

7-15-2013

# A case of champagne: a study of geographical indications

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## Recommended Citation

Jay, Tim and Taylor, Madeline, "A case of champagne: a study of geographical indications" (2013). *Corporate Governance eJournal*. Paper 29.  
<http://epublications.bond.edu.au/cgej/29>

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# A case of champagne: a study of geographical indications

## **Abstract**

### **SPECIAL ISSUE: FOOD LAW & GOVERNANCE**

The urgency of securing food supply has increased dramatically in a period when the GFC, environmental degradation, global warming and the rapid increase in industrialised food production has revealed the fragility of the world's food production systems. In July 2012, Australia published its first Green Paper on food security, noting; 'in the next 30 years the world will have to produce 70% more food to feed the world's growing population.'<sup>[1]</sup> In the same month, the US Congress commenced a legislative debate about policy directions and public funding through taxation for farm subsidies to American primary producers. In May 2012, The Canadian government introduced the first National Food Strategy, to manage failures of the social security system to provide adequate and nourishing food to around 800,000 Canadians. In July 2013, the Indian government issued an ordinance to give the nation's population the right to get 5kgs of food grains every month at highly subsidised rates. This will be the biggest food security program on the planet.

Food policy involves vital challenges in humanitarian, health and environmental law. Food law and governance plays an important role in facilitating the transition to sustainable agriculture and food security. The Centre for Commercial Law is embarking on a project to produce international publications, colloquia, presentations and research analysing and proposing reform to areas in food law.

Our mission is to conduct research and publishing in the vital area of Food Governance and Food Security policy making, celebrating food, local *terroir* and its relationship with society. The Centre provides legal studies of culinary modernism, tourism, restaurants, the gourmet and health aspects of food, wine and trade law.

Our first contribution, the fruit of a successful Colloquium on Food and Law in 2012, is on Champagne and Geographical Indications. It is both informative, enjoyable and a little long on taste, like a fine wine.

[1] [National Food Plan](#), DAFF, 2012

## **Keywords**

method champenois, food law, food law and governance, agriculture, food security, Colloquium on Food and Law, food governance

## **Disciplines**

Food and Drug Law

# A CASE OF CHAMPAGNE: A STUDY OF GEOGRAPHICAL INDICATIONS

TIM JAY\* and MADELINE TAYLOR\*\*

The term 'Method Champenois' connects champagne to its rich history, geographical location and image. Few words evoke luxury and good cheer as much as champagne. Behind the bubbles is an international trade rivalry between the EU and the US to control the lucrative champagne market. The battle lines concern champagne's recognition as a 'geographical indication'; a type of intellectual property cited primarily in the *Trade-Related Aspects of Intellectual Property Rights Agreement*. The conflict is hotly contested. The EU claims the label champagne must only be used for sparkling wine produced in the Champagne region in France. The US counterclaims that champagne is a generic word describing the type of sparkling wine.

As the global middle class population continues to rise and international agricultural trade becomes more crucial, understanding international food law is now imperative. Geographical indications (GIs) have long been used in Europe as indicators or appellations of origin in food law. They authenticate and symbolise an intellectual property right of a label owned collectively by all producers in a region. The law surrounding GIs protects producers and their reputations and reassures consumers that a product of the origin stated on the label is authentic.

Vigorous debate has arisen particularly over the GI of champagne. Champagne is elite and expensive; exactly the type of luxury product which the law of GIs aims to protect. French champagne makers strive for ever-increasing levels of excellence in the quality of their produce. If the GI of Champagne is dismantled, they believe, the champagne flute will soon contain an inferior sparkling wine. This devotion to quality control is a foundation for the designation of champagne as an appellation of origin, as opposed to a mere indication of source. The vintners of Champagne have become equally obsessive in their desire to protect and control the use of the word champagne, both in terms of regulating the geographical limits of the region which is permitted to use the appellation and in seeking to enforce restraints on the use of the word champagne on products manufactured outside the eponymous region.

Champagne, along with other wines and spirits, is accorded special, preferential treatment in the *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*.<sup>1</sup> Growth in the

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<sup>1</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights*, WTO Doc IP/N/1/-/G (15 April 1994).

popularity of champagne among the middle classes over the last two centuries has taken place predominantly in the United States and the United Kingdom. This has resulted in a generalisation of the term champagne in those jurisdictions to mean dry, sparkling white (or rosé) wine, wherever manufactured. As a result, the Champenois have had to fight a rearguard action to recapture the intellectual property associated with the name champagne.

It is arguable that the French should have no monopoly on the use of the word champagne in the first place. The word is derived from the Latin 'campania', meaning open country.<sup>2</sup> The Latin term is also the source of the English word campaign.<sup>3</sup> There is a large region of southern Italy known as Campania, of which Naples is the capital, where wine was grown by Greek settlers as early as the 7th century BC and in which wine-making has undergone a modern resurgence.<sup>4</sup> The town of Campania, in Tasmania's Coal River Valley, is at the centre of one of Tasmania's premier wine-producing regions.<sup>5</sup> In the Canton of Vaud, Switzerland, lies the tiny village of Champagne, where a still wine bearing that name has been made since 1657. It is at the centre of an on-going dispute with its more famous French namesake.<sup>6</sup>

This article examines Champagne as a GI from a legal perspective, before looking behind the law to examine the historical and cultural reasons following the determination of the Champenois to safeguard the intellectual property of their appellation and the legacy of their achievements. We trace the rich history of champagne and the Champagne region, chronicling the succession of advances in the production of what was once called the devil's wine (*le vin du diable*),<sup>7</sup> culminating in the intense pride and sense of cultural identity within the Champagne region. Attention will turn to the reasons why the United States, in particular, may resist to the calls from the French to acknowledge their claim to the exclusive use of the word champagne. We traverse the economic reasons why jurisdictions such as Australia have shifted their stance to accommodate the desires of the Europeans.

The French cause may already be lost; the use of the word champagne has become far too generic in the minds of the drinking public. Metaphorically speaking, the bubbly has escaped, and any attempt to re-cork the bottle is futile. While this may cause chagrin to the Champenois, it may not be economically deleterious to them; it may indeed have positive benefits. The article examines some arguments against the French entitlement to the exclusive use of the term champagne, based on prior or contemporaneous use.

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<sup>2</sup> John Simpson and Edmund Weiner, *Oxford English Dictionary* (Clarendon Press, 2<sup>nd</sup> ed, 1989).

<sup>3</sup> Ibid.

<sup>4</sup> Ed McCarthy, *The Unique Wines of Campania* (29 May 2007) *Wine Review Online* <[http://www.winereviewonline.com/mccarthy\\_on\\_campania.cfm](http://www.winereviewonline.com/mccarthy_on_campania.cfm)>.

<sup>5</sup> Visit Vineyards, *Campania Hills vineyard* (2012) Visit Vineyards <<http://www.visitvineyards.com/tasmania/coal-river-valley/wine/vineyards-wineries/info/campania-hills-vineyard-colmaur>>.

<sup>6</sup> BBC News, *Swiss town fights Champagne ban* (5 April 2008) *BBC News* <<http://news.bbc.co.uk/2/hi/europe/7332473.stm>>.

<sup>7</sup> Ibid.

### The law of geographical indications in France and Europe

Laws to protect geographical indications have existed in Europe since the middle ages.<sup>8</sup> Often guild marks were used to identify the geographical origin of goods, as well as the identity of their manufacturer. These developed into geographical indications, on the one hand, and trademarks, on the other.

Indications of geographic origin fall into three broad categories:

- (a) Indications of source (*indications de provenance*): for example, Made in China. Such designations contain no implication as to the quality of the product. They merely indicate its geographical origin;
- (b) Appellations of origin (*appellations d'origine*): these impute to the product a characteristic quality that relates to geographic factors; and
- (c) Geographical Indications (*indications géographique*): sometimes used as a broad term encompassing both indications of source and appellations of origin. In the TRIPS Agreement the term is given a more specific meaning, in between the other two categories – more than a mere indication of source, but not necessarily meeting the high quality standards of an appellation of origin.<sup>9</sup>

One of the earliest international treaties for the protection of intellectual property, including appellations of origin and indications of source, is the *Paris Convention for the Protection of Industrial Property* 1883 (Paris Convention).<sup>10</sup> Following an 1880 diplomatic conference, the Paris Convention was signed in March 1883 by 11 nations from Europe and Central and South America.<sup>11</sup> The Paris Convention has been revised numerous times, but is still in force as at 2013, with 174 signatories to date.<sup>12</sup>

Two international agreements in Madrid, both dated 14 April 1891, were designed to enhance the protections available to geographical indications. Whereas the Paris Convention provided broad protection for a wide range of industrial property, the *Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods* 1891 provided a more specific framework for the protection of indications of source.<sup>13</sup> The contemporaneous agreement, the *Madrid Agreement Concerning the International Registration of Marks* 1891, established the international system for registering trademarks in multiple (signatory) jurisdictions.<sup>14</sup>

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<sup>8</sup> Bernard O'Connor, *The Law of Geographical Indications* (Cameron & May, 2004) 21.

<sup>9</sup> Ibid 22-3.

<sup>10</sup> WIPO, *International Treaties and Conventions on Intellectual Property* (2010) WIPO <<http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch5.pdf#paris>>.

<sup>11</sup> The original signatories were Belgium, Brazil, France, Guatemala, Italy, The Netherlands, Portugal, El Salvador, Serbia, Spain and Switzerland.

<sup>12</sup> WIPO, *Contracting Parties* (2012) WIPO <[http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=2](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=2)>.

<sup>13</sup> O'Connor, above n 8, 31.

<sup>14</sup> WIPO, *Madrid Agreement Concerning the International Registration of Marks* (14 April 1891) WIPO <[http://www.wipo.int/madrid/en/legal\\_texts/trtdocs\\_wo015.html](http://www.wipo.int/madrid/en/legal_texts/trtdocs_wo015.html)>.

Geographical indications could be protected under the latter agreement as collective marks, certification marks or guarantee marks.<sup>15</sup>

In French domestic law, the *Loi du 1er Août 1905*, allowed the government to define geographic boundaries for the production of certain foodstuffs.<sup>16</sup> While the *Loi du 6 Mai 1919* established appellations of origin, including champagne, as intellectual property.<sup>17</sup> The *Institut National des Appellations d'Origine* (INAO) was created on 30 July 1935.<sup>18</sup> Its co-founder was Baron Pierre Le Roy de Boiseaumarie, a trained lawyer, World War I flying ace and winemaker from the Châteauneuf-du-Pape region.<sup>19 20</sup> The Decree of 30 July 1935 established a special category of *appellations d'origine contrôlée* (AOC) for wine and spirits. Following the Decree of 30 July 1935, champagne was one of the earliest wines to be granted an AOC, in 1936.<sup>21</sup>

Widespread international support for further protection of appellations of origin was sought under the provisions of the *Lisbon Agreement of 1958*.<sup>22</sup> The primary aim of the Lisbon Agreement was that contracting party States would protect appellations of origin that are designated in the source country.<sup>23</sup> However, the Lisbon Agreement has not achieved significant support. To date, the agreement is in force in only 27 countries,<sup>24</sup> and many major WTO and OECD countries are not signatories. Nevertheless, Gervais notes the recent renewed interest in the Lisbon Agreement.<sup>25</sup> He posits that it may play a role in the establishment of the multilateral register of appellations for wines and spirits that is mandated by Article 23(4) of the TRIPS Agreement.

### Current international regulations

The TRIPS agreement of 1996, proposed by the WTO and agreed upon by 158 members including the EU, US and Australia, provides the most comprehensive multilateral treaty to draft and enforce intellectual property laws.<sup>26</sup> TRIPS represents the minimum level of

<sup>15</sup> O'Connor, above n 8, 32.

<sup>16</sup> Economie Gouv, *Histoire d'une loi* (2010) Economie Gouv France <[http://www2.economie.gouv.fr/directions\\_services/dgccrf/documentation/publications/ouvrages/loi1905.pdf](http://www2.economie.gouv.fr/directions_services/dgccrf/documentation/publications/ouvrages/loi1905.pdf)>.

<sup>17</sup> Ibid.

<sup>18</sup> On 1 January 2007, its name was changed to *Institut National de l'Origine et de la Qualité*; however, the Institut maintains its original abbreviation.

<sup>19</sup> Provence, *Châteauneuf du Pape* (2010) Provence <<http://www.provence-hideaway.com/242.html>>.

<sup>20</sup> Global Province, *Gods, Heroes and Legends* (2000) Global Province <<http://www.globalprovince.com/ghl.htm>>.

<sup>21</sup> Educa Vin, *About Champagne* (2010) Educavin <<http://www.educavin.com/-About-Champagne-?lang=en>>.

<sup>22</sup> WIPO, *Lisbon Agreement for the Protection of Appellations of Origin and their International Registration* (31 October 1958) WIPO <[http://www.wipo.int/lisbon/en/legal\\_texts/lisbon\\_agreement.html](http://www.wipo.int/lisbon/en/legal_texts/lisbon_agreement.html)>.

<sup>23</sup> O'Connor, above n 8, 37.

<sup>24</sup> Algeria, Bulgaria, Burkina Faso, Congo, Costa Rica, Cuba, Czech Republic, France, Gabon, Georgia, Greece, Haiti, Hungary, Iran, Israel, Italy, Macedonia (FYROM), Mexico, Moldova, Montenegro, Morocco, Nicaragua, North Korea, Peru, Portugal, Romania, Serbia, Slovakia, Spain, Togo, Tunisia and Turkey.

<sup>25</sup> Daniel Gervais, 'The Lisbon Agreement's Misunderstood Potential' (2009)1.1 *WIPO Journal: Analysis and Debate of Intellectual Property Issues* 87.

<sup>26</sup> The North American Free Trade Agreement contains some protection for GIs but these overlap with the TRIPS agreement.

protection that member countries are required to enact domestically. It is hailed as ‘the most significant step in creating a uniform system for the international protection of all Intellectual Property, especially GIs’.<sup>27</sup> The definition of a GI pursuant to TRIPS Article 22 provides indications which identify a ‘good’ as originating in the territory of a 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.<sup>28</sup> The general standard focusing on protecting the consumer public from misleading geographical labels is also found in Article 22:

The legal means for interested parties to prevent: (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place or origin in a manner which misleads the public as to the geographical origin of the good.<sup>29</sup>

The legal methods and remedies for the enforcement of Article 22 are implemented subjectively into members’ legal systems. Article 24 provides exceptions to the broad Article 22 definition, allowing precedent for member states to deny generic terms GI protection within their domestic market that indicate a type of good rather than the good’s geographical origin.<sup>30</sup> Article 23 establishes a heightened level of protection for wine and spirit production and has caused a divide between commentators and governments. As van Caenegem points out, ‘the current international debate revolves around the EU’s proposals for the expansion of a hybrid system, that of registered GIs, which already exists under municipal and EU laws’.<sup>31</sup> The EU Old World camp<sup>32</sup> has consistently argued for heightened protection for all GIs. The opposing US New World camp<sup>33</sup> has historically argued to limit GI protection to the Article 22 broad standard. Australia originally belonged to the New World camp, but has recently shifted position.

The implementation of TRIPS provisions varies considerably, most notably between the two camps, led by the EU and US jurisdictions respectively, notwithstanding efforts to harmonise a consensual basis for granting rights to a particular group to use a geographical designation. Differing standards of legal protection for GIs pose issues relating to competitive advantage and export trade, effectively acting as technical barriers to

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<sup>27</sup> Emily Creditt, ‘Terroir vs. Trademarks: The Debate over Geographical Indications and Expansions to the TRIPS Agreement’ (2009) 11 *Vanderbilt Journal of Entertainment and Technology Law* 435.

<sup>28</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights*, WTO Doc IP/N/1/-/G (15 April 1994) art 22 note 11.

<sup>29</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights*, WTO Doc IP/N/1/-/G (15 April 1994) art 22 para 22.

<sup>30</sup> Ibid art 24, para 6, states that a member need not protect GIs for goods or services for which the relevant indication is identical with the term customary in common language as the common name for such goods or services in the territory of that Member.

<sup>31</sup> William van Caenegem, ‘Registered geographical indications between intellectual property and rural policy - Part I’ (2003) 6 *Journal of World Intellectual Property* 870.

<sup>32</sup> Bulgaria, Guinea, India, Jamaica, Kenya, Madagascar, Mauritius, Morocco, Pakistan, Romania, Sri Lanka, Switzerland, Thailand, Tunisia and Turkey.

<sup>33</sup> Argentina, previously Australia, Canada, Chile, Colombia, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, New Zealand, Panama, Paraguay, the Philippines and Chinese Taipei.

international trade as well as being burdensome for policy makers and confusing for consumers. Dawson suggests throughout the 20<sup>th</sup> century; ‘GIs have been an intellectual property right in the making surrounded by a complex debate lacking common terminology’.<sup>34</sup> Ambiguities and a shallow consensus exist around the proposition that the use of GIs will be prohibited where it results in consumers being misled or confused in regard to the origin or qualities of the product. Wine (and specifically, champagne) provides the quintessential example of a product that relies on a GI, as differing environments produce different wine grapes and thus wines of different characteristics.<sup>35</sup> As a result, the wine market relies most heavily on GIs for consumer product recognition. The varying levels of GI protection for winemakers internationally provide the important comparative analysis of the fundamentally opposed EU and US policies.

### US GI Protection

Despite the United States’ general adherence to the 1994 TRIPS agreement, Zahn argues the US does not comply with the legal purpose of Articles 23 and 24 of TRIPS because of the US inadequate protection of semi-generic wine product names.<sup>36</sup> The US provides two means to protect GIs: first, under the previously enacted *Trademark Act* of 1946 (Lanham Act); and secondly, through the Bureau of Alcohol, Tobacco and Firearms (ATF). The *Taxpayer Relief Act* of 1997 codified the wine classification system created by the ATF, which includes five categories; ‘generic names,<sup>37</sup> semi-generic names,<sup>38</sup> non-generic names, non-distinctive names and non-generic distinctive names’.<sup>39</sup> According to the ATF, GIs that have obtained significance for consumers are afforded protection if they are distinctive names, however generic names will not be eligible for GI protection. Champagne is classified as a semi-generic name. Consequently, American winemakers may label their product champagne, despite the fact that the product does not originate in Champagne, France. However, the producer must denominate the wine’s actual place of origin and the wine product itself must express the traits and attributes typically associated with the semi-generic name.<sup>40</sup>

The ATF classification system is in conflict with TRIPS, Article 23 of which explicitly provides that a misleading GI cannot be used with any of the words kind, type or style (this is aimed at preventing recognised GIs from becoming generic). According to the *Lanham Act*,

<sup>34</sup> Norma Dawson, ‘Locating Geographical Indications: Perspectives from English Law’ (2000) 90 *Trademark Rep* 590.

<sup>35</sup> Mark Silva, ‘Sour Grapes: The Compromising Effect of the United States’ Failure to Protect Foreign Geographic Indications of Wines’ (2005) 28 *Boston College International and Comparative Law Review* 199.

<sup>36</sup> Lindsey Zahn, ‘Australia Corked Its Champagne and So Should We: Enforcing Stricter Protection for Semi-Generic Wines in the United States’ (2012) 18 *Journal of Transnational Law and Contemporary Problems* 26.

<sup>37</sup> Pursuant to *The Lanham (Trademark) Act of 1946*, 15 USC. Examples of generic terms are Vermouth and Sake.

<sup>38</sup> As well as Champagne, other semi-generic terms under the Lanham Act include Angelica, Burgundy, Claret, Chablis, Chianti, Malaga, Marsala, Madeira, Moselle, Port, Rhine Wine (syn Hock), Sauterne, Haut Sauterne, Sherry and Tokay.

<sup>39</sup> Non-generic distinctive GIs include but are not limited to: Bordeaux Blanc; Medox; Saint-Julien; Chateau Yquem; Chateau Margaux; Rhone; and Lagrima.

<sup>40</sup> Zahn, Above n 36, 12.



for a trademark to be protected, a GI must be distinct, since GIs are not inherently distinctive and must acquire distinctiveness through proof of a secondary meaning to obtain protection.<sup>41</sup> GIs are protected as certification marks and collective marks pursuant to the *Lanham Act*. The amendment to the *Lanham Act* in 1996 to comply with TRIPS provides stronger protection for GIs used in wines and spirits, versus a lower level of protection for all other products. US commentators argue that trademark law rationales are the same as GIs in allowing consumers to correctly identify the source of a product.<sup>42</sup> However, there are numerous factors differentiating GIs to trademarks. GIs possess the crucial role of identifying the product quality. Many GIs are controlled by umbrella organisations that set rigorous quality control standards for products bearing their GI registered names domestically and protect the investment of local producers by creating brand recognition in the international marketplace.

Certification marks are administered by an umbrella organisation which may license others to use the mark to certify regional or other origin, material, mode of manufacture, quality accuracy or other characteristics<sup>43</sup> to licensees who meet the organisation's quality standards of the mark. In contrast to a certification mark described by Nation as a guarantee or approval mark,<sup>44</sup> a collective mark is used by the members of a cooperative, an association or other collective group or organisation<sup>45</sup> and merely identifies the membership in the organisation.

Unlike certification marks, collective marks do not represent product quality but merely guarantee the origin of the goods. In the United States, a GI holder can ensure rights in either a collective or certification mark by registering with the US Patent and Trademark Office, or the holder may claim a collective or certification mark at common law. The *Lanham Act* does not protect generic marks, defined as a mark that embraces an entire class of products or services, which do not necessarily emanate from the same source.<sup>46</sup> For example, the term safari was held to be generic when used in connection with certain clothing items in the case of *Abercrombie & Fitch Co v Hunting World Inc*, as the term had become widely used as a genus rather than a species of goods. The governing standard for GI owners pursuing action against alleged infringers is the same as the US trademark law standard: likelihood of confusion of consumers. This can lead to unpredictable results as the test often comes down to the subjective judgement of the examiner or judge.<sup>47</sup>

The relevant question for the court in determining GI infringement based on the likelihood of confusion test is how likely is it that the consumer will confuse the duplicate for the

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<sup>41</sup> Emily Nation, 'Geographical Indications: the International debate over intellectual property rights for local producers' (2011) 82 *Colorado Law Review* 970.

<sup>42</sup> Ibid 971.

<sup>43</sup> *The Lanham (Trademark) Act of 1946*, 15 USC § 1127.

<sup>44</sup> Nation, above n 41, 973.

<sup>45</sup> Margaret Ritzert, 'Champagne is from Champagne: an economic justification for extending trademark-level protection to wine-related geographical indications' (2009) 37 *AIPLA Quarterly Journal* 225.

<sup>46</sup> Nation, above n 41, 975.

<sup>47</sup> Ibid 981.

original trademark?<sup>48</sup> A bright line rule does not exist for determining consumer confusion. However, the court may look at factors including strength of the original mark, the similarity of the products involved, the similarity of their advertising and targeted classes and evidence of actual confusion.<sup>49</sup> The policy aim of TRIPS is to eliminate consumer confusion in a competitive market by reducing consumer search costs. Reducing consumer search costs will include factors such as saving time and effort required by the trial and error process to distinguish between GIs and brand names to establish the desired product.

The United States has historically advocated for the development and enforcement of international IP rights and protection<sup>50</sup> yet paradoxically, the US remains resistant to reform. Historically, the US wine market places emphasis on characterisation by grape varietals, rather than the EU approach of placing importance on GIs. The US position is to limit its GI protection regime to provide uniform protection of GIs, partly because GIs are a form of communal property without strict boundaries and thus run foul of to the American capitalist view of society.<sup>51</sup> International pressure has increased for the US to comply with the expansion of Article 23 protection of semi-generic wine products after Australia's shift to the EU camp and ratification of its new bi-lateral agreement with the EU.

The argument to extend GI protection to Champagne to render it a non-generic GI is ongoing within the United States. The US sector of the *Comité Interprofessionnel du Vin de Champagne*, The Office of Champagne, previously launched an advertising campaign in magazines including *The Economist*, *Wine Spectator* and *Vanity Fair* asking readers the following questions; Alaska salmon from Florida? and Florida oranges from Maine? Followed by the larger question, Champagne not from Champagne?<sup>52</sup> The answer to these questions provided by the ad is No Way following a description of Champagne and sparkling wine in general. In 2007, the Office of Champagne in the US launched Champagne Week with the goal of further educating and exciting American wine enthusiasts about true champagne produced in the Champagne region of France.<sup>53</sup> Evidently, champagne has been promoted by some sectors of the US community to eventually claim a non-generic status and thus to be protected by Article 23 in the future.

## EU GI Protection

In stark comparison to the US approach, European Union GIs enjoy a double layer of protection; in the EU-wide system, and domestic laws in individual countries. GIs for food products are protected either as Protected Designations of Origin (PDO) or as Protected

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<sup>48</sup> Ritzert, above n 45, 204.

<sup>49</sup> Ibid.

<sup>50</sup> Justin Waggoner, 'Acquiring a European Taste for Geographical Indications' (2008) 33 *Brooklyn Journal of International Law* 591.

<sup>51</sup> Eva Gutierrez, 'Geographical Indicators: A Unique European Perspective on Intellectual Property' (2005) 29 *Hastings International & Comparative Law Review* 41.

<sup>52</sup> Elliot, *The Champagne Campaign* (January 28 2003) *New York Times* <<http://www.maisons-champagne.com/en/pub/newyork.htm>>.

<sup>53</sup> Ritzert, above n 45, 223.

Geographical Indications (PGI); these categories extensively protect over 700 food items. Products bearing a PDO (including champagne) must be produced, processed and prepared within the specified geographical area and the product's quality or characteristics must be essentially due to that area.<sup>54</sup> The less stringent PGI regulation requires the 'product to be produced, processed or prepared in the geographical area and need only have one particular quality, rather than the majority of the good's characteristics, that is attributable to, rather than exclusively due to, the geographical area'.<sup>55</sup> Registration is a mandatory prerequisite for protection under EU law, unlike the US system, and each PDO or PGI is monitored by umbrella organisations for compliance with quality-control standards. The holder of a PDO or PGI enjoys four broad rights. First, the holder is protected against unauthorised commercial use of the PDO or PGI on comparable products that exploit the reputation of the protected name.<sup>56</sup> Second, the holder is protected against any misuse, imitation, or evocation, even if the true origin of the product is indicated or if the protected name is translated or accompanied by an expression such as 'style', 'type', 'method', 'as produced in', 'imitation', or 'similar'.<sup>57</sup> This right is notably similar to the rights granted to wine and spirits under TRIPS Article 23, providing a heightened level of protection. Third, any false or misleading indication of GI indication on packaging or advertising materials<sup>58</sup> may be prosecuted. Finally, GI holders may prosecute any other practice liable to mislead the consumer as to the true origin of the product.<sup>59</sup>

These rights may be prosecuted by a nation's government, unlike the US system which allows for individual causes of action. The EU system greatly benefits small producers who cannot afford to protect GIs in private litigation. The case of *European Commission v Germany*<sup>60</sup> illustrates the relative ease with which GI holders may prove evocation, whereas the US system enforces the 'likelihood of confusion' test which arguably favours a lower standard by providing a variety of factors for court circuits to consider subjectively in a particular case. In *European Commission v Germany*,<sup>61</sup> the Court debated whether the protection granted to the registered PDO Parmigiano Reggiano extends to the German word Parmesan.<sup>62</sup> Parmesan was held to be a prohibited evocation of Parmigiano Reggiano due to the phonetic and visual similarity of the two words to market hard cheeses. Evocation was defined by the court as:

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<sup>54</sup> Vicki Wayne, 'Wine market reform: A tale of two markets and their legal interaction' (2010) 29 *The University of Queensland Law Journal* 219.

<sup>55</sup> GE Evans and Michael Blakeney, 'The Protection of Geographical Indications After Doha: Quo Vadis?' (2006) 9 *The Journal of International Economic Law* 583.

<sup>56</sup> *EU Council Regulation (EC) No 510/2006 of 20 March 2006 On the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs* [2006] OJ L 93 31/3, art. 4-5 (2006).

<sup>57</sup> *Commission of European Communities v Germany, Opinion of Advocate Gen Mazik* (C-132/05) [2008] ECR I-957.

<sup>58</sup> *EU Council Regulation (EC) No 510/2006 of 20 March 2006 On the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs* [2006] OJ L 93 31/3, art. 13.1(c).

<sup>59</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights*, WTO Doc IP/N/1/-/G (15 April 1994) art. 13.1(d).

<sup>60</sup> *European Commission v Germany* (C-301/95) [2008] ECR I-957.

<sup>61</sup> *Ibid.*

<sup>62</sup> Nation, above n 41, 987.

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A situation where the term used to designate product incorporates part of a protected designation, so that when the consumer is confronted with the name of the product, the image brought to his mind is that of the product whose designation is protected. It is possible for a PDO to be evoked where there is no likelihood of confusion between the products concerned.<sup>63</sup>

Evocation does not require that a consumer actually is confused into thinking that the infringing product is identical with the protected product.<sup>64</sup> Unlike the US likelihood of confusion test, the EU test will be satisfied in the event that the infringing product merely brings to the consumer's mind the protected product.

The US and EU regimes are in contrast in the initial determination of infringement before the genericness defence is raised. The US test analyses infringement based on likelihood of consumer confusion and the EU uses the evocation/misuse standard. The US implements the minimum standard required by TRIPS Article 22, and relies on Article 24 exemptions, whereas the EU provides Article 23 level protection for all GIs. The international debate surrounding GIs lies in the EU's campaign to require all WTO members to adhere to Article 23 level protection for all GIs. Taking an expansionist approach<sup>65</sup> to recognising a plethora of EU GI goods that the US argues are generic. The EU rigorously enforces their heightened wine GI protection policy. On 10 January 2008, a shipment of 3,000 bottles of E & J's Gallo's sparkling wine Andre was labelled Champagne illegally. It was destroyed by Belgium customs officials.

### **Champagne vs sparkling wine: the international divide**

The New World and Old World camps are diametrically opposed<sup>66</sup> over domestic GI protection policy. The EU supports strong protections for GIs proposing the increased protection provided in Article 23 of TRIPS to all GIs. In comparison, the US is opposed to any protections beyond those currently mandated in TRIPS. The EU has proposed that GIs should no longer be subject to the consumer confusion test pursuant to Article 22 and that a ban on the use of false GIs should be applicable to all products, whilst the Article 24 exceptions would remain, containing the genericness principle. The EU is partly seeking these stronger protections to allow its small scale and rural farmers to sustain traditional food production practices and provide a competitive advantage over the US agribusiness monoculture and mass produced cheaper products. The divide between the EU and US agriculture is culturally engrained, with the US creating the Green Revolution model of agriculture focusing on high yields achieved through the replacement of human labour with

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<sup>63</sup> *European Commission v Germany* (C-301/95 [2008] ECR I-957.

<sup>64</sup> Nation, above n 41, 988.

<sup>65</sup> William van Caenegem, 'Registered geographical indications between intellectual property and rural policy - Part II' (2003) 6 *Journal of World Intellectual Property* 870.

<sup>66</sup> Graeme Dinwoodie, *International Intellectual Property Law and Policy* (Matthew Bender, 2nd ed, 2008) 360.

technical innovations and mechanised farm equipment.<sup>67</sup> In contrast, the EU focuses on historical designations applicable to their agricultural production embracing quality based agriculture.<sup>68</sup>

Fundamentally, the EU argues that the extension of TRIPS Article 23 over all goods will advance the availability of quality products by sustaining traditional, quality orientated products. It will discourage mass-produced goods from free riding on the goodwill associated with the GI and diluting its value. The EU points out that strong protection of GIs must be enforced to protect traditional small producer methods of agriculture.<sup>69</sup> GI protection in the EU is a reaction against globalisation and mass production. However, critics state that because regional specifications often dictate a particular grape that must be used and outline the method of production in great detail, GI protections encourage the establishment of monocultures. The EU argues the stricter protection of GIs will provide readily available high quality products for consumers who will be able to identify GIs without confusion. As described by the General Council Trade Negotiations Committee, extension of GI protection would eliminate legal uncertainties by requiring producers and traders to answer only one question when deciding whether to use a GI on a product: did the product come from the place and have the given quality designated by the GI in question?<sup>70</sup>

The strongest argument in opposition to the EU stance employed by the US, as summarised by Nation, is that extension would create chaos and prove unmanageable. As geographic terms are so engrained in product labelling, extension could require a massive overhaul of the food industry.<sup>71</sup> This criticism in combination with the sheer cost of introducing a new uniform scheme in the US holds merit pursuant to the rationale and aim of the GI protection scheme and TRIPS policy goal of globally reducing consumer confusion. US critics believe extension pursuant to the EU's expansion of Article 23 protection to all products will lead to consumers roaming the supermarket without recognition of products they would usually purchase.<sup>72</sup> However, the increased protection will only apply and affect future products and consumers will most likely be able to recognise the products they are used to and can be educated during the phase-out period of infringing product names to understand product name alterations. There would be no need for producers to engage in comprehensive re-labelling and re-marketing campaigns instead producers would only change the wording of new products in accordance with the extension provisions. EU commentators point to the

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<sup>67</sup> Mary Jane Angelo, 'Corn, Carbon, and Conservation: Rethinking US Agricultural Policy in a Changing Global Environment' (2010) 17 *George Mason Law Review* 602.

<sup>68</sup> Nation, above n 41, 994.

<sup>69</sup> Ibid 996.

<sup>70</sup> *Issues Related to the Extension of the Protection of Geographical Indications Provided for in Article 23 of the TRIPS Agreement to Products other than Wines and Spirits*, WTO Doc WT/GC/W/546 (May 18 2005) (Note by the Secretariat) [9].

<sup>71</sup> Nation, above n 41, 999.

<sup>72</sup> *Issues Related to the Extension of the Protection of Geographical Indications Provided for in Article 23 of the TRIPS Agreement to Products other than Wines and Spirits*, WTO Doc WT/GC/W/546 (May 18 2005) (Note by the Secretariat) [9].

example in Spain, where sparkling wine producers could no longer call their product champagne, instead renaming it Cava. The product has prospered and consumers have accepted the new term for sparkling wine with little confusion and cost for Spanish producers.<sup>73</sup> The US also argues that, as their country is founded upon immigration, its citizens have inducted GIs into American everyday vocabulary.<sup>74</sup> The counter-argument for this position is that generic GIs should be preserved under the genericness exception provided in Article 24 of TRIPS, rather than in the hybrid semi-generic category. Arguments from US critics to maintain minimum level protection for semi-generic utilised in products range from allegations of possible monopolisation of EU products on the US market in the event of expansion, to a breach of the First Amendment of the US Constitution. They claim that reform will restrict commercial speech by prohibiting infringing use of a GI. Strong political arguments exist for both sides of the extension debate. With trillions of dollars and euros at stake, there is no immediate sign of compromise.

### **Why the French are concerned about champagne: Part 1 – The Monk**

According to French legend, upon creating the first champagne, the 17th century Benedictine monk, Dom Pierre Perignon, tasted his new invention and called out to his brethren *Venez vite! Je bois des étoiles!* (Come quickly! I am drinking stars!)<sup>75</sup> From the abbey of Hautvillers, near the town of Épernay in the Department of the Marne, a drink was launched that eventually would enrich the lives of royalty, nobility, billionaires, millionaires, celebrities and ordinary men and women all around the world. At least, this is what the French champagne-makers would have us believe.

Several aspects of the above story are apocryphal. Champagne was certainly not invented by Dom Perignon. He did not become cellar master at Hautvillers until after his arrival there from the abbey of Saint-Vannes, near Verdun, in 1688.<sup>76</sup> There is documentary evidence that champagne was intentionally produced by an Englishman, Christopher Merrett, prior to 1662.<sup>77</sup> Blanquette de Limoux, from the abbey of Saint Hilare, near Carcassonne in the south of France, is the oldest recorded sparkling wine, dating from 1531.<sup>78</sup> At the time when Dom Perignon was making wine at Hautvillers, secondary fermentation, which causes the bubbles of carbon dioxide in champagne, was regarded as a defect and liable to cause the wine bottles of the day to break. Rather than embracing the effect, Dom Perignon worked hard to prevent it.<sup>79</sup> Further, the famous 'drinking stars' quote attributed to the monk appears to

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<sup>73</sup> Nation, above n 41, 999.

<sup>74</sup> Ibid.

<sup>75</sup> Rod Phillips, *A Short History of Wine* (Harper Collins, 2000) 138.

<sup>76</sup> Ibid 245.

<sup>77</sup> Christopher Merrett, *Some Observations Concerning the Ordering of Wine Presented to the Royal Society: Of the Mystery of the Vintners* (Agricultural History, 1669) 200.

<sup>78</sup> Languedoc Food and Drink, *Blanquette de Limoux Sparkling* (2012) French Entree Wine, <<http://www.frenchentree.com/languedoc-restaurants-wine/displayarticle.asp?id=25191>>.

<sup>79</sup> Phillips, above n 75.

have been an advertising slogan (albeit, a brilliant one!) for a print campaign in the late 19th century.<sup>80</sup>

What is without doubt is that Dom Perignon was a significant early advocate of quality control in the production of wine in the Champagne region. Among his innovations were the blending of grapes prior to pressing, and the blind tasting of wines to avoid pre-judging them.<sup>81</sup>

### **Why the French are concerned: Part 2 - The *terroir* and the grapes of Champagne**

*Terroir*, a French word roughly meaning sense of place, embodies the characteristics of geography, geology and climate that contribute to the qualities of the produce of the region. The concept of *terroir* is at the heart of the AOC system, and is highly relevant to the production of champagne wines.

The vineyards of Champagne straddle the 49<sup>th</sup> parallel; they mark the northernmost limit of viticulture on the European continent.<sup>82</sup> The subsoil of the region is mainly chalk, which is highly porous and acts as a reservoir of water during summer months. Outcrops of limestone mixed with chalk and marl are naturally fissured, providing excellent drainage.<sup>83</sup>

Three grape varieties are predominantly used to make champagne; pinot noir, chardonnay and pinot meunier.<sup>84</sup> Chardonnay grapes are white-skinned, while pinot noir and pinot meunier are red-skinned varieties. However, careful pressing of the red grapes, together with the separation of the juice from the skins, allows white wine to be produced from the red-skinned grapes.<sup>85</sup> Champagne made exclusively from chardonnay grapes is known as *blanc de blancs*; if made exclusively from the red-skinned varieties, it is known as *blanc de noirs*. Rosé champagnes are made either by allowing the natural colouring agents of red grape skins to leach (macerate) briefly into the clear juice (the so-called *saignée* method), or, more commonly, to add a small amount of still pinot noir red wine to the clear champagne.<sup>86</sup>

Champagne vineyards are classified according to a system known as the *Échelle des Crus* (ladder of growth), whereby certain villages command a higher value for their grapes than

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<sup>80</sup> Ellena Perry, *Dom Perignon* (3 April 2012) Vintage Seekers <<http://www.vintageseekers.com/profile/dom-perignon>>.

<sup>81</sup> Champagne Gallery, *Dom Perignon- The man and the myths* (2012) Champagne Gallery, <<https://www.champagnegallery.com.au/champagne-science/vinification/dom-perignon-the-man-and-the-myth/>>.

<sup>82</sup> Michael Edwards, *The Finest Wines of Champagne: A Guide to the Best Cuvées, Houses, and Growers* (University of California Press, 2009) 23.

<sup>83</sup> Ibid.

<sup>84</sup> Grape Escapes, *Champagne the grapes* (2012) Grape Escapes, <<http://www.champagneescapes.com/grapes.shtml>>. The champagne AOC allows for four other varieties (Arbanne, Petit Meslier, Pinot Blanc and Pinot Gris), though these are seldom used.

<sup>85</sup> Ibid.

<sup>86</sup> Wine and Spirits magazine, *The New Rose* (2012) *Wine and Spirits Magazine* <[http://www.wineandspiritsmagazine.com/pages/F&F/1209\\_new\\_rose.html](http://www.wineandspiritsmagazine.com/pages/F&F/1209_new_rose.html)>.

other villages. The 17 *Grand Crus* villages are the highest rated (100%), followed by *Premier Crus* villages (90% - 99%), and so on.<sup>87</sup>

### Why the French are concerned: Part 3 - The making of champagne

The traditional method of producing champagne is known as *méthode champenoise* within the Champagne region, and *méthode traditionnelle* elsewhere.<sup>88</sup> Primary fermentation takes place in vats or barrels, as for other wines. The wine resulting from primary fermentation of champagne grapes is acidic and not very pleasant.<sup>89</sup>

The next step in the manufacture of champagne involves blending (*assemblage*) of several (or many) different wines, often from the production of several different years' harvests, to achieve the distinctive *style de maison* (house style).<sup>90</sup> A vintage champagne must be composed at least 85% from grapes of the year of vintage; non-vintage champagnes contain anything up to 40% of wines from previous years.<sup>91</sup> The job of selection and *assemblage* is usually left to the *Chef de Cave* (cellarmaster). The end result is the *cuvée*, the base wine from which the champagne will be produced.<sup>92</sup> Individual champagne houses do not produce a vintage champagne every year. Only those years in which the quality of the harvest is deemed sufficient will justify the declaration of a *millesimé*; a vintage year.<sup>93</sup>

The key to champagne production lies in a process of secondary fermentation, which takes place in the bottle. The blended wine is put into bottles, and a small amount of *liqueur de tirage*, a mixture of sugar and yeast dissolved in still wine is added. The bottles are then sealed with a crown cap (or crown cork), similar to a beer bottle cap.<sup>94</sup>

### Why the French are concerned: Part 4 – The Widow and the Wire Cage

The next step in the story of champagne owes much to the widow (*veuve*) of François Clicquot, whose father founded the champagne house (maison) that would eventually bear the famous name of Veuve Clicquot.<sup>95</sup> Madame Clicquot, together with her *chef de cave*, Antoine de Müller, invented the wooden riddling rack (*pupitre*) which greatly improved the next crucial step in the production of champagne, namely, that of disgorging (*dégorgement*).<sup>96</sup>

<sup>87</sup> Tom Stevenson, *The Sotheby's Wine Encyclopedia* (Dorling Kindersley, 4<sup>th</sup> ed, 2005) 172-4.

<sup>88</sup> Wikipedia, 'Sparkling Wine Production' (2012) Wikipedia <[http://en.wikipedia.org/wiki/Sparkling\\_wine\\_production](http://en.wikipedia.org/wiki/Sparkling_wine_production)>.

<sup>89</sup> Ibid.

<sup>90</sup> Champagne Magic, *Champagne Types* (2009) Champagne Magic <<http://www.champagnemagic.com/types.htm>>.

<sup>91</sup> Stevenson, above n 87, 169-178.

<sup>92</sup> Alexander Pandell, *Making Champagne* (2010) Wine Perspective <[http://www.wineperspective.com/making\\_champagne.htm](http://www.wineperspective.com/making_champagne.htm)>.

<sup>93</sup> Wikipedia, 'Champagne' (2012) Wikipedia <<http://en.wikipedia.org/wiki/Champagne>>.

<sup>94</sup> Jancis Robinson, *The Oxford Companion to Wine* (Oxford University Press, 4<sup>th</sup> ed, 2006) 150-153.

<sup>95</sup> Veuve Clicquot, *History* (2010) Veuve Clicquot <<http://www.veuve-clicquot.com/en/the-house/history/key-dates>>.

<sup>96</sup> Don and Petie Kladstrup, *Champagne: How the World's Most Glamorous Wine Triumphed Over War and Hard Times* (J Wiley & Sons, 2006) 78.



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The secondary fermentation, which is essentially the consumption of sugar by yeast to produce alcohol and carbon dioxide (the latter being responsible for the bubbles in sparkling wine), produces residue (spent yeast) known as lees (*lie*). Under the champagne AOC, vintage champagnes must mature on the lees (*sur lie*) for at least 3 years; for non-vintage champagnes, a minimum of 1.5 years is required.<sup>97</sup> Some top quality champagnes may greatly exceed these minima, holding their bottles on the lees for up to 8 years.

Being heavier than the wine, the lees drift to the lowest point of the bottle. To facilitate removal of the lees, each bottle is turned upside down (*sur point*), so that the lees drift towards the cork. To encourage fermentation, to consolidate the lees and to move them towards the cork, the bottles undergo a process called riddling (*remuage*). Once every two days, each bottle is given a slight shake and turn, alternatively to the left and right, and then a slight tap as it is replaced. The major contribution of Madame Clicquot and Monsieur de Müller was the invention of the riddling rack (*pupitre*). These wooden racks allow the bottles to be positioned initially at around a 20 to 25 degree angle from horizontal, neck down.<sup>98</sup> After each stage of *remuage*, the racks allow the angle of the bottle to be incrementally increased until ultimately, the bottle is positioned at an angle from 60 to 75 degrees, neck down.

At the end of the designated riddling period, the crown cap is removed and the lees are disgorged, with minimal loss of wine. The lost volume is replaced with a fluid known as *liqueur d'expédition*; this practice is called *dosage*.<sup>99</sup> The *liqueur d'expédition* mainly consists of still wine and sugar; however, some Champagne *maisons* add secret ingredients which contribute to the house style. The amount of sugar added determines whether the champagne will be sweet or dry: the various gradations are *doux* (sweet); *demi-sec* (half-dry); *sec* (dry); *extra-sec*; *brut* (very dry); *extra brut*; and *brut nature* (also, *brut zero* or *ultra brut*, ie. bone dry) – no sugar whatsoever is added to the last category.

The final stage of production is the insertion of the cork that will stopper the bottle until consumption of its contents. A champagne cork is not a single item but an assembly of component parts. Two stacked discs of pristine cork comprise the bottom section, fused to an agglomeration of ground cork and glue, forming the top of the cork.<sup>100</sup> The cork is compressed to a cylinder and inserted into the bottle; over time, the top of the cork relaxes into the distinctive mushroom shape.<sup>101</sup>

The newly installed cork is secured by the addition of the *muselet*, the familiar wire cage, together with the tin plate cap that usually bears the logo or distinctive mark of the *maison*.

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<sup>97</sup> Wikipedia, above n 88.

<sup>98</sup> Vinoprod, *Le Remuage* (2010) Vinoprod <<http://vinoprod.free.fr/remuage.html>>.

<sup>99</sup> Wikipedia, above n 88.

<sup>100</sup> Wikipedia, above n 93.

<sup>101</sup> Ibid.

The *muselet* was invented by Adolphe Jacquesson in 1844. Prior to its use, corks were secured by hand-twisted lengths of hemp.<sup>102</sup>

### Why the French are concerned: Part 5 – Royalty and Riots

The complexity and the evolutionary development in the steps of production to achieve fine champagne are two of the main reasons why the French are concerned to guard the reputation of the appellation and to secure the geographical indication to the Champagne region alone.

French kings were traditionally anointed in the cathedral at Reims, which just happens to lie in the heart of the Champagne district.<sup>103</sup> Wine from the local region was used as part of the coronation ceremony; as the *méthode champenoise* developed fully, so champagne began to feature in these ceremonies from about 1700 AD.<sup>104</sup> Champagne became the preferred beverage of the Sun King, Louis XIV, who is said to have drunk little else for much of his life.<sup>105</sup> From Versailles, the taste for champagne spread throughout the royalty and nobility of Europe. Some went so far as to purchase their own vineyards in the region; these included Pope Leo X, Francis I of France, Charles V of Spain, and Henry VIII of England.<sup>106</sup> From the outset, champagne became regarded as a luxury good; a product for society's elite.

As a boy, Napoleon Bonaparte studied at the military academy of Brienne le Château, in the southern part of the Champagne region.<sup>107</sup> Before embarking on his military campaigns, Napoleon would obtain provisions from his good friend Jean-Rémy Moët.<sup>108</sup> Napoleon once declared of champagne, 'in victory you deserve it; in defeat you need it'.<sup>109</sup>

In 1876, the political situation in Russia was quite unstable; Tsar Alexander II feared for his life. The Tsar ordered special bottles to be made for his champagne; these were to be clear (instead of the dark green glass in use at the time), and were to feature a flat bottom, instead

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<sup>102</sup> Ruinart, *The Ruinart Collections* (2012) Ruinart <<http://www.ruinart.com/uk/page/collection-fil-d-or-muselet.php>>.

<sup>103</sup> Reims Tourism, *Heritage and Discovery* (2011) Reims Tourism <<http://www.reims-tourism.com/reims-champagne/heritage-and-discovery/the-history-of-reims.aspx>>.

<sup>104</sup> Debatepedia, *Champagne as only French* (2010) Debatepedia <[http://debatepedia.idebate.org/en/index.php/Debate:\\_%22Champagne%22\\_as\\_only\\_French](http://debatepedia.idebate.org/en/index.php/Debate:_%22Champagne%22_as_only_French)>.

<sup>105</sup> Champagne Bliard, *Champagne Bliard Moriset is the celebratory drink* (2009) Champagne Bliard <<http://champagne-bliard-moriset.webs.com/drinkofkings.htm>>.

<sup>106</sup> Wikipedia, 'Champagne (Wine Region)' (2009) Wikipedia <[http://en.wikipedia.org/wiki/Champagne\\_\(wine\\_region\)](http://en.wikipedia.org/wiki/Champagne_(wine_region))>.

<sup>107</sup> Napoleon.org, *Places, Museums and Monuments* (2010) Napoleon.org <[http://www.napoleon.org/en/magazine/museums/files/museum\\_napoleon\\_i-brienne\\_chateau.asp](http://www.napoleon.org/en/magazine/museums/files/museum_napoleon_i-brienne_chateau.asp)>.

<sup>108</sup> Alex N, *Bubble Trouble* (2007) Neatorama <<http://www.neatorama.com/2007/06/22/bubble-trouble-the-not-so-sweet-history-of-champagne/>>.

<sup>109</sup> Ibid.

of the pronounced punt (bell bottom) that characterised bottles of the period.<sup>110</sup> These features were designed to deny would-be assassins locations in which to hide a bomb.<sup>111</sup>

To produce a clear bottle without a punt (which is normally necessary to strengthen the bottle against the high internal pressure caused by the carbonation process), Louis Roederer commissioned a renowned Belgian glassmaker.<sup>112</sup> The solution was to use lead crystal, which was not only clear, but stronger than common glass. The material of the unique bottles gave its name to the champagne contained within them; Louis Roederer Cristal is generally regarded as the first *prestige cuvée*.<sup>113</sup>

At this point, the reader may be forgiven for thinking that the story of champagne is one of a continuous stepladder of good fortune and success. However, there have been hard times; possibly none more so than the years leading up to the so-called champagne riots of 1910 and 1911. That period produced a perfect storm of negative factors affecting the champagne crops.

First, towards the end of the nineteenth century, vineyards across the whole of France were ravaged by phylloxera (wine blight, or vine louse). The cooler climate of the Champagne region inhibited the spread of the pest; nevertheless, half the vineyards in the Marne district were lost.<sup>114</sup> The early years of the 20th century were not much better; frosts and rains severely reduced crop yields, while mould and mildew further affected the crops from 1902 to 1909.<sup>115</sup> In 1910, hailstorms and flooding added to the winegrowers' woes; up to 96% of the crop was lost that year.<sup>116</sup>

The major champagne houses were in a position of power; using the French railway network, they were able to import lower priced grapes from outside the Champagne region to continue wine production. The local growers petitioned the French government, who passed a law requiring that wines bearing the appellation champagne must be made at least 51% from grapes grown in that region.<sup>117</sup> However, the *maisons* colluded to drive down local prices with the threat of further importation of cheaper produce. This incensed the local vignerons, who believed that using foreign grapes did not produce true champagne, while the environmental and economic conditions had thrown many of the locals into poverty.<sup>118</sup>

Matters came to a head in January 1911, with rioting in the villages of Damery and Hautvillers. The worst violence was in Aÿ, three miles northeast of Épernay. The whole

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<sup>110</sup> Joe Ray, *The History Page: Bling in a bottle* (2011) *The Daily*

<<http://www.thedaily.com/page/2011/12/31/123111-opinions-history-cristal-ray-1-3/>>.

<sup>111</sup> Anderja, *Cristal* (2010) Carpe Diem Club <<http://carpediemclub.wordpress.com/2010/12/12/cristal-champagne-of-the-tsar-and-of-the-rap-stars/>>.

<sup>112</sup> Ibid.

<sup>113</sup> Chris Kissack, *Roederer* (2010) Wine Doctor <<http://www.thewinedoctor.com/champagne/roederer.shtml>>.

<sup>114</sup> Champagne Magic, *Champagne History* (2000) Champagne Magic <<http://www.champagnemagic.com/history.htm>>.

<sup>115</sup> Wikipedia, 'Champagne Riots' (2006) Wikipedia <[http://en.wikipedia.org/wiki/Champagne\\_Riots](http://en.wikipedia.org/wiki/Champagne_Riots)>.

<sup>116</sup> Ibid.

<sup>117</sup> Petie and Kladstrup, above n 96, 129-151.

<sup>118</sup> Ibid.

village of Aÿ was set alight. Following an urgent telegraph from the regional governor to Paris, over 40,000 troops were sent to Champagne and billeted in every village.

The champagne riots were instrumental in the decision to designate an AOC for the Champagne region.

### **Why the French are concerned: Part 6 – Grapes and Grapeshot: The March of War**

The Champagne region sits almost precisely half way between Paris and France's north-eastern border with Belgium, Luxembourg and Germany. This has placed the vineyards of Champagne squarely in the path of conflict over the centuries. In 1870, Bonaparte's nephew, Napoleon III, declared war on Prussia. It was not a good decision. The Franco-Prussian war was won by Prussia; Napoleon III was deposed, and France was left nearly bankrupt.<sup>119</sup> Much of the fighting took place over the champagne vineyards, in fields strewn with glass from champagne bottles, according to one observer.

During World War I, at least four major battles<sup>120</sup> were fought over the territory. Many local residents took shelter in the underground limestone caverns used for the storage and aging of champagne, to escape the artillery bombardment, while many vineyards and warehouses were destroyed.<sup>121</sup> There was one positive outcome; after the war, the vignerons were able to replant with phylloxera-resistant rootstock.<sup>122</sup>

World War II saw more armies marching through the vineyards, though the devastation this time was not as severe as in previous wars. On 7 May 1945, General Alfred Jodl offered unconditional surrender to General Dwight D Eisenhower in Reims. The signing of the document that brought about the end of the war was celebrated with six cases of Pommery champagne.

### **Why the French are concerned: Part 7 – Summary**

The extraordinary history of champagne, the successes and sufferings of the Champenois, the incremental steps in the evolution of the product we know today, and the complex and labour-intensive nature of the *méthode champenoise*, all contribute to the sense of identity and connection between the land, the produce and the people of Champagne. This fuels the passion and the desire of the Champenois to protect the product and the appellation from foreign imitations; from *faux champagnes*.

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<sup>119</sup> Alex N, above note 108.

<sup>120</sup> The First Battle of Champagne (20 December 1914 – 17 March 1915); The Second Battle of Champagne (25 September – 6 October 1915); The Third Battle of Champagne (17–20 April 1917); The Fourth Battle of Champagne (15 July 1918; part of the Second Battle of the Marne).

<sup>121</sup> Petie and Kladstrup, above n 96, 179-203.

<sup>122</sup> Ibid 223-4.

### Marketing of champagne in the UK, USA and elsewhere: Characters and Celebrities

Throughout the 19th century and into the early 20th century, champagne was generally much sweeter than the varieties we know today. The trend towards drier, *brut* champagnes was begun in the mid nineteenth century by Pierre-Nicolas-Marie Perrier-Jouët and Jeanne-Alexandrine Louise Pommery, both of whom created dry champagnes specifically to cater for aristocratic English palates.<sup>123</sup>

The targeted marketing to England marked the beginning of a transition for champagne as being a drink for French and upper class European consumers, to being a global phenomenon, enjoyed by people from all walks of life. Though France and her territories were, as of 2004, still responsible for the consumption of more than 60% of total consumption of French champagne, the two most important export markets were the UK (12%) and the USA (7%).<sup>124</sup> In 2011, while champagne sales in France declined by 0.3% (and UK sales declined by 10%), sales in other countries soared, particularly in Australia (up by 36%), the United States (up by 34%), Italy (up by 26%) and Germany (up by 9%).<sup>125</sup> If these trends continue, French champagne exports will eventually outsell domestic consumption.

The popularisation of champagne within the United States is largely credited to one man; Charles 'Champagne Charlie' Heidsieck. To say that Champagne Charlie was a colourful character, from a family of colourful characters, is akin to saying that the Battle of Thermopylae was a bit one-sided. Charlie's father, Charles-Henri Heidsieck had, after all, ridden into Moscow just ahead of Napoleon's army, bringing with him cases of his champagne, ready to sell to whichever side won the forthcoming battle.<sup>126</sup>

Charles Heidsieck, nephew of the co-founder of the *maison* that would become Piper-Heidsieck, entered the United States for the first time in 1852, visiting New York and New England.<sup>127</sup> He engaged an agent for the mass importation of his champagne, a venture that proved to be spectacularly successful. When Charles returned five years later he was a *fêted* celebrity, and the persona of Champagne Charlie was born.

When the US Civil War broke out in 1861, Congress passed a law which relieved Charles' agent from any obligation to pay Heidsieck moneys owed as a result of unpaid accounts from Southern customers. Undeterred, Charles headed for New Orleans to seek repayment directly from the purchasers. One buyer paid in cotton, but it was necessary to run the Union blockade to get the cotton to Europe; Charles hired two blockade runners from Mobile, Alabama, but both were intercepted and sunk. On his return, Charles carried a diplomatic pouch from the French consul in Mobile to the consul in New Orleans. Unbeknownst to Charles, the pouch contained papers dealing with the supply of goods from

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<sup>123</sup> Alex N, above note 108.

<sup>124</sup> Champagne info, *Champagne Consumption* (2000) Champagne Info <<http://www.champagneinfo.net/en-us/commerce/champagneconsumption.aspx>>.

<sup>125</sup> French Wine News, *Champagne: Sales of bubbly boomed in 2011* (January 9 2012) *French Wine News* <<http://www.frenchwinenews.com/champagne-sales-of-bubbly-boomed-in-2011/>>.

<sup>126</sup> Petie and Kladstrup, above n 96, 81.

<sup>127</sup> *Ibid.*

the French to the Confederate forces. When Charles arrived in New Orleans, he found the city occupied by Union soldiers; Charles was seized, accused of spying, and imprisoned. Eventually released in November 1862, Charles returned to France, in ill-health, demoralised, and bankrupt.

In 1863, an American missionary brought Charles a letter from the brother of Charles' former New York agent. The writer of the letter was ashamed at the way his brother had cheated Charles, and offered Charles a number of deeds to land in the American Midwest, by way of repayment. The land turned out to comprise about a third of a small village known as Denver, Colorado. As Denver grew into a city, Charles Heidsieck was able to repay all his debts and to re-launch the champagne house that bears his name.

In both the United Kingdom and the United States, champagne has become the drink of celebrities, the rich and the powerful. Each famous person has tended to be associated with his or her own preferred brand of champagne. Perhaps the best example is Sir Winston Churchill, whose lifelong attachment to Pol Roger champagne was recognised after the great man died in 1965; a black border was added to the label of every bottle of Pol Roger White Foil champagne sold in the UK.<sup>128</sup> Marilyn Monroe preferred Piper-Heidsieck;<sup>129</sup> allegedly, she once took a champagne bath, using 350 bottles of champagne.<sup>130</sup> In more modern times, Madonna, Britney Spears, Donald Trump and Sir Mick Jagger prefer Louis Roederer Cristal; Christina Aguilera, Pamela Anderson and Jack Nicholson like Veuve Clicquot; while allegedly Victoria Beckham, Kim Kardashian and Jay-Z are fond of Armand de Brignac.<sup>131</sup>

Fictional celebrities, too, have endorsed champagne. Probably the best known example is Ian Fleming's superhero spy, James Bond. In the Fleming novels, 007 preferred Taittinger, and this was true of the earliest Bond films. However, after the champagne glass of Tatiana Romanova (played by Daniela Bianchi) was poisoned in *From Russia With Love* (1963), subsequent movies featured Bond drinking Bollinger.

The association of champagne with celebrities and celebrity status has not only increased public awareness of champagne, but also increased its desirability as a luxury product. Just as certain celebrities are associated with particular brands of champagne, it will be argued below that the marketing of champagne to the general public involves a degree of snobbery and brand distinction, and this tends to counteract the argument for retention of the appellation as a protected term.

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<sup>128</sup> Polroger, *Sir Winston Churchill* (2000) Polroger <<http://www.polroger.co.uk/champagne/background/sir-winston-churchill/>>.

<sup>129</sup> Konrad Ejbich, *Wine and spirits perfect mates* (2012) Style at Home <<http://www.styleathome.com/article/00000/687/index.php>>.

<sup>130</sup> Champagne Trivia, *Champagne Trivia* (2000) Champagnes a Bering <<http://www.champagnesabering.com/home.php?id=29&aid=104>>.

<sup>131</sup> Gayot, *Favourite Champagnes of Celebrities* (2009) Gayot <<http://www.gayot.com/wine/feature/celebrities-champagne.html>>.

**Remuage: The shift in the Australian position**

The disparity between the Old World EU wine policies and the New World US wine market is culturally engrained in the evolution of their opposing market systems. The US market culture is founded on innovation, capitalism and the competitive market with an emphasis on brand names to create distinction between products. In comparison, the EU wine market, developed during the medieval period, placed strong emphasis on the origin of the product, illustrating its historical origins, location and pedigree. In Europe, the lineage and history of a product has a resonance with consumers that goes beyond a brand name and confers the concept of quality, taste, smell and the sensual experience of the product. Australia provides the ideal comparative jurisdiction with a New World wine GI system and a market culture imitating the US capitalist market, whilst maintaining European traditions based on immigration and the importation of European food and wine traditions.

Historically, Australia has adopted an American stance in continuing to utilise traditional EU GIs despite adherence to the TRIPS agreement. The surge in the demand for Australian wine has been extraordinary. Australia exported 2% in the mid-1980s and reached its highest point in 2009-2010, exporting 382 million litres of wine solely to the EU worth \$863 million and importing only 17 million litres from the EU, worth \$200 million. Wine is the third largest agricultural export with export sales over AUD 2.43 billion.<sup>132</sup> During the period 1986 to 2009, cultivated vineyard land grew from 59,970 to 162,550 hectares and annual wine beverage production expanded from 336.4 million litres to 1.2 billion litres.<sup>133</sup>

The EU began to target the Australian wine market as the next jurisdiction to claw back EU wine terms using a bilateral trade agreement in 1988. In 1993 the *Australian Wine and Brandy Corporation Amendment Act 1993* (Cth) was signed and Australia agreed to relinquish the use of certain EU wine terms including beaujolais, chianti and frascati to gain greater access to the EU market. The 1993 agreement was a political and economic move by the EU setting up further negotiations with Australia of the date in which other sensitive names including champagne, sherry, port and burgundy would be phased out in the Australian market. The careful planning and determination of the EU paid off against the landscape of impressive Australian wine growth with a surge in exports to the EU.

Australia has received even more secure access and protection in the EU market under the *Agreement between Australia and the European Community on Trade in Wine* (Cth) (the Agreement) in 2008; entering into force on 1 September 2010. The stated purpose of the Agreement is to facilitate and promote trade in wine originating in the EU Community and Australia to secure continued access to EU markets for Australian winemakers.<sup>134</sup> A shift in

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<sup>132</sup> DAFF, *Wine policy* (2012) DAFF <<http://www.daff.gov.au/agriculture-food/wine-policy/trade-in-wine>>.

<sup>133</sup> Australian Government Australian Wine and Brandy Corporation, *Australian Wine and Brandy Corporation Annual Report 1987 – 97* (2009) Australian Bureau of Statistics <<http://www.wineaustralia.com/en/About%20Us/~media/0000Industry%20Site/Documents/About%20Us/WEB%20AR%20AWB0809.ashx>>.

<sup>134</sup> *Agreement between Australia and the European Community on Trade in Wine*, EU-Australia, signed 1 December 2008 UNTS 1503 (entered into force 1 September 2010) art 1.

the advancement of regional reputation and brand segmentation within Australia also provided motivation to sign the Agreement.

Anderson has documented the intensification of regional differentiation since 2001 in Australia. This recognises the subtle shift in Australian market culture from the American brand culture to the European emphasis on geographic origin to distinguish brands. Despite the provisions provided in the *Australian Wine and Brandy Corporation Act 1980* (Cth) Division 4D and the *Trade Marks Act 1995* (Cth) protecting GIs, from September 2010 the *Australian Wine and Brandy Corporation Amendment Act 2010* (Cth) (the Act) came into force to broaden and strengthen existing requirements for the claims of GIs in the EU and ensure market security.

The *Australian Wine and Brandy Corporation Act 1980* (Cth) sections 40C- 40F prohibit the sale, export or import of wine holding misleading or false GIs, and extends to the presentation and description of wines using kind, method, imitation, or style of the protected GI term;<sup>135+</sup> these provisions are consistent with Article 23 of TRIPS.<sup>136</sup> The term ‘traditional expression’ refers to a word or expression used in the description and presentation of the wine that relates to the method of production, or to the quality, colour or type, of the wine.<sup>137</sup> The *Australian Wine and Brandy Corporation Amendment Act 2010* (Cth), in conjunction with the Agreement, reserves and protects the utilisation of a large range of traditional expressions such as *amontillado*, *claret*, *fino* and *auslese* for exclusive use by EU winemakers. An exception to this principle exists in Article 16 of the Agreement; traditional expressions are permitted to be used by Australian wine makers if they are legally registered in good faith in Australia, or that have legitimately acquired rights in Australia by being used in good faith.<sup>138</sup> The Agreement also protects 11 of the EU’s labels, including sherry, tokay and the most hotly-debated and prized term amongst New and Old world GI systems, champagne. In return, 112 Australian GIs are now protected in the EU. Title II of The Agreement stipulates:

That the Contracting Parties shall take all necessary measures to prevent, in cases where wines originating in the Contracting Parties are exported and marketed outside of their territories, the use of the protected names of one Contracting Party to describe and present a wine originating in the other Contracting Party<sup>139</sup>

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<sup>135</sup> *Australian Wine and Brandy Corporation Act 1980* (Cth) s 40D(4).

<sup>136</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights*, WTO Doc IP/N/1/-/G (15 April 1994) art 23. ‘By prevent[ing] use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question’.

<sup>137</sup> *Australian Wine and Brandy Corporation Act 1980* (Cth) s 4.

<sup>138</sup> *Agreement between Australia and the European Community on Trade in Wine*, EU-Australia, signed 1 December 2008 UNTS 1503 (entered into force 1 September 2010) art 16.

<sup>139</sup> *Ibid* art 12.



The Agreement prohibits Australian wine markets from labelling wine utilising EU product GIs that are now recognised as non-generic in Australia by restricting the use of these GIs to their appropriate legitimate geographical region.

The impetus of Australia's decision to change to the EU Old World standpoint on the issue of GIs is partly due to recent reforms to the Common Organisation for Wine by the EU wine sector enforcing the phasing out of distillation leading to the increased production of low quality wine in the EU. Under the reforms, the EU wine market attracted national government funding to encourage the promotion of EU wine producers to consumers and the adoption of a simpler labelling regime in the EU. Simple, coherent labelling had formerly been a competitive consumer advantage to Australian wine producers in export markets.

One of the most important benefits of The Agreement is the security of access for Australian producers to the EU wine market. Without this increased access, Australian wine faced a number of barriers into the EU wine market, including sanitary and phytosanitary measures such as maximum limits upon mineral and chemical content, prohibitions on the use of additives or processing aids, and prohibitions upon certain oenological practices, onerous packaging and labelling requirements and complex import procedures.<sup>140</sup> The Agreement creates flexible rules on blending alcohol content and simpler labelling systems to export products to the EU. Waye argues that the Agreement has also been realised at a low economic cost, as the preceding 1994 agreement laid the foundation of protection for Australian and EU wine descriptions and GIs, and by 2008 Australia had already phased out a large number of EU GIs without significant economic effects on the wine industry.<sup>141</sup> The previous label integrity program and registration of GIs were costly to administer. The label integrity program checked statements by winemakers pursuant to the *Australian Wine and Brandy Corporation Act 1980* (Cth) s 39A and ensured the truthfulness of vintage, variety and origin of wine made in Australia.

Substantial costs are also incurred by winemakers when applying for a GI, although the cost is shared among winemakers from a region, with a basic application fee for the determination of a geographical indication of \$27,500. Winemakers must also provide that the area under consideration is discrete and homogenous in its grape growing attributes.<sup>142</sup> Winemakers must expend considerable sums upon the gathering, organising and adducing of evidence (including expensive expert evidence). If a GI dispute arises between factions of grape growers and wine makers, the costs escalate exponentially. Rimmer describes the regime as bedevilled by administrative complexity and uncertainty, legal conflict and

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<sup>140</sup> Waye Above n 54, 226.

<sup>141</sup> Ibid 243.

<sup>142</sup> *Australian Wine and Brandy Corporation Regulations 1981* (Cth) reg 24.

disputation, and social disruption.<sup>143</sup> The cost argument provides strong support for the Australian wine market to be guaranteed GI protection in the EU market.

However, legal path theorists have argued that Australia had already established its *sui generis* systems for identifying and protecting GIs in response to the 1994 Agreement with the EU. According to Hathaway, legal outcomes are largely the cumulative product of previous agreements rather than a response to current political, social and economic conditions.<sup>144</sup> The benefits of the Agreement far outreach those of the previous 1994 Agreement. For example, one of the key benefits in the Agreement relates to the natural levels of mineral content in Australian agriculture soils. As Australian soils have high salt contents some EU regulations previously did not permit high mineral content in wine, for example in Germany. Second, the EU now authorises the importation of wine with alcohol strength of up to 20% of its volume, as Australia's warmer climate produces wine of higher alcohol strength than EU which typically only creates alcohol content of 15% of volume. Parties must prevent the use of certain protected GIs and traditional expression in the labelling of wines within their jurisdictions pursuant to Articles 12 and 16. This extends to expressions stipulating that the wine is made in the style of a particular region, such as *méthode champenoise*, *hermitage* and *lambrusco*.<sup>145</sup> Both the EU and Australia will allow their wholesalers to exhaust existing stocks of wine whose labels contain prohibited terms for a period of up to 5 years for liqueur wines and 3 years for all other wine varieties. However, the names *chablis*, *champagne*, *graves*, *manzanilla*, *marsala*, *moselle*, *port*, *sauterne*, *sherry*, *white burgundy*, *amontillado*, *auslese*, *claret*, *fino*, *oloroso* and *spatlese* must be phased out within 12 months after the enforcement of the Agreement date of September 1 2010. Pursuant to the previous 1994 Agreement, Champagne had already voluntarily been abandoned by Australian wine makers.<sup>146</sup> This move by Australian winemakers may have been in anticipation of the European desire to retain traditional GIs such as champagne. Unlike other countries trading with the EU, Australia may continue to use quality wine terms in the manner set out in Annex V including *cream*, *crusted*, *ruby*, *solera*, *tawny*, and *vintage* to fortified wine. The Australian government provided a grant of \$500,000 towards a re-badging project in a range of new Australian terms created to replace port, sherry and tokay.

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<sup>143</sup> Matthew Rimmer, *Submission to the Senate Standing Committee on Treaties on the Agreement Between Australia and the European Community on Trade in Wine 2009* (3 February 2009) APH <<http://www.aph.gov.au/house/committee/jsct/3february2009/subs/sub7.pdf>>.

<sup>144</sup> Oona Hathaway, 'Path Dependence in the Law: The Course and Pattern of Change in a Common Law Legal System' (2000) 86 *Iowa Law Review* 205.

<sup>145</sup> Australia is required to prevent use of the terms set out in Annex II, Part A and Annex III of the Agreement and the EU must prevent the use of terms set out in Annex II, Part B of the Agreement. References to Australia or Member States of the EU may only be applied to wine originating in those jurisdictions.

<sup>146</sup> Apart from sherry, port and tokay. Parliament of Australia, *Report 101: Treaties Tabled on 3 February 2009, Agreement between Australia and the European Community on Trade in Wine* (2009) APH <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=jsct/3february2009/report1.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/3february2009/report1.htm)>.

Critics argue that the Agreement ‘facilitates monopolisation or production methods rather than protecting wine makers from unfair competition or protecting consumers from being misled about wine quality’.<sup>147</sup> Conversely, Zahn believes ‘the 2008 (Australian-EU) Agreement is a model for future wine negotiations between the EU and US’.<sup>148</sup> When weighing the cost of maintaining the expanded protection for GIs and traditional expressions against the protection of market access into the EU on balance, the scales appear to tip in favour of the Agreement. An important step to create future multilateral consensus between nations regarding GIs and other IP issues has occurred as the WTO originally envisioned.<sup>149</sup> Time consuming and expensive WTO litigation has been circumvented by the enactment of the Agreement. In contrast, the US provides an example illustrating the long term consequences of disagreement and gridlock regarding GIs.

The Australian Government’s motivation to sign the Agreement was a combination of the positive experience of the 1994 Agreement. Increasing reliability and predictability of export conditions to the EU wine market have been influential in colouring the perspectives of key wine industry lobbyists in the political process toward execution of the treaty and its subsequent implementation by way of the *Australian Wine and Brandy Corporation Amendment Act 2010* (Cth).<sup>150</sup> However, the Australian wine and grape industry suffered a market decline shortly after the Agreement was enacted, which also coincided with the GFC and the strength of the Australian dollar on world currency markets. There was 1.12 billion litres of wine produced in 2010-11; a decrease of 2.1% in comparison to 2009-10. Exports have decreased by 8.2% to just AUS \$1989.2 million.<sup>151</sup> This short term decline in wine exports has been damaging to the Australian wine industry. Critics will likely blame the costs associated with administering the Agreement for a steady decline in the Australian wine market. This approach recycles the traditional US argument that costs associated with re-labelling and the monopolisation of GI terms by the EU will inevitably lead to a rise in production costs and a loss of domestic market share.

There are short term costs associated with the reforms contained in the Agreement. However, the long-term goal of bilateral wine agreements are aimed at the prize of securing market access and GI protection to support domestic wine industries and increase trade into the future. The *Australian Food and Drink Report 2012*<sup>152</sup> predicts that the Australian wine sector will experience the strongest growth in the future, with sales volumes forecast to increase at 1.9% compound annual growth rate (CAGR) from 2009 to 2016.<sup>153</sup> The market access to the EU ensured under the Agreement will catalyse the wine trade and provide Australia with

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<sup>147</sup> Ibid.

<sup>148</sup> Zahn, Above n 36, 20.

<sup>149</sup> Sebastian Wilckens, ‘The Usage of the WTO Dispute Settlement System: Do Power Considerations Matter?’ (2009) 6 *Frontiers of Economics and Globalization* 22.

<sup>150</sup> Waye, above n 54, 245.

<sup>151</sup> Australian Government Australian Wine and Brandy Corporation, above n 133.

<sup>152</sup> Business Monitor International, *Australia Food and Drink Report* (2012) ProQuest <<http://search.proquest.com.ezproxy.bond.edu.au/docview/921997457>>.

<sup>153</sup> Ibid.

recognition and respect for its unique wine products on the international world stage, while protecting domestic products and recognising the right of other wine industries to protect their own innovative and distinctive GIs. Reducing consumer confusion by maintaining heightened protection for all GIs, without compromising consumer satisfaction with the product, is an important principle to ensure market prestige and integrity. Enacting robust GI legal systems is likely to curtail wine fraud, which is essential for the industry to grow strongly in the international market.<sup>154</sup>

### **Nightcap: A summary**

The various levels of GI protection provided by the EU, US and Australia provide a useful comparative foundation. The differing approaches demonstrate the inconsistency in management GI protection and TRIPS implementation in both civil and common law countries. After 15 years of negotiation, the EU and US camps have reached a stalemate without any notable progress. The WTO acknowledges that members remain deeply divided, with no agreement in sight.<sup>155</sup> William van Caenegem sums up the fundamentals of the debate:

On the one hand, to justify the strong rights granted, not subject to any defence of genericness - and with a strict prohibition on use even in good faith or in absence of consumer deception - a system of registered GIs should require an intimate geographical connection and high and pervasive product standards. On the other hand, if a system with such characteristics is adopted, restraints on competition, grave rigidities in terms of land use, production levels and innovation, and considerable private and social costs are imposed.<sup>156</sup>

The recent ratification of the EU-Australia Agreement has increased pressure on the US to comply with heightened legal protection of semi-generic wine products. While some commentators<sup>157</sup> argue that the EU-Australia Agreement should be the model for a bilateral agreement to take place between the US and EU, the full effects of the Agreement are yet to be realised. It is likely that the US will not accept a full extension of Article 23 to an absolute standard. However, the US GI protection regime could be improved. Nation provides a solution to reform the current US position of GIs being granted a presumption of non-genericness only when they are registered by the USPTO as certification marks or collective marks.<sup>158</sup> The reform could consist of granting a presumption of non-genericness to all GIs that are overseen by self-regulating umbrella organisations before GIs are registered. This would guarantee to consumers that both the quality and origin has been met by organisation standards. The balance between respecting the value of traditional regional products, while maximising informed consumer choice in the free market, must be struck. The academic

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<sup>154</sup> Zahn, above n 36, 29.

<sup>155</sup> Nation, above n 41, 1007.

<sup>156</sup> William van Caenegem, above n 31, 874.

<sup>157</sup> Zahn, above n 36, 31.

<sup>158</sup> Nation, above n 41, 1007.

debate will continue over the perfect balance for GI protection within the international community. The current EU and US arguments and current GI frameworks do not strike this balance. Reform of the US legislation, in correspondence with umbrella organisation standards, could prove the first steps to the international harmonisation and agreement on GI standards.

### **Champagne: Genericization vs brand distinction**

The reasons why the French may have valid arguments for being highly sensitive and protective about the use of the 'champagne' appellation, and their desire to protect the term as a geographical indication, have been addressed. At the same time, the 'New World' jurisdictions, particularly the United States, raise powerful arguments that the word 'champagne' has become generic (or semi-generic, according to the Lanham Act), and accordingly no longer justifies protective treatment. One of the central submissions of this article is whatever the relative merits of the two arguments, in the case of champagne at least, the French have little cause for concern in an economic sense. The reason proposed is that champagne is such an exclusive, expensive and up-market product that brand and price-point distinctions are likely to be much more significant than the geographical indication itself.

To illustrate; if a person (of drinking age) in Australia<sup>159</sup> is asked will you go down to the shop and buy me a bottle of champagne, their first reaction is likely to be how much do you want to spend? (The response may well be phrased as do you want French champagne, or the local bubbly? but the question is essentially the same). If the person making the initial request indicates that they wish to spend \$30 to \$50, the person going to the shop knows immediately that the local product is desired. If the price range is \$80 to \$100, it is likely that a non-vintage French champagne is being requested; if the price is \$200 or more, pretty clearly the target is vintage French Champagne; and if \$300 or more, it is a prestige cuvée that is being requested. In the latter case (or last two cases), the next question is likely to be Well, which brand would you like?

Champagne, throughout its history, has been marketed as a prestige product to well-heeled and discerning customers. Such consumers are usually much more brand sensitive than price sensitive (or location sensitive). The association of various celebrities with their favourite brands of champagne demonstrates that premium quality champagnes continue to be preferred by society's elite in contemporary times. The French should not be concerned so much about protecting the appellation champagne as they should about protecting the quality and reputation of Krug, Louis Roederer, Dom Perignon, and the other champagne *maisons*. No customer is ever likely to mistake the local sparkling wine for any of these famous brands.

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<sup>159</sup> The proposition is equally relevant in the US or UK.

**Are the Champenois entitled to their monopoly?**

The word Champagne itself is a derivative word, whose origin is the Latin word *campania*. If the registered PDO Parmigiano Reggiano was held to extend to the German variant Parmesan,<sup>160</sup> and if Jerez de la Frontera in Spain is entitled to protect the word sherry,<sup>161</sup> why should the residents of Campania, Italy, not be able to enforce their rights against the French? It seems that the claims of the Champenois for protection of their appellation may have more to do with French pride, market power and economics than with the reason usually put forward<sup>162</sup> for affording protection to geographical indications, which is not misleading or confusing the consumer public.

As pointed out at the start of this article, the argument that other localities may have a valid claim to the use of champagne, campania, or other variants of the word, is not hypothetical. A tiny village, just north of Lake Neuchâtel in the Canton of Vaud, Switzerland, has been called Champagne since 885 AD.<sup>163</sup> For the last 20 years or more, the tiny Swiss village has been involved in an intense dispute with the Comité Interprofessionnel du Vin de Champagne (CIVC), the statutory trade organisation for the French champagne industry.<sup>164</sup> The dispute concerned two types of products that originally were marketed under the Champagne brand name. The first category of products was a series of sweet and savoury biscuits manufactured by the Cornu bakery. After a lengthy series of court battles, in 2011 the parties agreed on a compromise. The biscuit-maker would no longer use champagne as a brand name, but would be permitted to use the name in describing the origin of the product. How a consumer could be misled or confused between a Swiss biscuit and a French sparkling wine remains unexplained. The enforcement of the AOC by the CIVC in this case smacks of bloody-mindedness on the part of the French.

The second product that was subject to the dispute is a still wine made in the Swiss village since 1657 and marketed under the label vin de Champagne. This aspect of the dispute is ongoing, although the French may have a stronger case here.<sup>165</sup>

The term *méthode champenoise* no longer deserves universal protection, as many French champagne houses have departed from the traditional process in various ways. For example, except for prestige cuvées, riddling is no longer performed manually, but through the use of large machines called gyropalettes, which can carry out *remuage* on hundreds of bottles at a

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<sup>160</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights*, WTO Doc IP/N/1/-/G (15 April 1994) art 13.1(d).

<sup>161</sup> *Vine Products Limited v Mackenzie & Company Limited* [1969] RPC 218.

<sup>162</sup> For example, *Agreement on Trade-Related Aspects of Intellectual Property Rights*, WTO Doc IP/N/1/-/G (15 April 1994) art 22.

<sup>163</sup> BBC News, *Swiss town fights Champagne ban* (5 April 2008) *BBC News* <<http://news.bbc.co.uk/2/hi/europe/7332473.stm>>.

<sup>164</sup> Swissingfo.ch, *Biscuit hatchet buried in champagne wars* (21 January 2011) *swissinfo* <[http://www.swissinfo.ch/eng/business/Biscuit\\_hatchet\\_buried\\_in\\_champagne\\_wars.html?cid=29305476](http://www.swissinfo.ch/eng/business/Biscuit_hatchet_buried_in_champagne_wars.html?cid=29305476)>.

<sup>165</sup> *Ibid.*

time.<sup>166</sup> Disgorging is now performed by freezing the lees into a plug in the neck of the bottle, and removing the plug with minimal loss of fluid.<sup>167</sup>

### Conclusion

Had the Champenois not discovered the secret of the sparkling bubbles, the history of the Champagne region and its wines would have been very different. The light, acidic wine produced by the primary fermentation of the Champagne grapes would never have been able to compete with the richer, more full-bodied wines of Burgundy or Bordeaux. The wine industry of Champagne might well have sunk into oblivion. As it transpired, the Champenois turned their product into a sparkling triumph, a drink of kings and emperors, but one that nowadays is enjoyed by all.

From the outset, the Champenois have jealously guarded the culture, history and technology that have gone into the development of their famous product. The Paris Convention of 1883 and the Madrid Agreement of 1891 did much to secure the rights to use the names champagne and *méthode champenoise*, at least within continental Europe. This article has explained the fierce desire of the Champenois to safeguard these appellations, by tracing the colourful history of champagne, the evolutionary nature of its development, and the complex, labour-intensive processes which comprise the *méthode champenoise*.

The intellectual property rights of geographical indications are protected at an international level by TRIPS Article 22.<sup>168</sup> A heightened level of protection for champagne (and other wines) is afforded by TRIPS Article 23.<sup>169</sup> However, TRIPS relies on national laws for its implementation, and TRIPS Article 24 specifically empowers member states to deny GI protection for terms that have achieved a certain level of generalisation.

In Europe, the champagne appellation enjoys strong protection as a Protected Geographical Indication (PGI). In France, the term champagne is an *appellation d'origine contrôlée* (AOC), and its intellectual property rights are strongly enforced by or on behalf of the Champenois. In the United States, the *Lanham Act* and the Bureau of Alcohol Tobacco and Firearms (through the *Taxpayer Relief Act of 1997*) categorise champagne as semi-generic. This allows US sparkling wine producers to label their product champagne, provided that it conforms to the attributes of the original product and that it displays the actual place of origin of the wine.<sup>170</sup> The US test, which is a more pragmatic one, based on the likelihood of confusion of consumers, is at odds with the European system, which is based on evocation of the concept of the *terroir* from which the product originated.<sup>171</sup>

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<sup>166</sup> Wikipedia, 'Gyropalette' (2011) Wikipedia <<http://en.wikipedia.org/wiki/Gyropalette>>.

<sup>167</sup> Wikipedia, above n 88.

<sup>168</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights*, WTO Doc IP/N/1/-/G (15 April 1994) art 22 paragraph 22.

<sup>169</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights*, WTO Doc IP/N/1/-/G (15 April 1994) art 24, paragraph 6.

<sup>170</sup> Zahn, above n 36, 12.

<sup>171</sup> Ibid.

## CHAMPAGNE AND GEOGRAPHICAL INDICATIONS

Australia traditionally belonged to the New World camp exemplified by the position of the United States. The recent *Agreement between Australia and the European Community on Trade in Wine*<sup>172</sup> and subsequent Australian domestic amending legislation<sup>173</sup> signifies a shift in Australia's position towards accommodation of the European position. The reasons for this may be more pragmatic than ideological; Australia exports far more wine to Europe than it imports from European countries.<sup>174</sup>

The highest level of GI protections sought by the Champenois may be unnecessary. Champagne has always been an up-market product, and nowadays champagne consumers are likely to be highly brand-sensitive, and not likely to be deceived by the use of the words champagne or *méthode champenoise* on labelling. Champenois should concentrate on protecting the trademarks of the various *maisons*, rather than trying to recapture words that are now regarded as generic or semi-generic in various jurisdictions.

The name Champagne was itself stolen from the Latin source *campania*, and if the appellation was subject to a thorough international scrutiny, the French may well find themselves defending against an argument that the word ultimately belongs to the Italians. A real-life instance of this argument is the on-going dispute between the Swiss village of Champagne and its French namesake.

The debate about the right to protect the geographical indications associated with champagne will continue. In the meantime, we should appreciate the marvellous achievement of the Champenois, the dedication they display to the perfection of their product, and the enjoyment that product brings to millions around the world. It is fitting to raise our glasses and toast that drink of monarchs, and monarch of drinks: to champagne!

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<sup>172</sup> *Agreement between Australia and the European Community on Trade in Wine*, EU-Australia, signed 1 December 2008 UNTS 1503 (entered into force 1 September 2010) art 1.

<sup>173</sup> *Australian Wine and Brandy Corporation Amendment Act 2010* (Cth).

<sup>174</sup> DAFF, *Wine policy* (2012) DAFF <<http://www.daff.gov.au/agriculture-food/wine-policy/trade-in-wine>>.