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Holy Spirits - Part I

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Think of "Chablis"... Or "Champagne"... Or "Tequila"...

What's so sacred about wines and spirits in international trade?
That's a question negotiators will be arguing vociferously at the next TRIPS Council Meeting March 8-10 in Geneva.
We're talking about the protection of "Geographical Indications" under the WTO's TRIPS Agreement Articles 22-24. Article 22 defines geographical indications as "indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin." Think of "Chablis"… Or "Champagne"… Or "Tequila"…

The first one isn't pink if it's genuine, or if it's made in California. Nor is the second, if it's from upstate New York: genuine "Champagne" only comes from the Champagne region surrounding Epernay, France.
And Tequila may not be genuine even if it's made in Mexico.
Under Mexican law, only tequila made from the blue agave plant grown in one of five Mexican states (Jalisco, or designated parts of Nayarit, Tamaulipas, Michoacan and Guanajuato) is entitled to use the name "Tequila."

In the U.S., going all the way back to 1920, the unfair competition provisions of the federal trademark law now found in Section 43(a) of the Lanham Act had their roots in protecting consumers from deception concerning the geographical origins of goods. And products such as FLORIDA ORANGE JUICE, or ROQUEFORT cheese, or potatoes GROWN IN IDAHO, or distilled wine known as COGNAC, are names which may be registered and protected as "Certification Marks" under Section 4 of the Lanham Act of 1946.
The purpose of trademark-like protection for regional products in the U.S. is clearly to prevent consumer confusion. And grape wines are protected further under regulations of the Treasury Department's Bureau of Alcohol, Tobacco, and Firearms and under some state laws. But the main focus of U.S. protection across the board is prevention of consumer confusion rather than ownership of names.

But in many civil law countries, particularly in Europe, elaborate regulations govern the marketing of regional products offering a much higher level of protection for what are called "appellations of origin."
The Lisbon Agreement for the Protection of Appellations of Origin and Their Registration of 1958 has 22 member states, but none of them are common law countries where consumer confusion is the main focus of protection for product names. (The French administrative regulations for the use of the term "COGNAC" in France are over 1,000 pages long!)

In particular, "wines and spirits" are being given special treatment. Unlike other forms of intellectual property protected under the TRIPS Agreement (such as inventions, for which patents must be available in "all areas of technology" under Article 27), geographical indications for wines and spirits are to be afforded "super-protection" from competition beyond that for other products.
When the "Dunkel Draft" of the TRIPS Agreement was first announced in 1991, it contained demands that an elaborate regime protecting geographical indications along European lines be adopted worldwide. And Article 23, entitled "Additional

Protection for Geographical Indications for Wines and Spirits," mandates that "the registration of a trademark for wines which contains or consists of a geographical indication identifying wines or for spirits which contains or consists of a geographical indication identifying spirits shall be refused or invalidated, ex officio if domestic legislation so permits or at the request of an interested party, with respect to such wines or spirits not having this origin."
If adopted, registration of a geographical indication for a wine or spirits would take precedence not only over the adoption of conflicting trademarks; existing trademarks adopted by other parties in good faith would be subject to invalidation and cancellation. Why should appellations for wines, such as "CHAMPAGNE" and spirits such as "COGNAC" be treated more favorably than names for agricultural products such as Parma ham or Roquefort cheese?

Now the developing countries such as India and Kenya are getting into the act, and asking why they should be obliged to develop elaborate protection mechanisms for European wines and spirits while their *own* DARJEELING tea and BASMATI rice, or KIRIMARA coffee are ineligible for such protection.
In the context of the "Doha Development Round," IP rights should be available to all countries – not just the ones which already have them.

Special rights for "wines and spirits" may have made sense a dozen years ago, but now that the developing countries have become keenly aware of the value of strong IP rights, they want action on their own products. The wine-producing countries are standing fast on their special privileges. Barring a breakthrough in the negotiations, the result may be a stalemate halting the development of this new form of IP protection. For more than a few WTO countries, however, *that* may be the best result of all.

I'll pick up on this topic again in my next column.