



An Edict from the Thought Police: Reconciling American and European Approaches to Geographical Designations

Citation

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The briefest of looks at two “typically American” foods – hamburger and frankfurters – reveals a good deal about American history: both culinary and cultural. The United States is, relatively speaking, a young country, built by immigrants who tried to replicate the best of the world they left behind. It is not surprising, then, to see so much borrowed culture within our own.

The European Union is, strictly speaking, even younger than the U.S., but its roots stretch back both far and wide. Much of American culture can be traced back to the traditions of Europe; often, the very words we use prove this heritage.

Given this difference in development and present states, one would expect these two entities to take different approaches to use of geographical descriptors for foods. Nonetheless, whether as a result of that common heritage or of the common necessities of the modern marketplace, American and European regulation of this area often achieves the same results through wildly different routes. Where these paths do diverge is not at the surface level of differing methods, but at the deeper level of differing views of the role of government and the law.

Background

The fundamental requirement of food labeling in the European Union is Council Directive 112/79, initially promulgated in 1979.¹ Enacted to rec-

¹1979 O.J. (L 033) 1

oncile the conflicting requirements of the various member nations, its stated “prime consideration” is “the need to inform and protect the consumer.” The Directive prohibits labeling that is even potentially misleading “to a material degree... in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production” as well as to other areas.² Labeling as to the origin of the product is specifically required when “failure to give such particulars might mislead the consumer to a material degree as to the true origin or provenance of the foodstuff.”³ Likewise, information regarding the processing and treatment of a product is required when “omission of such information could create confusion in the mind of the purchaser.”⁴

In the mid-1980s, the Commission undertook a shift in food policy away from development of Community-wide recipe laws.⁵ Instead, it adopted the principle of informing consumers and limiting food regulations to those necessary for public health. In response to concerns that such a program would lead to a decline in food quality, the Commission undertook to determine “whether and, if so, how the Community should encourage industry to adopt an active quality policy for foodstuffs. If this is found desirable, the need for a Community system for the mutual recognition of labels and other quality marks and for the relevant checks and certifications” would need to be developed.⁶

In 1989, the Commission announced its intention to develop such a

²1979 O.J. (L 033) 1, art. 2

³Id., art. 3(1)(7)

⁴Id., art. 5(3)

⁵COM(85) 603, November 8, 1985

⁶Id., par. 28

Community-wide program to promote food quality. Drawing upon the previous examples of wine and spirits, the Commission intended to establish “a clear link... between product quality and geographical origin.”⁷ The proposal quickly divided the Community between northern and southern countries. The agriculture of the southern members (France, Greece, Italy and Spain) is characterized by small-scale production and these nations sought to use the program to offer a means of promotion for their products without the investment necessary for the development of individual trademarks.⁸ Northern countries, on the other hand, “are apt to view quality as a matter of personal taste and consider that trademarks and labeling provide sufficient indications for consumers, without need for any particular product specifications.”⁹ As a result, there was substantial discussion after the Commission’s quality program was proposed; however, only relatively inconsequential changes were made between the initial proposal in December of 1990 and the final regulations adopted in July of 1992.

Food Quality Program

The centerpiece of the European Union’s food quality program is Council Regulation No. 2081/92 (hereinafter “Regulation”), establishing protected designations of origin (PDOs) and protected geographical indications (PGIs).¹⁰ This regulation applies to all agricultural products and foodstuffs within the Community, with the exception of wine products and spirit drinks, which are regulated separately.

⁷1989 O.J. (C 272) 3

⁸O. W. Brouwer, *Community Protection of Geographical Indications and Specific Character as a Means of Enhancing Foodstuff Quality*, 28 Common Mkt. L. Rev. 615, 621 (1991)

⁹Eur. Parl. Doc. (A3-0283/91) 22

¹⁰1992 O.J. (L 208) 1, art. 1(1)

Application for registration of a PDO or PGI is made by a group of interested parties (namely, producers or processors of the food product) to the country in which the geographical area is located. The individual country checks the application to confirm that the requirements of the Regulation are met and, if so, forwards the materials to the Commission.¹¹ The Commission undertakes its own investigation of the application and, within six months, must determine whether the application meets the requirements of the Regulation.¹² If the Commission determines that the region qualifies for protection, the name is published in the Official Journal; any “legitimately concerned” party (including national governments belonging to the EU) has until six months after publication to object to the registration. Objections may be made only upon the grounds that: (1) the proposed registration fails to meet the conditions for a PDO or PGI; (2) the registration would jeopardize the existence of an identical trademark or name; or, (3) the proposed name is generic.¹³ In the event of an objection, and if an agreement cannot be worked out between the parties involved, the Commission may determine whether to proceed with the registration in consultation with a committee of the member nations or the Council.¹⁴

When an application is finally approved, it is recorded in a register kept by the

¹¹Id., art. 5

¹²1992 O.J. (L 208) 1, art. 6(1)

¹³Id., art. 7(4)

¹⁴Article 15 provides that the Commission shall submit a proposed course of action to a committee of the member nations. If the committee agrees, the Commission may proceed; otherwise, the proposal is submitted to the Council for action. Should the Council fail to act within three months (as in the case where it was unable to achieve a consensus regarding registering Feta cheese as a PDO), the Commission may proceed with its proposal.

The committee of member nations created in Article 15 should not be confused with the committee of scientific experts created by the Commission. 1993 O.J. (L 13) 16. This latter committee is comprised of experts appointed by the Commission, to provide advice regarding the “technical problems” related to applications for PDOs and PGIs. The opinion of the committee of experts is advisory only.

Commission, which register is again published in the Official Journal.

The Regulation also provided an alternate application method for all names protected under national systems (statutory or judicial) at the time of adoption.¹⁵ This provision required all member nations to submit a comprehensive list of nationally-protected names which they wished to register under the Regulation. Any name not submitted by December 24, 1993, lost its previous national protection; however, those names which were submitted to the Commission continue to be protected under the national regimes until a decision is reached on registration under the Regulation. Furthermore, names submitted under this system are not subject to objection by other nations or interested third parties; rather, the Commission's proposed action on the applications is required to be submitted to the committee of member nations or the Council.¹⁶ Over 1,500 applications for PDO or PGI status were submitted to the Commission under this system.¹⁷ Consequently, the Commission failed to meet the July 26, 1993, deadline for presenting a list of generic terms that were not be eligible for registration¹⁸ and did not submit its first set of proposed registrations until January 1996.¹⁹ This delay is not altogether surprising, given the sensitive nature of the decisions being made and the delays which had plagued the program from its inception.²⁰

¹⁵1992 O.J. (L 208) 1, art. 17

¹⁶1992 O.J. (L 208) 1, art. 15

¹⁷European Report, January 18, 1997

¹⁸Id., art. 3(3)

¹⁹The committee of member nations was unable to reach a consensus as the proposal, so the Commission forwarded the proposal to the Council. COM (96) 48 Final, March 6, 1996. The Council failed to achieve the majority required to act upon the proposal, and so the proposal was adopted by the Commission after three months due to the Council's inaction. 1996 O.J. (L 148) 1

²⁰The report by Parliament on the original proposal for protection of geographical indi-

Both designations of origin and geographical indications are “the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff.”²¹ To qualify for a PDO, a food:²²

- (1) must originate in the region;
- (2) the qualities or characteristics of the food must be “essentially or exclusively due” to the particular geographical environment, including “inherent natural and human factors”; and,
- (3) the production, processing, and preparation of the food must take place within the defined region.²³

To qualify for a PGI, a food must:²⁴

- (1) originate in the region;
- (2) possess a particular quality, characteristic, or reputation “attributable to that geographical origin”; and,
- (3) be produced, processed, **or** prepared within the defined region.

Thus, qualifying for a PGI is less stringent than qualifying for a PDO, since the product need not originate entirely from within the designated region and need only have one particular quality (rather than the majority of the food’s characteristics) that is attributable (rather than exclusively due to) the geographical area.

cations noted that the proposal “[had] been submitted later than had been called for by Parliament and repeatedly promised by the Council and indeed the Commission.” Eur. Parl. Doc. (A3-0283/91) 21. Parliament again chastised the Commission for its delays in a resolution adopted on October 26, 1995 and in an Agriculture Committee report adopted on January 17, 1997.

²¹Id., art. 2(2)

²²Id., art. 2(2)(a)

²³The regulation does allow for certain raw materials (live animals, meat, and milk) to come from a larger or different area than that defined by the PDO, but only if: (1) the production area of the raw materials is itself limited; (2) special requirements exist for the production of the raw materials; and, (3) an inspection program exists to ensure compliance with those requirements. Id., art. 2(4) Furthermore, this exemption was only available to application made before July 24, 1995.

²⁴1992 O.J. (L 208) 1, art. 2(2)(b)

To be eligible to use a PDO or PGI, a product must comply with the specification established by the application. The specification must include:²⁵

- (1) the name of the product, including the designation of origin or geographical indication;
- (2) a description of the product;
- (3) the definition of the geographical area;
- (4) evidence that the product originates within the area, meeting either the requirements for a PDO or a PGI;
- (5) a description of the method of production, including traditional methods if appropriate;
- (6) details demonstrating the necessary link between the defined region and the characteristics of the product;
- (7) provisions for inspections to ensure compliance with the specification requirements²⁶; and,
- (8) specific labeling details relating to the PDO or PGI.

Although a specification must demonstrate that the proposed PDO or PGI meets the requirements of the Regulation, it is otherwise crafted entirely by the group or association submitting the application.²⁷

Once a PDO or PGI is recorded in the register, it receives legal protection comparable to, and perhaps even greater than²⁸, that afforded to a trademark.²⁹

²⁵Id., art. 4(2)

²⁶Complete requirements for inspection authorities and procedures are laid out in 1992 O.J. (L 208) 1, art. 10

²⁷In the case of geographical regions spanning more than one country, all of the countries spanned must be consulted. Id., art. 5(5)

²⁸Once a PDO or PGI is registered, it prohibits the registration of a trademark that would lead to a situation from which the registered indications would be protected (i.e. misleading use of the registered name). Where a trademark was obtained prior to the application for a PDO or PGI, the trademark may continue to be used at the same time as the registered name. In rare cases where the trademark is so well established that the registration of a PDO or PGI would inevitably be misleading to consumers, the new application would not be allowed. 1992 O.J. (L 208) 1, art. 14

²⁹The opinion of the Economic and Social Committee on the initial proposal of Regulation 2081/92 noted that geographical names are “an important collective asset” which “have hitherto not enjoyed the legal protection accorded to registered trade marks.” 1991 O.J. (C 269)

The indications “PDO” and “PGI” may appear only on products which comply with the Regulation.³⁰ Furthermore, registered names (whether PDOs or PGIs) are specifically protected against:³¹

- (1) any “direct or indirect commercial use” of the indication by non-conforming products which are “comparable to the products registered” or “exploit[] the reputation of the protected name”. This prohibits not only food products from outside the region from using the geographical name, but also denies use of the name to products within the region that do not meet the standards set forth in the application. The prohibition on exploitation may extend to include even dissimilar products which attempt to trade on the cachet of the registered products, as where a French court found that a comparable regulation governing wine appellations prohibited the use of “Champagne” for a perfume as a misappropriation of the registered designation.³² In this respect, the protection goes beyond that afforded to trademarks, which are limited to the field in which the mark is registered or those sufficiently similar to cause confusion.
- (2) any “misuse, imitation or evocation, even if the true origin of the product is indicated.” This prohibits the use of PDOs and PGIs in conjunction with modifiers such as “imitation”, “style”, or “method”. Individual nations may allow continued use of these modifiers until July 25, 1997, if products had previously been marketed in such a manner for at least five years and the true origin of the product is clearly labeled.³³
- (3) any “false or misleading indication” regarding the origin or qualities of a product.
- (4) any other practice “liable to mislead the public as to the true origin of the product.” These last two provisions extend the protection beyond just use of the protected name to any activity (such as packaging style or design) which suggest the protected product.

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³⁰1992 O.J. (L 208) 1, art. 8

³¹Id., art. 13

³²Cour d’appel Paris 1st ch.A., Dec. 15, 1993
Yves Saint Laurent Parfums v. INAO and CIVC

³³Given the delay in the Commission presenting the first set of proposed registrations (with over 1,000 still pending), the Regulation as it currently stands provides for little (and soon to be no) transition time after a PDO or PGI is registered. Accordingly, the Commission has proposed a transition period for five years after the date of registration, during which time the use of the registered name (either alone or in conjunction with a modifier) would be permitted, provided the actual origin is clearly labeled. COM (96) 266 Final, June 12, 1996. The Parliament has recently rejected this proposal, proposing instead to extend the transition period for an additional two years until July 25, 1999. European Update, January 18, 1997. The outcome of this debate, which will obviously have a serious impact on producers, remains to be seen.

Perhaps most importantly, the Regulation prevents any protected name from becoming generic.³⁴ Although a designation may be altered, or even lost, as a result of changes in technology or processing techniques, it cannot be lost as a result of changes in understanding or usage of the protected name.

U.S. Protection of Geographical Designations

As may be expected, American law is somewhat fragmented in its approach to geographical designations in food labeling. Because origin labeling has never been a major focus of any of the potential regulators (other than BATF), agencies ranging from the FDA to the Customs Service have separate regulations touching upon some aspect of this issue. Although the Bureau of Alcohol, Tobacco, and Firearms has focused strongly on indications of geographical origin for wines and spirits, the limited jurisdiction of the agency has prevented any comprehensive approach to indications of origin for foodstuffs as a whole. Additionally, unfair competition issues are covered by the Lanham Act and FTC regulations, which apply to all industries and commerce.

Even before the first Food and Drug Act, Congress has prohibited mislabeling the origin of food in interstate commerce.³⁵ This provision, however, only applies to direct or implied³⁶ mislabeling of the place of origin; it does not affirmatively require the label to state the actual origin. Similarly, while the

³⁴1992 O.J. (L 208) 1, art. 13(3)

³⁵“No person or persons, company or corporation, shall introduce into any State or Territory of the United States or the District of Columbia from any other State or Territory of the United States or the District of Columbia, or sell in the District of Columbia or in any Territory any dairy or food products which shall be falsely labeled or branded as to the State or Territory in which they are made, produced, or grown, or cause or procure the same to be done by others.” 21 U.S.C. § 16, enacted 1902.

³⁶24 Op. Atty. Gen. 697 (1903)

section applies to foreign products which are mislabeled as being domestic³⁷, it does not require imported goods to be labeled as such. It is unclear with mislabeling as to a foreign source would fall within the statute; while such mislabeling clearly violates the intent of the law, a literal reading of the language would cover only an incorrect indication of a domestic source upon the label.

Customs regulations, however, do require all imported goods to bear an indication of the country of origin.³⁸ Furthermore, whenever the name of any locality or country (other than the product's origin) appears upon an imported good, an indication of origin country must appear "in close proximity" and in "a comparable size".³⁹ A recent proposal by the Customs Service would limit this requirement only to cases where the presence of the locality may mislead the customer.⁴⁰

In general, however, labeling of food products is within the jurisdiction of the FDA. FDA regulations consider any labeling which expresses or implies a geographical origin to be misbranded unless:⁴¹

- (1) the origin is a truthful representation;
- (2) the expression is a trademark or trade name that is not deceptively misdescriptive. This may be the case even when the geographical reference is not the actual origin, if the trademark has acquired secondary meaning (namely, the trademark is understood to represent the manufacturer rather than the literal geographic meaning) or is so fanciful that it would not be understood to represent the actual origin. "Waltham watches" would be an example of the former, while "North Pole Orange Juice" would be an example of the later;

³⁷24 Op. Atty. Gen. 675 (1903)

³⁸19 C.F.R. § 134.11

³⁹19 C.F.R. § 134.46

⁴⁰60 Fed.Reg. 57599 (1995) (to be codified at 19 C.F.R. § 134.46) (proposed Nov. 16, 1995)
Final action on this proposal is overdue and still pending.

⁴¹21 C.F.R. § 101.18(c)

- (3) the representation is required by federal law or regulation; or
- (4) the name is understood by the consumer to represent a class or style of food, rather than geographical origin. This is distinct from secondary meaning in that no one would expect that “French” fries come from France, whereas a person may expect (quite correctly) that Waltham watches come from a particular manufacture who is located in Waltham.

Despite the presence of the regulation, misbranding of geographical origin appears to either not have been a significant problem, or not have been a significant priority, or both, as no actions taken under this section could be found.

The USDA, which has jurisdiction over labeling of meat and poultry, has similar (if differently worded) regulations regarding the use of geographical terms. Any reference to a locality other than the actual origin must be accompanied by a modifier (e.g. style, type, or brand) and a prominent statement identifying the actual origin.⁴² Furthermore, there must exist a recognized style or type in the manner used and the product must meet the requirements for that type or style. The regulation also recognizes the existence of certain generic terms (such as “Italian” sausage or “Irish” stew) which, after being identified as such by the Administrator of the Food Safety and Inspection Service, may be used without a modifier or a statement of origin. Even these terms, however, may not be used in such a manner as to give a false indication of origin or quality.⁴³

The most extensive regulation of geographical designations is carried out by the Bureau of Alcohol, Tobacco, and Firearms in connection with wines and spirits. BATF maintains and enforces a system of appellations of origin

⁴²9 C.F.R. § 317.8(b)(1)

⁴³9 C.F.R. § 317.8(a)

which are used in labeling and advertising wines.⁴⁴ These appellations may be based upon political subdivisions, such as counties and states, or upon viticultural areas defined and recognized by BATF. To establish an American viticultural area, a petitioner must provide: (1) evidence that the name of the viticultural area is locally or nationally known as referring to the specified area; (2) historical or current evidence of the boundaries of the area; (3) evidence of geological features which distinguish the area from surrounding areas; (4) the specific boundaries of the area, based on geological features; and (5) an appropriate map with the boundaries marked. A foreign viticultural area is established and defined by the foreign government in accordance with its use for labels within that country. A wine may use a viticultural appellation provided at least 85% of the wine is derived from grapes grown within the area and is fully finished within the state(s) in which the area is located; a foreign wine must comply with any and all foreign requirements regarding use of that appellation in the country of origin.

In addition to specific appellations, BATF regulates use of geographical designations which are generic, semi-generic, or non-generic.⁴⁵ If a geographic name is determined to be semi-generic, it may be used by wines for which it does not designate the origin, provided an appellation disclosing the true place of origin appears in conjunction with the term and the wine complies with the standard of identity or trade understanding for such a wine. Designations which are non-generic may be used only by wines of the origin indicated by the design-

⁴⁴27 C.F.R. § 4.25a

⁴⁵27 C.F.R. § 4.24

nation.

These restrictions occur within the more general prohibitions on indications of origin. Product names (as distinct from appellations) may not have geographical significance unless they are not seen by consumers as representing the origin. In such a case, the product name must be followed by the term “brand” and the label must include an appellation of origin.⁴⁶ Any other indications, express or implied, of an origin other than a wine’s true origin are prohibited.⁴⁷

Finally, regulation of designations of geographical origin may be established under the Lanham Act. Trademarks which are primarily geographically descriptive may not be registered⁴⁸; this bar may be overcome if the mark develops secondary meaning and becomes distinctive of the goods.⁴⁹ As a trademark, however, it is used to identify the goods of the owner of the mark; thus for a geographical indication to gain trademark status, it can only be associated with a single source of goods, defeating its purpose as a designation of origin.

A stronger possibility for protection exists in the provisions for certification marks in the Lanham Act.⁵⁰ By definition, a certification mark is used by someone other than the owner “to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics.”⁵¹ As a result, geographically descriptive certification marks are not required to obtain

⁴⁶27 C.F.R. § 4.39(j)

⁴⁷27 C.F.R. § 4.39(k)

⁴⁸15 U.S.C. § 1052(e)(2)

⁴⁹15 U.S.C. § 1052(f)

⁵⁰15 U.S.C. § 1054

⁵¹15 U.S.C. §1127

secondary meaning, precisely because they are intended to represent qualities in a good rather than a source of a good.

Comparisons

In comparing the American and European approaches to labeling of food with geographical indicators, the protection offered by each system must be examined in the context of the principles (both asserted and underlying) to be served by the program.

One of the primary purposes the Commission gives for the quality program is to respond to a “growing demand for agricultural products or foodstuffs with an identifiable geographical origin.”⁵² This statement of the problem that the Regulation claims to be addressing demonstrates the first point of tension between the European and American approaches: the link between geographical origin and quality.

The Regulation claims to limit its scope to “certain agricultural products and foodstuffs for which a link between product or foodstuff characteristics and geographical origin exists.”⁵³ This statement must be questioned, though, given the Commission’s previous announcement that the quality program would be based upon this link.⁵⁴ The Parliament’s analysis of the original proposal called for the quality program to become “a corner-stone of Community agricultural policy”⁵⁵; surely this is not a sensible approach unless the Parliament believes that a substantial portion of agricultural products has this geographical

⁵²1992 O.J. (L 208) 1

⁵³1992 O.J. (L 208) 1

⁵⁴1989 O.J. (C 272) 3

⁵⁵Eur. Parl. Doc. (A3-0283/91) 21

link.

At the same time, both the Parliament and the Commission conflate the issue of regional origin with traditional production methods. The most important clarification to the Regulation when proposed, in the mind of the Parliament, was that “the two definitions make no mention whatsoever of tradition, i.e. unvarying production methods and traditional associations with particular production sites.”⁵⁶ While protection of these traditional methods and associations may be a valid goal in and of itself, it must be recognized as distinct from protecting the qualities resulting from the physical location. As the Committee on the Environment, Public Health and Consumer Protection recognized, “there is no necessary connection between quality and geographical location. Feta cheese produced in Denmark, or Parma ham produced in Scotland may be just as good as the “original”, provided that high quality ingredients and processes are used.”⁵⁷

The Commission’s confusion of traditional location with traditional methods is seen in the definition of PDO. To qualify, the production, processing, and preparation of the foodstuff must take place within the defined geographic area.⁵⁸ However, there is no requirement of a connection between these steps and the particular characteristics of the product; indeed, there is no requirement that the methods used be traditional.⁵⁹ This issue was raised by several member nations in opposing the first list of registrations submitted by

⁵⁶Id., at 23

⁵⁷Id., at 28

⁵⁸1992 O.J. (L 208) 1, art. 2(2)(a)

⁵⁹The Regulation allows, but does not require, the specification to include, “if appropriate, the authentic and unvarying local methods.” Id., art. 4(2)(e)

the Commission; Denmark, the United Kingdom, and the Netherlands objected, for example, to the requirement that ham be sliced only in the defined region.⁶⁰

The perceived connection between geographical location and quality has not been a part of American food law. BATF requires viticultural areas to be geologically distinct from the surrounding area, but does not require that distinction to affect the wine that is produced. Similarly, the Customs Service proposal to loosen the identification requirement demonstrates a belief that there are some, if not many, instances in which the origin of a product will not be material to consumers. The certification mark provisions of the Lanham Act, which allow marks to certify origin or quality, do not require both. While the owner of the mark would presumably hope to give the certification of regional origin an aura of quality in the eyes of consumers, that is left to the abilities of the mark owner, rather than the government.

Nor has American food law been influenced by a connection between region and traditional methods. FDA regulation of food processing has focused on safety issues and standards of identity have addressed the qualities of the final product rather than how it was produced. Viticultural areas are not required to have traditional methods of producing wine and traditions, if any existed, are not imposed within the area by the BATF registration process.

The Economic and Social Committee, in analyzing the Regulation proposal, noted that the program would aid consumers not only by promoting the desired selection of food products, but by providing “a guarantee of the origin,

⁶⁰COM (96) 48 Final, March 6, 1996

method of manufacture and quality of the product and thus of its distinctive organoleptic properties.”⁶¹ This “significant step forward for the consumer”⁶² is questionable in light of the Commission’s failure to consult consumer groups during the drafting of the proposals.⁶³ Here again, the European system breaks from the American system in its focus on the producers rather than the consumers.

Only a group of producers or processors of a product are entitled to apply for registration.⁶⁴ Since the applicant is required to provide the specification, these trade groups will be able to shape the scope and requirements of their protection. Although “legitimately concerned” people may object to the registration, “this is unlikely to include consumer groups.”⁶⁵ Furthermore, the grounds on which an objection may be based do not include a specification which is undesirable to consumers but which otherwise meets the requirements of the Regulation.

Both the purposes and structure of the Regulation indicate that it is designed not to provide consumers with trust in their use of geographic designations to represent the quality they seek, but to present them with designations with government or industry supplied meanings. If, in fact, consumers attached the association of quality or traditional preparation methods with particular geographic regions, both the origin and processing of these foodstuffs would

⁶¹1991 O.J. (C 269) 63, para. 1.3

⁶²Id., para. 1.4

⁶³Opinion of the Committee on the Environment, Public Health and Consumer Protection. Eur. Parl. Doc. (A3-0283/ 91) 28

⁶⁴1992 O.J. (L 208) 1, art. 5(1)

⁶⁵Charles Lister, *Protectionism and Integration: Designations of Origin for Foodstuffs in the European Community*, 47 Food Drug L.J. 639, 651 (1992)

become material; therefore, any deception or misleading labeling in those respects would be prohibited by the standard food labeling requirements.⁶⁶ To the extent that consumers truly desired this information, authentic producers were not prohibited by any portion of the labeling regulation from including it in their packaging. On the contrary, the original proposal submitted by the Commission included two whereas clauses (dropped from the final regulation) that called for the Community to educate consumers as to geographical designations and to financially encourage producers to make use of them.⁶⁷ The commitment to public education regarding PDOs and PGIs was later revived by the Commission, but with the explicit proviso that no aid be directed towards producers or processors.⁶⁸

The recent controversy regarding the registration of “Feta” as a PDO demonstrates that it is producers, rather than consumers, that drive the meaning of these designations. As part of its deliberation, the Council commissioned a survey of consumers.⁶⁹ The results showed that only 20% of people had heard of Feta cheese, despite the fact that it is produced in no less than 7 countries in the Community. Thus the PDO is hardly a response to widespread consumer demand for certainty regarding Feta, but rather a newly provided government definition.

Finally, the Committee on the Environment, Public Health and Con-

⁶⁶1979 O.J. (L 033) 1, art. 2(a)

⁶⁷1991 O.J. (L 030) 11

⁶⁸1993 O.J. (L 185) 2, art. 5. The Commission has announced a plan to spend 8.8 million ECU (roughly \$10.5 million) to encourage producers to apply for registration and inform consumers of this program. A 1995 survey found that 77% of consumers had never heard of the special quality labels. European Report, June 26, 1996.

⁶⁹COM(96) 38 Final, March 6, 1996

sumer Protection noted that “products which achieve a reputation for quality usually come from areas possessing particularly favourable soil, climatic, and other conditions.”⁷⁰ This raises the question of whether the quality program can serve as a “considerable benefit to the rural economy, in particular to less-favoured or remote areas”⁷¹ without altering consumer demand. Together, these issues illustrate that the Regulation is based upon the producer perspective and approach rather than that of the consumer.

Once again, American law takes an opposite approach, focusing instead on the perspective of the consumer. Certification marks possess no significance other than that given to them by consumers; there is no government imprimatur of approval. Aside from that fact, certification marks can serve the same function as a PGI in certifying regional origin. More generally, a geographically descriptive mark can be registered only if consumers place secondary meaning in the name and associate it with the product; the mark owner’s assertion of a connection between the geographical term and a particular item or quality is insufficient. Similarly, BATF and FDA standards of identity make no claims to a particular level of quality; rather, they serve as thresholds ensuring that products fit consumer expectations. Finally, standards of identity are, to a large extent, based upon consumer expectations in a product rather than industry’s or government’s desired definition.

The final, but perhaps most difficult, discrepancy between American and European law regarding geographical indications is the effect of consumer

⁷⁰Eur. Parl. Doc. (A3-0283/91) 29

⁷¹1992 O.J. (L 208) 1

usage on such designations. Under the European system, the “genericism” of a geographical term is nothing short of anathema; the American approach, no doubt influenced by an intellectual property regime that places high value on adding knowledge to the public domain, regards the loss of protection as simply the price of too much success.

The Regulation clearly prohibits the registration as a PDO or PGI of any name which has become generic.⁷² In making such a determination, the Regulation calls for the Commission to consider: (1) the state of the term in the country of origin; (2) the state of the term in areas where the food product is consumed; (3) the situation in other member nations; and (4) any relevant Community or national laws. As part of the initial implementation of the Regulation, the Council is required to prepare a list of geographical names which have entered the lexicon as the common name of a foodstuff and thereby severed their connection to the original location. The Council has proven hesitant to do this, noting the “very important consequences” of such a decision and calling for “great caution” to be exercised.⁷³

The Council’s analysis of this area is flawed, however, as it erroneously concludes that a geographical indication for which the application for registration has been rejected must be considered generic.⁷⁴ While a name being generic is one of the grounds for objecting to a proposed registration, the Regulation permits an objection on the separate grounds of failing to meet the require-

⁷²1992 O.J. (L 208) 1, art. 3(1)

⁷³COM(96) 38 Final, March 6, 1996. After consulting with the member countries, the Council finally listed six cheeses (Brie, Camembert, Cheddar, Edam, Emmentaler, and Gouda) as generic.

⁷⁴Id.

ments of the Regulation.⁷⁵ Thus an application may be denied because it fails to prove the necessary connection between the product’s characteristics and the geographical origin, but that does not mean the location name should be considered generic. The Council’s position is no doubt influenced by the belief, discussed above, that there is a strong link between quality and geographical location; if this link is presumed, the primary reason remaining for denial of registration is a generic term. By relaxing this strong presumption and recognizing that nongeneric geographical names may be denied registration, the Council and the Community would not need to face the “all-or-nothing” consequences of a generic term decision with every registration.

If the Council is concerned with declaring terms generic, the Commission is equally concerned with geographic designations becoming generic over time. The Economic and Social Committee advised that names “must not be allowed to become generic designations simply because they are not properly protected.”⁷⁶ The Commission response is a provision in the regulation preventing protected names from becoming generic.⁷⁷ This was recognized by the Committee for Consumer Protection as nothing more than “an edict from the Thought Police, attempting to control the evolution of language.”⁷⁸ If the generic nature of a term comes from its use by consumers, that use cannot be controlled by the Commission; rather, the Commission can only choose to ignore its use as a generic term once protection has been granted under the Regulation.

⁷⁵1992 O.J. (L 208) 1, art. 7(4)

⁷⁶1991 O.J. (C 269) 63, para. 1.7

⁷⁷1992 O.J. (L 208) 1, art. 13(3)

⁷⁸Eur. Parl. Doc. (A3-0283/91) 29

American law, on the contrary, refuses to ignore such changes in the use and meaning of terms. A mark may be canceled “at any time if the registered mark becomes the generic name for the goods or services.”⁷⁹ Indeed, in a case involving a certification mark used to protect the geographic indication of Roquefort cheese, the court expressly noted that a certification mark which became primarily a description of the goods for which it was used would be subject to cancellation.⁸⁰ Rather than judging whether a name is generic only at the time of registration, American law allows a mark to be challenged at any time, forcing a mark owner to remain vigilant as to the use and meaning of a mark.

This divergence between American and European law is the most troubling because it is also the most difficult to reconcile. Most of the wine designations considered semi-generic by BATF⁸¹ have retained their distinctiveness in Europe. It would be difficult, if not impossible, for most Americans to make the psychological and vocabulary adjustment to restore the geographic meaning of these terms. Further, there would seem to be little gain to consumers or producers (other than in the original region) in removing these terms from the public domain. On the other hand, there is little benefit for Europeans in abandoning terms which still retain particular meaning to them. This impasse will continue to widen, as American law pursues a trend favoring adding material to the public domain, while European law rejects the loss of geographic indications

⁷⁹15 U.S.C. § 1064(3)

⁸⁰Community of Roquefort v. Faehndrich, 303 F.2d 494, 497 (2d Cir.1962)

⁸¹27 C.F.R. § 4.24 (1996)

to generic terminology, even at the price of ignoring actual usage and meaning.

Conclusion

Regulation 2081/92 provides for reciprocal treatment of third countries which provide comparable protection for geographical designations under their laws. Given the difference that exist between European and American protection at present, the United States is unlikely to receive the benefit of such treatment in the near future. What is more important to observe, however, is that both systems have mechanisms in place for the identification and protection of geographic designations. The differences arise not in whether to protect the designation, but to what extent that protection extends and what the meaning of such designations is to be.