

University Brands as Geographical Indications

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I. INTRODUCTION

When lawyers and managers come together to discuss brands, very often discussion can slip between two distinguishable meanings of the term. The first meaning – the one managers typically use – is a marketing concept. In this view a brand is some set of meanings, beliefs, and associations formed around a particular symbol or set of symbols associated with a company, an institution, or a person. This is the sense in which university administrators and consultants typically use the word; it is also the primary sense of the word as used in Mario Biagioli’s chapter and those by Celia Lury and Deven Desai. The second meaning of the term “brand” – the one lawyers typically use – is, unsurprisingly, a legal concept. In this sense, a brand is a legally protectable sign that serves as a symbol and repository of the meanings and associations implied by the marketing concept of a “brand,” typically enforced through intellectual property law (and more specifically, trademark and unfair competition law). This is the sense in which Jamie Boyle and Jennifer Jenkins seem to use the term.¹ In point of fact, a lot of slippage exists between these two senses of the term, and many have noted this ambiguity in the past.²

¹ James Boyle & Jennifer Jenkins, *Mark of the Devil: The University as Brand Bully*, 31 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 391 (2021).

² Deven Desai has paid particular attention to the relationship between these competing senses of the term “brand.” See generally Deven R. Desai, *From Trademarks to Brands*, 64 *FLA. L. REV.* 981 (2012); Deven R. Desai & Spencer Waller, *Brands, Competition, and the Law*, 2010 *BYU L. REV.* 1425 (2010). The expansion of the legally protectable trademark to capture marketers’ conception of brands, and the ambiguity between the legal and marketing concepts, have long been observed by courts and commentators. See, e.g., *Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co.*, 316 U.S. 203, 205 (1942): “The protection of trade-marks is the law’s recognition of the psychological function of symbols . . . A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol”; Felix

In this chapter, I will focus on the second meaning, that is to say, on the intellectual property right in the sign itself, and particularly on the *justifications* for conferring such a right and delimiting its boundaries. Careful consideration of the legal context of university brand enforcement reveals that we have been mis-categorizing academic brands in the legal framework of intellectual property. I will argue that academic brands ought to be thought of less as trademarks – the species of intellectual property rights under whose rubric they are typically enforced – and more as geographical indications (GIs). As I hope to show, understanding university brands in this way both makes better sense of the legal doctrine around university trademark enforcement and also has implications for how we view university licensing and enforcement programs as a matter of normative justification.

II. TRADEMARKS AND THE UNIVERSITY

The other contributions to this volume demonstrate some of the difficulties that attend upon evaluating university brands through a trademark lens – at least under the American theory and doctrine of trademarks. The dominant theoretical account of trademarks in American law today is grounded in an economic model of markets in which buyers and sellers have asymmetric information.³ Sellers, it is said, stake their reputations and their going-concern values on the association of their products with particular marketing messages tied to a brand, which gives consumers a mechanism to punish dishonest sellers (the withholding of future business) and reward honest or high-quality ones with their repeat business. This association supposedly gives sellers an incentive to produce goods of high and consistent quality and to disseminate honest marketing messages. Conversely, if this incentive bears out, consumers will be able to shift the cost of discovering information about their purchase options – their “search costs” – to sellers (who are uniquely in possession of such information and thus face far lower information costs than prospective buyers), thereby facilitating welfare-increasing transactions by lowering the aggregate costs of entering into them.

Of course, such a shift of search costs depends on sellers being able to control who may use the symbol – the trademark – that serves as the vehicle for the information transfer and the mechanism for consumer discipline.⁴ Thus, the standard of liability for trademark infringement gives producers the right to enjoin conduct that

S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *COLUM. L. REV.* 809, 814–17 (1935); Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 *YALE L.J.* 1165, 1180–91 (1948); Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 *UCLA L. REV.* 621, 648–51 (2003).

³ George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 *Q. J. ECON.* 488 (1970).

⁴ William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 *J. L. & ECON.* 265 (1987); Nicholas Economides, *The Economics of Trademarks*, 78 *TRADEMARK REP.* 523 (1988).

jeopardizes the reliability of a mark as an indicator of information and a mechanism of consumer discipline. Defendants will be liable for infringement where their conduct is “likely to cause confusion, or to cause mistake, or to deceive” “as to the affiliation, connection, or association” between the defendant and the mark owner, “or as to the origin, sponsorship, or approval of [the defendant’s] goods, services, or commercial activities by another person.”⁵

This economic account has been subject to harsh and sustained criticism since it crystallized in the writings of Chicago School scholars in the 1980s. Some scholars point out that information transfer is only a small part of what branding does – that it also gives sellers opportunities to engage in spurious differentiation, exercise problematic persuasive influence, and leverage potential cognitive biases of consumers.⁶ Others point out that not all consumer efforts to identify their preferred purchase options need be considered “costs” in a negative sense.⁷ Still, this economic theory has gained authoritative approval, both from the leading trademark law treatise and from the US Supreme Court.⁸ But regardless of whether the Chicago School theory of trademarks is descriptively or normatively adequate to mainstream trademark doctrine, it clearly has very little (if anything) to do with the role of academic brands today.

As Professors Boyle and Jenkins illustrate, when universities try to enforce their trademark rights, they do so primarily in areas far removed from any aspect of their reputation as institutions of higher education or research.⁹ While occasionally a dispute may arise in which one university claims another university is using a trademark that might lead consumers to confuse the two institutions themselves,¹⁰

⁵ Lanham Act §§ 32(1)(a), 43(a)(1)(A), codified at 15 U.S.C. §§ 1114(1)(a), 1125(a)(1)(A). While Section 32 of the Lanham Act ostensibly deals with infringement of *registered* trademarks and Section 43(a) ostensibly deals with infringement of *unregistered* trademarks, the scope of infringement under both sections has – rightly or wrongly – long been held to be coextensive. See, e.g., *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 780 (1992) (Thomas, J., concurring); Rebecca Tushnet, *Registering Disagreement: Registration in Modern American Trademark Law*, 130 *HARV. L. REV.* 867, 879–80 & n.54 (2017) (collecting cases).

⁶ See, e.g., Barton Beebe, *Search and Persuasion in Trademark Law*, 103 *MICH. L. REV.* 2020, 2066 (2005): “The tradeoff between information and persuasion described above goes far towards explaining one dynamic that has driven the expansion of trademark scope since the beginning of the twentieth century. At the heart of this dynamic is the trademark producer’s willingness to assume the costs of search in order to gain the benefits of persuasion”; Jeremy N. Sheff, *Biasing Brands*, 32 *CARDOZO L. REV.* 1245, 1293 (2011): “branding *biases* consumers. It leads us to hold subjective beliefs as to objectively knowable facts that may diverge from objective data and yet be resistant to influence by exposure to such data, and it influences our preferences and choice behaviors accordingly.”

⁷ Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 *VA. L. REV.* 67 (2012).

⁸ J. THOMAS MCCARTHY, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* ch. 2 (5th ed. 2020); *Qualitex Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159, 163–64 (1995).

⁹ Boyle & Jenkins, *supra* note 1.

¹⁰ See, e.g., *Board of Regents of the University of Houston System v. Houston College of Law, Inc.*, 214 F.Supp.3d 573 (S.D. Tex. 2016).

for the most part university trademark disputes involve secondary and tertiary lines of business – branded apparel and gifts, often connected to athletics programs – or the use of a university name in expressive works. And as Mark Bartholomew points out in Chapter 7 of this volume, universities' trademark enforcement activities in these areas may actually be in deep tension with their academic missions.

Many of these types of enforcement actions involve what we've come to call "merchandising rights" – the right of a mark owner to control the use of their mark on promotional merchandise such as branded apparel and gifts, notwithstanding that the mark is primarily associated with other goods or services. These merchandising rights are of relatively recent vintage: prior to the late 1970s or early 1980s, apparel and merchandise bearing university names and logos were often produced and sold by independent businesses local to the university in question, and this practice was widely tolerated.¹¹ A similar commercial ecosystem arose around sports franchises and third-party-manufactured merchandise bearing their logos. But in a series of court victories starting in 1975, professional sports franchises in the United States began arrogating this trade in team-branded merchandise to themselves.¹² Over the ensuing years, universities followed suit, attempting (not always successfully) to put the manufacturers that supply university-branded merchandise under tribute, and steering the trade to their preferred vendors.¹³

In the earliest of these merchandising rights cases, courts held that where consumers demand university-branded or sports-franchise-branded apparel and merchandise in order to manifest their identification with the team or school, the team or school has an exclusive right to satisfy that demand, even if there is no plausible argument that such consumers are confused as to the affiliation of the merchandise manufacturer with the university or the team – and indeed even where it seems likely that consumers do not care about that commercial affiliation.

¹¹ *University of Pittsburgh v. Champion Products Inc.*, 686 F.2d 1040, 467–68 (3rd Cir. 1982), *rev'd in part*, 686 F.2d 1040 (3d Cir.); *University Book Store v. University of Wisconsin Board of Regents*, 33 U.S.P.Q.2d 1385, 1396 (Trademark Trial and Appeal Board 1994).

¹² *Boston Professional Hockey Ass'n, Inc. v. Dallas Cap & Emblem Mfg., Inc.*, 510 F.2d 1004 (5th Cir. 1975); *National Football League Properties, Inc. v. Consumer Enterprises, Inc.*, 327 N.E.2d 242 (Ill. App. Ct. 1975).

¹³ *University Book Store*, 33 U.S.P.Q.2d 1385; *Board of Supervisors for Louisiana State University Agricultural and Mechanical College v. Smack Apparel Co.*, 550 F.3d 465 (5th Cir. 2008). The litigation between the well-known sportswear maker Champion and the University of Pittsburgh in the early 1980s generated district court opinion in Champion's favor on laches grounds, which was reversed with respect to prospective remedies by the Third Circuit, which led the District Court to reject the merchandising right entirely, which led the parties to settle and prevail upon the Third Circuit to vacate the District Court's opinion. *University of Pittsburgh v. Champion Products, Inc.*, 529 F. Supp. 464 (W.D. Pa. 1982), *rev'd in part*, 686 F.2d 1040; *University of Pittsburgh v. Champion Products, Inc.*, 566 F. Supp. 711 (W.D. Pa. 1983), *vacated pursuant to settlement as noted in University Book Store*, 33 U.S.P.Q.2d at 1394 & n.25.

The classic explanation was given by the Fifth Circuit in the early merchandising case, *Boston Hockey*:

The confusion or deceit requirement is met by the fact that the defendant duplicated the protected trademarks and sold them to the public knowing that the public would identify them as being the teams' trademarks. The certain knowledge of the buyer that the source and origin of the trademark symbols were in plaintiffs satisfies the requirement of the act. The argument that confusion must be as to the source of the manufacture of the emblem itself is unpersuasive, where the trademark, originated by the team, is the triggering mechanism for the sale of the emblem.¹⁴

As I and others have argued elsewhere, it is extraordinarily difficult to square this argument with the likelihood-of-confusion standard for trademark liability, or with the conventional “search costs” justification for that standard – indeed, it is difficult to square the argument with *any* theoretical justification for trademark law other than a fairly crude anti-misappropriation impulse.¹⁵ Indeed, in Europe courts freely admit to the anti-misappropriation impulse as a basis for trademark liability,¹⁶ and the leading EU merchandising case – *Arsenal Football Club plc v. Reed* – rests in no small part on the assertion that “the proprietor [of a trademark] must be protected against competitors wishing to take unfair advantage of the status and reputation of the trade mark by selling products illegally bearing it.”¹⁷ The question-begging circularity of the word “illegally” in this passage gives the game away.

But because anti-misappropriation theory is not explicitly countenanced by American trademark law, with its historical antipathy to “rights in gross,”¹⁸ some American courts have sought means of indulging the anti-misappropriation impulse

¹⁴ *Boston Professional Hockey Ass'n*, 510 F.2d at 1012.

¹⁵ See generally Jeremy N. Sheff, *Misappropriation-Based Trademark Liability in Comparative Perspective*, in *CAMBRIDGE HANDBOOK OF INTERNATIONAL AND COMPARATIVE TRADEMARK LAW* 452 (Irene Calboli & Jane C. Ginsburg eds., 2020); Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 *EMORY L.J.* 461 (2005).

¹⁶ *L'Oréal SA v. Bellure NV*, [2009] I-05185, ¶50: “the taking of unfair advantage of the distinctive character or the repute of a mark . . . does not require that there be a likelihood of confusion or a likelihood of detriment to the distinctive character or the repute of the mark or, more generally, to its proprietor. The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an advantage taken unfairly by that third party of the distinctive character or the repute of the mark where that party seeks by that use to ride on the coat-tails of the mark with a reputation in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image.”

¹⁷ *Arsenal Football Club plc v. Reed*, [2002] ECR I-10273, ¶50.

¹⁸ *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97 (1918): “The asserted doctrine is based upon the fundamental error of supposing that a trade-mark right is a right in gross or at large . . . There is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed. The law of trade-marks is but a part of the broader law of unfair competition; the right to a particular mark grows out of its use, not its mere adoption . . . it is not the subject of property except in connection with an existing business.”

sub rosa. The most successful means of doing so has followed the “rights accretion” feedback pattern identified by Jim Gibson: because trademark liability turns on consumer psychology, and because “consumer perception reflects an acquired familiarity with licensing practices,” the successful assertion of a merchandising right in some areas of commerce – even if grounded in a mistaken legal theory – can over time give rise to real, measurable confusion as to whether any new use of a trademark is in fact licensed, and thereby justify a finding of infringement that would not have been justified but for the assertion of the merchandising right in the first place.¹⁹ Today, courts upholding the merchandising right tend to justify trademark liability by reference to supposed consumer confusion as to whether unauthorized manufacturers of merchandise were “sponsored by” or “affiliated with” the university or sports franchise plaintiffs.

This reasoning leads to the same result as the reasoning of *Boston Hockey*, but aligns more closely with the Lanham Act’s text regarding confusion as to affiliation, sponsorship, or approval. The Fifth Circuit has explicitly endorsed this move. In the course of affirming a district court opinion denying relief in a merchandising case regarding fraternal organization emblems used in jewelry, the Fifth Circuit quoted with approval the district court’s assertion that “It is not unreasonable to conclude, given the degree to which sports emblems [as contrasted with fraternal order symbols] are used to advertise teams and endorse products, that a consumer seeing the emblem or name of a team on or associated with a good or service would assume some sort of sponsorship or association between the product’s seller and the team.”²⁰ And in *Board of Supervisors for Louisiana State University Agricultural and Mechanical College v. Smack Apparel Co.*, the Fifth Circuit invoked this argument to rest the merchandising right explicitly on confusion as to sponsorship:

We hold that given the . . . overwhelming similarity between the defendant’s t-shirts and the Universities’ licensed products, and the defendant’s admitted intent to create an association with the plaintiffs and to influence consumers in calling the plaintiffs to mind – that the inescapable conclusion is that many consumers would likely be confused and believe that Smack’s t-shirts were sponsored or endorsed by the Universities . . . We further recognize the public’s indisputable desire to associate with college sports teams by wearing team-related apparel. We are not persuaded that simply because some consumers might not care whether Smack’s shirts are officially licensed the likelihood of confusion is negated. Whether or not a consumer *cares* about official sponsorship is a different question from whether that consumer would likely *believe* the product is officially sponsored.²¹

¹⁹ James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 *YALE L.J.* 882, 886, 920–23 (2007).

²⁰ Supreme Assembly, *Order of Rainbow for Girls v. J.H. Ray Jewelry Co.*, 676 F.2d 1079, 1085 (5th Cir. 1982).

²¹ *Board of Supervisors for Louisiana State University Agricultural and Mechanical College v. Smack Apparel Co.*, 550 F.3d 465, 485 (5th Cir. 2008).

Many commentators have criticized this species of sponsorship confusion liability as bad policy. Stacey Dogan and Mark Lemley have argued that such confusion, even if proved, should only give rise to liability where it is shown that consumers “are likely to believe that [the defendant] *makes or stands behind* the t-shirt, cap, or other merchandise at issue in the case,” or where they suffer confusion “that could affect the trademark holder’s reputation and *cannot be dispelled with a disclaimer*.”²² Mark Lemley and Mark McKenna have argued that sponsorship approval cases should be thought of through a false advertising lens – requiring trademark plaintiffs to establish that any alleged confusion as to sponsorship is material to consumer purchasing decisions.²³ These commentators seek to prevent rent-seeking or otherwise anti-competitive behavior by trademark owners that raises prices without providing corresponding consumer benefits, and which may also pose a threat to freedom of expression. But they are ultimately dismissive of the anti-misappropriation impulse that clearly guides these cases, and they do not closely examine *why* sponsorship might matter to some consumers and indeed motivate their purchasing decisions.²⁴

I may share the view of such critics on the normative desirability of anti-misappropriation rationales for *trademark* protection generally. But there is something at work in university merchandising programs that goes beyond simple misappropriation, and even these critics seem to recognize it as an issue. As Dogan and Lemley explain:

there may be merchandising cases in which the trademark serves as both source-identifier and as a critical feature of the product, so that it confers both reputation-related and nonreputation-related advantage to those who use it. In these cases, the ultimate competitive effect of allowing trademark rights may be difficult to gauge. On the one hand, reputational concerns may drive some purchasers to mistakenly assume an affiliation between the parties and thereby increase search costs; on the other hand, the absence of competition may force consumers to pay a premium for the good, even when many of them do not particularly care whether the product was officially licensed.²⁵

As this analysis suggests, markets for branded products used by consumers to signal affiliation with the source of the brand create what Michael Grynberg has referred to as “consumer conflict”:

While trademark litigation is literally a battle between competing sellers, it is also a struggle between consumer classes. The conflict arises because each class attaches a

²² Dogan & Lemley, *supra* note 15, at 500, 505 (emphasis added).

²³ See generally Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 *STAN. L. REV.* 413 (2009).

²⁴ Dogan & Lemley, *supra* note 15, at 479: “These [misappropriation-based] justifications are circular and ultimately empty”; Lemley & McKenna, *supra* note 23, at 438–39.

²⁵ Dogan & Lemley, *supra* note 15, at 504 (footnote omitted).

different value to the defendant's conduct. The "plaintiff" consumer class seeks to avoid confusion of its members by depriving the "defendant" consumer class of access to a particular product or service.²⁶

In disputes over merchandising, this conflict is particularly acute. As Dogan and Lemley point out, some consumers actually care whether merchandise is licensed, and others do not. Consumers who do not care about sponsorship or approval are simply seeking a means of signaling their affiliation, and are happy to do so at the lowest cost. Those who *do* care expect branded merchandise to be licensed and have reasons for wanting that expectation to be honored – and, if need be, enforced. But in the case of university merchandise, I think it is a mistake to call these reasons "reputation-related," as Dogan and Lemley do. A university supporter who wishes to signal their support by wearing licensed, branded apparel is unlikely to demand the university's sponsorship because they trust in the university's reputation regarding any *quality of apparel*. But such a person might still want to be assured that the apparel is licensed, because they want their purchase to *provide some material support to the university*, in the form of licensing revenues. Thus, if trademark enforcement – even under affiliation, sponsorship, or approval confusion theories – is about *reputation*, I think it provides scant justification for university merchandising programs.

But that is not to say that no such justification is possible, or even that intellectual property law is incapable of providing such justification. Even though the consumer class that aligns with universities in their licensing enforcement activities are not motivated by reputation-related concerns, they still diverge from consumers seeking the lowest-cost token of affiliation signaling in ways that reproduce precisely the consumer conflict described above. So long as we conceive of intellectual property rights in university-branded merchandise as trademark-based and thus reputation-based, we will lack the tools to describe and analyze this conflict. But I think we can find another and potentially less problematic justification for these types of university practices in a different branch of intellectual property law – the law of geographical indications.

III. GEOGRAPHICAL INDICATIONS AND THEIR EVOLUTION

The World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) defines a Geographical Indication (GI) as a sign that identifies "a good as originating in the territory of a [WTO] Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."²⁷

²⁶ Michael Grynberg, *Trademark Litigation as Consumer Conflict*, 83 *NYU L. REV.* 60, 87 (2008).

²⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, as amended, January 23, 2017, 1869 UNTS 299, 33 ILM 1197 (1994), www.wto.org/english/docs_e/legal_e/31bis_trips_e.pdf, art. 22.1 [hereinafter TRIPS Agreement].

The paradigm example is denominations of origin for wine,²⁸ but other agricultural products such as Parma ham and Roquefort cheese have long been subject to GI protection. The classic theoretical defense of GIs is that they prevent fraud regarding certain objective characteristics of products – especially agricultural products – that are uniquely and causally connected to that combination of *physical* geographic, agronomic, and climatic features that are collectively referred to as “terroir.”

I have always been deeply skeptical of terroir arguments for GI protection, because I am dubious about the relationship between geographic origin and any objective quality or characteristic of a product. Perhaps the most famous example I could cite is the 1976 blind wine tasting dubbed the “Judgment of Paris,” in which a panel of illustrious French wine experts collectively gave top honors to upstart California vintners over their venerable French counterparts. The aspect of this episode that is most damning to the terroir theory of GIs is not that the California wines were deemed better, but that the blind tasters confused which wines came from which region – they couldn’t tell the difference.²⁹

But if examples such as the Judgment of Paris put the lie to terroir-based justifications for GI protection, more recent developments in the law of GIs offer an alternative. The Lisbon Agreement, and particularly the Geneva Act of the Lisbon Agreement, provides a new argument about what it means for the quality, reputation, or characteristics of a good to be “essentially attributable” to its geographical origin. Specifically, it contemplates that such a connection between goods and place may be attributable to a combination of *both natural and human factors*.³⁰ The European Commission, in a recent Green Paper, has put its authority behind this position, going so far as to say that for some GIs, human factors may be *entirely* responsible for the connection between the reputation of a good and its geographical origin.³¹ And increasingly, cultural products outside of agriculture (often labeled

²⁸ This historical source of the system of GI protection now has its own special body of protections and qualifications in addition to those applicable to other GIs. See TRIPS Agreement arts. 23, 24.4, 24.6.

²⁹ GEORGE M. TABER, JUDGMENT OF PARIS: CALIFORNIA VS. FRANCE AND THE HISTORIC 1976 PARIS TASTING 3 (2005).

³⁰ Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration, October 31, 1958, as revised, July 14, 1967, 923 UNTS 205 [hereinafter Lisbon Agreement], <https://wipolex.wipo.int/en/text/285856>; World Intellectual Prop. Org. [WIPO], Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications and Regulations under the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications, WIPO Lex No. TRT/LISBON/009 (May 20, 2015), [hereinafter Geneva Act], <https://wipolex.wipo.int/en/treaties/textdetails/15625>, art. 2(1)(i).

³¹ European Commission, *Green Paper: Making the Most Out of Europe’s Traditional Know-How: A Possible Extension of Geographical Indication Protection of the European Union to Non-Agricultural Products*, COM(2014) 469 final (July 15, 2014), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0469&from=EN> [<https://perma.cc/T425-9XSF>].

as forms of “intangible cultural heritage”) have been seeking and obtaining such protection in some jurisdictions.³²

This trend is consistent with the arguments of scholars like Delphine Marie-Vivien who have advocated for recognition of such human factors as craft, culture, and tradition as a sufficient basis for GI protection, particularly for goods such as textiles, pottery, and other non-agricultural traditional products.³³ Dev Gangjee generalizes this view of GIs into a historical theory of justification, where GIs exist to recognize the historical continuity of a particular productive community, defined by human factors that have persisted in a particular location as to a particular product.³⁴ This reasoning recognizes that a particular geographically defined community may find value in, and seek to protect and preserve, its shared history, shared culture, shared forms of life, and shared experience in particular modes of production, and may find a GI a useful means of doing so.

The availability of this historical, human-factors-based account of GI protection gives my inner GI-skeptic some pause. The historical account suggests that the reason for protecting GIs is not that they indicate some physical quality or characteristic of the products to which they are affixed, but that they indicate a cultural tradition of the people who make those products – a tradition that others might deem worthy of support and protection – and provide a means for that community to identify itself to others in commerce. By identifying the products of particular productive communities in the marketplace, GI protection gives people who wish to provide material support to those communities a tool to direct their resources with confidence that they will reach their targets.

This cultivation of geographically and historically defined productive communities shares clear affinities with the logic of the university: a geographically defined community convened and perpetuated over time for the purpose of producing and disseminating knowledge. Such a conception of the university is best expressed in Michael Oakeshott’s classic description:

What distinguishes a university is a special manner of engaging in the pursuit of learning. It is a corporate body of scholars, each devoted to a particular branch of learning: what is characteristic is the pursuit of learning as a co-operative enterprise. The members of this corporation are not spread about the world, meeting occasionally or not at all; they live in permanent proximity to one another. And

³² Steven Van Uytsel, *When Geographical Indications Meet Intangible Cultural Heritage: The New Japanese Act on Geographical Indications*, in *GEOGRAPHICAL INDICATIONS AT THE CROSSROADS OF TRADE, DEVELOPMENT, AND CULTURE* 508 (Irene Calboli & Wee Loon Ng-Loy eds., 2017).

³³ Delphine Marie-Vivien, *A Comparative Analysis of GIs for Handicrafts: The Link to Origin in Culture as Well as Nature?*, in *RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND GEOGRAPHICAL INDICATIONS* 292 (Dev S. Gangjee ed., 2016).

³⁴ See generally Dev S. Gangjee, *From Geography to History: Geographical Indications and the Reputational Link*, in *GEOGRAPHICAL INDICATIONS AT THE CROSSROADS OF TRADE, DEVELOPMENT, AND CULTURE* 36 (Irene Calboli & Wee Loon Ng-Loy eds., 2017).

consequently we should neglect part of the character of a university if we omitted to think of it *as a place*.³⁵

Of course, today's university branding identifies not just the community of scholars and learners, but also the athletics programs that coexist with them in uneasy symbiosis. Even so, just as with professional athletics franchises, such programs are inextricably tied to a particular historically continuous community convened in a particular place.

If we think of the university's right to control uses of its name and logo on merchandise (such as apparel) as serving this interest of a geographically defined productive community in preserving and advancing its particular way of life, I think we run into far fewer analytical problems than when we try to justify that right by reference to protecting the university's reputation. As an illustration, imagine a person who respects and values particular European (or Californian) traditions of craft and culture in winemaking, for example, and wishes to preserve those traditions against the encroaching pressures of global competition in an environment where goods, labor, and capital are increasingly mobile. Such a person might well seek to give their custom to producers who presently embody and promise to carry on the traditions that person holds dear – and those producers may well be identifiable most readily by their particular geographical and historical affiliations. The reasons why such a person might seek out goods bearing a particular GI strike me as essentially the same as the reasons why consumers might seek out merchandise sold (or licensed) by a particular university. That is: they wish to offer both expressive solidarity with, and pecuniary support for, a *particular productive community*. This is not a purchase motivated by reputation, but by a kind of *charity*: a desire to provide material support to communities that cannot extract sufficient resources to sustain themselves through the competitive market as currently constituted (and, perhaps, to signal to the purchaser's social audience that they harbor this desire).

Now, while this justification for enforcement of academic brands in university merchandise strikes me as more descriptively plausible than a reputation-based account, and while the concept of charity has positive connotations, it also has a dark side. In the GI context, at worst, the desire to cultivate patronage by customers of particular geographic communities simply by reference to place and history may smack of chauvinism or jingoism – it can devolve into a desire to shield one's tribe from competitive pressures even at the cost of pouring valuable resources into wasteful endeavors. This is a tendency that the European Union, for example, has worked hard to resist in reconciling GI protection with the principle of the common market.³⁶ And

³⁵ Michael Oakeshott, *The Idea of a University*, 1 *ACADEMIC QUESTIONS* 23, 24 (2004) (emphasis added).

³⁶ *Compare* Case 12/74, *Commission of the European Communities v. Federal Republic of Germany* (Sekt/Weinbrand), 1975 ECR 181 (rejecting minimum-domestic-content and domestic-production restrictions on wines and spirits as unjustified by any quality or characteristics peculiar to any geographic location) *with* Cases C-465/02 and C-466/02, *Federal Republic*

in the university context as in political economy more broadly, discrete communities that come to rely on a flow of resources from a small number of well-resourced supporters open themselves up to the dangers of complacency, corruption, and even ruin, as they become increasingly beholden to the idiosyncratic preferences of those who command such resources at particular moments.

IV. THE DARK SIDE OF THE ACADEMIC GI

In the case of GIs, a cautionary tale for universities can be found, again, in the wine industry. The 1982 vintage of Bordeaux wines is famous for cementing the reputation of the leading wine critic of the past half-century, Robert Parker. Parker famously raved about the high-alcohol, jammy, concentrated quality of that year's vintages, contradicting the judgment of some more established critics who preferred the more restrained and balanced style typical of the region's history.³⁷ Wine merchants capitalized on Parker's 100-point rating system to launch a media marketing campaign that triggered a speculative frenzy, bringing the ordinary affluent American consumer, for the first time, into the world of intensive interest in buying and drinking world-class wines. The new entry of American money, guided by Parker's tastes and judgments, irreversibly upended the world of wine. If high-priced wine could be a marker of taste, status, and wealth, Parker's 100-point system gave Americans a perfectly calibrated tool to buy in, and they bought in big. By the mid-1990s, Parker's nod could make or break a winemaker: "the difference between a score of 85 and 95 was 6 to 7 million Euros. If a château received a score of 100, it could multiply its price by four."³⁸ This money brought new levels of prosperity to Bordeaux – a region Parker has always championed – but it also changed the region's wines. The "American" style – fruit-forward, high-alcohol, young-drinking, and concentrated – took over these most venerable of *appellations d'origines contrôlées*, the geographically and historically defined communities whose traditions of austere, balanced, and restrained wines of great longevity had supposedly justified the protection of their coveted indicia of origin in the first place. Parker's biographer quotes one importer who neatly encapsulated the dilemma: "The French can see Parker is magic for their wine, but they resent having to do things the American way."³⁹

of Germany and Kingdom of Denmark v. Commission of the European Communities (Feta), 2005 ECR I-9178 (upholding a GI for the term "Feta" despite its long-standing use by producers outside of Greece, based in part on the Greek government's documentation of certain geographic characteristics claimed to influence the characteristics of the version of the cheese produced in Greece).

³⁷ ELIN MCCOY, *THE EMPEROR OF WINE: THE RISE OF ROBERT M. PARKER, JR., AND THE REIGN OF AMERICAN TASTE* ch. 4 (2014).

³⁸ *Id.* ch. 8 (internal quotation marks omitted).

³⁹ *Id.* at 253.

If university brands are best thought of as GIs, the Parkerization of Bordeaux illustrates the dilemma they present. A university that seeks to resist broad competitive pressures by relying on supporters of its GI-like brand puts itself – its community identity – at the mercy of the interests of its wealthiest supporters. At worst, it surrenders to wealthy patrons' control over those characteristics, traditions, and ways of life that defined the university community in the first place. And it is entirely possible that those patrons' views about the proper way of life for the university community may systematically differ from that community's historical traditions. The university analogue of Parkerization, then, can be seen in the cultivation of donor funding, and the efforts of university managers to organize their institutions in pursuit of that goal.

This problem is not a new one, and is reflected in two long-standing and competing visions of the university as an institution. In one vision, most famously expressed by Wilhelm von Humboldt, the university is and should be an enclave dedicated to the pursuit of knowledge for its own sake, insulated from the pressures and demands of both the market and politics. While the fruits of academic study will surely advance both the material and moral welfare of the state that is presumed to be the university's natural sponsor (and ultimate beneficiary), Humboldt warned that those fruits could only materialize if the university is provided ample public resources and allowed to deploy them as it sees fit with minimal public oversight.⁴⁰

⁴⁰ Wilhelm von Humboldt, *On the Spirit and the Organisational Framework of Intellectual Institutions in Berlin*, repr. in *University Reform in Germany*, 8 *MINERVA* 242, 242–46 (1970). Humboldt writes:

The idea of disciplined intellectual activity, embodied in institutions, is the most valuable element of the moral culture of the nation . . . Since these institutions can only fulfil their purpose when each of them bears continuously in mind the pure idea of science and scholarship, their dominant principles must be freedom and the absence of distraction (*Einsamkeit*). The intellectual exertions of men, however, only prosper through a process of collaboration . . . Given this collective character of individual accomplishment the inner life of these higher intellectual institutions must be such as to call forth and sustain a continuously self-renewing, wholly uncoerced and disinterested collaboration . . .

The state must understand that intellectual work will go on infinitely better if it does not intrude. The state's legitimate sphere of action must be adapted to the following circumstances: in view of the fact that in the real world an organizational framework and resources are needed for any widely practiced activity, the state must supply the organizational framework and the resources necessary for the practice of science and scholarship. The manner in which the state provides the organizational framework and resources can be damaging to the essence of science and scholarship; the very fact that it provides such organizational structures and resources, which are quite alien to the nature of the activity which they are to serve, can result in the degradation to a basely material level of what should be intellectual and lofty . . .

The state must not deal with its universities as *Gymnasia* or as specialized technical schools; it must not use its academy as if it were a technical or scientific commission. It must in general . . . demand nothing from them simply for the satisfaction of its own needs. It should instead adhere to a deep conviction that if the universities attain their highest ends, they will also realise the state's ends too, and these on a far higher plane. On this higher plane, more is comprehended and forces and mechanisms are brought into action which are quite different from those which the state can command.

Contrast this idealist vision with the jaundiced assessment of Thorstein Veblen, who at the turn of the last century diagnosed the market's infiltration into the university and identified it with the professionalization of university administration along the lines of business enterprises – the metrics-based management of his day.⁴¹ The tension between the Taylorist university of Veblen's polemic and the ivory tower of Humboldt's imagination turns in no small part on the type of community affiliation that we can now identify with the GI-like university brand – its promises and its threats. And nowhere is the tension between the risks and rewards of GI-like branding more evident than in the role of athletics programs in university management.

This was true even in Veblen's day, as he wrote:

Unquestionably, an unreflecting imitation of methods that have been found good in retail merchandising counts for something [in university promotional activities] . . . There is also the lower motive of unreflecting clannishness on the part of the several university establishments. This counts for something, perhaps for more than one could gracefully admit. It stands out perhaps most baldly in the sentimental rivalry – somewhat factitious, it is true – shown at intercollegiate games and similar occasions of invidious comparison between the different schools. It is, of course, gratifying to the clannish conceit of any college man to be able to hold up convincing statistical exhibits showing the greater glory of “his own” university, whether in athletics, enrolment, alumni, material equipment, or schedules of instruction; whether he be an official, student, alumnus, or member of the academic staff; and all this array and circumstance will appeal to him the more unreservedly in proportion as he is gifted with a more vulgar sportsmanlike bent and is unmoved by any dispassionate interest in matters of science or scholarship; and in proportion, also, as his habitual outlook is that of the commonplace man of affairs.⁴²

⁴¹ THORSTEIN VEBLEN, *THE HIGHER LEARNING IN AMERICA: A MEMORANDUM ON THE CONDUCT OF UNIVERSITIES BY BUSINESS MEN* 220–21 (1918). Veblen writes: “Business principles take effect in academic affairs most simply, obviously and avowably in the way of a business-like administration of the scholastic routine; where they lead immediately to a bureaucratic organization and a system of scholastic accountancy . . . the ideal of efficiency by force of which a large-scale centralized organization commends itself in these premises is that pattern of shrewd management whereby a large business concern makes money. The underlying business-like presumption accordingly appears to be that learning is a merchantable commodity, to be produced on a piece-rate plan, rated, bought and sold by standard units, measured, counted and reduced to staple equivalence by impersonal, mechanical tests. In all its bearings the work is hereby reduced to a mechanistic, statistical consistency, with numerical standards and units; which conduces to perfunctory and mediocre work throughout, and acts to deter both students and teachers from a free pursuit of knowledge, as contrasted with the pursuit of academic credits. So far as this mechanistic system goes freely into effect it leads to a substitution of salesmanlike proficiency – a balancing of bargains in staple credits – in the place of scientific capacity and addiction to study.” *Id.* This critique of metrics-based university management as a threat to other values instantiated by universities is still with us a century later, though the metrics themselves have changed dramatically. See generally, e.g., Mario Biagioli, *Quality to Impact, Text to Metadata: Publication and Evaluation in the Age of Metrics*, 2 *KNOW: A JOURNAL ON THE FORMATION OF KNOWLEDGE* 249 (2018).

⁴² VEBLEN, *supra* note 41, at 234–35.

Veblen claims that the types of people who could be won over by “clannish” chauvinism are precisely the types of people who lack the disposition to the pursuit of knowledge that Humboldt (and implicitly Veblen) associate with the true purpose of the university and the highest calling of its members. Nearly a century later, Derek Bok put it more bluntly: “Another reason some have given for operating big-time athletic programs is that the publicity and excitement of a winning team can attract more applicants and better students. Those who make this claim rarely pause to explain why a college would want to attract students who chose it because of its football team.”⁴³

Veblen and Bok may be indulging in some chauvinism of their own, but they may also have a point. What little research there is on the motivation of consumers to purchase officially licensed university merchandise suggests that the most powerful contributor to such motivation is a desire to support the university’s athletics programs – more than the desire to support academic programs, more than the desire to support a university’s religious mission, more even than the quality of the goods bearing the university brand.⁴⁴ And combined with the observations of critics of market-based university management like Veblen and Bok, this suggests a distributive dilemma in the university branding context that mirrors the distributive dilemma of the university as a whole. In pursuing GI-like recognition as productive communities, universities may believe they are securing the means to protect their tradition of knowledge production, but they may in fact be surrendering that tradition to the control of others who do not value it. Whenever the occasion arises for a community to define its values, it will be required to prioritize certain values over others – and as we saw in Bordeaux, control over those priorities may ultimately devolve on those who *give* support rather than those who *receive* it.

In Chapter 2 of this volume, Celia Lury argues that market relations tend over time toward hierarchy, while solidarity on the basis of identity is an essentially horizontal relation. Obviously, the GI-based conception of the university brand I am developing has the potential for both. The horizontal solidarity that I have identified as a justification for the historical, human-factor-based theory of GI protection has a long history in university communities. It is implicit in Humboldt’s valorization of the collaborative community of scholars set apart from ordinary life. Indeed, the first university, in Bologna (Italy), originated in a sort of medieval solidarity movement among students organizing against their grasping landlords and idling professors.⁴⁵ But a hierarchical dynamic of market relations is obviously present as well, particularly when the university looks to its identity as a community as a potential tool to attract material resources. Inevitably, with boosters as with customers, material support tends

⁴³ DEREK BOK, *UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION* 48 (2009).

⁴⁴ Joan M. Phillips et al., *Mind, Body, or Spirit? An Exploration of Customer Motivations to Purchase University Licensed Merchandise*, 4 *SPORT, BUSINESS AND MANAGEMENT* 71 (2014).

⁴⁵ CHARLES HOMER HASKINS, *THE RISE OF UNIVERSITIES* 13–14 (1923).

to come with demands for a measure of control – charity, even motivated by solidarity, can ultimately start to look like a purchase.

V. CONCLUSION

The linking of social identification to market behaviors is a move that we might associate with the currently unfashionable and vaguely defined school of political economy that passes under the name “neoliberalism.” If neoliberalism stands for anything, it stands for a preference for markets as a tool of social organization.⁴⁶ It is thus directly opposed to the Humboldtian model of the university as a social institution insulated from the market and protected (but not dominated) by the state. As critics of neoliberalism note, particularly in the context of intellectual property, driving social interactions into markets can have the effect of elevating the interests of particular constituencies over others: markets are biased in favor of those who *already have* disproportionate control over material resources.⁴⁷

The dark side of the GI-based view of academic brands is thus, at bottom, really just one manifestation of the neoliberal approach to university management that has been criticized at least since Veblen. Its implications for the university are analogous to the implications for the polity of increased economic inequality and decreased public social spending that critics of neoliberalism consistently warn us against. Rather than a collective obligation of either a particular university community or (following Humboldt) of society as a whole, higher education and knowledge production may come to be seen as (perhaps eccentric or arbitrary) charitable causes, and thereby threaten to become subject to the (again, perhaps eccentric or arbitrary) preferences and priorities of individuals with surplus resources and a chauvinist affinity for a particular university community. And if there is no such thing as pure charity in the marketplace, university brand development makes it difficult to distinguish boosterism from outright corruption. Recent revelations about donor influence at George Mason and the University of Oregon (both, notably, public institutions) are illustrative of this danger.⁴⁸ In such episodes, some

⁴⁶ DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM 2* (2007): “Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices.”

⁴⁷ Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 *UCLA L. REV.* 970, 1005 (2012): “even [for] a nonbasic good a case can be made on distributive grounds that we should direct its production and distribution in a way that is not systematically sensitive to the underlying distribution of wealth, when that distribution is itself unjust, and when alternative systems exact no toll in efficiency terms.”

⁴⁸ JOSHUA HUNT, *UNIVERSITY OF NIKE: HOW CORPORATE CASH BOUGHT AMERICAN HIGHER EDUCATION* (2018); Erica L. Green & Stephanie Saul, *What Charles Koch and Other Donors to George Mason University Got for Their Money*, *NY TIMES*, May 5, 2018, www.nytimes.com/2018/05/05/us/koch-donors-george-mason.html.

will see universities making managerial decisions that happen to attract donors' material support. Others will see donors corrupting the university's mission with their quid pro quos and starving academic pursuits for the benefit of ideological or commercial ones. But the very fact that different constituencies view these episodes in such starkly different terms is exactly the point. When a university uses its geographic and historical identity as a productive community *distinct from* the market as a tool to try to marshal material resources, it inevitably subjects that identity to market forces, and may ultimately end up destroying it.

This is the paradox of the GI-based view of academic brands. Where donors' and boosters' preferences and priorities systematically diverge from those that would emerge from either democratic processes or expert stewardship (or both), the productive work of the university that justified its protected status in the first place – preparation of students for civic life and knowledge production through free inquiry – may lose priority to other concerns *precisely because* the university seeks to solicit material support for that productive work. Thus, while a view of academic brands as justified by the logic of geographical indications seems doctrinally and theoretically more plausible to me than a view based on trademark law, examining academic brands through a GI lens also focuses our attention on the particular dangers such brands pose to the idealized forms of life of universities.