Case 11

The Taste of Wine—Wine Appellations and the Importance of Terroir

Bronco Wine Company v. Jolly, 129 Cal. App. 4th 989 (3d Dist. 2005), *cert. denied,* ___ U.S. ___, 126 S. Ct. 1169 (2006)

When Warren Winiarski was first determining in 1970 where to locate the winery that became the famous Stag's Leap Wine Cellars, he tasted wines made from grapes in the various sub-regions of the Napa Valley and ultimately decided that the chalky soil near the cliffs of Stag's Leap produced the type of Cabernet Sauvignon grapes that he wanted for the premium Bordeaux-style blend that he intended to create.[1] Other fine wine producers in the Napa Valley and elsewhere have followed this same principle: that the nature of the soil, the climate of a geographic location, exposure to sun, water levels, slope and elevation will strongly affect the taste of the wines produced from grapes grown there. The French call this *terroir*. The wine will express a "sense of place."

Several holiday seasons ago, a colleague from my office offered me a bottle of wine as a gift. It was a Chardonnay that I did not know, under the label of "Charles Shaw." I was impressed that a person I hardly knew had been so thoughtful. When I drank it, however, I was disappointed, for the wine was, although a decent table wine, without distinction and not of a quality that one generally expects in a wine that one has received as a gift. I could detect none of that "sense of place" that one finds in a good Napa Valley Chardonnay. Very soon after, I learned that this wine was a so-called "value wine," available only in Trader Joe's stores, priced at $1.99 per bottle and commonly known as "Two-Buck Chuck." (I saw this same wine several weeks later in a Trader Joe's in Chicago, only there it was referred to as "Three-Buck Chuck," to take into account higher distribution costs in Illinois.) But I wondered how the Bronco Wine Company, the producer of Charles Shaw wines, could sell what was still a relatively decent everyday table wine at such a low price. I learned that Bronco, based in Ceres, California, produced not just the now-famous Two-Buck Chuck

but other commonly found brands; it is the fourth-largest producer of wine in the United States.[2] Most of its 35,000 acres of vineyards are located in California's Central Valley, far away from the Napa Valley, not just in distance but also in terms of soil characteristics, climate, sunlight, and availability of water. The grapes grown there are much less expensive than Napa Valley grapes. The wines made from them present a very different *terroir* from those produced from Napa Valley grapes.

Others of the Bronco Wine Company's wines, however, have been more controversial than the popular Two-Buck Chuck. As the Napa Valley developed an international reputation over the last two decades of the twentieth century for producing superior-quality wines, and as wines such as Winiarski's famous Stag's Leap Wine Cellars Cabernet Sauvignon gained critical acclaim and won awards, concerns grew over the accuracy of the place names on wine labels. It helped, of course, that the enhanced cachet of their wines enabled Napa Valley vintners to command a premium in the pricing of wines carrying a "Napa" appellation on their labels. And there was the general feeling among Napa Valley winemakers in particular that they had worked hard to lift up the general reputation of California wines from the days both before and after Prohibition, when poor-quality, generic wines had flooded the market and given all California wines a bad reputation. Accordingly, they began to clamor for increased protection for true Napa Valley wines to differentiate them from wines that had the word "Napa" in their brand names but were made from grapes grown in areas outside of the Napa Valley. They argued that wines labeled "Napa" that were not produced from Napa County grapes caused consumer confusion, especially for those novice buyers who were not familiar with specific Napa Valley wineries and were merely seeking a good-quality wine.[3] To them, "Napa" was synonymous with quality. In response to these growing concerns, in 2000 the California legislature enacted a law[4] that prevents the use of the name of a recognized viticultural region within Napa County unless a large percentage of the grapes used for the production of the wine sold under that brand came from that area.

Shortly after this legislation became effective, the California Alcoholic Beverage Control Board (ABC) notified Bronco Wine Company that certain of its labels violated the new law. Besides Charles Shaw wines, Bronco also marketed wines made from grapes grown in areas outside the Napa Valley under the brands "Napa Ridge," "Napa Creek Winery," and "Rutherford Vintners"—areas where the cost of grapes and their perceived quality were much lower. Before 2000, Bronco had legally been entitled to sell its wines under these labels under an exception to the federal wine-labeling laws.[5]

On its Napa Creek Winery label, for example, in smaller lettering and below the brand name, Bronco stated the appellation of origin—the geographic source of the

grapes—as Lodi, followed underneath by the varietal name, Chardonnay. The back label for the wine stated that the wine was "vinted and bottled" by the named winery in Napa, California. Most consumers would not know without doing some research that the word "vinted" is used when wine is fermented at one address and finished (such as by filtering out sediment) in another. Thus, in the case of the Napa Creek–labeled wine, Bronco grew and fermented the grapes in Lodi and then transported them to Bronco's bottling facility in the city of Napa, at the southern edge of the Napa Valley, for "vinting." The Napa Creek Winery back label also stated that the Chardonnay was from "vineyards blessed by the warm days and cool nights of California's *famed* [emphasis added] Lodi viticultural area," implying a region with a *terroir* as significant as the Napa Valley, when most residents of Lodi would not think of their region as "famed" among wine-producing regions.

Bronco had acquired these three brand names and the right to use the labels from predecessor wineries located in Napa County. It had acquired the Napa Ridge brand in January 2000 from Beringer Wine Estates for more than $40 million. This brand had been in use since the early 1970s. Berenger had used the Napa Ridge brand and label for wines made from grapes grown outside the Napa Valley, including California's Central Coast and North Coast, as well as from Napa County. The owner of the Napa Creek Winery brand and the owner of the Rutherford Vintners brand had previously marketed wines under those brands made largely from Napa County grapes. After Bronco acquired these brands, they were used exclusively to sell wines made from grapes grown outside Napa County and priced generally at under $10 per bottle.

Bronco's labeling practices were legal under the relevant federal labeling regulations. Brands coming into use after 1986 when federal labeling regulations were modified were required to comply with "geographical designation requirements," including a mandate that at least 75 percent of the grapes used in the wine had to be grown in the area indicated on the label. But, as noted, brands previously in use had been "grandfathered" when the federal regulations were enacted and were allowed to be used as long as the labels also indicated the grapes' place of origin or made some statement to "dispel the impression that the geographic area suggested by the brand name is indicative of the origin of the wine."[6] All three of Bronco's labels had been in use since 1986 (although not by Bronco) and therefore, Bronco claimed, fell into this exception.

When Bronco received its notice from the California ABC, it sued, seeking a declaration that the California law was not enforceable because it was preempted by federal labeling laws. Bronco also claimed that the law violated its First Amendment Right of free speech, the Commerce Clause, and the Fifth Amendment Takings

Clause (because the law deprived it of the value of its brand without just compensation). The lower courts found that the federal law did preempt California law,[7] but the California Supreme Court reversed, finding no preemption, and remanded the case to the California appellate court for a determination of the various other claims made by Bronco.[8] According to the California Supreme Court, states have historically taken the lead in protecting consumers against misleading brand names and labels, and there was no evidence that the federal government intended to preempt these laws when it put in place minimum standards for wine bottle labels. The court stated, "We do not find it surprising that Congress, in its effort to provide minimum standards for wine labels, would not foreclose a state with particular expertise and interest from providing stricter protection for consumers in order to ensure the integrity of its wine industry."

In its decision upon remand, the California appellate court determined that the California law preventing the use of the word "Napa" in labels on wines made from grapes not grown in Napa County was not a violation of Bronco's First Amendment rights, nor was it a violation of the Commerce Clause or the Takings Clause.

Under the First Amendment to the U.S. Constitution, commercial speech is entitled to protection from unreasonable governmental regulation, but this provides less protection than other forms of constitutionally guaranteed speech. The court noted that there has to be a balance between the commercial rights of the business to advertise its wines and the responsibility of the government to protect against claims on labels that are unlawful or misleading. In this case, Bronco's brands included a geographical or viticultural designation that conveyed "information about the geographic source of the grapes used to make the wine. For that reason, a brand name of geographical significance is entitled to First Amendment protection as commercial speech only if the information about the source of the wine is accurate." Bronco claimed that consumers were not misled by the labels on its wines because they gave the geographic source of the grapes, such as Lodi.

The court disagreed and noted two things. First, a wine consumer not familiar with California geography could reasonably conclude that Lodi was located within Napa County. Second, a consumer buying wine by the glass in a restaurant would have no information about the wine other than its varietal name, such as Chardonnay, and its brand—"Napa Creek Winery"—and would assume that he or she was buying a glass of Chardonnay from the Napa Valley. Because a brand name using "Napa" is naturally associated with grapes from the Napa Valley, the consumer could easily conclude in either of the above scenarios that the wine being purchased was made from Napa Valley grapes and was of premium quality.

Polls that were presented as evidence at the trial demonstrated the accuracy of these conclusions. In a marketing survey commissioned by the California Legislature when considering the enactment of the California labeling law, 91 percent of the respondents believed that it was deceptive to use a geographic region reputed for its quality wines in a brand name if the grapes came from another region; 82 percent stated that the brand name was a critical factor in the decision to purchase a wine.

Moreover, the court suggested that Bronco itself knew that the labels would cause consumer confusion and that it took advantage of that potential confusion in the use of its labels. It noted that Bronco had spent $40 million for the Napa Ridge brand, although it did not acquire either the vineyards or the winery that had produced the Napa Ridge wine in the past. "It is reasonable to assume," the court stated, that "Bronco concluded the name 'Napa Ridge,' by itself, is valuable because it has name recognition that signifies quality." "However," the court continued, "if the wine produced under such a name is not made with Napa Valley grapes, it is marketed as something that it is not while benefiting from the reputation of Napa Valley wines."

Therefore, the court concluded that Bronco's brand names were inherently misleading and, as a result, that this commercial speech was unprotected and could be limited to prevent consumer confusion.

Bronco also claimed that the California statute violated the Commerce Clause of the U.S. Constitution because it was an attempt by the state of California to regulate products sold in interstate commerce. The court gave short shrift to this argument because the statute applied only to wine sold or offered for sale in California. Even though it might affect interstate commerce in an indirect way, its goal was not to restrict the sale of wines, but only the way wines sold in California could be labeled to prevent confusion among California consumers and to protect the reputation of the Napa Valley.

Finally, Bronco tried to convince the court that the law was an unconstitutional taking of property without just compensation because it amounted to confiscation of its federal Certificates of Label Approval (COLAs) that it had received for its three brand names. The court did not deem these COLAs to afford a property right to Bronco because they did not give Bronco any exclusive use of the brand name. Moreover, the California law did not prevent Bronco from selling its wines and, therefore, did not destroy the substantial economic value of Bronco's business. In other words, nothing prevented Bronco from continuing to use the brands; it just had to use them on wines that complied with the statute, that is, on wines made from grapes grown in the Napa Valley.

Bronco, unhappy with this decision, took its appeals all the way to the U.S. Supreme Court in January 2006 for a second time, and for a second time the Court declined to take the case. In the aftermath, after losing numerous rounds in the courts

over a four-year period, Bronco agreed to drop the word "Napa" and to add "Lodi" to its labels for wine made from grapes grown outside the Napa Valley. It agreed to change "Napa Ridge" to "Harlow Ridge," named after the street in the town of Napa where Bronco ran a large bottling plant. The label notes that the grapes are from Lodi. Bronco also agreed to use Napa grapes in its Rutherford Vintners and its Napa Creek wines. It had been more of a matter of principle for Bronco to fight so long and so hard to continue a practice that many viewed as "sneaky" but that Bronco maintained was long-standing practice in California wine making. Fred Franzia, Bronco's owner, simply did not believe that using appellations had much substance and that it was all a bit of snobbery, a symptom of the changing Napa Valley with which he disagreed.[9] Bronco's biggest cost from the lengthy battle with the state and the other Napa Valley vintners was probably the attorneys' fees it likely had to pay for the prolonged litigation, because the three brands that it defended had accounted for only a small percentage of Bronco's then $500 million in wine sales.

Vignette

Wine Labels—Appellation of Origin

One of the most critical decisions to be made by a new winery owner is the form of, and text on, the label under which the wine will be marketed and sold. Certainly the trademark is important, and with the proliferation of so many wineries in the last few decades, coming up with a strong, eye-catching brand for a wine is increasingly difficult. But choosing the brand is only a small part of the task. A wine bottle label is used to provide the consumer with useful information to help him or her select and appreciate the wine. And frankly, it also has

the purpose of selling the wine—of making the wine appear better, and of better value, than the wine next to it on the shelf.

A minimum amount of information is required by law to be on wine bottle labels in the United States. Many wineries provide additional information that they hope will influence the purchasing decision. What is on a wine label? The label, first of all, must show the brand name. If no brand is provided, then the bottler's name will be considered the brand. Many wine labels will also tell the vintage, such as 2005. This corresponds to the year of the actual grape harvest and the wine made from those grapes. If a wine is a blend of grapes from two or more years, then the wine is considered a non-vintage wine.

The label may state the "appellation of origin" for the wine and must state the wine type. It may be labeled by a grape or varietal name, such as Merlot, or it may be given a generic name, such as "Red Table Wine." Although labeling laws do not require them to do so, many wineries also list the grape varietals that comprise their generic wines. A label may also describe the wine, including any special attributes, such as whether it is sweet or dry. Many wineries will also name the vineyard where the grapes were grown, particularly if that vineyard is known for producing a high-quality grape.

The name of the producer and bottler is required by federal labeling laws, as well as their location. It is important to pay attention to the distinctions on this part of the label. "Produced and bottled by" certifies that the bottler fermented at least 75 percent of the wine. "Cellared and bottled by" indicates that the bottler aged the wine in a cellar before bottling it, but did not ferment the wine. "Bottled by" indicates that the winery bottled the wine; in other words, that the wine was grown, crushed, fermented, finished, and aged somewhere else. Opposite of "bottled by" is "estate bottled." If the label states that the wine was "estate bottled," this means that 100 percent of the grapes in the wine were grown on the winery's own vineyards, and that the winery crushed, fermented, and finished (that is, vinified) the wine, and bottled it at that winery. "Estate bottled" wine is thought to have a superior quality.

The law requires that the label show the wine's alcohol content, its net contents, and whether or not it contains sulfites. The alcohol content is shown by volume. Table wines generally have between 12 and 14 percent alcohol content. One critical step in creating the wine label is obtaining approval of the label by the federal Alcohol and Tobacco Tax Trade Bureau (TTB) within the Department of the Treasury.[1]

Under the Federal Alcohol Administration Act first enacted in 1935 and amended many times because, no person can produce, sell, or ship wine in in-

terstate or foreign commerce without a license from the Secretary of the Treasury. For each wine so sold or shipped, the winery must obtain a Certificate of Label Approval (COLA) from the TTB that certifies that the wine label has been reviewed and approved.[2] In 1988, the FAA Act was amended further to require certain health warnings on wine labels related to consumption of alcoholic beverages during pregnancy and potential impairment of one's ability to drive a car or operate machinery.

The regulations issued under the federal act are complicated and have been amended many times. One regulation entitles a wine to be described by an appellation of origin if at least 75 percent of the wine sold under that label comes from fruit "grown in the appellation area indicated."[3]

What is an "appellation of origin"? This term is translated from the French, "*Appellation d'Origine Contrôlée*" (AOC or AC), which is the French system for ensuring the quality of wines. This system was initiated in 1935 as a means of protecting quality vineyards and areas from unscrupulous wine producers who were making wines from other geographical areas under labels that passed the wines off as being from, and taking advantage of, better-known wine regions. The United States has modeled its structure for appellations of origin after the French system, and for the same purpose. While an appellation of origin cannot guarantee the quality of a particular winemaker's wine, it can control what goes into the making of that wine. There are seven categories in the French system that a wine must meet to quality as an AC: land, grape varieties, viticultural practices (such as the number of vines per hectare and pruning techniques), permissible yield (large yields will decrease each grape's quality), alcohol content (the grapes must reach a certain ripeness—sugar content—in order to reach a minimum alcohol level), winemaking procedures (based on historical practices that have produced favorable results), and official tasting (all wines that apply for an AC are sampled by a panel of judges).

To qualify as an appellation of origin in the United States is not so rigorous. It is a designated growing area governed by both federal and state laws and regulations.[4] This is also known as an American Viticultural Area (AVA). An appellation of origin is defined in the regulations as a political division or subdivision, a state or county, such as Napa or Sonoma County, in which grapes used to make wine are grown. A "viticultural area" is a subcategory within an appellation of origin demarcated by geographic terms and characteristics, rather than political boundaries.[5] Examples of recognized Ameri-

can Viticultural Areas (AVAs) include the Napa Valley and areas wholly contained within the Napa Valley, such as Rutherford, Stags Leap District, Oakville, St. Helena, and Yountville.

The other requirements for viticultural area appellation are that the area be recognized as such by the federal government, that the wine be made from at least 85 percent grapes grown in that viticultural area, and that the wine be fully finished within the state of the viticultural area. To use an appellation of origin other than an AVA on a wine label, at least 75 percent of the wine must be derived from grapes grown in the area identified by the appellation and must be fully finished in the named appellation area. To use an AVA on a wine label, the AVA must be approved under the federal regulations, 85 percent of the wine must be derived from grapes grown within the AVA, and the wine must be fully finished within the state in which the labeled AVA is located.[6]

The regulations broadly prohibit any misleading brand names. Essentially, no wine label may bear "statements, designs or devices which are false or misleading."[7]

> "No label shall contain any brand name, which, standing alone, or in association with other printed or graphic matter creates any impression or infer-

ence as to the age, origin, identity, or other characteristics of the product, unless…such brand name…conveys no erroneous impressions as to the age, origin, identity, or other characteristics of the product."[8]

Many times when the federal government has received a request to designate another American Viticultural Area, there has been a controversy between the winery or group of wineries within that region making the request and one or more wineries within the region that have an established brand name, but that may not produce wine utilizing only grapes from that region. Or the established winery may balk at having the value of its brand weakened by the allowance of the designation for other wineries that are less known. When the Stags Leap District was first proposed, for example, both Stag's Leap Wine Cellars and Stags' Leap Winery objected, because neither winery wanted to dilute the value of its respective brand.[9] Some have complained also that the government has moved too fast in creating these regions without fully appreciating the nature and quality of the wines produced there.[10]

Because of these controversies, in November 2007, in an effort to address the effects that the approval of an AVA may have on an established brand name, the TTB proposed revisions to the American Viticultural Area Regulations.[11] The instigation for this was the attempted creation of a Calistoga viticultural area in Napa County.[12]

In its proposed rulemaking, the TTB stated its belief, based upon comments that it had received on its initial attempt at rulemaking to establish the Calistoga viticultural area, that a comprehensive review of the AVA program was necessary "in order to maintain the integrity of the program."[13] It expressed concern that the establishment of an AVA limits the use of established brand names, could be used by competitors to adversely affect another winery's business, and could limit competition, because at least 85 percent of the wine using that designation must be derived from grapes grown within the AVA boundaries. It recognized that

"establishment of a new AVA could give rise to a misleading impression regarding the provenance of the wine that carries a known brand name similar to an AVA name but that does not meet the 85 percent requirement."

This could result in a failure to provide the consumer with "adequate information as to the identity and quality of the wine" and create "confusion for consumers." The TTB also noted that there had been a substantial increase in petitions to create AVAs, [14] including new AVAs within already established AVAs (so-called "nested AVAs").

The revised regulations would accordingly no longer favor place names over brand names and would impose stricter standards for the establishment of nested AVAs. And they would impose stricter requirements for the grandfathering of brands in place before the establishment of the regulations, including a double time frame: the COLA for the label with the brand must have been in place for a five-year period preceding the request for establishment of the AVA, and the label must have been in commercial use for at least three of those five years.

The comment period for the proposed regulations ended in March 2008 with many objections received. It is unlikely that the final rules will be issued before the end of 2008. But whatever decisions the government makes are likely to be controversial, especially in the emotion-laden wine production business, where appellations such as "Napa Valley" can enhance significantly both the reputation and the price of a wine, but where the creation of appellations can sometimes seem arbitrary and may also result in the dilution of an established and well-known brand. The proposed regulations make clear that, in the case of a dispute, United States regulations should generally choose to protect the established trademark over the geographic place name. This position puts the federal government at odds with not only those within areas such as the Napa Valley that would prefer to see greater use of geographic indications to protect the value of wine produced in those areas, but also members of the European Union.[15]

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1. Created under the Homeland Security Act of 2002, formerly the Bureau of Alcohol, Tobacco and Firearms (BATF).

2. 27 C.F.R. § 4.50 (a).

3. 27 C.F.R. § 4.25(a)(1) (i)-(VI).

4. In 1978, the BATF first proposed new rules for regulating the use in brand names of terms of geographic or viticultural significance, which were amended and finally implemented in 1986.

5. 27 C.F.R. § 4.25(e)(3)(i), (ii) &-(iv).

6. 27 C.F.R. §§ 4.25 et seq.

7. 27 C.F.R. § 4.30.

8. 27 C.F.R § 4.33(b).

9. Carol Emert, *The Winiarski Way*, SAN FRANCISCO CHRONICLE, Thurs., Apr. 1, 2004, http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2004/04/01/W1GRS5TNSF1.DTL&hw=Stags+Leap+District+Winiarski&sn=001&sc=1000.

10. Jon Bonne, *Overhaul of Labeling Rules Stirs Up Wine Wars*, SAN FRANCISCO CHRONICLE, Mon., Apr. 7, 2008, http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2008/04/07/MN81V76JA.DTL.

11. Notice No. 78, 72 Fed. Reg. No. 223, at 65, 261-75 (Nov. 20, 2007).

12. Notice No. 77, 72 Fed. Reg. No. 223, at 65, 256-61 (Nov. 20, 2007).

13. *Id.*

14. There are almost 200 U.S. appellations, and within California there are more than 100.

15. *See* Case 12.

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1. Stag's Leap Wine Cellars official website, http://www.cask23.com/foundersviscon.htm

2. Claim of Bronco's head, Fred Franzia, *see*, *Fred Franzia's Role in California Wine Industry History—The Story of Fred Franzia and Two Buck Chuck*, http://www.fredfranzia.com/FredFranziaRole.aspx.

3. Maura Dolan and Jerry Hirsch, *Napa Vintners Toast California's Justices*, LOS ANGELES TIMES, Aug. 6, 2004 (Business (C-1)), http://www.articles.latimes.com/2004/aug/06/business/fi-wine6.

4. CAL. BUS. & PROF. CODE § 25241.

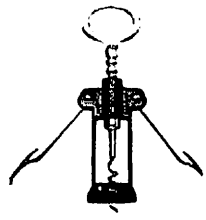
5. 27 C.F.R. § 4.39(i)(2)(ii).

6. 27 C.F.R. § 4.39(i)(2)(iii).

7. Bronco Wine Co. v. Espinoza , 104 Cal. App. 4th 598 (3d Dist. 2002).

8. Bronco Wine Co. v. Jolly , 33 Cal. 4th 942 (2004).

9. W. Blake Gray, *Two Buck Chuck Creator Ups the Ante in Wine Feud*, SAN FRANCISCO CHRONICLE, Thurs., May 18, 2006, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/05/18/WICGOISRON1.DTL.



Case 12

What's Bud® Got to Do with It? Appellations and Trademarks in a Global Economy

World Trade Organization (WTO) Ruling, WT/DS 174 R 15, March 2005 (05-0955), (U.S. Complaint) and WT/DS 290 R 15, March 2005 (Australian Complaint) (The "Budweiser® Ruling")

Wine enthusiasts grow poetic in describing the great pleasure derived from tasting the smooth mineral flavors of a dry white wine known as "Chablis," produced in the area north of the Burgundy region of France with grapes from vines grown in the limestone soil of the region, and in inhaling the soft, earthy bouquet of an impeccably finished red wine from the Saint Emilion region northeast of Bordeaux, and in feeling against their palates the delicate bubbles of a fine sparkling wine produced in Epernay, in the heart of the Champagne region of France. These wines are all what they are because of where the grapes from which they are produced are grown, and their names, whether Chablis, Bordeaux or Champagne, tell us what to expect from the wine. Unfortunately and ironically, because of the quality of these wines, vintners from other parts of the world have "borrowed" their names to pass off very different and frequently inferior wines as something of a greater quality. This complaint has been leveled against California wines since the early days of the California wine industry in the nineteenth century. For example, winemakers in the state as early as the 1860s and 1870s gave blended red wines with no relation at all to the red wines made from Pinot Noir grapes in France's Burgundy region names such as "California Burgundy," or simply "Burgundy" wine.

A Champagne Vineyard

The naming of wines first became common in eighteenth century France when wine was identified by the area in which the grapes were grown. Grapes grown in the Bordeaux region produced "*un vin de Bordeaux*"—that is, a wine from Bordeaux; grapes grown in the Chablis region produced "*un vin de Chablis*," and so forth. Before this time, wines were largely identified by their color. Red Burgundy wines made from the Pinot Noir grape were "*vins rouges*." Wines from the south were "*vins rosés*"—that is, with a "blush"—and wines from Bordeaux were called "clarets," from their clear, luminous, light red color. By the time winemaking activities started in California in the mid-nineteenth century, French wines had acquired an international cachet. These wines graced the dinner tables of upper-class East Coast Americans. Winemakers in California therefore followed a natural impulse to identify their wines with those from France if they might have remotely similar characteristics. For example, a French wine producer in California might have called the white California wine he had produced a "Chablis" because it had perhaps some distant characteristics of a French Chablis. This wine was not a true Chablis, however, and over time the term "Chablis" came to generically represent any light dry or semi-dry white wine, even though its only resemblance to the classic mineral-tasting dry white wine produced in the Chablis region of France was the name.

This practice has continued into the twenty-first century and remains legal within the United States. Winemakers can use what are known as "semi-generic" place names such as "Chablis" or "Chianti" or "Burgundy" on their labels as long as they also disclose the geographic region in which they are produced, such as "California Burgundy." This is the case even though there is less and less reason to give "-

faux" place names to California wines. When Jack and Jamie Davies founded the Schramsberg Vineyards in 1965, they called their sparkling wine "Champagne" to demonstrate to consumers that they were serious about producing a quality sparkling wine, using the "*méthode champenoise*."[1] Another sparkling wine specialist in California, Korbel Champagne Cellars, claims to have produced sparkling wines in California since 1882 and has always identified these as "Champagne," or more recently, "California Champagne." They argue that the "*méthode champenoise*" is a method for making sparkling wine that originated in the Champagne region of France and that Champagne is not a "*terroir*." They maintain that what makes the sparkling wine great is not the quality of the grapes but the meticulous methodology used to produce the secondary fermentation that creates the sparkling wine.[2] Therefore, any consumer who appreciates good sparkling wine knows that Korbel California Champagne originates in the United States and that it is not to be confused with sparkling wines produced in and named after the famous region east of Paris. Schramsberg has taken a different tack. Since the mid-1990s, when a number of French Champagne houses such as Moët et Chandon and G. H. Mumm established wineries in Northern California—Domaine Chandon and Mumm Napa—Schramsberg has identified its famous sparkling wines simply as "Schramsberg," knowing that the brand is sufficient to denote the quality of the beverage.[3]

In 1973, Moët-Hennessy (Moët et Chandon) acquired land near Yountville and founded Domaine Chandon; its first California sparkling wine using the méthode champenoise was released in 1976, and its visitors' center and famed restaurant opened in 1977.

The French have taken a strong position, attempting through regulatory means to repatriate names considered to be generic in the United States, such as Chablis and Champagne, and suggesting that wines produced in California that are identified using French place names do not possess the character or quality of a good French wine and are merely poor-quality imitators. And in all honesty, this misuse of place names in the past stigmatized California wines as being inferior to their French namesakes. As California winemakers have moved away from this particular practice toward that of placing the varietal name on the label, such as Chardonnay or Pinot Noir instead of Chablis or Burgundy, this stigma has faded.

Wines and beers that have generic names taken from registered European geographic indications (GIs),[4] although legal in the United States, are prohibited not

just in France but throughout the European Union. The EU finds terms such as "California Champagne" to be deceptive and confusing to consumers as well as harmful to the image and value of wines produced in regions that rightfully claim the name of that particular place. And this conflict between the EU's efforts to protect its geographic names led the United States and Australia to lodge complaints before the World Trade Organization (WTO). The WTO's ruling in the United States' favor established and confirmed the rights of parties who had had established trademarks that were also place names versus the rights of European Union members seeking to restrict the sale of beverages within their territory of products, whether wine or beer, that carry the place name of geographic significance that has been registered as such with the EU.

Fraud and adulteration were growing problems in the 19th Century, and sloppy practices in the California wine industry prevented California from developing the reputation necessary to replace the French wineries as having the best wines.

In 1994, the United States and member nations of the European Union, among others, signed the WTO agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), which came into force in 1996.[5] The TRIPS Agreement requires that WTO members provide the legal means for interested parties to prevent the use of a GI that indicates or suggests that a product originates in a geographical area other than its true place of origin, in a manner that misleads the public as to the real geographic origin of the product, or that constitutes an act of unfair competition. The TRIPS Agreement also provides for an "enhanced" minimum level of protection for GIs that identify wines and spirits.[6] For wines and spirits, even if the public would not be deceived by the use of a particular GI, a GI may not be used if the wines or spirits do not originate in the place indicated by the GI. However, there are exceptions to the TRIPS Agreement. For example, TRIPS does not require protection of a GI if it is the generic or semi-generic name for the wine, such as Chablis or Champagne, in the country where it is made, such as the United States. Also, if a trademark using a place name that is a GI already existed when the GI was registered, then the trademark is legally presumed to take precedence over the GI.

Before TRIPS was ratified by WTO member nations, in July 1992, the European Union had issued a regulation[7] that protected GIs and designation of origin for agricultural products and foodstuffs (including wine) within the EU. In this regulation, the European Council created a system that protected certain names by allowing for

their registration. Once registered, those designations of origin and geographic indications were reserved solely for the products that had been produced and/or processed in the regions or places designated by those names. In other words, only sparkling wines produced in the Champagne region of France could be sold in the EU under the name "Champagne." Moreover, regional trade names such as "Champagne" are related to products connected to a particular territory and, unlike trademarks, do not ensure an exclusive right but are available to any producer in the region. This regulation conflicted with the practice of wineries in other parts of the world, not just in the United States, which had long used such place names to identify their wines or other beverages and viewed these names as generic.

The United States was concerned that this EU regulation provided stronger protection for GIs of EU members but denied the same level of protection to United States's GIs. This meant, for the wine industry, that places like Napa in California, or the Willamette Valley in Oregon, or Finger Lakes in New York could not be assured under the EU regulation that their names would be protected in Europe. This was because the EU regulation required reciprocity; it required that non-EU countries also protect EU products, such as Chianti, Chablis, and Champagne. Because the United States and some other countries have not amended their laws to provide such protection, U.S. products such as Florida oranges or Idaho potatoes did not qualify for registration within the EU. The United States asked the WTO to force the EU to open the protections offered to EU products to other non-EU countries without requiring reciprocity.

In 1965, Jack and Jamie Davies purchased the Schramsberg Estate and began producing quality sparkling wine, using the méthode champenoise, the traditional method for making Champagne, developed in the Champagne region of northern France.

The United States also believed that the EU regulation did not provide sufficient protection to preexisting trademarks that are similar or identical to a European GI. It claimed that the European Council regulation, as enforced by the EU, violated the TRIPS agreement because it did not ensure that an owner of a trademark registered before 1996 could prevent uses of a geographic indication that would create confusion with the established trademark. The United States claimed that the EU protections of GIs were inconsistent with its obligations under the TRIPS Agreement. The TRIPS Agreement specified that a trademark that has been used or registered in good faith in one country could not be preempted by a later-established GI that conflicted

with that trademark. The EU defended its right to protect GIs and to prevent registration of trademarks within the EU that use GIs unless there was reciprocity in banning the use of EU GIs in the home country.

In 2004, the United States initiated a dispute settlement case at the WTO against the European Union. (Australia launched a comparable case at the same time.)

The United States challenged the EU regulation on several grounds. First, it claimed that the regulation allowed no national treatment for foreigners. It argued that government intervention should not be required for an owner to assert a trademark or a GI right. The EU regulation had allowed European Community right holders to apply directly to register and protect their GIs for EU-originated products, but non-European nationals had to rely on their government to apply for protection in the European Community on their behalf and to object to GI applications in the European Community. Also it disputed the EU requirement that, to obtain protection for its GIs, such as Idaho potatoes, a foreign government such as the United States had to adopt a system of protection for EU GIs that mirrored the European Community's regulation. The WTO panel agreed with the United States that these aspects of the regulation discriminated in favor of European Community products and of EU GI right holders against GI right holders and the products of non-EU WTO agreement signatories. The panel found that the conditions imposed by the EU on a non-EU member to obtain GI protection under the EU regulations violated the national treatment obligation under TRIPS, by affording less favorable treatment to non-European Community nationals than to EC nationals. For example, it protects a name such as "Champagne," but fails to protect U.S. products, such as Florida orange juice or Idaho potatoes, that are named for their place of origin.

Second, the United States argued that the European Community's GI regulation would not allow certain trademark owners to enforce their trademark rights and prevent holders of similar or identical GIs from confusing uses. The United States maintained that the TRIPS Agreement requires that the owner of a registered trademark be enabled by law to prevent others from using the same trademark that includes a GI when consumers would be confused by the later uses. The WTO panel agreed generally with the United States's interpretation of TRIPS. The panel also found that the EU Regulation was inconsistent with TRIPS because it limited the availability of use rights for owners of trademarks. In other words, the EU cannot deny U.S. trademark holders, such as Anheuser-Busch, the right to register and use its mark, such as Budweiser®, in the EU. However, the panel allowed for the coexistence of a GI in the European Union with a similar or preexisting product trademark. Nevertheless, it also ruled that the EU's GI regulations could protect only GI names as registered

in their original language, but this protection could not extend to translations of the GI unless this also had been specifically registered.

And this leads to why the WTO decision is often referred to as the "Budweiser® Ruling." Why discuss a beer case in a book about wine? Because the United States's complaint to the World Trade Organization was instigated in part because of adverse actions against the Budweiser® brand in the European Union, although it had a larger purpose of clarifying and enforcing rights that broadly affected not just beer but any wine or other beverage trademarks. Anheuser-Busch had been selling beer in the United States since 1876 using the Budweiser® mark. The name was no longer associated with any particular place. Budweiser®-branded beer has been exported to a number of countries since early in the twentieth century. It is a well-known international brand. Anheuser-Busch also sells beer internationally under the BUD® brand. Budejovicky Budvar, NP, a Czech brewer, had been selling a beer called "Budweiser," named after Budvar, the place name, since 1895. The Czech Republic claimed the terms "Budweiser" and "BUD" were proprietary GIs that identify beer from the town of Ceske Budejovice (which translates into German as "Budweis"). This GI was registered for European Union protection in 2004. The Czech Republic also claimed protection of the name "Budweiser Bürgerbrau" as an appellation of origin for beer produced in that town under the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (Lisbon Agreement).[8] (The United States is not a signatory of the Lisbon Agreement.[9]) Under the theory that GIs are superior to trademark rights in the European Union, the brewery, Budejovicky Budvar, sought to prohibit Anheuser-Busch from selling beer under the Budweiser® name anywhere in the European Union and to cancel Anheuser-Busch's trademark registrations in several countries, including Austria, France, Germany, and Greece.

The WTO Ruling halted the attempts by Budejovicky Budvar to prevent sales of beer under the Budweiser® name in the European Union by relying on the GI registration, even though the Czech GI is still protected as registered. This conflict between the EU's regulations concerning geographic naming rights and the United States's attempt to protect Anheuser-Busch's (and other companies') right to use the same place names in long-established brand names illustrates the priorities of each country. The EU seeks to protect geographic names used to identify wine and beer for the exclusive use within those geographic areas where specific wines and spirits are made. Therefore, for the EU it is as important to retain the name "Champagne" for all sparkling wines made from grapes from the Champagne region as it would be to protect the brands under which that wine is bottled, whether Moët et Chandon,

Veuve Cliquot, or Mumm. On the other hand, in the United States, trademark protection of an established brand would have highest priority.

Even though the WTO ruling did not specifically relate to the wine sector, it nevertheless was helpful to the United States' wine industry. As noted, from the European perspective, geographical protections best trademark rights. Europe's goal is to reclaim names that relate to specific places, whether Champagne, Parmesan cheese, or Budweiser beer. But for United States producers, where these names have become generic, being forced to change them to something else would mean expensive repackaging and rebranding. The WTO ruling did not end the controversy for either beer producers or wine producers. For instance, even though everyone agreed in the TRIPS accord that wine names deserve special treatment, U.S. regulations allow some European GIs, such as Champagne, Burgundy, and Chablis, to be used by wine producers to designate products made from grapes grown in the United States, not in Champagne or Burgundy. In fact, generic wine names are provided for in wine-labeling regulations.

As the global wine industry has grown, new controversies will arise, and in fact already have surfaced. A recent EU decision illustrates the dilemma even for EU members. As more Eastern Bloc countries have joined the European Union, the Western members have faced a dilemma comparable to that faced in the United States because of long-time use of certain names. As part of the agreements for Hungary's accession to the European Union, the governments of Italy and France agreed to require that wines called "Tokay d'Alsace" (France) and "Tocai Friulano" (Italy) be renamed because the Hungarian government claimed that these names were too similar to the famous Hungarian sweet wine, Tokaji Aszu—commonly known internationally as Tokay—produced in the Tokaji region of Hungary (a GI). The Alsatians agreed to rename their wine as "Tokay-Pinot Gris d'Alsace," but the Friulians objected. "Tocai" is the name of the specific grape used in their wine. However, the EU rejected the appeal because the name of the Italian Tocai did not qualify as a geographic indication; it did not have characteristics that are attributable to its geographic region. This presented an interesting problem and also demonstrates the confusion and unfairness that can result when geographic names are supported over an existing and long-standing trademark. The Italian use of "Tocai" did not reflect the same situation as California winemakers calling a generic blended red wine a "Burgundy," because for the Hungarians, Alsatians, and Italians in the case of Tocai, the three wines in question were all very different. The French and Italians were not attempting to take advantage of the reputation of the Hungarian wine by imitating its style, or by attempting to pass off inferior wine as something better. The Tokay d'Alsace was a light, dry wine made entirely from the Pinot Gris grape. The Italian Tocai Friulano was a dry white wine also, but more aromatic, made from the Tocai grape (Sauvi-

gnon Vert). The Hungarian Tokaji Aszu is a dessert wine made from other (not Tocai) grapes that have been afflicted with botrytis (noble rot). The Italians particularly were very disappointed with the EU decision because they could not see why the makers of a wine named after a place in Hungary (Tokaji) but not made from Tocai grapes could claim priority over or have superior rights to those held by the Italian makers of Tocai Friulano, which is made entirely from the Tocai grape.

And for California winemakers, turnabout may seem ultimately to be fair play. Napa Valley winemakers have come to appreciate better in the last few years the Europeans' position on the importance of *terroir* and place names. At the same time the United States was challenging the European Union regulation at the WTO and arguing in favor of the priority of long-standing trademarks over GIs, its own labeling laws were under scrutiny in the legal battle pitting Napa Valley winemakers and the state of California against the Bronco Wine Company, to prohibit Bronco from "borrowing" the Napa Valley name in its trademarks to sell wines from grapes not grown in the Napa Valley.[10] In 2007, the Napa Valley became the first U.S. wine region to win recognition from the European Union as a Geographic Indication, entitling its wines to recognition and protection by the EU's member nations. A big victory for wines that were disparaged just a century before.

Indeed, the legal and wine worlds are full of ironies.

Vignette

What are "Geographic Indications"?

"Geographic indications" are commonly referred to as signs to indicate the regional origin of a particular good, such as wine or beer. They can convey to consumers some of the important or desirable characteristics of the goods or ser-

vices that are attributable to their geographic origin. They are valued for the same reason that trademarks are valued: they identify the source of the product. They point out that the product, instead of coming from a particular manufacturer, has been produced in a certain territory or region. They also are an indicator of quality: the consumer knows that the product comes from a region recognized for a superior product. They also are intended to protect products and producers in a particular region from unfair competition.

Geographic indications have become so important today because, like trademarks, they are valuable marketing tools in a global economy. And in the case of certain geographic areas, such as Champagne, for example, there is a strong desire to take back a term that has long been generically used in some countries, through enforcement of geographic indications regulations.

The conflict between those desires and the concerns of owners of long-established trademarks that use place names came out in the open in the negotiations for the International Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in the December 1993 Uruguay Round of the General Agreement on Tariffs and Trade (GATT). Each signatory to the TRIPS accord, which included the United States and the then member nations of the European Union, agreed to abide by the treaty and to recognize the intellectual property rights (including trademark rights) of owners within each of the signatory countries.

The TRIPS Agreement sets forth standards to regulate international intellectual property protection and enforcement and establishes international minimum standards for geographic indications. For purposes of TRIPS, geographic indications are defined as follows:

> "[I]ndications 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 geographic origin."[1]

Examples of geographic indications in the United States are Florida for oranges, Idaho for potatoes, Washington state for apples, and Vidalia for onions. Under Article 22, all governments must provide legal opportunities in their own laws for the owner of a geographic indication registered in that country to prevent the use of misleading trademarks.

Article 23 of TRIPS provides an enhanced level of protection for geographic indications for wines and beers. Under Article 23, all governments must provide the owners of geographic indications the right, under their laws, to prevent the use of a geographical indication identifying wines not originating in the place indicated by such geographical indication. It absolutely prohibits the registration of any trademark containing a false geographic indication as a source of wines and beers, regardless of whether the public would actually be deceived or whether the location is obscure or remote. These provisions took effect on January 1, 1996.

Although geographic indications are protected in theory under the TRIPS Agreement, as a practical matter the agreement sets out only minimum standards of protection, with certain exceptions. In the absence of international consensus among World Trade Organization members, including the United States and the member counties of the European Union, various participants in the negotiations for the agreement were divided over the protection that must be afforded to intellectual property rights in geographic indications under TRIPS.[2] The United States was concerned that trademark protection for long-standing and established brands could be obliterated by this new agreement. Accordingly, it fought hard for certain protective exceptions. For example, under TRIPS, names that have become common or generic (such as Cheddar cheese in the United States) can be used whether or not they use a false geographic indication. Thus, despite TRIPS, because "Champagne" is recognized in the United States as a semi-generic term,[3] it can continue to be used for any "light-colored sparkling wine with bubbles." Accordingly, Korbel Champagne Cellars, for example, can continue to legally identify its sparkling wine as "California Champagne" because it had used the name in connection with its sparkling wines long before 1996.

In addition, restrictions do not apply to the continued registration of geographic indications—however false or misleading—that were first used in established trademarks. Where a trademark had been applied for or registered in good faith, or where rights to a trademark have been acquired through actual use in good faith, either before January 1, 1996, or before the geographical indication was protected in its country of origin, the trademark maintains its legal presumption of superiority, based on the principle of "first-in-time, first-in-right." When the federal trademark law (Lanham Act) was amended to implement TRIPS,[4] these exceptions for prior trademark use were specifically carved out.[5] The amendment prohibits registration of "a geographic indication which, when used on or in connection with wines or spirits, identifies a place

other than the origin of the goods" and is first used in connection with wines, for example, by the applicant on or after January 1, 1996.

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1. International Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Article 22(1).

2. *See, e.g.*, the Communications from Canada, Chile, Japan, and the United States, IP/C/W/133/Rev. www.wto.org.

3. *See* federal wine-labeling regulations, 27 C.F.R. § 4.24(b)(2). According to the regulation, semi-generic designations may be used to designate wines of an origin other than that indicated by such name only if there appears in direct conjunction therewith an appropriate appellation of origin disclosing the true place of origin of the wine, such as "California Champagne." 27 C.F.R. § 4.24(a)(1).

4. 15 U.S.C. § 1052(a).

5. 15 U.S.C. § 1052(f).

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1. Linda Murphy, *Napa Valley's Grande Dame: Schramsberg's Jamie Davies Coaxes Champagne Quality from California Grapes*, San Francisco Chronicle, Thurs., Dec. 22, 2005, http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/12/22/WIGDGG919B1.DTL&hw=Schramsberg+California+champagne&sn=001&sc=1000.

2. Gerald D. Boyd, *Inaccurate Labeling of "Champagne" is Making a Case of Sour Grapes*, San Francisco Chronicle, Wed., Dec. 20, 2000, http://www.sfgate.com/cgib-in/article.cgi?file=/c/a/2000/12/20/FD50619.DTL&hw=Korbel+California+Champagne&sn=005&sc=548.

3. Linda Murphy, *Napa Valley's Grande Dame: Schramsberg's Jamie Davies Coaxes Champagne Quality from California Grapes*, San Francisco Chronicle, Thurs., Dec. 22, 2005, http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/12/22/WIGDGG919B1.DTL&hw=Schramsberg+California+champagne&sn=001&sc=1000.

4. Geographic Indications are place names—and in some countries also words associated with a place—used to identify the origin and quality, reputation or other characteristics of products such as "Champagne."

5. For developed countries.

6. TRIPS, Art. 23.

7. European Council Reg. No. 2081/92 (1992).

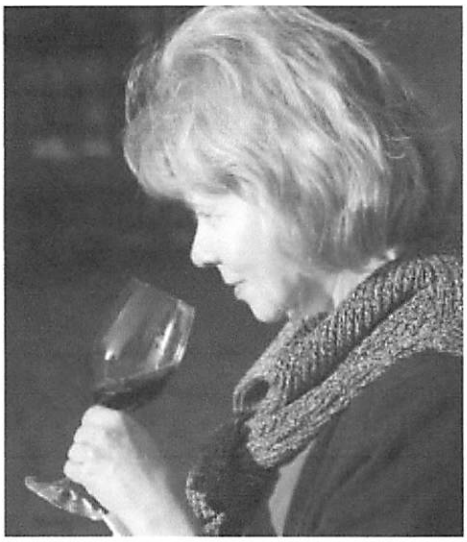
8. Registration No. 837, Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of October 31, 1958, as revised at Stockholm on July 14, 1967, and as amended on September 28, 1979 (Lisbon Agreement).

9. Current members of the Lisbon Agreement (as of January 15, 2008) are Algeria, Bulgaria, Burkina Faso, Congo, Costa Rica, Cuba, the Czech Republic, the Democratic People's Republic of Korea, France, Gabon, Georgia, Haiti, Hungary, Iran, Israel, Italy, Mexico, Portugal, Moldova, Montenegro, Nicaragua, Peru, Portugal, Serbia, Slovakia, Togo, and Tunisia.

10. *See* Case 11.

About the Author

Carol Robertson has been a practicing attorney for over 25 years, including as a partner at a major San Francisco law firm and as corporate counsel with San Francisco Bay Area companies. In the course of her practice, Ms. Robertson has had the opportunity to represent grape growers, wine producers, and alcoholic beverage retailers in their general business and regulatory matters. She has taught French at both the high school and college levels, and holds a BA and an MA in French Literature. She interrupted her studies toward her PhD in order to attend law school at the University of California at Berkeley (Boalt Hall School of Law), where she graduated in the top 10 percent of her class in 1980.



Carol Robertson

She has been a frequent speaker at professional seminars, workshops, conferences and conventions throughout the United States and Canada, on various business and legal subjects, and has taught English at the Law and Business School and at the College of Sciences at the Université de Pau, France. Ms. Robertson is an adjunct professor at John F. Kennedy University, in Pleasant Hill, California, in the School of Management and in the Law School, where she has taught courses on Business Law, Business Ethics, and Negotiation Techniques.

Ms. Robertson has been a wine enthusiast since her college years when she studied at the Université de Bordeaux, in France, where she earned a Diplôme Supérieur d'Etudes Françaises. During one of her frequent trips back to France, she

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