geographical indication (GI) regimes in the EU. In turn, the EU's regimes have proved influential around the world, exporting the intoxication with this particular subject matter. A question which remains (strategically) neglected is this: to what extent can a regime designed around the particularities of wine be adapted to accommodate cheese, charcuterie, coffee as well as crafts and textiles? With exquisite irony, GI law lacks a reliable map when it comes to appropriate subject matter.

The prototype of wine has undeniably shaped the norms, form and substance of *sui generis* GI systems. In epistemological terms, it has been “*in vino veritas*” for some time. This category of subject matter has been distilled and decanted into the distinctive link between product and place, which sets GIs apart as a separate category of IP. According to the TRIPS Agreement, a GI is a sign which indicates that a good originates “in the territory of a [WTO] Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin” (Art 22.1). This “essentially attributable” link was initially conceived in the context of legislative and administrative experiments relating to French wine regulation across the 19th and 20th century, informed by notions of *terroir*. While the precise connotations of *terroir* have fluctuated over time, it functions as a cipher for the influence of

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geographical origin on the end-product's quality.¹ As one leading scholar of the concept describes it: "Historically, *terroir* refers to an area or terrain, usually rather small, whose soil and micro-climate impart distinctive qualities to food products. The word is particularly closely associated with the production of wine."² This type of causal relationship – where the physical geography factors within a region leave their distinctive traces upon the end product – is reflected in the TRIPS definition of a GI. In the regulatory context, a wine would be genuine or authentic if its *terroir* was truthfully indicated on the label.

2 The Work that Wine Did

The early GI regimes that arose were considerably influenced by a particular vision of this archetypal subject matter.³ The law was designed around wine in specific ways. (1) Take the subject matter definition: only those products which can demonstrably verify that (a) a specific region of origin causally influences (b) the typical or distinguishing features of that product deserve to qualify for protection. If the causal narrative requires product quality to be influenced by physical geography, then olives or oranges seem similar enough to grapes to qualify for protection. A reputed regional honey may also fit this paradigm, where its organoleptic qualities and flavour can be objectively traced to the distinctive local wildflowers, which have sustained bees in the region. (2) *Terroir* thinking also informs the process of drawing a boundary around a region of origin. According to this logic we should be looking for the homogenous features of soil, climate, elevation and so on, which define a parcel of land and set it apart. Physical geography features provide compelling guidance when drawing appellation boundaries. (3) The distinctive or even unique relationship between product and place also normatively grounds the broad scope of protection found in *sui generis* GI regimes, where any evocation or claims to equivalence (Champagne-style wine) are considered illegitimate. If unique places produce unique products, then how can outsiders claim meaningful equivalence for their competing products? According to this view, any such referencing either misleads consumers or misappropriates the image of the regional product. This also potentially explains the existence of a rule which prohibits any generic use after a GI has been legally recognised. If the unique features of place which give the product its "typicity" cannot be replicated elsewhere, then why should the external product use the same name? Each of these aspects can be critiqued – does physical geography in fact help us to draw neatly bounded regions

¹ DW Gade, "Tradition, Territory, and Terroir in French Viticulture: Cassis, France, and Appellation Contrôlée" (2004) 94(4) *Annals of the Association of American Geographers* p. 848; C Van Leeuwen and G Seguin, "The Concept of Terroir in Viticulture" (2006) 17 *Journal of Wine Research* p. 1; M Demossier, "Beyond Terroir: Territorial Construction, Hegemonic Discourses, and French Wine Culture" (2011) 17 *Journal of the Royal Anthropological Institute (N.S.)* p. 685.

² E Barham, "'Translating Terroir' Revisited: The Global Challenge of French AOC Labelling" in: D Gangjee (ed) *Research Handbook on Intellectual Property and Geographical Indications* (Edward Elgar, 2016) p. 57.

³ D Gangjee, *Relocating the Law of Geographical Indications* (CUP, 2012).

of origin, when place is socially constructed⁴ – but wine’s influence on the *sui generis* GI model is undeniable.

3 Subject Matter Expansion

GI regimes today are moving beyond the wine hangover, and the evidence for this is growing. Three recent developments illustrate this trend. First, one of the principal motivations for the new Geneva Act of the Lisbon Agreement of 2015 was to broaden the membership of the original Lisbon Agreement.⁵ As there are several countries with an interest in protecting agricultural products, crafts and textiles, certain flexibilities have been introduced to make an international registration system capable of registering a broad swathe of subject matter more attractive. Second, the EU is considering instituting a *sui generis* registration system for non-agricultural products – primarily crafts and textiles – along the lines of the existing regimes for wines, spirits and agricultural products.⁶ However, the preparatory work reveals a sense of complacency; an assumption that the conceptual architecture for the existing regimes can be adapted to a new system for crafts, without any major modifications. Third, internal registration statistics from within the EU suggest that the Protected Geographical Indication (PGI) category of subject matter, which allows for a reputation-based link instead of the more objective qualities or characteristics, is in the ascendant. There are presently 621 registered Protected Designations of Origin (PDOs) while there are 708 registered PGIs.⁷ To the extent that the PDO represents the naturalistic *terroir* model, this suggests a transition even within jurisdictions widely regarded as the historic home of GI protection.

These recent developments are driven by the desire to recognise and protect other types of historic regional specialities. However for crafts and textiles, soil, climate and other environmental factors cannot provide the physical geography anchor to the region. When the emphasis shifts to human skills which are historically associated with a region, the corresponding concern is that people are mobile and can take their skills with them. If skilled producers can relocate to a neighbouring region and produce an identical carved wooden box or lace fabric, then how are we to characterise the link to place for such products? Where is the anchor to place? The imperatives of coalition building and consensus have led to compromises, where such questions are not asked too loudly. Even within the EU, substantive examination occurs at the national level – as the entry point into the EU regime – and the European Commission conducts a largely formal examination. However at the national level, there are policy pressures to register more products, often

⁴ G Edmond, “Disorder with Law: Determining the Geographical Indication for the Coonawarra Wine Region”, (2006) 27(1) Adelaide Law Review p. 59.

⁵ Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, 20 May 2015 (LI/DC/19).

⁶ See the resources at: https://ec.europa.eu/growth/industry/intellectual-property/geographical-indications/non-agricultural-products_en (accessed January 2017).

⁷ See <http://ec.europa.eu/agriculture/quality/door/list.html> (accessed January 2017).

portrayed as national or regional champions. While some EU members with a long history of *sui generis* protection have more sophisticated institutional frameworks to process registration and examination, in other EU members the examination may be more cursory, allowing product specifications with mythical or romantically asserted linkages into the system (“from time immemorial this unique product has been produced in the misty mountains of X”).

4 Crafting the Future?

Given the increasing mismatch between (i) a naturalistic *terroir* model and (ii) an expanding universe of GI subject matter, are we resigned to a future of selective policy arguments, a focus on products with export potential and political expediency in general? Or is there a meaningful, principled manner in which the link between product and place can be reconceived, to accommodate categories of subject matter beyond wines? Here, two possibilities are worth mentioning as avenues for future research as well as practical experimentation.

First, can we reconsider reputation as a form of linking products to places? Regional confectionaries, charcuterie, breads, toys, fabrics and jewellery all share the common feature of a historic reputation. For each regional product, the reputation has usually accreted around specific or distinctive features of the product, which set it apart. These distinctive features emerge from the “biography” of that product – why producers made it in a certain manner, which may have to do with environmental, socio-economic or cultural factors specific to the region of origin. So a smoking or curing technique may result from the historic necessity to preserve food in a remote or mountainous region while a hand-carved wooden container may symbolically represent aspects of the cultural or seasonal life of a region.⁸ To recapitulate: a product qualifies as a “reputational” GI where its past and present reputation depend on its distinguishing features, which in turn depend on specific human skills and techniques developed in response to the particularities of place. This approach links product to place and is distinct from both (i) a naturalistic *terroir* approach (avoiding the need to pretend that a craft is like wine) and (ii) a trade mark law approach to reputation, which considers whether consumers have heard of the product and whether the reputation is commercially valuable enough to protect. The aspects of historical depth and human skills also have normative potential. We do not protect such products because they are unique and cannot be replicated elsewhere. Instead we protect such products to sustain and develop places, the manner in which products are made in those places and the communities of producers who reside in them. We may therefore need to flip the arrow of causation – if the traditional *terroir* narrative was about “place making product”,

⁸ See D Marie-Vivien, “A Comparative Analysis of GIs for Handicrafts: The Link to Origin in Culture as Well as Nature?” in: Gangjee (ed) (supra note 2) p. 292; D Gangjee, “From Geography to History: Geographical Indications and the Reputational Link” in: I Calboli and WL Ng-Loy (eds), *Geographical Indications at the Crossroads of Trade, Development, and Culture in the Asia-Pacific* (CUP, 2017) [forthcoming].

the reputation approach requires us to additionally consider how “products make place”.

The second possibility is more subtle but profoundly important. It has to do with implementing institutions. Unlike patent or trade mark registries around the globe, which share basic institutional features, GI registries – even those within EU members – take very different institutional forms. A trade mark office which also processes GIs as part of its remit could take a very different, far less interventionist approach to the process of registration. By contrast, a specialist body such as France’s INAO, with its intersecting circles of expertise and historic engagement with collective producer organisations, is more deeply involved in the GI specification drafting process. Empirical research on GIs, drawing on collective action theorising, suggests that a crucial feature of successful GI implementation is the initial design and subsequent regulation of collective producer organisations.⁹ In the context of an expanded universe of subject matter, where we turn to the history of production and human factors, it is all the more important to ensure that the local community of producers is part of the conversation in deciding what makes their product traditional and connected to the region. The conversation should be inclusive, with a sensitivity to power dynamics since some parts of the supply chain may have a disproportionate voice. GI institutions and actors – public registrars and even non-governmental organisations or experts – have a crucial role to play in ensuring that representative organisations of producers do the work they are supposed to, with the long-term interests of the regional product in mind.

Events across 2016 serve as all-too-painful reminders that there are limits to the inevitability of globalisation. The local matters; place matters. However a defensive localism and mythical, exclusionary place-making are real dangers, without thought and attention being given to how products are meaningfully linked to places in this expanding universe of subject matter.

⁹ See e.g. E Biénabe, J Kirsten and C Bramley, “Collective Action Dynamics and Product Reputation” in: C Bramley, E Biénabe and J Kirsten, *Developing Geographical Indications in the South: The South African experience* (Springer, 2013) p. 51.