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Italian Perspective on the Importance of Geographical Indications and Protected Designation of Origin Status for Parmigiano-Reggiano Cheese

Margherita Corrado

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AN ITALIAN PERSPECTIVE ON THE IMPORTANCE OF
GEOGRAPHICAL INDICATIONS AND PROTECTED DESIGNATION
OF ORIGIN STATUS FOR PARMIGIANO-REGGIANO CHEESE

MARGHERITA CORRADO

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When it comes to eating, territories have to be incorporated.

— Jean Brunhes

INTRODUCTION

“Parmesan” is not merely a generic name to identify a product, nor only the mark of a particular and famous Italian cheese: it is history, taste, quality and tradition of a country. Parmigiano-Reggiano, also known as Parmesan cheese, has a hard granular structure and a long and natural maturation, which distinguishes it from other cheeses.¹ The Consortium for Parmigiano Reggiano Cheese was formed in 1934 from the Italian chambers of commerce, with the intent of promoting and protecting the traditional production and features of Parmigiano-Reggiano.² According to the Consortium, “the secret of its goodness originates in the place of origin, in the natural feed, and in the high quality milk with no additives.”³

The term “Parmesan” is related to its geographical origin and means “of or from Parma;” people who live closer to Reggio than Parma call it “Reggiano”, from the Reggio Emilia district.⁴ It has a reputation worldwide for its natural properties, its precise production process and its unique flavor. The distinctive taste of Parmigiano also makes it “the King of Italian cuisine”, since it is the protagonist and accompaniment of delicious dishes.⁵ “Parmigiano Reggiano: it is not manufactured, it is made,” is not only the slogan of an advertisement, it is actually a truth.⁶

The transformation from milk to cheese, made by dairy farmers without the addition of additives and preservatives, is a real art and a work that is done every day of the year, without interruption.⁷ The cheese makers affect the quality of cheeses through their choices: they decide how long the evening milk should rest to let the cream rise, how much rennet (an extract

1. *Nutritional Features*, PARMIGIANO REGGIANO, http://www.parmigianoreggiano.com/made/nutritional_features/default.aspx (last accessed Apr. 17, 2016).

2. Emily Nation, *Geographical Indications: The International Debate Over Intellectual Property*, 82 U. COLO. L. REV. 959, 959 (2011); see also *The History of Parmigiano-Reggiano DOP*, PARMIGIANO REGGIANO, <http://www.parmigiano-reggiano.it/en/made/history/default.aspx> (last visited Apr. 18, 2016).

3. *Place of Origin*, PARMIGIANO REGGIANO, http://www.parmigianoreggiano.com/made/place_origin/default.aspx (last visited Apr. 17, 2016).

4. *History of Parmesan Cheese*, PARMIGIANO REGGIANO, <http://www.parmesan.com/history/history-of-parmesan-cheese/> (last visited Apr. 18, 2016).

5. *Parmesan the King of Cheeses*, WIPO MAGAZINE (Feb. 2011) http://www.wipo.int/wipo_magazine/en/2011/01/article_0005.html (last accessed Apr. 18, 2016).

6. *Our Strength Points*, PARMIGIANO REGGIANO, http://www.parmigianoreggiano.com/where/strength_points/default.aspx (last visited Apr. 18, 2016).

7. *Id.*

used in making cheese) should be used, and they control the dehydration of the granules by hand during the cooking period.⁸ The same cheese makers then spend their time caring for cheese, from the first hours until its maturation.⁹ Parmigiano Reggiano is not only a good cheese, but also healthy and nutritious, and is the result of an ancient tradition of production.¹⁰ Its link with the territory of origin has made it one of the symbols of Made in Italy food.¹¹

After a long and elaborate process, the cheese wheels are subjected to a maturation period of at least twelve months, which follows the natural course of the seasons, allowing Parmigiano-Reggiano to gain its characteristic granular structure.¹² Each single cheese is then inspected by the Control Body, to verify if they are worthy of the name “Parmesan.”¹³ A mark is fire-branded on the cheeses that meet all of the requirements of the Protected Designation of Origin (PDO).¹⁴ According to the Consortium, “the moment of selection and the granting of a certificate of absolute guarantee for the product” is extremely important for consumers.¹⁵

Even if Parmigiano-Reggiano cheese is largely guaranteed in its authenticity by precise rules and regulations, over the years more and more cheese manufacturers, particularly in the United States, will be charged in criminal court for labeling violations over the manufacturing of Parmesan cheese and go bankrupt.¹⁶ Furthermore, every year American consumers sue food companies and stores for having falsely advertised its Parmesan cheese products and for having misrepresented its store-brand Parmesan cheese.¹⁷ Consumers are often unable to distinguish the Parmesan cheese PDO from

8. *Id.*

9. *Id.*; see also FRANCESCA ZANETTI & CONSORTIUM OF PARMIGIANO-REGGIANO CHEESE, THE ROADS OF PARMIGIANO-REGGIANO DAIRIES AND TERRITORY IN THE PROVINCE OF REGGIO EMILIA 22 (Consortium of Parmigiano-Reggiano cheese, Bologna section, June 2012).

10. See PARMIGIANO-REGGIANO, *supra* note 6.

11. See ZANETTI, *supra* note 9.

12. *The Making of Parmigiano Reggiano Cheese*, PARMIGIANO REGGIANO, http://www.parmigianoreggiano.com/made/parmigiano_reggiano_cheese/default.aspx (last accessed Apr. 18, 2016).

13. *Id.*

14. *Id.*

15. *Id.*

16. Linda Larsen, *Is There Wood in Your Parmesan Cheese?*, FOOD POISONING BULLETIN (Mar. 3, 2016), <https://foodpoisoningbulletin.com/2016/is-there-wood-in-your-parmesan-cheese/>; see also Lando M. C. Hermann, *The Fifty States of Sway & the European Cheese Union: Why the United States and the European Union Struggle with the Implementation of Geographical Indications in their TTIP Neogotiations*, 7 AM. U. INTELL. PROP. BRIEF 44, 58 (2015).

17. Robbie Hargett, *San Francisco Woman Alleges Kraft Heinz Falsely Advertises Parmesan Products*, LEGAL NEWS LINE (Feb. 27, 2016), <http://legalnewsline.com/stories/510697450-san-francisco-woman-alleges-kraft-heinz-falsely-advertises-parmesan-products>.

imitations.¹⁸ This confusion occurs because some producers of cheese, including Germany, sponsor their product, bearing the name “Parmesan” with labels that recall traditions and Italian landscapes.¹⁹ As a result, consumers associate these products with Parmigiano Reggiano PDO produced in Italy, even if in reality it has been produced in another country.²⁰

And that is not all: in the last few years the European Union has started criminal proceedings against Italy, Austria, Hungary, Denmark, Spain, Belgium, Estonia, Latvia, Lithuania, France and the Netherlands for the violation of the *Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs*.²¹ The objective of the regulation is to protect the quality and variety of the EU agricultural and seafood products, as part of the European cultural and territorial European heritage.²²

The purpose of this paper is to demonstrate, through the history of Parmigiano Reggiano, the importance of the preservation of the products protected by Geographical Indications (GIs) and the PDO and why United States should increase its domestic protection for GIs. Part I of the paper discusses the provisions of the WTO Agreement on Trade-Related Aspects of IP Rights (“TRIPs”) relating to GI protections and PDO status, in particular in Europe and Italy, in relation to Parmigiano-Reggiano cheese. Part II presents a detailed analysis of the European and Italian regulations regarding GI and Parmigiano-Reggiano PDO. Part III shows how the European Union has come to “propertize” the Parmesan name after an important holding in the *Case C-132/05 Commission v. Germany*.²³ Part IV focuses, through an analysis of Walmart and Castle Cheese cases, on how other countries, beginning with Europe, try to imitate Parmesan cheese and fall into a pattern of violating the rules that regulate the production process, labeling and distribution. Finally, Part V presents the current debate between Europe and US regarding GI protection and the analysis of the Italian sounding phenomena.

18. *UE- procedimenti penali*, PARMIGIANO REGGIANO, http://www.parmigianoreggiano.it/consorzio/azioni_tutela/unione_europea_procedimenti_penali.aspx (last visited Apr. 18, 2016).

19. *Case C-132/05, Comm'n v. Federal Republic of Germany*, 2008 E.C.R. I-00957.

20. *See UE- procedimenti penali supra* note 18.

21. Document available at the link: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:343:0001:0029:en:PDF>

22. Regulation 1151/12 of the European Parliament and of the Council of November 21, 2012 on quality schemes for agricultural products and foodstuffs, O. J. (L 343) 14.12.2012, <http://eurlex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32012R1151>.

23. *Case C-132/05, Comm'n v. Federal Republic of Germany*, 2008 E.C.R. I-00957.

I. THE GEOGRAPHICAL INDICATION AND PDO OF PARMIGIANO REGGIANO

A. *Geographical Indications: A Brief Introduction*

A GI is a form of intellectual property (IP) typically used for agricultural products, foodstuffs, wines, handicrafts and industrial products.²⁴ In particular, it is a name or a sign, related to goods or products that have distinctive features and qualities, arising from the place of origin.²⁵ The connection between a product and its territory, that is connatural to GIs, it is an important instrument to guarantee the quality of the product that a consumer is buying.²⁶ It is also a way for consumers to have the knowledge and awareness of the community where the product was produced and packaged, in order to identify themselves with that place.²⁷

Parmesan is worthy of protection as a GI, since its “distinctiveness and qualities are closely linked to its place of origin and method of production.”²⁸ Other examples of GIs include Champagne and Florida oranges.²⁹ One of the objectives of GIs is to prevent third parties from using the indication on products that do not conform to the applicable standard or that come from a different geographical area.³⁰ Such use creates confusion, “which can lead to the removal of products from sale where they are marked using particular signs.”³¹ However, a protected GI does not prevent the holder from using the same techniques disposed by the standards of those indications in order to make another product.³²

The GI protection in Europe is much stronger and tied to the values and traditions of the territory compared to the United States and it is “a reflection of European cultural values since its citizens have considerable pride and

24. *What is a Geographical Indication?*, WIPO MAGAZINE http://www.wipo.int/geo_indications/en/faq_geographicalindications.html (last visited May 6, 2016).

25. *Id.* Under article 22 of the TRIPS Agreement, “*Geographical indications are, for the purposes of this Agreement, 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.*”

26. Matteo Ferrari, *The Regulation of Geographical Indications in the Wine Sector*, (Sept. 4, 2009), available at: <https://ssrn.com/abstract=1465378> or <http://dx.doi.org/10.2139/ssrn.1465378>.

27. *Id.* at 4.

28. *See* WIPO MAGAZINE, *supra* note 5.

29. *See* Nation *supra* note 2.

30. FREDERICK M. ABBOTT, THOMAS COTTIE & FRANCIS GURRY, *INTERNATIONAL INTELLECTUAL PROPERTY IN AN INTEGRATED WORLD ECONOMY* 440 (Aspen Publishers, 2007).

31. *Id.*

32. *Id.*

tradition tied to GIs, especially in the face of potential lost identity under the increased harmonization of the EU.”³³

Europe provides a series of schemes in order to encourage the variety of agricultural production, to protect product names from misuse and imitation, as well as to help consumers by giving them information concerning the particular features of the products.³⁴ These European protection schemes include, first of all, the Protected Geographical Indications (PGI). PGI “indicates a link with the area in at least one of the stages of production, processing or preparation.”³⁵ Therefore, to receive the PGI status, a product must be at least partially manufactured in its specific geographical area.³⁶

The second European protection scheme is the PDO, which identifies, under the EU definition, products that are “produced, processed and prepared in a given geographical area, using recognized know-how.”³⁷ The qualities and characteristics of these products are linked to their geographical environment of origin; to receive the PDO status, the product must be traditionally and entirely manufactured in its place of origin.³⁸

The third protection scheme is the Traditional Specialty Guaranteed (TGS). To qualify for a TGS, a product must have a specific characteristic, in both its composition and the mode of production, that is not necessarily linked to its geographical area of origin.³⁹

B. The TRIPS Agreement on Geographical Indications

The *Lisbon Agreement for the Protection of Appellations of Origin and their International Registration*, defines an “appellation of origin”⁴⁰ as a

33. Justin M. Waggoner, *Acquiring a European Taste for Geographical Indications*, 33 BROOK. J. INT’L L. 569, 584 (2008).

34. *EU Quality Logos*, EUR. COMMISSION AGRIC. AND RURAL DEV., http://ec.europa.eu/agriculture/quality/schemes/index_en.htm (last visited Apr. 18, 2016).

35. Council Regulation 510/06 of March 20, 2006, on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, <http://eur-lex.europa.eu/legal-content/IT/TXT/?uri=URISERV:l66044>; see also Hermann, *supra* note 16.

36. *Geographical Indications and Traditional Specialities*, WIKIPEDIA, https://en.wikipedia.org/wiki/Geographical_indications_and_traditional_specialities_in_the_European_Union, (last accessed Apr. 18, 2016); see also Council Regulation 510/06, *supra* note 35.

37. *European Union Wine Label Information*, WINE-SEARCHER, <http://www.wine-searcher.com/wine-label-eu.lml> (last visited May 6, 2016).

38. *Geographical Indications: An Introduction*, WIPO, http://www.wipo.int/edocs/pubdocs/en/geographical/952/wipo_pub_952.pdf. (last visited Apr. 18, 2016).

39. *PDO/PGI/TSG - Protected Food Names*, DEP’T OF AGRIC., FOOD, & THE MARINE (Ir.) <http://www.agriculture.gov.ie/gi/pdopgitsg-protectedfoodnames/>, (last visited Apr. 18, 2016).

40. See *Lisbon Agreement for the Protection of Appellations of Origin and their International Registration*, art. 2, Oct. 31, 1958, 923 U.N.T.S. 205 [hereinafter *Lisbon Agreement*],

substantial step toward the definition and protection of GIs.⁴¹ The TRIPs agreement entered into force on January 1, 1995 as a part of the World Trade Organization (WTO) Agreement and was subscribed by the majority of the world's countries.⁴² One of the primary objectives of the TRIPs Agreement is to protect GIs from abuses and usurpations.

Article 22 provides a standard level of protection that WTO members have to provide for GIs, in order to avoid misleading the consumers and to prevent unfair competition.⁴³

Article 23 instead guarantees a higher or enhanced standard of protection of GIs for wines and spirits: "they have to be protected even if misuse would not cause the public to be misled."⁴⁴

Finally, article 24 contains some exceptions and limitations to the protection of GIs. One exception is when a name has become common or "generic" in the community.⁴⁵ This occurs when a GI loses the link to its territory; in such situations the GI protection is lost.⁴⁶ Another exception is when a particular trademark already exists; however, under the 'first-in-time, first-in-right' principle, the trademark maintains the legal superiority under some circumstances.⁴⁷

On December 23, 1969, Parmigiano Reggiano was registered under the Lisbon Agreement as an Appellation of Origin (AO).⁴⁸ The identification of

http://www.wipo.int/treaties/en/text.jsp?file_id=285856/. The treaty defines "appellation of origin" as "the geographical denomination of a country, region, or locality, which serves to designate a product originating therein, the quality or characteristics of which are due exclusively or essentially to the geographic environment, including natural and human factors."

41. Lisbon Agreement, art. 3, Oct. 31, 1958, 923 U.N.T.S. 205, http://www.wipo.int/treaties/en/text.jsp?file_id=285856/; see also Waggoner, *supra* note 33.

42. See Waggoner, *supra* note 33, at 575.

43. *Geographical Indications in general*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/trips_e/gi_background_e.htm (last visited May 6, 2016); see also TRIPs: Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 22, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPs Agreement]. "In respect of geographical indications, Members shall provide the legal means for interested parties to prevent: (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good; (b) any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967)."

44. See WTO, *supra* note 43.

45. *Id.*

46. *Id.*

47. See TRIPs Agreement, art. 24, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 "Where a trademark has been applied for or registered in good faith, or where the rights to the trademark have been acquired through actual use in good faith, either (1) before the date of application of the TRIPs Agreement for a particular WTO member, or (2) before the GI 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.'" *Id.*

48. *The King of Cheese and its IP Crown*, WIPO, <http://www.wipo.int/ipadvantage/en/details.jsp?id=3664> (last visited May 6, 2016).

Parmigiano Reggiano for GIs was enhanced in 1994.⁴⁹ In 1996, the Parmigiano Reggiano GI gained overall legal status in the EU when it was classified as a classification for GIs recognized in the EU.⁵⁰

C. The Protected Designation of Origin of Parmigiano-Reggiano

“Parmigiano-Reggiano” is a cheese with a PDO that meets important and specific requirements, guaranteeing its qualities and unique flavor.⁵¹ The regions where cows live, graze and produce milk, before the milk is made into cheese in the provinces of Parma, Reggio Emilia, Modena, Bologna and Mantova, together with the climate and the fodder of these areas, are important factors that allow Parmesan to gain its distinctive flavor and success.⁵² Moreover, under the EU regulations, Parmigiano Reggiano’s long period of maturation, can apply only to cheeses that: “have been produced and processed only in the place of origin” and “according to ancient methods and traditional craftsmanship, defined by strict rules, which requires precise production methods, controlled feeding of the cows and rules for the qualitative selection and the tagging on the forms.”⁵³

Moreover, PDOs also require that the raw material for a given product originates in the area designated.⁵⁴ Only cheeses manufactured under the rules contained in the Production Regulation can bear the “Parmigiano-Reggiano” mark.⁵⁵

According to the Consortium’s rules, the marks, which are also subdivided into mark of origin and grade selection marks, play a fundamental role in identifying and distinguishing the product and must displayed on the wheels.⁵⁶ The PDO system gives Parmesan cheese the same protection guaranteed to other European traditional products, such as French

49. *Id.*

50. *Id.*

51. *Id.*; see also Zanetti, *supra* note 9.

52. See WIPO, *supra* note 48.

53. *Parmigiano-Reggiano PDO, PARMIGIANO REGGIANO*, http://www.parmigianoreggiano.com/where/purchase_guide/parmigiano_reggiano_2.aspx (last visited May 6, 2013) (for more information, visit the Parmigiano-Reggiano Website at: <http://www.parmigianoreggiano.com/consortium/default.aspx>).

54. See WIPO, *supra* note 48.

55. *Symbols and Marks, PARMIGIANO REGGIANO*, http://www.parmigianoreggiano.com/where/purchase_guide/symbols_marks.aspx (last visited May 6, 2013) (for more information, visit the Parmigiano-Reggiano Website at: http://www.parmigianoreggiano.com/consortium/rules_regulation_2/default).

56. *Id.*

“Camembert,” which must come from Normandy, or the famous “Champagne” that must come from that French region.⁵⁷

II. EUROPEAN REGULATIONS

In Europe, more than other continents, there is a particular love for the land and the quality of both agricultural and industrial products. Due to this affection, Europe has issued a series of very narrow and strict regulations in order to safeguard the quality and authenticity of their products and the attendant production processes, which lead to its sale.⁵⁸ Obtaining a GI by the producer, involves an economic investment and, above all, the compliance with a product specification and control of the entire manufacturing process by the competent bodies, which demonstrates the quality, authenticity and territorial vocation of the protected product.⁵⁹

A. Quality Requirements under EU Law

EU Regulation No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs guarantees uniform respect throughout the Union of IP rights related to names protected. This regulation ensures that some agricultural products or foodstuffs, that have special features linked to their geographical origin, are recognizable by consumers and identifiable on the market.⁶⁰

The objective of the Regulation is, on the one hand to provide efficient instruments for producers to identify and promote their product and, on the other hand, to protect consumers from fraudulent practices.⁶¹ Furthermore, the protection of the GIs and the PDOs furthers the goal of granting a fair return to the producer and farmers for the quality of their products.⁶² GI and PDO protection also provides information to consumers about products that have specific and distinctive characteristics related to their geographical origin in order to allow them to make informed purchasing decisions.⁶³The

57. *EU Court Says Parmesan Cheese Must Come From Italy*, DW (Feb. 17, 2008), <http://p.dw.com/p/DE1Q>.

58. DONATELLA IARICCI & SABRINA LEPRE LEVA, *Analisi Giuridica del Fenomeno 'Italian Sounding'* 4 (Italian Trade Commission April 2011).

59. *Id.*

60. Regulation 1151/12 of the European Parliament and of the Council of November 21, 2012 on quality schemes for agricultural products and foodstuffs, O. J. (L 343) 14.12.2012, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32012R1151>.

61. *Id.*

62. *Id.*; See also Carina Folkesson, *Geographical Indications and Rural Development in the EU* (January 2005) (unpublished dissertation, School of Economics and Management, Lund University).

63. See Regulation 1151/2012, *supra* note 60.

protection therefore avoids misleading consumers with non-genuine products, which may have a different taste or be of an inferior quality.⁶⁴ In fact, it is important to highlight that consumer trust is the basis of the added value of the GIs and traditional specialties guaranteed.

B. EU Regulations and Parmigiano-Reggiano

The *single document, Council Regulation (EC) No 510/2006 "Parmigiano Reggiano"*, specifically describes the features, aromas, appearance and dimensions of Parmesan to which name applies.⁶⁵ The document also describes the process of production and steps that have to take place in the identified geographical area, and the rules of slicing, packaging and labeling.⁶⁶

The particular characteristics of the Parmigiano Reggiano cheese, are also detailed: "the structure of the body of the cheese, fine grained and flaky, the fragrant aroma and delicate taste, which is flavoursome without being pungent, and its high level of solubility and digestibility."⁶⁷ The document even establishes the forage used to feed cows and the minimum twelve-months maturing period, which take place in the specific geographical area because of the climate.⁶⁸

III. "PARMESAN" IS NOT A GENERIC NAME

A trademark is generic when it "ceases to serve its function of identifying the source and quality of the product or service."⁶⁹ When a term becomes generic, and enters in the common language, a geographical designation is identified with a type of product rather than with a geographical area because it no longer suggests that the product originated in the particular region.⁷⁰ This exception creates a deterioration of GI

64. *Geographical indications and traditional specialties in the European Union*, WIKIPEDIA, https://en.wikipedia.org/wiki/Geographical_indications_and_traditional_specialties_in_the_European_Union (last accessed May 6, 2016); See also Meg Pier, *Parmigiano Reggiano Cheese & Family: Beloved Italian Institutions*, VIEW FROM THE PIER (Dec. 11, 2015), <http://www.viewfromthepier.com/2015/12/11/parmigiano-reggiano-cheese-family-beloved-italian-institutions/>.

65. Publication of an amendment application pursuant to Article 6(2) of Council Regulation (EC) No 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, 2009 O. J. (C 87) 14.

66. *Id.*

67. *Id.*

68. *Id.* All these peculiarities establish "a link between the geographical area and the Italian Law n.124 April 10, 1954, which deals with the protection of designations of origin and typical designations of cheeses 'gorgonzola', 'parmigiano-reggiano', and 'pecorino romano'."

69. See Waggoner, *supra* note 33, at 582.

70. *Id.*

protection: the non-recognition of some peculiarities of the product, which constitute the value component and contributes to the decrease of the product's market value.⁷¹

A. Case C-132/05-European Commission v. Germany

On October 16, 2003 Europe intervened by opening an infringement suit in response to a complaint filed by the Consortium of Parmigiano Reggiano concerning the improper use by certain German companies of the name "Parmesan," as a generic name, on cheeses that neither exhibited the peculiarities of Parmigiano-Reggiano PDO, nor came from the area of origin.⁷² These usurpations of the name violated the rights of the producers and created confusion among consumers, resulting in damage to the image and the quality of one the most famous cheeses in the world.⁷³

Furthermore, it constituted a violation of the obligations included in *Article 13(1)(b) of Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs*,⁷⁴ which protects the designations of origin and the GIs of cultural products. After a motivated notice to German authorities and several refusals to respect the PDO Parmigiano-Reggiano in its use of "Parmesan", the case was taken before the European Court of Justice.⁷⁵ On February 26, 2009 the Court announced a clear and precise judgment in favor of most famous Italian cheese, stating: "of course, a geographical designation could, over time and through use, become a generic name in the sense that consumers cease to regard it as an indication of the geographical origin of the product, and come to regard it only as an indication of a certain type of product."⁷⁶ In the Commission's view,

71. *Id.*

72. Consortium of Parmigiano-Reggiano Cheese Press Office and Public Relations in collaboration with Centro Stampa, *On the Matter of "Parmesan" Cheese- Germany: The Case Goes Back to Court in Luxembourg*, PARMIGIANO REGGIANO, http://www.parmigianoreggiano.com/news/2004_3/f28880b62aad4fa7adfd967b5efcb3e.aspx (last visited Apr. 14, 2016).

73. *Id.*

74. Regulation 2081/92/EEC of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, art. 13 (1)(b), 1992 O.J. (L 208/1) ("1. Registered names shall be protected against: (b) any misuse, imitation or evocation, even if the true origin of the product is indicated or if the protected name is translated or accompanied by an expression such as 'style', 'type', 'method', 'as produced in', 'imitation' or similar.").

75. See PARMIGIANO REGGIANO, *supra* note 72.

76. Case C-132/05, *Comm'n v. Germany*, 2008 E.C.R. I-4273.

however, “only cheeses bearing the protected designation of origin (PDO) ‘Parmigiano Reggiano’ can be sold under the name ‘Parmesan.’”⁷⁷

Viewed as a definite success, the Consortium and the producers of Parmigiano-Reggiano PDO welcomed the Court’s judgment with satisfaction.⁷⁸ In its reasoning, the Court remarked that the community law does not only protect the correct form in which a PDO has been protected, but extends to any misuse or imitation, even a translation.⁷⁹ Secondly, the Court stated that the use of the name “Parmesan”, considering the phonetic similarity and the similar aspect of the products, must be considered an evocation of the name “Parmigiano-Reggiano” PDO, which is protected by European regulations against similar infringements.⁸⁰ These visual and phonetic proximities of the two names are likely to create confusion among consumers bringing to mind the protected PDO Parmigiano Reggiano cheese when confronted with a hard cheese, often grated, bearing the name ‘Parmesan’.⁸¹ Therefore, since Germany failed to demonstrate that “Parmesan” is a generic name, it is irrelevant whether “Parmesan” is a translation of “Parmigiano Reggiano.”⁸²

The Commission also rightly evidenced that if the name “Parmesan” were a generic name, neutral, without any geographical connotation, “there would be no plausible explanation for the persistent efforts of manufacturers of imitations to establish through words or images a link between their products and Italy.”⁸³

However, the Court held that in contrast to what the Commission claimed, “a member state is not obliged to take on its own initiative the measures required in order to penalize the infringement on its territory of PDOs from another member state.”⁸⁴ As a result, the German inspection authorities don’t have the specific obligation to control the observance and respect of the PDO ‘Parmigiano Reggiano.’⁸⁵ It is the task of the Consortium “to protect the designation of origin of the “Parmigiano-Reggiano” cheese,

77. European Commission Press Release No 11/08, Judgment of the Court of Justice in Case C-132/05 Commission of the European Communities v Federal Republic of Germany, CJE/08/11 Brussels, (February 26, 2008).

78. PARMIGIANO REGGIANO, *supra* note 72.

79. *See* Comm’n v. Germany, *supra* note 76.

80. *Id.*

81. *Id.*; *see also* Christian Hauer, *Using the Designation Parmesan for Hard Cheese (Grated Cheese) of Non-Italian Origin*, 2008 EUR. FOOD & FEED L. REV. 387, 393 (2008).

82. Case C-132/05, Comm’n v. Germany, 2008 E.C.R. I-4273.

83. *Id.*

84. *Id.*; *see also* DW Staff, *EU Court Says Parmesan Cheese Must Come From Italy*, DEUTSCHE WELLE (Feb. 27, 2008), <http://www.dw.com/en/eu-court-says-parmesan-cheese-must-come-from-italy/a-3152168>.

85. *See* Case C-132/05, Comm’n v. Germany, 2008 E.C.R. I-4273.

in compliance with *Article 13 of Regulation (EC) No. 510/06*, with the Italian legislation and with the relevant international agreements and treaties.”⁸⁶ In conclusion, the infringement proceeding brought by the European Commission has been dismissed, as a result of the Commission’s failure to demonstrate that the German legal system does not sufficiently protect the PDO of “Parmigiano Reggiano.”⁸⁷ This is not, however, the only controversy regarding Italian cheese and GI protection.

IV. THE “INIMITABLE” PARMIGIANO-REGGIANO

As previously established, Parmigiano-Reggiano is unique, thanks to its special and distinctive taste and its consistent 800-year-old production process despite the advent of technology.⁸⁸ But, is it possible to reproduce the particular taste by changing the manufacturing process? Or by making it somewhere else? How does Parmesan taste as its production is imitated in other countries? Above all, do cheese manufacturers from other countries respect the rules contained in European regulations?

As explained above the European Court of Justice has ruled several times, affirming that “Parmesan” is not a generic name and Parmesan production should therefore respect certain rules and the cheese itself has to meet specific requirements. However, despite the intervention of the Court, Parmesan is one of the principal products subjected to false imitations and misrepresentations that harm its image. According to the US Food and Drug Administration, “Parmesan fraud has become a serious problem for American consumers.”⁸⁹ Moreover, “of all the popular cheeses in the U.S., the hard Italian varieties are the most likely to have fillers because of their expense.”⁹⁰

A Bloomberg investigation explains why this is the case: “Parmesan wheels sit in curing rooms for months, losing moisture, which results in a smaller yield than other cheeses offer; while 100 pounds of milk might produce 10 pounds of cheddar, it makes only eight pounds of Parmesan.”⁹¹

86. Statuto del Consorzio del Formaggio Parmigiano Reggiano, 18 Aprile 2012, available at http://storage.parmigiano-reggiano.it/file/STATUTO_Consorzio_Parmigiano_Reggiano_-_Assemblea_18_.pdf.

87. See Case C-132/05, *Comm’n v. Germany*, 2008 E.C.R. I-4273.

88. See Waggoner, *supra* note 33, at 569.

89. Abbey Dean, *FDA Warns That Most Grated Parmesan Could Really Be Wood Pulp*, MANUFACTURING.NET (last accessed Jan. 6, 2017), <http://www.manufacturing.net/news/2016/02/fda-warns-most-grated-parmesan-could-really-be-wood-pulp>.

90. Lydia Mulvany, *The Parmesan Cheese You Sprinkle on Your Penne Could be Wood*, BLOOMBERG.COM (Feb. 16, 2016), <http://www.bloomberg.com/news/articles/2016-02-16/the-parmesan-cheese-you-sprinkle-on-your-penne-could-be-wood>.

91. *Id.*

Tests by the Food and Drug Administration (FDA), showed that cheeses sell in the food stores described as “100 percent Parmesan” usually have cut-rate substitutes, like less expensive cheeses such as mozzarella, swiss and cheddar, and wood pulp.⁹² The Walmart and Pennsylvania cases are an example of such practices.

A. The “Castle Cheese Case”

On November 2012, some FDA agents made a surprise investigation at a cheese factory in Pennsylvania, called “Castle Cheese.”⁹³ The agents found that the products distributed as “100 percent real parmesan” in the largest grocery store of the country, were falsified with cut-rate substitutes and fillers, such as wood pulp.⁹⁴ In fact, Castle Cheese’s “100 percent grated parmesan cheese”, was actually a mixture of Swiss, mozzarella, white cheddar and cellulose.⁹⁵ Someone had to pay: Castle Cheese President pled guilty and was sentenced to a year in prison and fined \$100,000.⁹⁶ The company went bankrupt in 2014.⁹⁷

However, it was not sufficient to stop such illegal practices of misrepresentation. “The tipping point was grated cheese, where less than 40 percent Castle Cheese’s was actually a cheese product”, said Neil Schuman of Arthur Schuman Inc., the US hard cheese leader and the biggest seller of hard Italian cheeses in the U.S.⁹⁸ “Consumers are innocent, and they’re not getting what they bargained for. And that’s just wrong.”⁹⁹

B. The “Walmart Case”

In February 2006, some American consumers from Los Angeles filed a class action lawsuit in the US District Court for the Central District of California against Walmart-Stores, for having misrepresented Parmesan

92. *Id.*; see also Joe Mandak, *Pa. Companies Plead Guilty to Selling Mislabeled Cheese with Wood Pulp*, THE MORNING CALL.COM (Feb. 26, 2016), <http://www.mcall.com/business/mc-pa-cheese-imitation-plea-0226-20160226-story.html>.

93. See Mulvany *supra* note 90.

94. *Id.*

95. Bloomberg, *Government Investigates Use of Fillers in Parmesan Cheese*, COLUMBIA DAILY TRIBUNE (Feb. 16, 2016), http://www.columbiatribune.com/business/government-investigates-use-of-fillers-in-parmesan-cheese/article_42ec6fc4-2264-5aa7-b396-18a1fdefa4a6.html.

96. See Mulvany *supra* note 90.

97. *Id.*

98. *Id.*; see also Roberto A. Ferdman, *Parmesan Cheese Is Not What It Seems*, THE WASHINGTON POST (Feb. 17, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/02/17/parmesan-cheese-is-not-what-it-seems/?utm_term=.1420bb46816e.

99. *Id.*; see also Bloomberg, *supra* note 95.

cheese.¹⁰⁰ In the suit they declared that Walmart sold its store-brand cheeses as “Great Value 100 percent Grated Parmesan Cheese.”¹⁰¹

However, tests and investigations demonstrated the cheese contained 7.8 percent of cellulose, an anti-clumping agent from wood chips.¹⁰² The case has not yet been granted class action certification,¹⁰³ however attorney Sultzer affirmed “regardless of the price of the product, people are still buying the product based on the label, and families are being put off. Imagine giving that to your kid with their pasta. We’re very confident that the case is going to move forward, based on the allegations in the complaint.”¹⁰⁴

C. *The Kraft Food’s Parmesan Cheese: Is It Real Parmesan?*

Kraft food started to produce and sell cheeses inspired by Italian Parmesan in 1945 and became one of the most important North American producers of generic Parmesan.¹⁰⁵ Some ingredients are the same; however, in 1997 Kraft Foods discovered a way to reduce the processing time from ten months to six.¹⁰⁶

However, it is precisely this long production process, together with its singular flavor which characterizes and distinguishes parmesan from other cheeses; cheese cured in six months cannot be called ‘Parmesan.’¹⁰⁷ It is undoubtedly the choice of business, oriented to decrease the production costs.¹⁰⁸ However, despite Kraft’s assurances that they did first test their new product with consumers to make sure they were satisfied, this alteration of the core process of Parmigiano could compromise Parmesan cheese’s image.¹⁰⁹ Moreover, “under EU law, Kraft Parmesan may not be marked as

100. Robbie Hargett, *Suit Claims Wal-Mart Misrepresents Parmesan Product*, LEGALNEWSLINE (Feb. 29, 2016), <http://legalnewsline.com/stories/510698139-suit-claims-wal-mart-misrepresents-parmesan-product>.

101. *Id.*

102. Nicholas Roberts, *Walmart Sued for Misrepresenting ‘100% Parmesan Cheese’*, OPPOSING VIEWS (Feb. 28, 2016), <http://www.opposingviews.com/i/health/wal-mart-sued-over-parmesan-cheese-wood-pulp-filler>.

103. Anita Balakrishnan, *Walmart Sued for Adding Wood Pulp to its Parmesan*, NBC NEWS (Feb. 29, 2016), <http://www.nbcnews.com/business/business-news/walmart-sued-allegedly-adding-wood-pulp-its-parmesan-n527986>.

104. *Id.*

105. See Waggoner, *supra* note 33, at 569.

106. Libby Quaid, *Kraft Wants to Speed the Making of Parmesan, but Purists Cry Foul*, CHRON (Feb. 9, 2006), <http://www.chron.com/business/article/Kraft-wants-to-speed-the-making-of-Parmesan-but-1491656.php>.

107. *Id.*

108. *Id.*

109. *Id.*; see also Mark Karklin, *You Can Taste the Need for Regulating Corporations When Parmesan Cheese Is Fake*, TRUTH OUT (Feb. 17, 2016), <http://www.truth->

‘parmesan’ cheese in Europe because the term ‘parmesan’ evokes – as established in the case *Commission v. Germany*– the protected GI ‘Parmigiano Reggiano.’”¹¹⁰

In fact, the president of the Italian Consorzio del Parmigiano-Reggiano, Andrea Bonati, affirmed that the taste “is drastically different depending on how long it is aged, and how it is handled while aging” and, in a letter to the FDA, stated “Cheese produced under a six-month aging process may be produced faster, in greater quantities and for a cheaper price; but it will not be Parmesan cheese.”¹¹¹

V. DEBATE ON GEOGRAPHICAL INDICATIONS PROTECTION AND THE “ITALIAN SOUNDING” PHENOMENA

A. *The Debate on Geographical Indications: Two Different Perspectives*

European countries are for a heightened GI support for several reasons.¹¹² First of all, GIs guarantee a high standard for products in the marketplace, which allows producers to distinguish and sell their products at a higher price.¹¹³ Furthermore, stricter protection of GIs increases the availability of quality products to consumers.¹¹⁴ This extension of quality products would also allow consumers to identify GIs and recognize that a particular product came from a specific place of origin.¹¹⁵ In fact, Europe “bases the protection of GIs on the idea of territory, the essential link between location of production and a specific quality or attribute of a product.”¹¹⁶ “This idea has scientific, as well as cultural, roots including climate, temperature, altitude, soil, vegetation, and other factors relevant to a specific geographical location.”¹¹⁷

The European Union argued further that a rigorous protection of GIs constitutes a substantial step to prevent confusion among consumers.¹¹⁸

Finally, the recognition of GIs as an added value to our society would substantially diminish genericness.¹¹⁹

out.org/buzzflash/commentary/you-can-taste-the-need-for-regulating-corporations-when-parmesan-cheese-has-no-parmesan-in-it.

110. See Nation, *supra* note 2, at 961.

111. See Quaid, *supra* note 106.

112. See Nation, *supra* note 2, at 994.

113. *Id.* at 994, 995.

114. *Id.* at 994.

115. *Id.* at 995.

116. See Hermann, *supra* note 16, at 47.

117. *Id.* at 47-48.

118. See Nation, *supra* note 2, at 995.

119. *Id.*

In contrast, the United States maintains that the current GI regime already adequately protects both consumers and producers.¹²⁰ The circulation of generic term products in the United States marketplace explains the difficulty for the US in facing GI protection.¹²¹ In particular, the United States and other “new world” countries pointed out that many GIs are already generic and therefore consumers could not be confused as to origin.¹²²

In support of this argument, the United States has held that because so many GIs are in everyday use, they have become a part of general culture and they do not deserve protection.¹²³ In America, ‘parmesan’ is used as a generic name to identify a hard granular cheese inspired by the original Italian cheese.¹²⁴ To most Americans, as long as the cheese vaguely reminds them of the taste expectations, they do not care where it comes from and where it was produced.¹²⁵ The United States has argued that if the Consortium were able to reclaim the name ‘Parmesan’, as happened in the in the case *Commission v Germany*, “they would gain a powerful monopoly over a product that Americans have come to know and love.”¹²⁶ As a consequence, the choice of products would be eliminated and, consumers instead of being protected, would be forced to pay a higher price.¹²⁷ Most states also argue that precluding to the use of a familiar name, would be unfair for the producers, who have used them for years to label, sell and advertise domestic products.¹²⁸

The philosophical and cultural differences between these two world powers are evident; the point is whether they will ever put an end to this “global food battle” and they will finally find a compromise on GIs protection.¹²⁹ Prohibiting US producers to make, label and sell their products under the name “Parmesan” would be a hard blow for the industry; on the

120. *Id.* at 965.

121. *See* Hermann, *supra* note 16, at 49.

122. Irene Calboli, *Expanding the Protection of Geographical Indications of Origin under TRIPS: Old Debate or New Opportunity*, 10 MARQ. INTELL. PROP. L. REV. 181, 182 (2006).

123. *See* Nation, *supra* note 2, at 999.

124. *Parmigiano Reggiano*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Parmigiano-Reggiano> (last visited Apr. 18, 2016).

125. Frances G. Zacher, *Pass the Parmesan: Geographic Indications in the United States and the European Union - Can There Be Compromise*, 19 EMORY INT'L L. REV. 427 (2005).

126. *See* Nation, *supra* note 2, at 1001.

127. *Id.*

128. Ivy Doster, *A Cheese by Any Other Name: A Palatable Compromise to the Conflict over Geographical Indications*, 59 VAND. L. REV. 873, 875 (2006).

129. *See* Zacher, *supra* note 125; *see also* Doster, *supra* note 128, at 876.

other hand EU is unlikely to give up the protection of one of its most valuable, quality and famous products.¹³⁰

A meeting point should be that of consumer protection: “from a marketing perspective, the distinction of goods on the basis of their origins, especially where the qualities associated with the product stem from the physical characteristics of the location of origin, benefits producers through product differentiation, as well as consumers, who receive more information on which to base their selections.”¹³¹

However, the difficult part is to get to the point where American consumers are able to recognize GI and PDO products.¹³² In this sense, the education of consumers is crucial.¹³³ Several researchers demonstrate that the average American consumer is often not able to recognize and distinguish products protected by GIs and PDOs from the other ones. One of the causes of this problem is the phenomena of ‘Italian Sounding’.

B. The Phenomena of “Italian Sounding” Advertising Also Affects Parmesan Cheese

On December 2015, the Consortium of Parmigiano-Reggiano asked the EU Court to protect their products from American companies which use the name “Parmesan” improperly by using Italian flags and other Italian references on their packaging.¹³⁴ Giuseppe Alai, the former president of the Consortium, described these acts as no less than “a deceit” perpetrated on the American people.¹³⁵

This marketing behavior is very common in the United States and it is based on the exportation and sale of foodstuffs as ‘made in Italy’, despite their inauthenticity.¹³⁶ This phenomena, called “Italian Sounding”, refers in particular to the imitative counterfeiting that affects Italian products of the agro-food sector, even if protected by GIs or PDO and PGI status.¹³⁷ Technically Italian Sounding, even if creates confusion among consumers through the use of words, colors, Italian flags, and images that recall Italian

130. See Zacher, *supra* note 125, at 457.

131. *Id.* at 460-461.

132. *Id.* at 461.

133. *Id.*

134. “Italian Sounding”: Two Thirds of USA Consumers Deceived. A New Battle for The Consortium, PARMIGIANO REGGIANO, (last visited Apr. 15, 2016), http://www.parmigianoreggiano.com/news/2015/italian_sounding_thirds_consumers_deceived_battle.aspx.

135. See Mulvany, *supra* note 90.

136. Elena La Rocca, *Do you sound Italian? Assessing the effectiveness of Italian Sounding as a marketing strategy*, University of Kassel a.y. 2015/2016.

137. See IARICCI & LEPRE LEVA, *supra* note 58.

traditions, does not infringe any IP rights.¹³⁸ As a result, consumers mistakenly assume local U.S. products are Italian.¹³⁹ At the European Parliament the Director of the Parmigiano Reggiano Consortium, Riccardo Deserti, recalled that the cheese made in the USA under the name “Parmesan” deemed “Italian” by 38% of American consumers.¹⁴⁰

Several surveys have been conducted on the prices of Italian PDO / PGI and Italian Sounding products as marketed in famous specialty food stores and supermarkets in New York.¹⁴¹ The stores were located in areas where the consumer is able to appreciate Italian specialty foods.¹⁴² The factors that may induce a consumer to buy Italian Sounding food brands can be multiple: “perceptions of quality, stereotypical associations, affinity to a country and brand equity are just some examples of possible reasons underlying purchase decisions.”¹⁴³ However, where there is confusion in the consumer’s mind, price becomes a decisive element.¹⁴⁴ As Italian Sounding products are generally much cheaper than PDO\ PGIs, the consumer often chooses the Italian Sounding products, damaging sales for those PDO/PGI products, but, above all, the overall image of the products themselves.¹⁴⁵

It is hard to find a solution to this problem. Definitely, an increase in information and awareness among consumers would be a first step towards raising the protection of GIs and PDOs.¹⁴⁶ In this sense, the Consortiums of Parmigiano, Asiago and Gorgonzola cheese, recently started a promotional campaign called “Cheese it’s Europe.”¹⁴⁷ The objective is to promote the exportation of authentic Italian cheeses in Poland, Hungary, the Czech Republic and Austria, as well as to increase the awareness of PDO products, enhancing the European System of Origin Protection and Quality Certified

138. *Id.*; see also Louis Coluccio, *Made in Italy: How to Protect Authenticity. Interview with Donatella Iaricci, Head of the Intellectual Property Rights Desk, ITALY* (Aug. 27, 2010), <http://www.iitaly.org/magazine/dining-in-out/articles-reviews/article/made-in-italy-how-protect-authenticity-interview>.

139. See IARICCI & LEPRE LEVA, *supra* note 58.

140. *Consumatori USA Ingannati dal “Parmesan” de Castro: La Loro Tutela in Ambito TTIP è Interesse Comune di Europa e Stati Uniti*, PARMIGIANO REGGIANO, http://www.parmigianoreggiano.it/news/2016/consumatori_ingannati_parmesan_castro_loro_tutela.aspx (last visited Jan. 6, 2016).

141. See IARICCI & LEPRE LEVA, *supra* note 58.

142. *Id.*

143. See La Rocca, *supra* note 136.

144. See IARICCI & LEPRE LEVA, *supra* note 58.

145. *Id.*

146. *Id.*

147. *Parmigiano Reggiano, Gorgonzola and Asiago: Launch of European Project, “Cheese it’s Europe”*, PARMIGIANO REGGIANO, http://www.parmigianoreggiano.com/en/news/2016/parmigiano_reggiano_gorgonzola_asiago_launch_european.aspx (last visited Jan. 6, 2017).

Products.¹⁴⁸ Similar programs in the United States would be a starting point for increasing consumers' knowledge and awareness of the origin and features of the products they purchase, in order to make more conscious choices.

CONCLUSION

Throughout its history, Parmesan has been a product with a worldwide reputation. Our focus here has been to demonstrate that GIs are precious and valuable instruments for protecting the quality and tradition of particular products. One might even imagine that GIs are like a tree that gains strength from the land and people that nourish and protect it, producing a bounty for producers and community alike.¹⁴⁹

In the worldwide marketplace, consumers do not have the means to appreciate the quality of the products they consume.¹⁵⁰ In such cases "GIs are means by which to fill an information asymmetry between producers and consumers".¹⁵¹ PDOs pursue the further objective of preserving and encouraging industrial activities of agricultural sectors, as well as distinguishing in a competitive market the quality and authenticity of the products and communicating the added value of the product to consumers.¹⁵²

LIST OF ABBREVIATIONS

- AO- Appellation of Origin
- GI- Geographical Indication
- IP- Intellectual Property
- PDO- Protected Designation of Origin
- PGI- Protected Geographical Indication
- TGS- Traditional Specialty Guaranteed

148. *Id.*; see also *Al via la campagna "Cheese – It's Europe"*, GORGONZOLA (Sept. 12, 2016), <http://www.gorgonzola.com/notizie-comunicati/al-via-la-campagna-cheese-its-europe/>.

149. *Agriculture and Rural Development: EU agricultural product quality policy*, EUROPEAN COMMISSION, <http://ec.europa.eu/agriculture/quality/> (last visited May 6, 2016).

150. See Ferrari, *supra* note 26 at 4.

151. *Id.* at 5.

152. See WIPO MAGAZINE, *supra* note 5.