

## HOW NEAT: USING GEOGRAPHICAL INDICATIONS TO EXPAND CONSUMERS' KNOWLEDGE OF BOURBON

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### INTRODUCTION

Bourbon is much more than a simple drink. A standard recipe determines if a whiskey—the broader category of distilled spirits to which bourbon belongs—is legally a bourbon, but there is considerable latitude in production choices that allows a brand to distinguish its product from other competitors.<sup>1</sup> Thus, a “shockingly wide spectrum of bourbon styles” are available to consumers.<sup>2</sup> Drinking bourbon, therefore, presents an opportunity to explore the choices distillers make in the production process.<sup>3</sup>

Consumption begins with the selection of a bottle of bourbon, and industry labelling practices are far from straightforward.<sup>4</sup> At minimum, every label will contain the following information: the brand name, the alcohol by volume, the proof, the volume, and an age statement.<sup>5</sup> Besides this information, however, there is little shared about production practices and their impact on a bourbon’s unique flavor.<sup>6</sup>

American whiskey, and more specifically bourbon, is in the midst of a “a modern golden age”,<sup>7</sup> however, through the spirit’s rise in popularity, the bourbon industry created a hyper-fixation on collectability.<sup>8</sup>

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<sup>1</sup> Bryce Wiatrak, *Tracking Bourbon’s Modern Day Revival*, SEVENFIFTY DAILY: THE BUS. AND CULTURE OF DRINKS (Aug. 21, 2019), <https://daily.sevenfifty.com/tracking-bourbons-modern-day-revival/> [perma.cc/7R74-FJNZ]; see also Audrey Morgan, *Whiskey v. Whisky: What’s the Difference?*, LIQUOR.COM (July 11, 2023), <https://www.liquor.com/whiskey-vs-whisky-spelling-7559460> [https://perma.cc/AS83-62QH] (explaining geography’s influence on the spelling of whiskey or whisky).

<sup>2</sup> Bryce Wiatrak, *supra* note 1 (“[T]he grains’ origins, fermentation and distillation temperatures, yeast strains, heat cycling [of] the rickhouse[s], barrel placement within the rickhouse[s], [and] length of aging . . . can yield a different final spirit. . .”).

<sup>3</sup> *Id.*

<sup>4</sup> Maggie Kimberl, *It’s Time to Get Schooled in Reading Bourbon Labels*, FLAVIAR (July 25, 2017), <https://flaviar.com/blog/how-to-read-a-bourbon-label/> [https://perma.cc/2JW4-YQB6].

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Kyle Swartz, *When Will the Modern Whiskey Boom End?*, BEVERAGE DYNAMICS (Sept. 22, 2022), <https://beveragedynamics.com/2022/09/22/modern-whiskey-boom-end-bourbon-louisville/> [https://perma.cc/DX3F-E5J6].

<sup>8</sup> See generally *When Did Buying Bourbon Get So Confusing?*, THE VINEPAIR PODCAST (Jan. 9, 2023), <https://vinepair.com/articles/vp-podcast-buying-bourbon/> [https://perma.cc/A78C-54WA] (examining the bourbon market’s sudden saturation with collectible bottles).

Accordingly, consumers' notions of prestige eclipsed knowledge of bourbon's production thereby causing distillers' craftsmanship and brands' unique qualities to go largely unnoticed.<sup>9</sup> Simply put, "many devoted whiskey and bourbon connoisseurs have little knowledge beyond what they've read on distillery sites."<sup>10</sup> Ignorance, however, is not to be confused with aloofness. "Consumers want more information, and frankly, not knowing gives them reason not to purchase."<sup>11</sup>

This Note argues that geographical indications will expand consumers' knowledge of bourbon and increase interest and demand for the spirit. Part I of this Note reviews bourbon's production process. Because this information is not openly shared with everyday consumers as they browse bourbon selections, it is important for the reader to conceptualize the wealth of information currently withheld from consumers.

Part I proceeds by chronicling bourbon's modern history to inform the reader of the spirit's resurging popularity and the relationship between growth and consumer education. Additionally, Part I reviews the geographical indications available at the national and international level. The section continues by outlining the current legal protections of bourbon and highlighting those protections' deficiencies at educating consumers of bourbon's characteristics. To conclude, the section argues that bourbon's American origin is protected by the current legal protections, but its marketability is not enhanced in any meaningful way.

Part II of this Note asserts that current protections fail to inform consumers of bourbon's unique characteristics. The section reviews the poor labelling practices of the industry and continues by sharing research on foreign markets' confusion towards bourbon's identity. The section concludes by identifying ineffective geographical indications that the industry should not implement.

Part III of this Note presents resolutions to fulfill the need for consumer education. The section highlights the Kentucky Proud trademark's availability to a small sector of bourbons that are authentically Kentucky-made. Noting that the Kentucky Proud trademark is not an industry-wide solution, Part III recommends the adoption of a mark certifying quality. Additionally, Part III examines the certification mark's economic value, marketing power, flexibility to accommodate the diversity of the industry, and access to a developing theory of recovery for its misuse.

This Note concludes by emphasizing the unique opportunity the bourbon industry has to capitalize on soaring popularity. Collaborative

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<sup>9</sup> *Id.*

<sup>10</sup> Olivia White, *Ask a Whiskey Pro: What is a Bourbon Tater?*, THE VINEPAIR PODCAST (Jan. 28, 2022), <https://vinepair.com/articles/ask-a-pro-bourbon-tater/> [<https://perma.cc/5GY8-QV83>].

<sup>11</sup> *Id.*

development and rigid enforcement of quality standards paired with proactive marketing will illuminate the unique qualities of bourbon, ultimately increasing demand for the spirit. The overall goal of this Note, therefore, is to analyze the available legal mechanisms for increasing consumer knowledge so that lawmakers, industry powers, and enthusiasts may champion the growth of bourbon.

## I. BACKGROUND

Understanding bourbon's production is necessary to grasp the wealth of information that geographical indications can share with consumers. Moreover, reviewing the industry's history—starting in the 1980s with the revitalization campaign through bourbon's booming popularity today—is critical to conceptualize the industry's unique opportunity to create long-lasting relationships with consumers. Lastly, it is essential to review the available geographical indications at the international and national level so their applicability to the bourbon industry may be discussed later.

### A. *How Bourbon Is Made*

It all starts with the mash bill, which “is a recipe of sorts” identifying the grains and their respective proportions to be used in distillation.<sup>12</sup> Bourbon's mash bill will always show at least 51% corn because the spirit's legal definition mandates that percentage as the minimum requirement.<sup>13</sup> Corn is responsible for bourbon's sweetness that, unlike other grains that lose flavor over time, becomes more robust throughout the aging process.<sup>14</sup>

The remaining ingredients on a mash bill are typically rye or wheat and malted barley.<sup>15</sup> Rye provides a spicy flavor profile while wheat is less flavorful, “allow[ing] more of the corn's sweetness and vanilla from the barrel to come through.”<sup>16</sup> Malted barley contains the enzymes that convert the various grains' starches to sugars.<sup>17</sup> Although “distillers sometimes

<sup>12</sup> *Learn About Bourbon*, RABBIT HOLE, <https://www.rabbitholedistillery.com/blogs/bourbon-101/learn-about-bourbon> [<https://perma.cc/D2V5-7TG9>] (last visited Oct. 28, 2022).

<sup>13</sup> *Id.*; 27 C.F.R. § 5.143 (c)(2).

<sup>14</sup> NEAT: THE STORY OF BOURBON (Vinegar Hill 2018) (on file with author).

<sup>15</sup> BRIAN F. HAARA, BOURBON JUSTICE: HOW WHISKEY LAW SHAPED AMERICA 9 (2018) (reviewing bourbon's historical background and unique relationship with America's legal system, particularly in the realm of consumer protection).

<sup>16</sup> *All About Wheated Bourbon – The History, Character, and Flavors*, TASTER'S CLUB, <https://tastersclub.com/blogs/articles/wheated-bourbon> [<https://perma.cc/8UN4-X2XF>] (last visited Jan. 21, 2023).

<sup>17</sup> NEAT: THE STORY OF BOURBON, *supra* note 14; Susan Reigler, *Beyond Fermentation – How Yeast Contribute to Bourbon Flavor*, BOURBON WOMEN: WHISKEY EDUC. (Apr. 30, 2021), <https://bourbonwomen.org/yeast-bourbon-flavor/#:~:text=The%20reason%20bourbons%20vary%20in,different%20strains%20produce%20different%20esters> [<https://perma.cc/3C5Z-WRB7>].

experiment with other secondary grains,” rye or wheat and malted barley are the most popular choices in the industry.<sup>18</sup>

Once the mash bill is selected, the ingredients are finely ground, heated, and mixed with water to gelatinize and release the starches and sugars within so fermentation may begin.<sup>19</sup> Fermentation is the process in which yeast is added to the mash to convert the starches and sugars of the grains to alcohol, which is visible in the “gassy bubbles and strong earthy smell” released from the mash vessels.<sup>20</sup>

All distilleries use the same species of yeast called “*Saccharomyces cerevisiae*,” but “bourbons vary in their detectable aromatics<sup>21</sup> . . . [because] each distillery uses its own proprietary yeast strain.”<sup>22</sup> Generations of distillers preserved their proprietary yeast strains for consistency, creating unique flavors that have become associated with their respective brand over time.<sup>23</sup> Bourbon enthusiasts often detect distinct scents in their favorite brands because of the particular yeast used.<sup>24</sup>

Next in the production process is distillation, which is the separation of the mash from the alcohol and water mixture.<sup>25</sup> The mash is added to a still—a pot that heats the mash so the alcohol content within will evaporate.<sup>26</sup> The condensed vapors form “a clear, high-alcohol liquid” that is “the precursor to a finished bourbon product.”<sup>27</sup> This liquid is often called “white dog” or simply “juice.”<sup>28</sup> The white dog is placed in a new charred oak barrel and shipped to a warehouse where it will age.<sup>29</sup>

A non-negotiable aspect of the aging process is the storage of white

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<sup>18</sup> BRYAN F. HAARA, *supra* note 15, at 11.

<sup>19</sup> NEAT: THE STORY OF BOURBON, *supra* note 14; RABBIT HOLE, *supra* note 12.

<sup>20</sup> RABBIT HOLE, *supra* note 12.

<sup>21</sup> The smell released in the fermentation process is a “class of aromatic compounds called esters,” which are “the molecules that lend fruits and flowers their various characteristic scents.” Susan Reigler, *supra* note 17.

<sup>22</sup> *Id.*

<sup>23</sup> NEAT: THE STORY OF BOURBON, *supra* note 14; *see also* Susan Reigler, *supra* note 17 (“Most of the major distilleries have laboratories where they employ microbiologists to propagate their yeast strains, which are stored in cryogenic freezers at minus 80 degrees Celsius. They are also usually stored at multiple sites in case of a prolonged power failure at one. Since all forms of life have a pesky habit of evolving over generations, yeast, which like other microorganisms can produce multiple generations in a matter of hours, not decades, the distilleries’ scientists also monitor the yeast populations for mutations. . . . Smaller distilleries simply buy their yeast from laboratories that specialize in developing and propagating different strains that produce different esters once they settle on the one with the aromatics they are looking for in their whiskeys.”).

<sup>24</sup> *See* Susan Reigler, *supra* note 17 (“For example, a lot of people can detect the scent of banana on the nose of Old Forester expressions. Peach is a commonly identified aromatic on the nose of Elijah Craig. Famously, Four Roses Distillery has five different proprietary yeast strains, variously characterized as delicately fruity, lightly spicy, richly fruity, floral, and herbal.”).

<sup>25</sup> NEAT: THE STORY OF BOURBON, *supra* note 14.

<sup>26</sup> RABBIT HOLE, *supra* note 12.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

dog in a new charred oak barrel.<sup>30</sup> Charring a barrel “change[s] the wood chemistry—creating new, more favorable compounds that will be extracted by the spirit through the aging process.”<sup>31</sup> Among these compounds is vanillin and simple sugars, which impart bourbon’s warm vanilla and caramel flavor tones.<sup>32</sup> Every barrel holds its own set of compounds that create a unique flavor profile; a barrel may taste different from the one sitting next to it.<sup>33</sup> The “oak tannins [in every barrel] lend color and mouthfeel to the final product” of the aging process.<sup>34</sup>

To fully benefit from storage in the new charred oak barrel, the liquid must experience the fluctuating temperatures of the changing seasons.<sup>35</sup> In the summer, when temperatures rise, liquid expands “forc[ing] whiskey into the wood” where it comes in contact with the extractives stored within the oak.<sup>36</sup> In winter, “as the weather turns colder, there is a pressure drop within the barrel[,] and whiskey is pulled back inside bringing the yummy compounds along.”<sup>37</sup> The longer whiskey remains within the barrel, the more flavorful it becomes because “[f]lavors are continuously created, destroyed, and then replaced with new ones” throughout the changing seasons.<sup>38</sup> Crafting bourbon, therefore, requires great patience because the flavor and color yielded by the aging process is not achieved overnight but instead takes multiple years to develop.<sup>39</sup>

### B. Bourbon’s Modern History

After the passage of the Bottled-in-Bond Act in 1897,<sup>40</sup> bourbon’s popularity flourished.<sup>41</sup> The spirit became a favorite of consumers until Prohibition effectively eliminated the spirits industry by outlawing the production, importation, transportation, and sale of alcohol.<sup>42</sup> After the 21<sup>st</sup>

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<sup>30</sup> See 27 C.F.R. §5.143 (c)(2) (reviewing bourbon’s legal definition that requires the spirit be stored in a charred new oak barrel).

<sup>31</sup> Andrew Wiehebrink, *A Formula for Maturation*, INDEP. STAVE CO. (Jan. 18, 2017), <https://www.iscbarrels.com/a-formula-for-maturation-by-andrew-w/> [<https://perma.cc/K236-4XK4>].

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> NEAT: THE STORY OF BOURBON, *supra* note 14.

<sup>40</sup> Bottled-in-Bond Act of 1897, ch. 379, 2929 Stat. 626 (1897). Historically noted as the first consumer protection law in the United States, the Bottled-in-Bond Act required distilleries to deliver a pure product to give consumers the assurance the spirit they drank was actually bourbon. See *Bottled in Bond*, THE BOURBON OBSERVER (May 27, 2009), <http://bourbonobserver.blogspot.com/2009/05/bottled-in-bond.html> [<https://perma.cc/T8GY-ATJQ>] (providing a historical overview of the Bottled-in-Bond Act of 1897).

<sup>41</sup> NEAT: THE STORY OF BOURBON, *supra* note 14.

<sup>42</sup> U.S. Const. amend. XVIII (repealed 1933).

Amendment repealed Prohibition in 1933, however, bourbon's demand quickly resurged and continued to do so for 30 years more.<sup>43</sup> In 1964, in recognition of its cultural and historical significance, Congress declared bourbon America's native spirit.<sup>44</sup>

Paradoxically, bourbon's historical significance factored into its decline in the latter half of the 1960s.<sup>45</sup> Inspired by the social movements of the time, younger generations rejected the principles of their parents, which unfortunately included consuming bourbon.<sup>46</sup> Instead, vodka, beer, and wine soared in popularity leaving bourbon virtually unknown outside the borders of Kentucky.<sup>47</sup> The bourbon industry tried to evolve by altering the spirit to mimic its clear-liquor competitors, but the process stripped the spirit of its identifying characteristics and further decreased demand.<sup>48</sup>

Thousands and thousands of barrels sat in aging warehouses—otherwise called rickhouses—untouched.<sup>49</sup> The bourbon industry remained stagnant, if not in decline, until the 1980s when the creativity of industry executives revived interest in the spirit.<sup>50</sup> In 1984, Elmer T. Lee—the master distiller at Buffalo Trace—created the first small batch<sup>51</sup> release of bourbon when he introduced “the world's first single-barrel bourbon, [called] Blanton's Single Barrel.”<sup>52</sup> Prior to Elmer T. Lee's creation, distilleries aged bourbon in large batches of barrels for the sake of consistency.<sup>53</sup> The small-scale production of Blanton's Single Barrel was unique and proved wildly popular.<sup>54</sup>

Other brands followed suit by releasing their own take on single-

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<sup>43</sup> *Id.* amend. XXI.; NEAT: THE STORY OF BOURBON, *supra* note 14.

<sup>44</sup> S. Con. Res. 19, 88th Cong., 78 Stat. 1208 (May 4, 1964).

<sup>45</sup> NEAT: THE STORY OF BOURBON, *supra* note 14.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Technically, the term small batch holds no meaning. The Alcohol and Tobacco Tax and Trade Bureau does not recognize the small batch distinction in its definitions of bourbon whiskey variants. Practically, the term refers to a smaller production of bourbon in relation to a distillery's standard batch size. Thus, the term is a relative concept because there is a wide discrepancy across the industry in the number of barrels used in each distillery's standard batch size. For example, a large-scale distillery that typically fills 1,000 barrels in a standard batch may use 400 to 500 barrels in its production of a small batch release. The 400 to 500 barrel quantity may, however, equal the largest production scale of a smaller distillery. The small distilleries, likewise, have their own small batch releases, representing a significantly smaller batch than that of a large-scale distillery at around 100 barrels. For further information on the meaning of small batch, see Will Price, *What the Hell is Small Batch Bourbon?*, GEAR PATROL (Oct. 10, 2021), <https://www.gearpatrol.com/food/drinks/a36688708/small-batch-bourbon-whiskey/> [<https://perma.cc/Y2X6-3M2A>].

<sup>52</sup> *The Legendary Craftsman Elmer T. Lee*, BUFFALO TRACE DISTILLERY, <https://www.buffalotracedistillery.com/legendary-people/lee.html> [<https://perma.cc/8WP9-CCYZ>] (last visited Nov. 6, 2022).

<sup>53</sup> NEAT: THE STORY OF BOURBON, *supra* note 14.

<sup>54</sup> *Id.*

barrel and small batch bourbons.<sup>55</sup> While bourbon remained “a drink of the past,” the introduction of novel releases like small batch bourbon, buttressed by a recommitment to sharing the industry’s history, gave the phrase new meaning.<sup>56</sup> Bourbon was no longer outdated and boring—its craftsmanship and history attracted consumers in the masses, resulting in the spirit’s exponential growth over the last 40 years.<sup>57</sup>

Kentucky’s bourbon industry, which is responsible for 95% of global production of the spirit, demonstrates the economic growth that occurred in tandem with its resurging popularity.<sup>58</sup> In its most recent economic impact report—released in February of 2023 and primarily based on economic and fiscal data through 2022—the Kentucky Distillers’ Association (KDA) estimated that Kentucky’s bourbon industry represented an estimated “23,100 jobs with annual salaries and wages of \$1.63 billion, with full labor income including fringe benefits and proprietors’ income of \$2.16 billion, producing \$9 billion of economic output” for the state.<sup>59</sup> Additionally, the report recorded investments “of \$1.9 billion over the last five years,” with \$3.5 billion more to be invested over the next five years.<sup>60</sup> Reaffirming the economic prosperity of the bourbon industry, Governor Andy Beshear “announced that in 2022 [alone], Kentucky recorded its best year for growth of its signature bourbon and spirits industry, with over \$2.1 billion in new investments and approximately 700 new jobs for Kentucky residents.”<sup>61</sup> Included in that \$2.1 billion is a pledged \$600 million investment by The Sazerac Company—whose portfolio of bourbons includes Buffalo Trace, Pappy Van Winkle, and W.L. Weller to name a few<sup>62</sup>—to build 20 barrel

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> John McCarthy, *Whiskey Wars: How Bourbon And Scotch Became Pawns In Global Trade Disputes*, FORBES MAGAZINE (Mar. 25, 2021), <https://www.forbes.com/sites/johnmccarthy12/2021/03/25/whiskey-wars-how-bourbon-and-scotch-became-pawns-in-global-trade-disputes/?sh=6f4408c840c1> [<https://perma.cc/XB3Q-B25X>]; NEAT: THE STORY OF BOURBON, *supra* note 14.

<sup>58</sup> Kentucky Distillers’ Ass’n, *Did You Know?*, KY. BOURBON TRAIL, <https://kybourbontrail.com/about/> [<https://perma.cc/BY6M-Q78X>] (last visited Feb. 7, 2024) (“[I]n the last two years alone, use of locally grown corn has increased by 65 percent, supporting Kentucky’s farm families. Bourbon’s economic output increased by \$1 billion, adding another 2,000 distillery-related jobs to its workforce. Pouring more than \$8.5 billion into the state’s economy every year, Kentucky Bourbon generates 17,500 well-paying jobs with an annual payroll of more than \$800 million.”).

<sup>59</sup> Paul Coomes & Barry Kornstein, *The Economic and Fiscal Impacts of the Distilling Industry in Kentucky* (Dec. 31, 2023), <https://kybourbon.com/wp-content/uploads/2024/02/Economic-and-Fiscal-Impacts-FINAL-2-6-24.pdf> [<https://perma.cc/JKZ8-WKTY>] (providing the most recent data on the economic and fiscal impact of the distilling industry in Kentucky).

<sup>60</sup> *Id.*

<sup>61</sup> Press Release, Andy Beshear, Governor of the Commonwealth of Kentucky, Kentucky’s Bourbon and Spirits Industry Continues To Thrive With All-Time Highs of \$2.1 Billion in New Investments and 700 Full-Time Jobs Announced in 2022 (Dec. 15, 2022), [https://ced.ky.gov/Newsroom/NewsPage/20221215\\_BourbonSuccess](https://ced.ky.gov/Newsroom/NewsPage/20221215_BourbonSuccess) [[perma.cc/H5T4-YG38](https://perma.cc/H5T4-YG38)].

<sup>62</sup> See *Refined Spirits*, SAZERAC <https://www.sazerac.com/our-brands/sazerac-brands.html>

warehouses and expand its number of cooperages<sup>63</sup> in London, Kentucky.<sup>64</sup>

Such investments signal brands' confidence that bourbon's popularity will continue to grow, but alarming threats exist that call into question the longevity of this upward trend.<sup>65</sup> For example, a current "flooding of the market . . . [with] so many collectors-edition offerings"<sup>66</sup> is creating a collectors' mentality amongst consumers.<sup>67</sup> Accordingly, stores take advantage of this mentality by "mark[ing] up . . . a bottle that once would sell for \$75 . . . [to] a \$500 price tag."<sup>68</sup> Although "the current economic numbers seem to be on bourbon's side," the spirit's appeal is unfortunately limited by this new trend.<sup>69</sup> The everyday consumer is not likely to purchase bourbon at an inflated price, yet alone repeatedly purchase the spirit.<sup>70</sup>

Moreover, the industry's shift to a collectors' mentality departs from the days when "bourbon used to be a liquid for every person."<sup>71</sup> The revitalization efforts of the 1980s focused on cultivating a knowledgeable and passionate consumer base;<sup>72</sup> industry powers "doubled down [by] educating consumers about [b]ourbon's story, then spent another fortune building multi-million dollar visitor centers, urban visitor sites, and bars and restaurants to solidify Kentucky as a tourist destination."<sup>73</sup> The industry's current practices, however, demonstrate a hyper-fixation on exclusivity<sup>74</sup> that

[<https://perma.cc/96ZY-WF3K>] (last visited Jan. 21, 2023).

<sup>63</sup> A cooper is a woodworker that "makes wooden, staved vessels, such as barrels, buckets, tubs, and other containers." Colonel Bourbon, *What is a Cooperage? Making Bourbon Barrels*, COLONEL BOURBON SHIRTS: BOURBON BLOG (Oct. 8, 2021), <https://colonelbourbontshirts.com/blogs/colonel-bourbon-blog/what-is-a-cooperage-making-bourbon-barrels> [<https://perma.cc/N9VJ-67FS>].

<sup>64</sup> Kirk Miller, *What Recession? Kentucky Bourbon Brands Are Spending Millions on Expansion.*, INSIDEHOOK (Dec. 12, 2022), [https://www.insidehook.com/daily\\_brief/booze/sazerac-whiskey-expansion](https://www.insidehook.com/daily_brief/booze/sazerac-whiskey-expansion) [<https://perma.cc/97G7-L9DH>].

<sup>65</sup> THE VINEPAIR PODCAST, *supra* note 8.

<sup>66</sup> *Id.*

<sup>67</sup> Savannah Sicurella, *The Hunt for Bourbon: Scarcity Leads Collectors to Line up All Night at Atlanta Bottle Shop*, ATLANTA BUS. J. (Dec. 14, 2022), <https://www.bizjournals.com/atlanta/news/2022/12/14/elemental-sale-bourbon-2022.html> [[perma.cc/6GGK-XS7D](https://perma.cc/6GGK-XS7D)].

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Clay Risen, *Where Did All the Bourbon Go? Blame the Whiskey Mania.*, N.Y. TIMES (Dec. 29, 2022), <https://www.nytimes.com/2022/12/29/dining/drinks/bourbon-prices-american-whiskey.html> [<https://perma.cc/8RZ5-NBH8>] ("The price leap is not just at the luxury level. Everyday bourbons like Buffalo Trace or Eagle Rare, which once sold for about \$35, now often go for twice that. . . . 'Today, \$75 is the new \$35,' said Dixon Dedman, who created Kentucky Owl, one of the first luxury American whiskeys not called Pappy. Mr. Dedman and his partners sold Kentucky Owl to Stolichnaya for an undisclosed sum in 2017, and he just introduced a new brand, 2XO, with a retail price starting at \$95.").

<sup>71</sup> THE VINEPAIR PODCAST, *supra* note 8.

<sup>72</sup> Clay Risen, *supra* note 70 ("Bourbon fans were becoming better educated, and with that education came a willingness to pay more for higher quality and, even more important, exclusivity. In response, distilleries began to offer limited-release bottles with unusual qualities—drawn from a single barrel, for example, or bottled at high proof—which fueled interest.").

<sup>73</sup> John McCarthy, *supra* note 57.

<sup>74</sup> Clay Risen, *supra* note 70.

primarily caters to the demands of “a faction of enthusiasts called ‘bourbon hunters’ who will travel across state lines, track the inventory of stores and pay hundreds of dollars for a rare bottle.”<sup>75</sup>

The industry caters to this faction of enthusiasts by barraging consumers with small batch and collector’s edition releases in order to create a mirage of scarcity.<sup>76</sup> An unfortunate byproduct of this effort, however, is the industry’s failure to inform consumers about the nuances of bourbon’s production and flavor-profile.<sup>77</sup> As a result, many bourbon hunters primarily operate on principles of scarcity rather than true understanding of the spirit, which is demonstrated by the rising sales of counterfeits.<sup>78</sup> The perils of deficient knowledge—namely ignorance of brands’ quality and taste offerings—unfortunately extends beyond the designation of bourbon hunters.<sup>79</sup>

In general, uninformed consumers are more likely to purchase bourbon based on notions of prestige and, if the taste does not meet their expectations, give up on the spirit altogether rather than make another expensive purchase with no clear indication of satisfaction.<sup>80</sup> Counterfeit bourbons, therefore, threaten to “deceive buyers and deliver a suboptimal customer experience” that directly contributes to consumer dissatisfaction.<sup>81</sup> Moreover, variants in the industry’s product offerings, such as the emerging market of blended and sourced bourbons, threaten to further confuse uninformed consumers.<sup>82</sup>

<sup>75</sup> Savannah Sicurella, *supra* note 67. The demand for exclusive bourbons reached extreme heights when an employee of Virginia’s Alcoholic Beverage Control Authority pled guilty to computer trespassing after feeding confidential information about when and where rare bourbons would be sold in state-run liquor stores to a third party who subsequently sold the list to bourbon hunters. See Press Release, Virginia Alcoholic Beverage Control Authority, Garcia Guilty Plea (Sept. 19, 2022); see also *Oregon Officials Lose Their Job After Keeping Rare Pappy Van Winkle Bourbon for Themselves*, ASSOCIATED PRESS (Feb. 9, 2023), <https://www.nbcnews.com/news/us-news/oregon-officials-lose-job-keeping-rare-pappy-van-winkle-bourbon-rcna69883> [https://perma.cc/Y2D3-6K7W] (“An internal investigation by the Oregon Liquor and Cannabis Commission . . . concluded that Executive Director Steve Marks and five other agency officials had diverted sought-after bourbons, including Pappy Van Winkle’s 23-year-old whiskey, for their personal use.”).

<sup>76</sup> Clay Risen, *supra* note 70.

<sup>77</sup> THE VINEPAIR PODCAST, *supra* note 8 (“You don’t really know who these producers are. You can’t say the names. You don’t know if the \$150 on this single malt is worth it or not; is a 12-year-old that’s \$200 better than the 18-year-old that’s only \$100 but comes from a distillery that you’ve never heard of before.”).

<sup>78</sup> *Id.* (“[Y]ou find often the person in the shop is like, we don’t have Blanton’s. Why don’t we have Blanton’s? They’re saying Blanton’s is really hard to find. You might not realize that. It’s very rare you would find it nowadays, but here are five other bourbons of the quality of Blanton’s around the same price point that are just as impressive or something. We have to get to that stage, I think in bourbon, so that consumers feel more comfortable or it’s just going to always be something where people just are looking for the biggest brand.”); see also Mike Pomeranz, *Bourbon Collecting Is On the Rise – So Are Counterfeit Bottles*, FOOD&WINE (Jan. 10, 2022), <https://www.foodandwine.com/news/counterfeit-bourbon-report> [https://perma.cc/7Q3V-CDTX].

<sup>79</sup> THE VINEPAIR PODCAST, *supra* note 8.

<sup>80</sup> See *Fake Bourbon In The Premium Whisky Sector – How To Prevent It?*, AUTHENA (Feb. 14, 2022), <https://authena.io/fake-bourbon/> [https://perma.cc/N865-C7XS].

<sup>81</sup> *Id.*

<sup>82</sup> See Brad Japhe, *Blended Bourbon: The Next Trend in American Whiskey?*, DISTILLER (Apr. 14, 2019),

Blending is the process whereby a distiller mixes different aged or different quality bourbons to create a unique flavor profile.<sup>83</sup> A brand may combine the variants of its own juice<sup>84</sup> to create a blended bourbon.<sup>85</sup> Similarly, sourcing describes a bourbon that “was not produced by the distillery that is selling it.”<sup>86</sup> Instead, the bourbon was made elsewhere—it may be another distiller’s leftover juice that will be aged by the purchasing brand and sold under their label, or it may be fully aged bourbon that is bottled and sold by the purchasing brand.<sup>87</sup> Blending and sourcing are a common practice amongst new entrants to the bourbon industry that lack the necessary capital to purchase their own distilling equipment.<sup>88</sup>

Unbeknownst to many consumers is the pervasive presence of a particular bourbon producer called the Midwest Grain Product of Indiana (MGP).<sup>89</sup> MGP’s business focuses on sourcing by producing standard recipe bourbons that are shipped on a massive scale to bottlers across the country who then sell the product as their own “unique” creation.<sup>90</sup> The presence of sourcing, and especially widespread use of MGP’s juices, complicates consumers’ pursuit of a distinctive bourbon. Simply put, “[if] you want to know where [a] product originates . . . [t]hat isn’t always possible or easy with MGP origin bourbons.”<sup>91</sup> Accordingly, there is an increasing amount

<https://distiller.com/articles/blended-bourbon> [https://perma.cc/UW7U-75HH].

<sup>83</sup> Mark Pringle, *What is Blended Whiskey (Bourbon)? A Quick Reference Guide*, THE PEOPLE’S BOURBON REV. (Aug. 4, 2022), [https://www.peoplesbourbonreview.com/articles/what-is-blended-whiskey-\(bourbon\)-a-quick-reference-guide](https://www.peoplesbourbonreview.com/articles/what-is-blended-whiskey-(bourbon)-a-quick-reference-guide) [https://perma.cc/V2PY-L6HA].

<sup>84</sup> Recall that juice is the clear, high-alcohol liquid that is the precursor to a finished bourbon. See RABBIT HOLE, *supra* note 12.

<sup>85</sup> Four Roses Bourbon is a popular blended bourbon. The designation of blended, however, likely goes unnoticed by many consumers because the brand describes its bourbon as 10 distinct recipes “mingl[ed] . . . to achieve an endless range of flavor profiles.” *Our Recipes*, FOUR ROSES BOURBON, <https://fourrosesbourbon.com/our-recipes/> [https://perma.cc/LH5X-ZGLQ] (last visited Feb. 22, 2023).

<sup>86</sup> *What Bourbons Are Sourced*, WARD III (Dec. 12, 2022), <https://ward3.com/what-bourbon-ares-sourced/> [https://perma.cc/R43S-UQZ3].

<sup>87</sup> *Id.*

<sup>88</sup> Sourcing and blending lower the barriers to market entrance by allowing distillers to create bourbon without having to invest the immense capital needed to purchase distilling and aging equipment. Some distillers transition to producing their own bourbon once they acquire the capital needed to purchase the necessary equipment, while others make their careers creating artful blends. See Stacy Jackson, *HBCU Grad, One of First Black Women Whiskey Blenders in U.S. Releases Her Own Bourbon*, BLACK ENTER. (Jan. 10, 2023), <https://www.blackenterprise.com/alabama-am-grad-one-of-the-first-black-women-whiskey-blenders-in-the-u-s-releases-bourbon/> [perma.cc/D9QU-JFMW] (chronicling Eboni Major’s journey to notoriety as “one of the first Black female whiskey blenders in the U.S.”). See generally BARDSTOWN BOURBON CO., <https://www.bardstownbourbon.com/> [https://perma.cc/QP8E-WZ68] (last visited Feb. 22, 2023) (detailing the brand’s original activity of sourcing and blending its product through today, as the brand makes its own spirit, even selling its juice to other private labels).

<sup>89</sup> *Sourced Bourbon What You Should Know*, RABBIT HOLE, <https://www.rabbitholedistillery.com/blogs/bourbon-101/mgp-bourbon-what-your-should-know> [https://perma.cc/C8WJ-8RKM] (last visited Feb. 22, 2023).

<sup>90</sup> *Id.*; see also *Distilling Solutions: Bourbon*, MGP, <https://www.mgpingredients.com/distilling-solutions/beverage/product/bourbon> [https://perma.cc/6VMQ-WJQ] (last visited Feb. 22, 2023).

<sup>91</sup> RABBIT HOLE, *supra* note 89.

of consumer protection litigation regarding deceptive marketing of sourced products.<sup>92</sup>

The threat of consumer confusion thus makes the industry's recent round of immense investments merely "a long-term bet."<sup>93</sup> By forgetting its historical roots and craftsmanship, the industry dooms its connection with everyday consumers and in turn threatens its investments.<sup>94</sup> There is no question that "bourbon . . . is going to continue to grow" but it will also "continue to be pretty confusing to most people."<sup>95</sup> Although there is hope that the general buzz around bourbon will compel interested consumers to do their own research to learn about the spirit, the threat of misinformation continues to loom in the shadows of bourbon's success.<sup>96</sup>

The industry would be well-served by circling back to the consumer education efforts from the 1980s' revitalization campaign.<sup>97</sup> As consumers increasingly focus on craft foods and beverages, bourbon is uniquely equipped with a "weapon [that] has been in its arsenal the whole time . . . bourbon's greatest power is its story."<sup>98</sup> The strength of bourbon's story lies in the "individuals and the distilleries and their recipes and their legacy and their practices."<sup>99</sup> Fortunately, there are legal mechanisms—both at the national and international level—through which to preserve the integrity of bourbon while sharing its story and craftsmanship.<sup>100</sup>

### C. An Overview of Geographical Indications

Throughout history, identifying a product's geographical source has been "a favored method of product identification."<sup>101</sup> Thus, products often have geographic identifiers such as an indication of source stating *made in*

<sup>92</sup> See generally *Alliano v. WhistlePig, LLC*, No. 14 C 10148, 2015 WL 2399354 (N.D. Ill. May 18, 2015) (class action lawsuit against WhistlePig Straight Rye Whiskey for fraudulent and deceptive trade practices. The brand described its whiskey as a small farm-based operation that was the nation's first farm-to-bottle distillery but, in actuality, sourced its product from a large distillery in Alberta, Canada). See also Josh Noel, *Templeton Rye Reaches Lawsuit Settlement, Will Pay Refunds*, CHICAGO TRIBUNE (July 14, 2015), <https://www.chicagotribune.com/dining/ct-templeton-rye-settlement-20150714-story.html> [<https://perma.cc/KYV8-YR38>] (describing a settlement in which anyone who bought a bottle of Templeton Rye since 2006 was entitled to a refund of \$3 per bottle. The settlement resolved a class-action lawsuit in Cook County in which a man claimed that Templeton Rye Spirits deceptively marketed its whiskey as an Iowa product when, in fact, the spirit was primarily distilled and aged at a plant owned by MGP).

<sup>93</sup> Kirk Miller, *supra* note 64.

<sup>94</sup> See *id.*

<sup>95</sup> THE VINEPAIR PODCAST, *supra* note 8.

<sup>96</sup> *Id.*

<sup>97</sup> NEAT: THE STORY OF BOURBON, *supra* note 14.

<sup>98</sup> Bryce Wiatrak, *supra* note 1.

<sup>99</sup> *Id.*

<sup>100</sup> See generally James Bonar-Bridges, *The Proof Is on the Label? Protecting Kentucky Bourbon in the Global Era*, 8 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 491 (2016).

<sup>101</sup> Lee Bendekygey & Caroline H. Mead, *International Protection of Appellations of Origin and Other Geographic Indications*, 82 TRADEMARK REP. 765, 765 (1992).

*China* or any “word, phrase, or symbol” to designate where the product was produced “regardless of reputation.”<sup>102</sup> Additionally, global intellectual property mechanisms include geographical indications, which inform consumers of a product’s origin while protecting the investment and innovation of producers by “designat[ing] the place where a product was produced and that the place is known to produce that item with particular desirable qualities.”<sup>103</sup> To clarify, a geographical indication is more precise than an indication of source, because the geographical indication recognizes the impact of the environment on the product’s unique qualities.<sup>104</sup>

In other words, a product with a geographical indication holds a land-quality nexus whereby a product’s characteristics may be attributed to the environment in which it was produced.<sup>105</sup> A geographical indication often pairs a geographic term with the generic term for a product (e.g., Irish whiskey), but the geographic term may also stand alone (e.g., Scotch).<sup>106</sup> The geographic term typically represents “either towns (Roquefort, Chablis), or sub-national regions such as states (Idaho potatoes), departments (cognac), or counties (Bourbon),” but not a larger region like the United States because the vast area covered by the national-designation weakens the likelihood that a product’s characteristics are consistent across that region or even uniquely attributable to the area.<sup>107</sup>

Geographical indications developed during the industrialization of early economies.<sup>108</sup> During that time, the emphasis on a land-quality nexus increased as consumers sought to distinguish “the products of one manufacturer from the same type of products manufactured by local

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<sup>102</sup> Justin Hughes, *Champagne, Feta, and Bourbon: The Spirited Debate About Geographical Indications*, 58 HASTINGS L.J. 299, 305 (2006).

<sup>103</sup> James Bonar-Bridges, *supra* note 100, at 497–98.

<sup>104</sup> *Frequently Asked Questions: Geographical Indications*, WIPO, [https://www.wipo.int/geo\\_indications/en/faq\\_geographicalindications.html](https://www.wipo.int/geo_indications/en/faq_geographicalindications.html) [https://perma.cc/ASK4-YU5E] (last visited Feb. 7, 2024) (“In contrast to a geographical indication, an indication of source does not imply the presence of any special quality, reputation, or characteristic of the product essentially attributable to its place of origin. Indications of source only require that the product on which the indication of source is used originate in a certain geographical area.”).

<sup>105</sup> James Bonar-Bridges, *supra* note 100, at 305, 307.

<sup>106</sup> *Id.* at 305.

<sup>107</sup> *Id.* at 306. The use of a name that does not indicate a place may also serve as a geographical indication. This practice is controversial because, like the designation of a product to a larger region, a name that does not indicate a place does little to identify how a specific region is responsible for the product’s unique and consistent characteristics. For example, the term feta is a geographical indication belonging to Greece that does not actually represent a place within the country. Accordingly, contention amongst nations of the European Union results from its use. *See* Press Release No. 92/05, Eur. Court of Justice, Judgment of the Court of Justice in Joined Cases C-465/02 and C-466/02, The Court of Justice Upholds the Name ‘Feta’ as a Protected Designation of Origin For Greece (Oct. 25, 2005), [https://ec.europa.eu/commission/presscorner/detail/en/CJE\\_05\\_92](https://ec.europa.eu/commission/presscorner/detail/en/CJE_05_92) [https://perma.cc/T2NZ-94KW].

<sup>108</sup> Lee Bendekygey & Caroline H. Mead, *supra* note 101, at 765.

competitors.”<sup>109</sup> Nations developed designation systems, but systemic differences across continents (and even within countries) led to a fractioned system globally.<sup>110</sup>

Generally, countries can be divided into two categories.<sup>111</sup> The first category is “Old World/civil law jurisdictions,” which use a *sui generis*<sup>112</sup> system to provide unique and specific protection to geographical indications.<sup>113</sup> The second category, “New World/common law jurisdictions” use “the pre-existing trademark regime” to protect geographical indications—typically as collective marks or certification marks.<sup>114</sup>

Old World countries are primarily European because their economies have longer traditions of localized industries.<sup>115</sup> Moreover, the existence of longstanding localized industries arguably strengthens Old World countries’ interest in protecting geographical indications.<sup>116</sup> In contrast, New World countries such as the United States have more recently developed economies and fewer localized industries.<sup>117</sup> The systemic differences of the Old and New World systems resulted in their “divergent evolutions” and the “international conflict over the proper treatment and protection of geographic[al] indications” that persists today.<sup>118</sup>

Today, the conflicting systems result in difficulties for producers seeking protection for their products, confusion for consumers selecting products with inconsistent descriptions, and considerable discourse amongst intellectual property scholars seeking to reconcile the systems.<sup>119</sup>

<sup>109</sup> *Id.*

<sup>110</sup> *See id.*; Benjamin Robert Hopper, *Whither (Wither?) Geographical Indications? The Case Against Geographical Indications and for Appellations of Origin in an Era of Glocalization*, 16 CHL-KENT J. INTELL. PROP. 210, 226 (2016) (discussing the clash between Old and New World approaches to geographical indications, and the international treaty regime’s failure to bridge the gap between the competing systems).

<sup>111</sup> Benjamin Robert Hopper, *supra* note 110.

<sup>112</sup> In the context of geographical indications, a *sui generis* system relies on the concept of *terroir*, which is the idea that “a particular land is a key input for a particular product.” Justin Hughes, *supra* note 102, at 301.

<sup>113</sup> Benjamin Robert Hopper, *supra* note 110.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 227.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*; *see also* *The Guide to Old World Wine vs. New World Wines*, VINE PAIR, <https://vinepair.com/wine-101/guide-old-world-vs-new-world-wines/> [<https://perma.cc/D2NX-Y96K>] (last visited Oct. 31, 2022) (exploring the distinction of Old World and New World markets in the context of the wine industry).

<sup>118</sup> Lee Bendekygey & Caroline H. Mead, *supra* note 101, at 766; *see also* Benjamin Robert Hopper, *supra* note 110, at 212 (2016) (“Although key international agreements . . . sought to ‘bridge the gap’ between the two systems . . . this article finds that there is an inherent, irreconcilable tension between the two systems, making the gap unbridgeable.”).

<sup>119</sup> *See generally* Justin Hughes, *supra* note 102; Lillian V. Faulhaber, *Cured Meat and Idaho Potatoes: A Comparative Analysis of European and American Protection and Enforcement of Geographic Indications of Foodstuffs*, 11 COLUM. J. EUR. L. 623 (2005); Kal Raustiala & Stephen R. Munzer, *The Global Struggle over Geographic Indications*, 18 EUR. J. INT’L L. 337 (2007); 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.

Unfortunately, legal scholarship has done little to illuminate *how* producers can navigate the current systems to identify the most appropriate and effective geographical indication for their products.<sup>120</sup> Now equipped with a basic understanding of geographical indications, it is therefore useful to review the specific Old World and New World approaches to geographical indications that are applicable to the bourbon industry.

### 1. Domestic Geographical Indications

Through the Lanham Act,<sup>121</sup> protection of geographical indications in the United States falls under trademark law.<sup>122</sup> The Lanham Act defines a trademark as

any word, name, symbol or device, or any combination thereof ... (1) used by a person, or (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this Act, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.<sup>123</sup>

Because trademark requirements demand that a mark be “distinctive of the applicant’s goods in commerce,” the mark cannot merely identify a product’s origin from a geographic region but instead must identify “a particular business source.”<sup>124</sup> A brand seeking to register a geographical indication in trademark, therefore, must show that consumers “understand the indication as a trademark, rather than as an indication of origin,” which the brand may demonstrate by a record of “continuous and substantially exclusive use of the

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427 (2005).

<sup>120</sup> There is extensive economic research on the subject of geographical indications. Findings show that through the use of a geographical indication, a product “becomes a unique article.” Mirna de Lima Medeiros et al., *Implications of Geographic Indications: A Comprehensive Review of Papers Listed in CAPES’ Journal Database*, 13 RAI 315, 325 (2016), <https://www.sciencedirect.com/science/article/pii/S1809203916310713> [<https://perma.cc/XQU7-JM96>]. That uniqueness, coupled with perceptions of higher quality, “consequently raises the income of producers” utilizing geographical indications. *Id.* Furthermore, geographical indications “facilitate the insertion of small and medium producers, since this uniqueness can raise competition with large producers.” *Id.* Overall, geographical indications “facilitate the presence of products in the market, allow the charging of higher prices, and promote the stability of demand.” *Id.*

<sup>121</sup> The Lanham Act is the primary federal trademark statute of the United States legal system that provides for a national system of trademark registration. Proper citation to the Lanham Act is a confusing and controversial task. *See generally* Paul Horton, *A Plea for the Proper Citation of the Lanham Act*, 106 TRADEMARK REP. 754 (2016). For the purposes of this Note, the Lanham Act is cited as 15 U.S.C. §§ 1051–1141n (1946).

<sup>122</sup> Justin Hughes, *supra* note 102, at 308; *see also* Emily Nation, *Geographical Indications: The International Debate over Intellectual Property Rights for Local Products*, 82 U. COLO. L. REV. 959, 972 (2011).

<sup>123</sup> 15 U.S.C. § 1127.

<sup>124</sup> Lee Bendekeygy & Caroline H. Mead, *supra* note 101, at 770.

indication as a mark” rather than a general description.<sup>125</sup> The “critical distinction between a word, name, symbol, or device that serves as a trademark, and one that serves as a geographic[al] indication . . . but not as a trademark,” consequently, depends on consumers’ perceptions of the term.<sup>126</sup>

Consumers’ perception as the lynchpin of trademark registrability thus creates a heavy burden for producers to invest in brand development and marketing to transform the geographic term used to describe their product into a true identifier of its source rather than a generic label.<sup>127</sup> Thankfully for producers, there are other readily achievable protections of geographical indications through the registration of a collective mark, certification mark, or establishment of an appellations of origin system.<sup>128</sup>

#### a. Collective Marks

A collective mark is a category of trademark that members “of a cooperative, an association, or other collective group or organization” use to indicate membership.<sup>129</sup> Collective marks do not require oversight of a product’s quality but instead are mere indicators of membership and nothing more.<sup>130</sup> Ownership of the collective mark belongs to “[a]ll members of the collective group . . . not any one of the members.”<sup>131</sup> The collective organization does not typically sell goods or perform services but will advertise and promote the goods or services sold by members under the mark.<sup>132</sup>

In the context of an agricultural cooperative, registration of a collective mark “identifies the geographic origin of the members’ goods.”<sup>133</sup> This geographically-coded mark is known as “a regional collective mark” that indicates membership in a collective of producers hailing from a specific

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 769; *see also id.* at 767–74 (discussing trademark registration for geographical indications).

<sup>127</sup> *Id.* at 770.

<sup>128</sup> Justin Hughes, *supra* note 102, at 308.

<sup>129</sup> 15 U.S.C. §1127. A classic example of a collective mark is the AAA logo that indicates an individual’s membership in the American Automobile Association. *See AAA Logo*, 1000 LOGOS (Feb. 14, 2023), <https://1000logos.net/aaa-logo/> [<https://perma.cc/8YBD-BYSV>].

<sup>130</sup> James Bonar-Bridges, *supra* note 100, at 501.

<sup>131</sup> J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* §14:21 (5th ed. 2022) (citing to L. Beresford, *Geographical Indications: The Current Landscape*, 17 *FORDHAM I.P., MEDIA & ENT. L.J.* 979, 984 (2007) (“An agricultural cooperative of produce sellers is an example of a collective organization, which does not sell its own goods, or render services, but promotes the goods and services of its members.”)).

<sup>132</sup> *Id.* at §19:99 (“This is an organization of sellers who each use the mark to indicate that the goods or services that they sell are provided by members of the organization who meet its standards for admission. Examples include: an agricultural cooperative of sellers of farm produce; the Professional Golfers Association, whose members use the mark in rendering such services as golf lessons; and the National Association of Realtors, whose members use the REALTOR mark in rendering real estate sales services.”).

<sup>133</sup> Daisuke Kojo, *The Importance of The Geographic Origin of Agricultural Products: A Comparison of Japanese and American Approaches*, 14 *MO. ENVTL. L. & POL’Y REV.* 275, 307–08 (2007).

geographic region.<sup>134</sup> In this way, a collective mark differs from a certification mark because sellers using a certification mark “are not members of an organization, but their products are certified according to set standards.”<sup>135</sup> Moreover, a collective mark allows an organization to avoid the stricter standards applied to certification marks under the Lanham Act.<sup>136</sup> Overall, there is less government oversight in the use of a collective mark because it is treated like a standard trademark, “subject only to . . . doctrines against abandonment, naked licensing, attachment to goodwill, and the like.”<sup>137</sup>

#### b. Certification Marks

A certification mark is a “word, name, symbol, [or] device” owned by one organization but used by individual producers to certify the quality or origin of their products.<sup>138</sup> A certification mark serves as a seal of approval—not a mere indicator of membership—to guarantee a product’s adherence to certain standards.<sup>139</sup> Relevant in this context are two subcategories of certification marks: those certifying the quality of goods or services and those certifying the regional origin of a good.<sup>140</sup>

A mark certifying quality signals that a good meets set standards of quality established by the mark’s owner.<sup>141</sup> Examples of marks certifying quality “include the Good Housekeeping seal of approval, the UL mark (Underwriters Laboratory), and various trademarks used to designate kosher foods.”<sup>142</sup> The government has no role in setting the quality standards of the mark; that is done by the mark’s owner who must permit its use by any

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<sup>134</sup> J. Thomas McCarthy, *supra* note 131, §19:99.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*; see also Jeff Young, *The Importance of Idaho Potatoes*, 19 J. CONTEMP. LEGAL ISSUES 241, 242 (2010) (“The registration of a certification mark is subject to cancellation on grounds not applicable to other registered marks.”).

<sup>137</sup> Justin Hughes, *supra* note 102, at 310.

<sup>138</sup> 15 U.S.C. §1127; see also Louis Altman and Malla Pollock, *Callmann on Unfair Competition, Trademarks and Monopolies* § 26:28 (4th ed.); Jeff Young, *supra* note 136, at 241 (“The Lanham Act tells us that a certification mark is a symbol used by a person other than the symbol’s owner to certify one or more characteristics of that person’s goods or services. . . . The owner of the certification mark is not permitted to use the mark on his own goods or services. Legitimate users of a certification mark have submitted to the specific criteria required for certification. The mark’s owner, in turn, must permit use of the mark on all goods or services that meet the standards of certification represented by the mark.”).

<sup>139</sup> Emily Nation, *supra* note 122.

<sup>140</sup> J. Thomas McCarthy, *supra* note 131, §19:91 (“There are three basic types of certification marks: (1) The ‘Underwriters Laboratories’-type certification of quality of goods or services; (2) The ‘Roquefort Cheese’-type of certification of regional origin; and (3) The ‘Union Label’-type certification that goods were made or services performed by union labor.”).

<sup>141</sup> Emily Nation, *supra* note 122.

<sup>142</sup> Justin Hughes, *supra* note 102, at 309 (internal quotations and citations omitted).

producer in compliance with the standards.<sup>143</sup> Moreover, an owner's failure to maintain the standards associated with the mark or arbitrary denial of the mark's use to a conforming product may result in its cancellation.<sup>144</sup> Thus, "the strength of a certification is measured by the quality of the organization for which it stands."<sup>145</sup>

The Lanham Act does not restrict a certification owner from advertising its mark and the goods certified by the mark.<sup>146</sup> Consumers are "entitled to assume" the product bearing the mark meets the standards of quality established by the owner.<sup>147</sup> Advertisement of a certification mark's standards thus strengthens buyers' perceptions of the reliability and usefulness of the information provided by the mark.<sup>148</sup> Accordingly, successful promotion of a certification mark rewards the producers meeting its standards with "the right to capitalize on the mark's reputation."<sup>149</sup>

A certification mark may also "certify regional or other origin[s]" of a product.<sup>150</sup> Generic names are not registrable as a certification mark, and a registered mark that becomes generic may later be subject to cancellation.<sup>151</sup> Many geographic names are generic because they merely name a product

<sup>143</sup> *State of Fla. v. Real Juices, Inc.*, 330 F. Supp. 428, 432 (M.D. Fla. 1971) ("It is required that the owner of the mark should set up the standards or conditions which must be met before another is permitted to use the certification mark and the owner should permit the use of the mark by others only when they meet those standards or conditions.").

<sup>144</sup> 15 U.S.C. § 1064(5) ("A petition to cancel a registration of a mark . . . [will be issued] [a]t any time in the case of a certification mark on the ground that the registrant . . . discriminately refuses to certify or to continue to certify the goods or services of any person who maintains the standards or conditions which such mark certifies.").

<sup>145</sup> *Peel v. Att'y Registration and Disciplinary Com'n of Ill.*, 496 U.S. 91, 102 (1990) (examining the potential of a "Certificate in Trial Advocacy" to mislead the public after a lawyer used the mark as letterhead—in contravention of the Illinois Code of Professional Responsibility).

<sup>146</sup> *Louis Altman and Malla Pollock, Callmann on Unfair Competition, Trademarks and Monopolies* Appendix 8 § 8:42 (4th ed.) ("Nothing . . . shall be deemed to prohibit the registrant from using its certification mark in advertising or promoting recognition of the certification program or of the goods or services meeting the certification standards of the registrant.").

<sup>147</sup> J. Thomas McCarthy, *supra* note 131, §19:91.

<sup>148</sup> *Id.*

<sup>149</sup> Emily Nation, *supra* note 122, at 973.

<sup>150</sup> 15 U.S.C. § 1127. Examples of certification marks indicating origin registered in the United States include: U.S. Trademark Registration No. 1,896,683 (filed June 7, 1993) (PARMIGIANO-REGGIANO certification mark owned by Consorzio del Formaggio Parmigiano-Reggiano); U.S. Trademark Registration No. 571,798 (filed Feb. 13, 1952) (ROQUEFORT certification mark owned by community of Roquefort); U.S. Trademark Registration No. 1,959,589 (filed Jan. 18, 1994) (STILTON certification mark owned by Stilton Cheese Makers' Association); U.S. Trademark Registration No. 1,285,675 (filed Apr. 11, 1993) (REAL CALIFORNIA CHEESE certification mark owned by California Milk Producers Advisory Board); U.S. Trademark Registration No. 2,014,628 (filed Aug. 7, 1984) (PARMA certification mark owned by Consorzio del Prosciutto di Parma); U.S. Trademark Registration No. 1,632,726 (filed July 1, 1998) (DARJEELING certification mark owned by the Tea Board of India); U.S. Trademark Registration No. 1,528,514 (filed Dec. 30, 1985) (WASHINGTON certification mark owned by Washington State Apple Advertising Commission); U.S. Trademark Registration No. 932,033 (filed Oct. 14, 1970) (THE FLORIDA SUNSHINE TREE certification mark owned by Florida Department of Citrus); U.S. Trademark Registration No. 1,559,414 (filed May 11, 1987) (FRESH FROM THE FLORIDA SUNSHINE TREE certification mark owned by Florida Department of Citrus).

<sup>151</sup> J. Thomas McCarthy, *supra* note 131, § 19:91; 15 U.S.C. § 1127.

rather than identifying a specific region or place of origin.<sup>152</sup> Ownership of a mark certifying origin belongs to “a single umbrella organization”<sup>153</sup>—for example, a state agency like the Idaho Potato Commission that is backed by recognition of the mark within the state’s statutory code.<sup>154</sup> Like the owner of a mark certifying quality, the owner of a mark certifying origins “set[s] up the standards or conditions which must be met,” and must permit the use of the mark to producers meeting the standards.<sup>155</sup>

### c. Appellations of Origin

In addition to the marks certifying the quality or origin of a product, the United States’ framework protects geographical indications through appellations of origin (AO) for wine.<sup>156</sup> The AO system provides *sui generis*<sup>157</sup> protection so consumers may distinguish wines based on their different areas of origination.<sup>158</sup> In practice, AO regulations prohibit a winemaker from claiming its product’s origination from an area in which its wine is not produced<sup>159</sup> so the commercial benefits of the claimed region’s prestige are enjoyed only by wines hailing from the area.<sup>160</sup>

<sup>152</sup> For example, “French” fries, “Hamburger” meat, “New York” strip steaks, and “brussels” sprouts are considered generically named food-products. See J. Thomas McCarthy, *supra* note 131, § 19:91.

<sup>153</sup> Emily Nation, *supra* note 122 (internal citations omitted).

<sup>154</sup> See generally *Idaho Potato*, IDAHO POTATO COMM’N, <https://idahopotato.com/> [<https://perma.cc/N2KH-3SHZ>] (last visited Nov. 3, 2022). See also Jeff Young, *supra* note 136, at 243–44 (“Idaho has long been synonymous with the production and distribution of potatoes. The Idaho Potato Commission (IPC), an agency of the State of Idaho created to promote Idaho potatoes, owns several federally registered certification marks including IDAHO POTATOES GROWN IN IDAHO®, CERTIFIED GROWN IN IDAHO 100% IDAHO POTATOES®, and GROWN IN IDAHO POTATOES®. According to the IPC, the word ‘Idaho’ on a bag of potatoes is to be considered a certification mark. . . . The IPC licenses the use of its marks to potato growers, packers and repackers, distributors, food service providers, retailers, and processors, as well as the manufacturers and purveyors of other goods such as t-shirts and souvenir items. The IPC enforces these certification marks to make sure that consumers are getting the highest quality product associated with the Idaho mark and that Idaho growers receive protection from infringers on their share of the potato market.”).

<sup>155</sup> *State of Fla. v. Real Juices, Inc.*, 330 F. Supp. 428, 432 (M.D. Fla. 1971).

<sup>156</sup> Irene Calboli, *Time to Say Local Cheese and Smile at Geographical Indications of Origin? International Trade and Local Development in the United State*, 53 HOUS. L. REV. 373, 394 (2015).

<sup>157</sup> See generally *Works on Signs or Quality of Origin*, INSTITUT NATL DE L’ORIGINE ET DE LA QUALITÉ, <https://www.inao.gouv.fr/Institut-national-de-l-origine-et-de-la-qualite/Ouvrages-sur-les-signes-de-qualite-ou-d-origine> [<https://perma.cc/WV3A-YSEB>] (last visited Nov. 5, 2022) (explaining the concept of terroir, which foundations sui generis systems, by reviewing the genesis of controlled appellations).

<sup>158</sup> J. Thomas McCarthy, *supra* note 131, §14:19.50.

<sup>159</sup> A viticultural area (AVA) is a grape growing region distinguished for its unique geographical features with boundaries recognized by the TTB. Moreover, an AVA is one of the protected regions included in the AO system, which also recognizes: the United States; a State; and two but no more than three counties in the same State. 27 C.F.R. § 4.25a(e)(1); see also Zachary Mike, *Terroir and Tanin: How to Amend 27 C.F.R. to Bring French-Style Quality to the American Wine Consumer*, 20 J. INT’L BUS. & L. 153, 154 (2021) (“Two of the most prominent ways [the TTB] regulates the industry is by defining American Viticultural Areas . . . and by imposing labelling and bottling requirements for wine.”). For a list of U.S. viticultural areas, see *Established American Viticultural Area*, TTB (Aug. 29, 2023), <https://www.ttb.gov/wine/established-avas> [<https://perma.cc/BD9E-9S49>].

<sup>160</sup> J. Thomas McCarthy, *supra* note 131, §14:19.50.

The Lanham Act and the Alcohol and Tobacco Tax and Trade Bureau (TTB) oversee the AO system, which forces a producer seeking to use a geographical indication on its label to navigate two sets of laws. The overlap of these two sets of law presents a relatively new frontier, so it is “not clear what should happen” when a winemaker claims it has trademark rights to a region designated as a viticultural area.<sup>161</sup> In spite of the uncertainties, the AO system’s marketing value stands strong;<sup>162</sup> a label’s inclusion of a protected region imparts its “collective reputation” thus differentiating the product.<sup>163</sup>

## 2. International Geographical Indications

A treaty regime governs international intellectual property protections.<sup>164</sup> The treaty regime unfortunately does not create an all-encompassing, universal intellectual property right but instead preserves a product’s intellectual property rights recognized within the borders of the nations subject to the treaty.<sup>165</sup> Thus, to gain international protection of a product, a party must piecemeal register through every participating nation’s intellectual property framework in accordance with its particular standards.<sup>166</sup> The modern framework seeks to reconcile the patchwork systems—especially in response to the unworkable nature of the older system revealed by the industrialization of the global economy.<sup>167</sup>

At the beginning of the 19<sup>th</sup> century, intellectual property’s enhancement of international trade became apparent.<sup>168</sup> Accordingly, nations began entering treaties aimed at allowing an individual with intellectual property rights in one nation to obtain similar ones in another nation.<sup>169</sup> After

<sup>161</sup> *Id.*

<sup>162</sup> See generally LUCA CAMANZI ET AL., EFFECTIVENESS OF EUROPEAN APPELLATIONS OF ORIGIN ON THE INTERNATIONAL WINE MARKET (Mar. 2007), [https://www.researchgate.net/publication/23508887\\_Effectiveness\\_of\\_European\\_Appellations\\_of\\_Origin\\_on\\_the\\_International\\_wine\\_market](https://www.researchgate.net/publication/23508887_Effectiveness_of_European_Appellations_of_Origin_on_the_International_wine_market) [https://perma.cc/S7HC-22MH] (evaluating the impact of the appellation of origin system on the international wine market); GIUSEPPE DI VITA ET AL., CLUSTERING ATTITUDES AND BEHAVIOURS OF ITALIAN WINE CONSUMERS (Mar. 2014), [https://www.researchgate.net/publication/260664289\\_Clustering\\_attitudes\\_and\\_behaviours\\_of\\_Italian\\_wine\\_consumers](https://www.researchgate.net/publication/260664289_Clustering_attitudes_and_behaviours_of_Italian_wine_consumers) [https://perma.cc/5BKL-PWAM] (an empirical analysis of the attitudes of Italian wine consumers through a multivariate statistical analysis).

<sup>163</sup> LUCA CAMANZI ET AL., *supra* note 162, at 13.

<sup>164</sup> See Emily Nation, *supra* note 122, at 966 n. 48.

<sup>165</sup> See Susan A. Mort, *The WTO, WIPO & The Internet: Confounding the Borders of Copyright and Neighboring Rights*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 173, 178 (1997).

<sup>166</sup> See Emily C. Creditt, *Terroir v. Trademarks: The Debate over Geographical Indications and Expansions to the Trips Agreement*, 11 VAND. J. ENT. & TECH. L. 425, 431 (2009) (“Until the end of the 19th century, intellectual property, including geographical indications, was largely governed at a country-specific level, with each country’s laws governing within its borders.”).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*; see also Susan K. Sell, *What Role for Humanitarian Intellectual Property? The Globalization of*

“the first bilateral intellectual property agreements,” only three international treaties<sup>170</sup> sought to simplify an individual’s acquisition of intellectual property rights.<sup>171</sup>

In 1994, however, the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement emerged to provide the most comprehensive framework of international intellectual property.<sup>172</sup> All 153 members of the World Trade Organization (WTO), including the United States, signed TRIPS in 1995.<sup>173</sup> In doing so, the WTO took “the most significant step[ ] in creating a uniform system for the international protection of all intellectual property, especially geographical indications.”<sup>174</sup>

Articles 22 through 24 of TRIPS cover geographical indications.<sup>175</sup> Article 22 focuses “on protecting the consuming public from misleading geographical labels,”<sup>176</sup> which it achieves by providing legal mechanisms for 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.<sup>177</sup>

*Intellectual Property Rights*, 6 MINN. J.L. SCI. & TECH. 191, 191–92 (2004) (“TRIPS requires states to provide adequate and effective enforcement mechanisms both internally and at their borders.”).

<sup>170</sup> Those agreements are: Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 (the Paris Convention); Madrid Agreement for the Repression of False or Deceptive Indications of Sources on Goods, Apr. 14, 1891, 828 U.N.T.S. 389 (the Madrid Agreement); and Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, Oct. 31, 1958, 923 U.N.T.S. 205 (the Lisbon Agreement).

<sup>171</sup> Emily C. Credit, *supra* note 166, at 431; *see also* Stacy D. Goldberg, *Who Will Raise the White Flag? The Battle Between the United States and the European Union over the Protection of Geographical Indications*, 22 U. PA. J. INT’L ECON. L. 107, 111–12 (“Only three international agreements addressed geographical indications prior to the TRIPS Agreement of 1994: the Paris Convention for the Protection of Industrial Property, the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, and the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration.”).

<sup>172</sup> *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 33 I.L.M. 1125, 1869 U.N.T.S. 299; *see also* Emily C. Credit, *supra* note 166, at 435 (citation omitted) (“The TRIPS Agreement is internationally recognized as ‘the most detailed and comprehensive multilateral agreement on intellectual property yet negotiated.’”).

<sup>173</sup> *See Understanding the World Trade Organization: Members and Observers*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) [<https://perma.cc/9KW2-QBA8>] (last visited Nov. 5, 2022).

<sup>174</sup> Emily C. Credit, *supra* note 166, at 435. For the purpose of this Note, TRIPS is the only international intellectual property treaty discussed because the Paris Convention provides a weak level of protection that TRIPS eclipsed. *See* Stacy D. Goldberg, *supra* note 171. Furthermore, the United States is not a party to the Madrid nor the Lisbon Agreements. *Id.* For a further discussion of the international treaty regime *see* Charlie Fu, *Geographical Indications in Multinational Agreements*, 19 J. CONTEMP. LEGAL ISSUES 451 (2010).

<sup>175</sup> *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, *supra* note 172, at arts. 22–24.

<sup>176</sup> Justin Hughes, *supra* note 102, at 314; Emily Nation, *supra* note 122, at 966.

<sup>177</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, *supra* note 172, at art. 22, para. 2.

In compliance with Article 22, every member country “must provide a legal remedy” to recover for the misuse of a geographical indication that results in consumer deception.<sup>178</sup> Thus, although TRIPS seeks to create a uniform system of protection, Article 22 may only be fulfilled “through [a nation’s] own particular domestic law tools.”<sup>179</sup>

Article 23, which focuses on wines and spirits, “adds another layer of obligations” for participating nations.<sup>180</sup> Under Article 23, “a trademark embodying an inaccurate geographical indication for wines or spirits must be denied registration,” even if the inaccuracy does not result in consumer confusion.<sup>181</sup> Impermissibility exists “even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as ‘kind[,]’ ‘type[,]’ ‘style[,]’ ‘imitation’ or the like.”<sup>182</sup> As a result, “member countries must provide a legal remedy against any inaccurate [geographical indication] . . . of wine and spirits regardless of whether it misleads the public.”<sup>183</sup> Consequently, criticism of this provision derives from its elimination of “many labeling and advertising possibilities that would actually increase consumer information.”<sup>184</sup>

Lastly, Article 24 “houses an array of limitations” to the obligations created by Articles 22 and 23. The two “most important” for this Note “are the provisions on grandfathering for established trademarks and the provision on genericity.”<sup>185</sup> The grandfathering provision essentially exempts a member nation from

invalidat[ing] any trademark containing a [geographical indication] . . . if rights in that trademark (including under the common law) developed prior to (a) the date of TRIPS coming into force in the country, or (b) the protection of the [geographical indication] in its country of origin, whichever comes later.<sup>186</sup>

Under the genericity exception, a member country need not offer protection

<sup>178</sup> Emily Nation, *supra* note 122, at 967.

<sup>179</sup> Justin Hughes, *supra* note 102, at 314.

<sup>180</sup> *Id.* at 317.

<sup>181</sup> *Id.* at 318.

<sup>182</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, *supra* note 172, at art. 23, para. 1.

<sup>183</sup> Emily Nation, *supra* note 122, at 968. For example, under the provisions of Article 23, a member nation “must provide a legal remedy against a non-French marketer of ‘Cognac,’ ‘Colorado Cognac,’ ‘Coñac,’ or ‘Cognac-style brandy,’” even though a consumer would likely deduce that the international variations were not sourced from the Cognac region of France. *Id.*

<sup>184</sup> Justin Hughes, *supra* note 102, at 318.

<sup>185</sup> *Id.* at 319.

<sup>186</sup> *Id.*

to geographical indications signifying “a type of good rather than signifying the geographic origin of that good.”<sup>187</sup> This exception is contradictory to the purpose of TRIPS because, among other examples, a nation may continue labeling sparkling wines under the name “Champagne” or selling cheese as “Camembert”—even though those terms indicate a specific geographic region—because the terms are generic within its own borders.<sup>188</sup>

Further issues exist in the counterintuitive enforcement mechanisms of TRIPS. Enactment of TRIPS is expected at the domestic level of member nations<sup>189</sup> and at the international level through the WTO’s dispute resolution process.<sup>190</sup> Domestically, member nations must provide a level of enforcement strong enough to deter potential infringers but not so burdensome as to become “overly complicated, costly, or unfair.”<sup>191</sup> A member country may, therefore, fulfill its obligation by allowing a rightsholder to pursue infringers through a cause of action within the respective nation’s legal system.<sup>192</sup>

The international enforcement system through the WTO dispute resolution process first encourages disputing nations “to talk to each other to see if they can settle their differences by themselves.”<sup>193</sup> If conversations prove fruitless, the nations “can also ask the WTO director-general to mediate or try to help in any other way.”<sup>194</sup> Petitioning the director-general initiates a process that may last a total of one year without an appeal or a year and three months with an appeal.<sup>195</sup> The resolution of this process is merely suggestive, however, as guidelines state:

If a country has done something wrong, it should swiftly correct its fault. And if it continues to break an agreement, it should offer compensation or face a suitable response that

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<sup>187</sup> Emily Nation, *supra* note 122, at 967; *see also id.* at 974–78 (reviewing the lack of protection for generic marks—a mark which “embrace[s] an entire class of products or services, not all of which necessarily emanate from the same source”—under the Lanham Act).

<sup>188</sup> Justin Hughes, *supra* note 102, at 319; *see also* Emily Nation, *supra* note 122, at 967 (“Article 24 provides exceptions to the general standard, including an important exception allowing members to deny protections to generic GIs. A member need not protect a GI that has come to signify a type of good rather than signifying the geographic origin of that good. For example, if a member determines that the term ‘parmesan’ identifies a type of cheese, rather than a cheese originating in Parma, the member does not need to protect ‘parmesan’ under its GI laws.”).

<sup>189</sup> *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, *supra* note 172, at art. 41, para. 2.

<sup>190</sup> *See generally Understanding the WTO: Settling Disputes*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm) [<https://perma.cc/5YQU-D642>] (last visited Nov. 5, 2022).

<sup>191</sup> Emily Nation, *supra* note 122, at 968.

<sup>192</sup> *Id.*

<sup>193</sup> WORLD TRADE ORG., *supra* note 190.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

has some bite — although this is not actually a punishment: it's a 'remedy', the ultimate goal being for the country to comply with the ruling.<sup>196</sup>

Article 24, therefore, demonstrates that TRIPS operates on principles of reciprocity rather than creating a uniform, all-encompassing scheme that is self-enforcing.

#### *D. Bourbon's Current Intellectual Property Protections*

Status as America's spirit<sup>197</sup> and additional domestic, statewide, and international mechanisms protect bourbon's integrity. Domestically, the TTB regulates bourbon through its definitions listed in the Code of Federal Regulations and its labelling requirements for distilled spirits.<sup>198</sup> At the state level, Kentucky has a similar regulation to protect its close relationship with bourbon. Lastly, at the international level, treaties and bilateral trade agreements protect bourbon's American identity.

Definitionally, the TTB requires a spirit wishing to be labeled a bourbon to adhere to requisite components of production.<sup>199</sup> Those components are a "[f]ermented mash of not less than 51% respectively: [c]orn, [r]ye, [w]heat, [m]alted barley, [m]alted rye grain, [other grain]," distilled at "160° or less," and stored in "[c]harred new oak barrels at 125° or less."<sup>200</sup> In addition, neutral spirits and coloring, flavoring, and blending materials are forbidden from the mash bill.<sup>201</sup> Lastly, the TTB forbids bourbon to "be used to describe any whisky or whisky-based distilled spirits not distilled and aged in the United States."<sup>202</sup> The TTB regulation protects bourbon's integrity by forging a geographical nexus between the spirit and its country of origin.<sup>203</sup>

The TTB further protects bourbon's authenticity by forbidding spirits

<sup>196</sup> *Id.*

<sup>197</sup> S. Con. Res. 19, 88th Cong., 78 Stat. 1208 (May 4, 1964) (declaring that "Bourbon whiskey has achieved recognition and acceptance throughout the world as a distinctive product of the United States . . .").

<sup>198</sup> 27 C.F.R. § 5.143 (c)(2); *see also Labeling and Formulation Approval*, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, <https://www.ttb.gov/distilled-spirits/labeling-and-formulation-approval> [<https://perma.cc/MV9T-RTNL>] (last visited Feb. 26, 2023) (the TTB "implements and enforces a broad range of statutory and compliance provisions to ensure that alcohol products are created, labeled, and marketed in accordance with Federal laws and regulations. Distillers must follow the labeling and advertising requirements found at 27 CFR Part 5, Labeling and Advertising of Distilled Spirits and 27 CFR Part 16, Alcoholic Beverage Health Warning Statement.").

<sup>199</sup> 27 C.F.R. § 5.143 (c)(2).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> Justin Hughes, *supra* note 102, at 305–07.

that fail to meet the Code's requirements from labelling themselves as bourbon.<sup>204</sup> Moreover, once a spirit meets the requirements, it must adhere to the labelling requirements of the TTB.<sup>205</sup> Mandatory information required on the front label of a bourbon bottle include: the brand name,<sup>206</sup> the designation (i.e., bourbon),<sup>207</sup> and the alcohol content.<sup>208</sup> Mandatory information that may be included on either the front or the back label includes: net contents,<sup>209</sup> name and address as listed on the brand's permit,<sup>210</sup> health warning statements,<sup>211</sup> country of origin,<sup>212</sup> and treatment with wood.<sup>213</sup> A brand will design its label and submit it for approval; afterwards, it may make certain changes to its label without having to submit a new application for approval, including the addition of a trademark, which encompasses a collective or certification mark.<sup>214</sup>

At the state level, Kentucky forbids whiskey "produced from grains . . . cooked, fermented, and distilled in Kentucky except . . . 'Corn Whiskey,'" to be bottled or removed from the State unless it "has been aged in oak barrels for at least one year."<sup>215</sup> Any whiskey aged less than one year in the State may be removed and bottled so long as it does not contain "Kentucky" or "any word or phrase implying Kentucky origin" on its front label or anywhere else on the label without listing the name and address of the distiller.<sup>216</sup> Additionally, the State's agricultural department owns a "Kentucky Proud" trademark to promote Kentucky farm products "raised, grown, manufactured, or processed in Kentucky."<sup>217</sup> There are several bourbon companies marketed under the Kentucky Proud trademark.<sup>218</sup>

Internationally, the "NAFTA and EU agreements signed in the 1900s

<sup>204</sup> 27 C.F.R. § 5.143 (c)(2).

<sup>205</sup> Before a bottle of bourbon can ship out it must receive a Certificate of Label Approval (COLA) from the TTB. See 27 C.F.R. § 5.3 (a) ("[A]ny bottler of distilled spirits, and any person who removes distilled spirits in containers from customs custody for sale or any other commercial purpose, is required to first obtain from TTB a COLA covering the label(s) on each container.").

<sup>206</sup> *Id.* § 5.64.

<sup>207</sup> *Id.* § 5.165; *Id.* § 5.141.

<sup>208</sup> *Id.* § 5.65.

<sup>209</sup> *Id.* § 16.

<sup>210</sup> *Id.* § 5.66–68.

<sup>211</sup> *Id.* § 16.

<sup>212</sup> 19 C.F.R. § 134.11; 27 C.F.R. § 5.69.

<sup>213</sup> 27 C.F.R. § 5.73.

<sup>214</sup> See DEP'T OF THE TREASURY ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, TTB 5 5100.31 Application for and Certification/Exemption of Label/Bottle Approval, <https://www.ttb.gov/images/pdfs/forms/f510031.pdf> (last visited Dec. 7, 2023).

<sup>215</sup> K.R.S. § 244.370.

<sup>216</sup> *Id.*

<sup>217</sup> *Who We Are*, KENTUCKY PROUD, <https://www.kyproud.com/who-we-are> [<https://perma.cc/UYL3-PLB9>] (last visited Feb. 26, 2023).

<sup>218</sup> Press Release, Bardstown Bourbon Company to Produce Certified Kentucky Proud Whiskey, BEVNET (Jun. 24, 2020), <https://www.bevnet.com/spirits/2020/bardstown-bourbon-company-to-produce-certified-kentucky-proud-whiskey/> [<https://perma.cc/YR9L-RSPE>].

to promote free trade between nations” recognize bourbon as a distinctively American product.<sup>219</sup> Additionally, the United States engages in one-to-one reciprocity through bilateral trade agreements with a number of foreign nations.<sup>220</sup> In these agreements, the United States typically promises to honor the geographical indication of the participating nation’s native spirits for the reciprocal acknowledgment that bourbon is an American whiskey.<sup>221</sup> Moreover, under the effect of these agreements, “any bottle sold in a [participating] foreign market” must comply with the statutory and labelling requirements of bourbon—especially that it was distilled in America.<sup>222</sup>

Today, there are 44 bilateral trade agreements acknowledging bourbon as a distinctly American spirit.<sup>223</sup> According to the KDA,<sup>224</sup> international trade agreements “got [bourbon] on a level playing field with

<sup>219</sup> Haley Scott, “Just Ice” for Bourbon: The Need for GIs in International Protection of America’s Beloved Spirit, 29 IND. J. GLOBAL LEGAL STUD. 213, 218 (2022); see also Ryan Valentin, *Milk and Other Intoxicating Choices: Official State Symbol Adoption*, 41 N.KY.L.REV. 1, 21–22 (2014) (“Several agreements, including the North American Free Trade Agreement, United States-European Union on Nomenclature of Distilled Spirits, and the United States-Australia Free Trade Agreement recognize bourbon-whiskey as a distinct product of the United States.”).

<sup>220</sup> Haley Scott, *supra* note 219, at 226.

<sup>221</sup> See Press Release, Distilled Spirits Council of the United States, Japan Recognizes Bourbon and Tennessee Whiskey As Distinctive Products of the United States (Jan. 14, 2022) (“Japan recently became the 44th country to officially recognize ‘Bourbon’ and ‘Tennessee Whiskey’ as distinctive products of the United States, according to the Distilled Spirits Council of the United States (DISCUS) . . . ‘This recognition ensures that only Bourbon and Tennessee Whiskey that are produced in the United States according to official U.S. standards may be sold in Japan,’ said Robert Maron, DISCUS Vice President of International Trade. ‘Japan ranks as the top export market for American Whiskeys. This action will ensure the integrity of these popular spirits products in this critical market.’”). Other examples of bilateral trade agreements protecting bourbon’s identity as a distinctly American product include: Agreement between the United States of America, the United Mexican States, and Canada, Art. 3. C.2, July 1, 2020, Distinctive Products, [https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/03\\_Agriculture.pdf](https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/03_Agriculture.pdf) (agreement amongst Canada, Mexico, and the United States recognizing bourbon as a distinct product of the United States in exchange for the recognition of Tequila as a distinct product of Mexico and Canadian Whisky as a distinct product of Canada); Agreement Providing for the Recognition and Protection by France of the Appellation of Origin of United States Bourbon Whiskey and Continued Protection by the United States of Appellations of Origin of the French Brandies Cognac, Armagnac, and Calvados, U.S.-Fr., Dec. 2, 1970-Jan. 18, 1971, 10 I.L.M. 673 (agreement between the United States and France to recognize bourbon as distinctly American in exchange for the recognition of Cognac as distinctly French); Standard of Identity for Tequila, 38 Fed. Reg. 33, 470 (Dec. 5, 1973) (to be codified at 27 C.F.R. pt. 5); Press Release, Dept of Treasury, TTB Amends the Distilled Spirits Identity Regulations to Recognize “Cachaça” as a Type of Rum and Distinctive Product of Brazil (Feb. 22, 2013), <https://www.ttb.gov/images/pdfs/press-releasefy1305-cache-td.pdf> [<https://perma.cc/BS65-LNVS>] (agreement between the United States and Brazil recognizing bourbon as distinctly American in exchange for recognizing Cachaça as distinctly Brazilian).

<sup>222</sup> Haley Scott, *supra* note 219, at 218 (internal quotations omitted).

<sup>223</sup> Press Release, Distilled Spirits Council of the United States, Japan Recognizes Bourbon and Tennessee Whiskey As Distinctive Products of the United States, *supra* note 221.

<sup>224</sup> The Kentucky Distillers’ Association (KDA) is a “non-profit trade association dedicated to protecting Kentucky’s legacy in Bourbon and sharing it with the world.” *Kentucky Bourbon*, KENTUCKY DISTILLERS’ ASSOCIATION, <https://kybourbon.com/industry/about/> [<https://perma.cc/GU26-WSH4>] (last visited Feb. 26, 2023). The KDA “bring[s] together distillers, businesses, educators and governmental entities” to advocate for the industry as a whole, but more specifically to “ensure that Kentucky always remains the one true home of Bourbon.” *Id.*

Scotch whisky and other global whiskeys” increasing bourbon’s overseas exports.<sup>225</sup> Moreover, the Distilled Spirits Council of the United States (DISCUS) reports that “data ... shows exports to countries with whom [the United States] ha[s] free trade agreements grow at a more rapid pace” than those without.<sup>226</sup> Although these comments are encouraging signs of the efficacy of bilateral trade agreements in overcoming foreign market barriers, there remains a need to increase international consumers’ knowledge of bourbon beyond its American identity.

## II. ANALYSIS: BOURBON’S CURRENT PROTECTIONS FAIL TO INFORM CONSUMERS OF THE SPIRIT’S UNIQUE CHARACTERISTICS

The bourbon industry’s poor labelling practices create confusion, especially during bottle selection. Moreover, international protections—in particular, the international treaty regime and bilateral trade agreements—merely identify bourbon as American doing little more to educate consumers of the spirit’s unique qualities.

### A. *Current Protections of Bourbon Leave a Glaring Need for Consumer Education*

Bourbon’s labels do little more than share the country and state of distillation and bottling. Poor enforcement of standards, brands’ inconspicuous disclosure of information, and the amount of information left off labels make bottle selection puzzling to consumers. Ultimately, confusion distorts consumers’ perceptions of bourbon, which in turn affects consumers’ purchasing decisions.

#### 1. Industry Labelling Practices Share Little About Bourbon’s Unique Characteristics and Leave Consumers Confused

Consumption begins with bottle selection, and a bourbon’s label is extremely influential to the process.<sup>227</sup> Labels today, however, confuse many consumers causing reliance on perceptions of prestige rather than quality or a bourbon’s unique characteristics.<sup>228</sup> Labelling deficiencies can be attributed to the TBB’s minimal requirements, brands’ use of meaningless

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<sup>225</sup>Tim Mckirdy, *What’s Fueling the Billion-Dollar Bourbon Boom?*, VINEPAIR (Sept. 1, 2020), <https://vinepair.com/articles/bourbon-market-billions-exports-sales-2020/> [perma.cc/V9R4-53JR].

<sup>226</sup>*Id.*

<sup>227</sup>Maggie Kimberl, *supra* note 4.

<sup>228</sup>THE VINEPAIR PODCAST, *supra* note 8.

buzzwords, and secrecy about the true source of a product.

The TBB's definitional and labelling requirements limit use of the term "bourbon" to only those spirits adhering to the standard recipe.<sup>229</sup> The label of a complying bourbon, however, only shares the brand name, the designation (i.e., bourbon), the alcohol content, the name and address as listed on the brand's permit, the country of origin, and treatment with wood.<sup>230</sup> Besides the brand name, designation as bourbon, and the alcohol content, the mandatory information does not have to appear on the front label of a bottle; instead, it is often located on the back of a bottle in small font.<sup>231</sup> Furthermore, although the mandatory information is useful, it does not begin to scratch the surface of the "inflection points in [bourbon's] production process."<sup>232</sup>

A brand may share more information on its unique distillation choices, but it is not common to do so.<sup>233</sup> Additionally, the use of words such as "small batch" and "hand-crafted" are unregulated, which allows brands to distract from their status as a sourced product.<sup>234</sup> Bourbon's surging popularity may account for the TTB's poor review of labels and brands' exclusion of desired information on labels.<sup>235</sup>

Regardless, many consumers desire to know more about bourbon before purchasing, and the attention span of consumers deprived of the undisclosed information may have a short expiration date.<sup>236</sup> There is a need to streamline bourbon labels so consumers can make informed purchases

<sup>229</sup> 27 C.F.R. § 5.143(c).

<sup>230</sup> *Anatomy of a Distiller Spirits Label Tool*, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, <https://www.ttb.gov/ds-labeling-home/anatomy-of-a-distilled-spirits-label-tool> [<https://perma.cc/YY66-3B39>] (last visited Feb. 27, 2023).

<sup>231</sup> 27 C.F.R. § 5.65; *see also* ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, *The Beverage Alcohol Manual: A Practice Guide, Basic Mandatory Labelling Information for Distilled Spirits* (Mar. 2007), [https://www.ttb.gov/images/pdfs/spirits\\_bam/complete-distilled-spirit-beverage-alcohol-manual.pdf](https://www.ttb.gov/images/pdfs/spirits_bam/complete-distilled-spirit-beverage-alcohol-manual.pdf) [<https://perma.cc/7U5F-GKN>] (listing the minimum range of distilled spirits labelling fonts at 1–2 mm).

<sup>232</sup> Bryce Wiatrak, *supra* note 1 ("The other 49% of the mash bill, the grains' origins, fermentation and distillation temperatures, yeast strains, heat cycling the rickhouse, barrel placement within the rickhouse, length of aging—toying with any of these factors and more can yield a different final spirit, not to mention that any given barrel of bourbon, even if filled with the exact same batch of new make, is likely to develop a personality of its own.").

<sup>233</sup> Susan Reigler, *Vanishing Act: What's Missing From Bourbon Labels*, LEO WEEKLY (Sept. 7, 2016), <https://www.leoweekly.com/2016/09/vanishing-act-whats-missing-bourbon-labels/#:~:text=D.S.P.%20is%20Distilled%20Spirit%20Plant,destroyed%20by%20fire%20in%201996> [<https://perma.cc/A6WX-E78H>].

<sup>234</sup> *Id.* (examining a bourbon label that "identified [the bourbon] as 100-proof, Kentucky straight . . . and small batch." The label lacked an age statement "though the company website says it [was] 'a blend of six-year-old bourbons.'" Upon reading the fine print, the label stated "'Bottled by Goodnight Distillery, Parlier, California' indicat[ing] that the bourbon was sourced" and not from Kentucky).

<sup>235</sup> *Id.* ("The demand for some brands has meant that some distillers may age for less time than they used to, in order to get their whiskey on the shelves. . . . Given the large number of new products coming onto the market (craft beers and wine, as well as spirits), the rules that do exist for labeling are not always enforced, or the regulators simply don't catch mistakes.").

<sup>236</sup> AUTHENA, *supra* note 80.

without having “to find a knowledgeable liquor store proprietor . . . [to] guide [them] through the labyrinth of label lore.”<sup>237</sup> An overhaul of the TTB’s labelling requirements is untenable—the bureaucratic headache alone stumps the viability of that idea. Instead brands—more preferably the entire bourbon industry—should proactively use geographical indications to increase consumer knowledge of the spirit.<sup>238</sup>

## 2. International Consumers Are Confused How Bourbon Is Unique from Other Whiskeys

Current legal protections merely identify bourbon as an American spirit but do little else to highlight its unique qualities. In 2021, DISCUS<sup>239</sup> conducted international research “to investigate consumer perceptions of American spirits” with a particular focus on American whiskey.<sup>240</sup> The study’s results demonstrated international consumers’ general confusion about bourbon’s characteristics.<sup>241</sup>

The Chinese market showed awareness of bourbon generally and looked to taste, age, origin, and aroma—characteristics of bourbon—as “key purchase drivers.”<sup>242</sup> Other markets reviewed in the study demonstrated conscious consumption; people are increasingly interested in the nuances of their food products.<sup>243</sup> South Africa, for example, recorded “[p]urchase interest for U.S. whiskey” but fewer than half of the study’s participants ever tasted bourbon specifically.<sup>244</sup> The study suggested growing the South African market through increased education on the history and heritage of the industry because consumers placed value on those factors.<sup>245</sup> Similarly, “industry experts, including bartenders, waitstaff, and retail marketers,” influenced Taiwan’s market, demonstrating the valuable role of personalized product education in attracting consumers.<sup>246</sup>

The study ultimately exhibits the extent of most foreign consumers’ knowledge of bourbon is its American identity and nothing more.<sup>247</sup> Moreover, the study emphasized “educating international drinkers . . . should have a positive impact” on international sales because “those who consume

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<sup>237</sup> Susan Reigler, *supra* note 233.

<sup>238</sup> *Id.*

<sup>239</sup> Recall that DISCUS stands for the Distilled Spirits Council of the United States.

<sup>240</sup> Countries surveyed included: Germany, the United Kingdom, India, South Africa, China, and Taiwan. See ROSE RESEARCH, AMERICAN WHISKEY STUDY – QUANTITATIVE AND QUALITATIVE – PRESENTATION OF KEY FINDINGS, (June 2021) (on file with author).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> Consumers commonly identified Jack Daniels and other American whiskeys as bourbon. *Id.*

whiskey tend to be interested in the specific characteristics of the brands they drink[—]in terms of flavor profile, aroma and the process in which they're made and aged."<sup>248</sup> The study noted that bourbon, with its rich history and traditions, is uniquely positioned to "[e]ducate international drinkers on the breadth and varieties of American whiskey."<sup>249</sup>

### B. Identifying Ineffective Protective Mechanisms

Navigating the international treaty regime requires investments of time and capital that do not guarantee added value to a brand because the reciprocal nature of the system makes it ineffective. If treaties are pursued, the industry should lobby for more bilateral trade agreements with countries that represent budding markets for bourbon. Bilateral trade agreements are a useful tool for informing consumers of bourbon's American identity, which serves to overcome an initial barrier to entrance in foreign markets. Beyond identifying bourbon's country of origin, however, bilateral trade agreements do little to inform consumers of the spirit's unique characteristics.

#### 1. The International Treaty Regime Lacks Enforcement Power

Though well-intentioned, multilateral treaties are largely ineffective because their basis in a reciprocity system lacks enforceability.<sup>250</sup> For example, TRIPS—the most prevalent multilateral treaty—merely preserves the preexisting rights of member nations rather than creating a uniform system of protection.<sup>251</sup> Prominently, the United States never altered its framework after entering TRIPS, thus demonstrating the treaty's ineffectiveness in bringing a uniform international framework.<sup>252</sup> Accordingly, a producer seeking international protection must register through the system of each nation in which it seeks protection.<sup>253</sup>

Registration is a time intensive and costly process. Within the United States alone, registration takes an average of 12 to 18 months.<sup>254</sup> If multiplied

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<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> Member nations may pursue legal action for another country's misuse of a geographical indication, but the process is long and primarily results in unenforceable outcomes. Further, the appeals process takes one to one and one-half years. As a result, the World Trade Organization merely encourages nations to respect each other's rights. The WTO does not have the legal authority to require the payment of damages to member nations whose geographical indications have been misused. See *Enf't of Intell. Prop. Rts.*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/tratop\\_e/trips\\_e/ipenforcement\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/ipenforcement_e.htm) [https://perma.cc/8TD4-K5SA] (last visited Feb. 7, 2024).

<sup>251</sup> Susan A. Mort, *supra* note 165.

<sup>252</sup> See, e.g., *id.* at 202.

<sup>253</sup> Emily C. Creditt, *supra* note 166.

<sup>254</sup> *How Long Does It Take to Register?*, USPTO, <https://www.uspto.gov/trademarks/basics/how-long-does-it->

in each country that a producer seeks registration, the timeline quickly adds up to a multi-year process. Moreover, this timeline does not include the pre-existence of a well-established brand—a concept whose timeline is too abstract to predict.

Legal representation by a patent attorney is not required to register in the United States, but it is highly encouraged.<sup>255</sup> There are long-term benefits to legal representation in the registration process—especially if a producer seeks registration in multiple countries—but it is an expensive investment.<sup>256</sup> In consideration of the average bourbon brand's limited resources, piecemeal registration through TRIPS nations' individual systems cannot be recommended. The process is too costly and time intensive for the small impact the treaty regime can potentially have on expanding consumers' knowledge of bourbon.

## 2. Bilateral Trade Agreements Should Not Be Abandoned

Bilateral treaties provide a more effective approach to educating consumers, but do not offer a permanent solution.<sup>257</sup> Besides informing consumers of bourbon's American identity, bilateral treaties do little to shed light on the spirit's unique characteristics. The United States has 44 bilateral trade agreements specifically aimed at protecting bourbon's American identity, but the scope of protection stops there.<sup>258</sup> As demonstrated by DISCUS' recent evaluation of foreign markets, international consumers lack knowledge of the variants of American whiskey.<sup>259</sup> Thus, the requisite depth of consumer education must do more than merely identify bourbon as an American spirit.

In its compilation of distilled spirits' export values through June of 2022, DISCUS identified Australia, Belgium, Brazil, Canada, China, France, Germany, India, Italy, Japan, South Korea, Latvia, Mexico, New Zealand, the Netherlands, South Africa, Singapore, Spain, and the United Kingdom as growing foreign markets of bourbon.<sup>260</sup> Some of the listed nations already participate in bilateral trade agreements that acknowledge bourbon's American identity. For countries not already participating, a bilateral trade agreement may provide greater, albeit limited, knowledge of bourbon's

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take-register [<https://perma.cc/2KV5-Q4Q6>] (last visited Feb. 7, 2024).

<sup>255</sup> *Do I Need An Attorney?*, USPTO, <https://www.uspto.gov/trademarks/basics/do-i-need-attorney> [<https://perma.cc/VWJ7-MC8T>] (last visited Feb. 7, 2024).

<sup>256</sup> *Id.* (“[I]n the long run, hiring an attorney may save you money because an attorney will know how to best advise you on your trademark’s registrability, prepare your application, and respond to the USPTO on various issues that might arise throughout the process.”).

<sup>257</sup> Justin Hughes, *supra* note 102.

<sup>258</sup> See James Bonar-Bridges, *supra* note 100, at 491, 506.

<sup>259</sup> ROSE RESEARCH, *supra* note 240.

<sup>260</sup> *Id.*

identity. Markets identified by DISCUS' June 2022 report that are not engaged in a bilateral trade agreement should therefore be prioritized over others when planning new agreements.

The total expense and timeline for developing a new bilateral trade agreement is unpredictable. Moreover, the benefit imparted on foreign markets mostly identifies bourbon's American identity and nothing more.<sup>261</sup> Thus, bilateral trade agreements do not provide the solution for educating consumers on bourbon's unique characteristics.<sup>262</sup>

### 3. Appellations of Origin Provide Value, but the Needed Overhaul of Bourbon's Labelling Standards Paired With the Geo-Homogeneity of Distilleries Makes the Solution Less Attractive

Creation of an AO system for bourbon presents a long-term solution to expanding consumers' knowledge of bourbon's unique characteristics, as evidenced by European nations' longstanding use of the system.<sup>263</sup> To create the AO system, however, would require an overhaul to the current labelling requirements for bourbon. Moreover, most bourbon distilleries exist in a geo-homogenous landscape because Kentucky accounts for 95% of the world's bourbon production.<sup>264</sup> Thus, detailed research and study is needed to identify areas within Kentucky with specific, unique impacts on a bourbon's identity. For these reasons, it is less likely that the bourbon industry would support the adoption of an AO system.

AO systems have long dominated the European wine market because of the vast amount of longstanding localized wineries across the continent.<sup>265</sup> In the context of wine, "[q]uality perception is a core concept in building customer value and satisfaction."<sup>266</sup> European AOs effectively appeal to quality concerns because the common hierarchal structure conveys an expert-issued value judgment.<sup>267</sup> What results is quality bonding that creates a long-

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<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> France has perhaps the most popular AO system for wines. Other nations like Italy and Germany, however, have similar systems focused on emphasizing wine variants' connection to the geographical area in which they were produced. See generally Justin Hughes, *supra* note 102, at 306–08 (reviewing the French AO system); *What Is DOC and DOCG Wine? Differences Between DOC, DOCG, IGT, and VdT on Italian Wine Labels*, MASTERCLASS (Aug. 10, 2021), <https://www.masterclass.com/articles/what-is-doc-and-docg-wine-differences-between-doc-docg-igt-and-vdt-on-italian-wine-labels> [<https://perma.cc/2MEB-2P5U>] (reviewing the Italian AO system); Per & Britt Karlson, *Germany Introduces A New Wine Hierarchy Based on Geography*, FORBES (Apr. 20, 2021), <https://www.forbes.com/sites/karlsson/2021/04/20/germany-introduces-a-new-wine-hierarchy-based-on-geography/?sh=5add8ae533d8> [<https://perma.cc/9WA5-HTTA>] (reviewing the German AO system).

<sup>264</sup> Kentucky Distillers' Ass'n, *supra* note 58.

<sup>265</sup> Benjamin Robert Hopper, *supra* note 110.

<sup>266</sup> LUCA CAMANZI ET AL., *supra* note 162.

<sup>267</sup> Benjamin Robert Hopper, *supra* note 110.

lasting relationship with consumers.<sup>268</sup>

Inspired by the European AO systems, the United States began developing an AO system in 1980.<sup>269</sup> Relatively—in comparison to the European wine systems—the United States AO system is young and still developing. Many wine critics and enthusiasts take issue with the logic behind AVAs and label designs.<sup>270</sup> Thus, developing an AO system is far from a quick solution.

Foremost, developing an AO system for bourbon will require government collaboration and enforcement.<sup>271</sup> Congress will need to repeal bourbon's current labelling laws and pass a new framework, which presents a lengthy timeline.<sup>272</sup> Furthermore, before any AVAs could receive official recognition,<sup>273</sup> a region would need to extensively research how its geographic qualities uniquely contribute to a specific type of bourbon.<sup>274</sup> For these reasons, it is not likely, nor is it recommended, that the industry adopt an AO system.

### III. RESOLUTIONS

The bourbon industry needs to increase consumer education so brand awareness extends beyond mere knowledge of bourbon's American identity. Adoption of a certification mark will inform consumers of quality standards and unique characteristics, without necessarily requiring government enforcement. Multiple approaches can meet this need—either through a pre-existing state trademark or adoption of a quality standard mark. Ultimately, adopting a quality mark offers the most effective solution to the need for consumer education because of its ability to accommodate industry concerns and the access it provides to developing consumer protections.

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<sup>268</sup> LUCA CAMANZI ET AL., *supra* note 162.

<sup>269</sup> Benjamin Robert Hopper, *supra* note 110.

<sup>270</sup> See generally Dave McIntyre, *Why American Wine Labels Aren't As Specific As They Could Be*, WASH. POST (Dec. 31, 2016), [https://www.washingtonpost.com/lifestyle/food/why-american-wine-labels-arent-as-specific-as-they-could-be/2016/12/30/ea4ea52c-ccfe-11e6-a747-d03044780a02\\_story.html](https://www.washingtonpost.com/lifestyle/food/why-american-wine-labels-arent-as-specific-as-they-could-be/2016/12/30/ea4ea52c-ccfe-11e6-a747-d03044780a02_story.html) [<https://perma.cc/2KRV-Y84X>]; Michael Maher, *On Vino Veritas? Clarifying the Use of Geographic References on American Wine Labels*, 89 CALIF. L. REV. 1881 (2001).

<sup>271</sup> Zachary Mike, *supra* note 159.

<sup>272</sup> See 27 C.F.R. § 5.143 (stating the labelling requirements for distilled spirits).

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

*A. Adopt a Certification Mark to Increase Consumer Knowledge of Bourbon's Unique Qualities*

The Kentucky Proud trademark informs consumers of a bourbon's authentic Kentucky identity.<sup>275</sup> The requirements for eligibility are very strict, however, which limits its application to a small sector of the industry.<sup>276</sup> Instead, a mark certifying quality can accommodate more brands and provide more information to consumers.

1. Kentucky Proud Trademark to Indicate a Bourbon's Status As a Kentucky Made Product

The Kentucky Proud trademark is available to products “raised, grown, or processed in Kentucky.”<sup>277</sup> The Kentucky Agricultural Development Board oversees the program with support from state law.<sup>278</sup> Although the standards of eligibility for the program are vague, the stated purpose to identify “Kentucky-grown agricultural products” provides direction.<sup>279</sup> Moreover, the statutory definition of “Kentucky-grown agricultural products” covers “any agricultural product grown, raised, produced, processed, or manufactured in Kentucky.”<sup>280</sup> Furthermore, Kentucky Proud's website states the “logo may only be used by licensed, qualified applicants” whose “[p]roduct's major ingredients shall be grown and/or processed in Kentucky.”<sup>281</sup>

Kentucky Proud's standards of eligibility are ambiguous—namely, the definition of “major ingredients” and the distinction between growth and processing of those ingredients is unclear. Though Kentucky Proud's encouragement that “[i]f you're not sure if you qualify, go ahead and apply” may quell the hesitancy of producers considering applying for permission to use the mark, for purposes of this Note, the statement does little to illuminate *how* the trademark's qualifications apply to the bourbon industry as a whole.<sup>282</sup>

For example, the Kentucky Proud standards conflict with the state's

<sup>275</sup> KENTUCKY PROUD, *supra* note 217.

<sup>276</sup> *Frequently Asked Questions: How Can I Use The Logo*, KENTUCKY PROUD, <https://www.kyproud.com/faqs#how-can-i-use-the-kentucky-proud-logo> [https://perma.cc/NN3P-D82D] (last visited Feb. 27, 2023).

<sup>277</sup> KENTUCKY PROUD, *supra* note 217.

<sup>278</sup> *Id.*; K.R.S. § 260.017.

<sup>279</sup> K.R.S. § 260.017.

<sup>280</sup> *Id.*

<sup>281</sup> *Frequently Asked Questions*, KENTUCKY PROUD, <https://www.kyproud.com/faqs> [https://perma.cc/N4GM-D3TY] (last visited Feb. 7, 2024).

<sup>282</sup> *Id.*

regulation of the word Kentucky in the labelling of bourbon, which only prohibits use of the state's name when a bourbon was not aged for at least a year before removal to another state.<sup>283</sup> This suggests that many bourbons legally permitted to label themselves as "Kentucky bourbons" may not qualify for the mark—not because of a failure to meet labelling standards, but because some of their major ingredients are sourced from other states.<sup>284</sup> Indeed, those distilled spirits identifying as Kentucky Proud note that every ingredient on their mash bill hails from Kentucky,<sup>285</sup> strengthening the inference regarding major ingredients. Moreover, although qualifications state that a product whose major ingredients are processed in Kentucky may qualify for use of the trademark, without a definition of processing, it is unclear whether a bourbon's distillation in Kentucky may overcome the sourcing of its major ingredients from other states to allow for use of the mark.<sup>286</sup>

Thus, while the Kentucky Proud trademark provides strong marketing support, it is not certain whether the mark is an accessible tool for many bourbons. For brands eligible to apply for the trademark (or who suspect they may be eligible), however, use of the Kentucky Proud trademark is an effective way to inform consumers of a bourbon's Kentucky origin. However, because the trademark applies only to a small sector of bourbons, it does not present an industry-wide solution to the need for consumer education.

## 2. Adopt a Certification Mark to Share More Beyond Bourbon's American Origin

To share information beyond a bourbon's American origin and to promote a wide range of bourbons, the industry should adopt a certification mark. Because ownership of a certification mark grants the power to develop quality standards for use of the mark,<sup>287</sup> the bourbon industry should consider collaboration at the national and state level to develop a series of certification marks to accommodate the wide spectrum of bourbon varieties.

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<sup>283</sup> K.R.S. § 244.370 ("No whiskey produced from grains which are cooked, fermented, and distilled in Kentucky, except whiskey the barrel containing which is branded 'Corn Whiskey' under the internal revenue laws, shall be bottled in Kentucky or removed from this state unless such whiskey has been aged in oak barrels for a period of not less than one (1) full year; provided, however, that whiskey aged less than one (1) year may be removed from the state and bottled, or bottled in Kentucky, if the word 'Kentucky' or any word or phrase implying Kentucky origin does not appear on the front label or elsewhere on the retail container or package except in the name and address of the distiller as required by federal regulation.").

<sup>284</sup> KENTUCKY PROUD, *supra* note 281. Recall that bourbon's mash bill is 51% corn. Thus, any bourbon sourcing its corn outside of the state is not likely eligible for use of the Kentucky Proud trademark.

<sup>285</sup> See Press Release, Bardstown Bourbon Company to Produce Certified Kentucky Proud Whiskey, *supra* note 218.

<sup>286</sup> KENTUCKY PROUD, *supra* note 281.

<sup>287</sup> 15 U.S.C. § 1064.

At the national level, the creation or identification of an impartial organization to own and administer the certification mark is required. Although the American Bourbon Association (ABA) holds itself out as an organization aimed at “ensur[ing] bourbon whiskey is respected around the world as the highest quality whiskey made,”<sup>288</sup> it is owned by the Sazerac Company that owns and operates multiple bourbon brands. Thus, because the owner of a certification mark cannot produce or sell the goods certified by the mark, the ABA is likely ineligible (or unwilling) to register a certification mark.<sup>289</sup> Additionally, the KDA appears well-equipped to own and administer a certification mark, but its focus to maintain Kentucky’s status as the leading producer of bourbon means it is unlikely to administer a mark recognizing the quality of bourbons from other states.<sup>290</sup> A new, impartial organization, therefore, must be created to develop and administer a certification mark at the national level.

To develop a national certification mark, the national organization must facilitate communication amongst brands, distillers, chemical engineers, and enthusiasts from across the nation to develop quality standards for the ingredients listed on a mash bill, distillation practices, the aging process, and bottling. The same collaborative efforts should take place amongst Kentucky-based brands, distillers, chemical engineers, and enthusiasts because there is potential, in addition to creating a mark to certify quality nationally, to develop a certification mark specifically aimed at certifying the regional origin and quality of bourbons distilled in Kentucky. This is especially so because of the unique relationship Kentucky has with bourbon. To that end, although the KDA is unlikely to administer a certification mark at the national level, the organization is well-equipped to administer a Kentucky-specific mark.

A Kentucky-specific mark can better serve as a geographical indication because the limited geographical scope of eligible distillers will increase the likelihood of the mark capturing a legitimate land-quality nexus in its standards. For example, the mark may consider the impact Kentucky’s limestone water has on bourbon’s quality by mandating its use in distillation as a standard for the certification mark. Additionally, other major ingredients like corn may be considered. In 2022, “Kentucky distillers purchased about 28.3 million bushels of corn and around 13.2 million bushels of other grains such as wheat and rye” with an estimated “19 million bushels of corn and 2.6 million bushels of other grains [purchased specifically] from Kentucky

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<sup>288</sup> *About*, AM. BOURBON ASS’N, <https://www.americanbourbonassociation.com/about> [<https://perma.cc/6RRN-ZQTW>] (last visited Feb. 28, 2023).

<sup>289</sup> 15 U.S.C.A. § 1064(5)(B).

<sup>290</sup> KENTUCKY DISTILLERS’ ASSOCIATION, *supra* note 224.

farmers.”<sup>291</sup> Interestingly, “[c]orn production ... in distilling counties”—namely, “Nelson, Shelby, Washington, Mercer and Marion counties ... where large, herigate distillers are located”—grew at a faster rate than statewide production.<sup>292</sup> Currently, there is no research identifying the unique qualities imparted by Kentucky corn, but the predominance of Kentucky farmers in the supply chain represents a viable Kentucky-specific quality standard.

Given the considerable latitude in bourbon’s production, there are infinite possibilities for the quality standards of a certification mark at the national and Kentucky-specific level. Regardless of the certification mark’s standards, much of the value provided by a certification mark is found in the collective marketing power the mark holds.<sup>293</sup> Initially, marketing efforts should focus on informing consumers of the quality standards of the mark and developing recognition of its design.

There are endless possibilities for the design of a certification mark, but the use of a security seal should be considered. A security seal is a sticker that would be placed on an approved brand’s bottle that will include the certification mark’s logo, a QR code, and tamper-evident feature to indicate that a bottle has not been opened or broken.<sup>294</sup> The logo will serve as a seal of approval to indicate a bourbon’s adherence to the quality standards of the mark.<sup>295</sup> The tamper-evident feature will ensure the bourbon within the bottle is the spirit actually conforming to the quality standards.<sup>296</sup> The QR code should link to a website explaining the certification mark’s quality standards to give consumers direct access to information about the unique qualities of the bourbon donning the mark on its bottle.

If the owner-organization thoughtfully develops and diligently promotes the certification mark, its design will transform into an iconic symbol that immediately indicates high-quality bourbon.<sup>297</sup> More importantly, a thoughtfully developed certification mark will serve as a springboard for education because its standards will provide consumers with meaningful information about a bourbon’s quality and flavor-profile. Thus, by fulfilling the bourbon industry’s need for education, a certification mark will create consumers more in tune with their personal preferences, more

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<sup>291</sup> Paul Coomes & Barry Kornstein, *supra* note 59.

<sup>292</sup> *Id.*

<sup>293</sup> Mima de Lima Medeiros et al., *supra* note 120.

<sup>294</sup> See *Security Seals*, PROOFTAG, <https://prooftag.net/en/products/security-seals/> [https://perma.cc/RY7E-DMG2] (last visited Feb. 28, 2023).

<sup>295</sup> Emily Nation, *supra* note 122.

<sup>296</sup> PROOFTAG, *supra* note 294.

<sup>297</sup> Carleigh Stiehm, *Celebrating 110 Years of the Good Housekeeping Seal*, HEARST (Aug. 22, 2019), <https://www.hearst.com/-/celebrating-110-years-of-the-good-housekeeping-seal> [https://perma.cc/4ELS-9XMD] (describing the Good Housekeeping Seal as “an iconic emblem of trust.”).

willing to explore other bourbon varieties and flavor-profiles, and more dedicated overall to the spirit. In other words, a certification mark is the gateway to longevous consumer interest.

a. The Industry's Emphasis on Brand Cooperation Should Not Deter Adoption of a Certification Mark

Iconic brands dominate the bourbon industry, but a strong sense of cooperation exists amongst distillers. The camaraderie of brands spans from lending support during times of crisis to the actual exchange of products through sourcing.<sup>298</sup> Adopting a certification mark, however, will arguably pull back the curtain on industry practices, and this may invoke well-founded concerns over disruption to the cooperative practices amongst brands.

A particular area of concern for the industry is the growing subset of blended and sourced products. Historically, there is a negative perception of blended and especially sourced products in the industry.<sup>299</sup> In recent years, however, that discourse has subsided as a result of the growing sophistication of blended and sourced products.<sup>300</sup> Indeed, not all consumers are adverse to sourced products; they simply want to know that what they are drinking is sourced.<sup>301</sup> Still, brands remain weary to share their status as a sourced product—discrete placement of a bourbon's distilling location on bottle labels demonstrates the industry's persisting secrecy about the subject.<sup>302</sup>

Adoption of a mark illuminating a bourbon's ingredient sources, distilling practices, and aging methods, etc., therefore, poses multiple threats to blended and sourced products. Foremost, identifying the source of ingredients may trace sourced products back to one brand: MGP.<sup>303</sup> Given

<sup>298</sup> Sara Havens, *The Kentucky Spirit: How Bourbon Distilleries Unite To Help in Times of Need*, THE ALCOHOL PROFESSOR, <https://www.alcoholprofessor.com/blog-posts/the-kentucky-spirit-how-bourbon-distilleries-unite-to-help-in-times-of-need> [<https://perma.cc/5WJD-9JX4>] (last visited Feb. 28, 2023) (“In November of 1996, Heaven Hill Distillery in Bardstown, Ky., went up in flames, most likely due to a lightning strike. As the fire spread, one rickhouse after another—wooden warehouses filled to the brim with high-proof bourbon, of course—burned to the ground. And when all was said and done, seven rickhouses, the historic distillery, and more than 90,000 barrels of bourbon were lost within a four-hour period. The very next day, fellow Kentucky distilleries like Brown-Forman (Old Forester, Woodford Reserve) and Jim Beam offered assistance to Heaven Hill, essentially their competitor, to distill whiskey for them until they were able to rebuild or purchase a new facility. It was a true testament to the comradery of the bourbon industry and an act of generosity you won't find in any other sector of the business world.”).

<sup>299</sup> Jake Emen, *Bourbon Blending: Brands Emphasizing the Blend*, DISTILLER (Oct. 20, 2021), <https://distiller.com/articles/blending-bourbon> [<https://perma.cc/XT4W-XSY8>] (“The word ‘blended’ is often considered a dirty one when it comes to bourbon.”).

<sup>300</sup> *Id.*

<sup>301</sup> Susan Reigler, *supra* note 233 (“‘Mostly, I want bourbon labels to be honest and true. I don't care if a bourbon is sourced from MGP . . . and blended, as long as the label says that, and doesn't claim some origin story dating back to good ol' great Grandpa Willie.’”).

<sup>302</sup> Maggie Kimberl, *supra* note 4.

<sup>303</sup> Mark Pringle, *Midwest Grain Products (MGP) and Its Influence in the Bourbon and Whiskey World*, THE

the historic negativity aimed at sourced products, it is understandable that brands are weary of a certification mark that will expose their genericity.<sup>304</sup> Additionally, hostility towards sourced products threatens to reconstruct barriers to market entrance torn down (or at least lowered) by the practice, negatively affecting people who lack the wealth needed to purchase the equipment required to distill their own juice.<sup>305</sup>

These concerns are valid. Economic research, however, reports encouraging statistics on geographical indications as “stimulat[ors] [of] commerce,” emphasizing their “manner to influence consumer behavior.”<sup>306</sup> Moreover, research suggests that consumers’ “access to knowledge” increases production, “which facilitates market access” over time.<sup>307</sup> Additionally, the flexibility of a certification mark—namely the owner’s ability to develop the specific standards of the mark<sup>308</sup>—allows for consideration of these concerns.<sup>309</sup> The industry can develop multiple certification marks—one for bourbons distilled, aged, and bottled by a single distillery/brand and one applying to sourced products—to inform consumers that a bourbon is sourced while promoting its quality. To successfully achieve positive promotion, a certification mark’s marketing power must be exercised to its full potential to provide consumers with thorough information about the practices of sourcing and blending, the high-quality products those practices generate, and the highly talented individuals those practices welcome into the industry.<sup>310</sup>

PEOPLE’S BOURBON REV. (Dec. 28, 2022), [https://www.peoplesbourbonreview.com/articles/midwest-grain-products-\(mgp\)-and-its-influence-in-the-bourbon-and-whiskey-world](https://www.peoplesbourbonreview.com/articles/midwest-grain-products-(mgp)-and-its-influence-in-the-bourbon-and-whiskey-world) [<https://perma.cc/5TJY-4SBY>] (“It is well known within the whiskey community that many ‘distilleries’ buy their whiskeys from the same source . . . In fact, in 2016, there were at least 130 ‘distilleries’ sourcing from this whiskey power broker . . . Now, in 2022, we may estimate or conclude by extrapolation that the current number of distilleries sourcing is nearly 200. This powerful and dominant source is Midwest Grain Products (MGP).”).

<sup>304</sup> *Inside a Sourced Bourbon*, BOURBONR (Apr. 21, 2017), <http://bourbonr.com/blog/inside-a-sourced-bourbon/> [<https://perma.cc/UD7U-GJFB>] (“Sourced bourbons are one of the most controversial topics in bourbon.”).

<sup>305</sup> Josh Wood, *Black-owned Distilleries are Breaking Barriers That Once Surrounded the Kentucky Bourbon Industry*, WASH. POST (Mar. 26, 2021), <https://www.washingtonpost.com/business/2021/03/24/kentucky-bourbon-black-owned-business/> [<https://perma.cc/YKN8-BLX7>] (“That means people who get into bourbon often have generational wealth or can easily obtain credit — barriers that disproportionately cut out African Americans.”); Vitoria Aparecido Cardoso et al., *The Benefits and Barriers of Geographical Indications to Producers: A Review*, 37 RENEWABLE AGRICULTURE AND FOOD SYSTEMS 707, 714–15 (2022) (“Extremely strict rules end up by excluding some producers, especially the less efficient ones, who may prefer to sell their products in the traditional market than to deal with high production costs.”); see also Noah Lederman, *The Untold History of Black Bourbon*, BRIT. BROAD. CO. (Aug. 25, 2022), <https://www.bbc.com/travel/article/20220824-the-untold-history-of-black-bourbon> [<https://perma.cc/R52Q-F7ZS>].

<sup>306</sup> Mirna de Lima Medeiros et al., *supra* note 120.

<sup>307</sup> Vitoria Aparecido Cardoso et al., *supra* note 305.

<sup>308</sup> Fla. v. Real Juices, Inc., 330 F. Supp. 428, 432 (M.D. Fla. 1971).

<sup>309</sup> Including blenders and brands that source their products in conversations regarding development of a mark will make the standards more inclusive and beneficial to those producers.

<sup>310</sup> See Roxanne Clemens, *Why Can’t Vidalia Onions Be Grown in Iowa? Developing a Branded Agricultural Product*, MIDWEST AGRIBUSINESS TRADE RSCH. AND INFO. CNTR. (Sept. 2002),

## b. The Emerging Combination of Trademark and Consumer Protection Law Gives Added Weight to the Adoption of a Certification Mark

In addition to economic benefits, an emerging theory of consumer protection law may allow the owner of a certification mark and bourbon consumers to recover under both the Lanham Act and state consumer protection laws thereby increasing the enforcement power of the mark.

An emerging line of cases contemplating the intersection of trademarks and consumer protection laws forecasts a certification mark owner's ability to seek recovery for the misuse of its mark through an action for federal trademark infringement and the violation of state consumer protection law. For example, *National Products, Inc. v. Arkon Resources, Inc.* contemplated the overlap of federal claims under the Lanham Act and state claims under the Washington Consumer Protection Act (WCPA).<sup>311</sup> The court held "as a general proposition, conduct that constitutes federal trademark infringement will also . . . violate the WCPA."<sup>312</sup> Under the WCPA, a business or consumer injured in their "business or property" may bring forth a claim for recovery.<sup>313</sup>

Overlap of a trademark infringement claim and a consumer protection claim suggests that a certification mark's effect may extend beyond providing consumer education. The certification mark may allow multiple routes to recovery for the certification mark owner and consumers injured by the mark's misuse.<sup>314</sup> In the context of bourbon, the court's opinion in *Victory Global, LLC v. Fresh Bourbon, LLC* opined at the potential of a similar type of claim under Kentucky law but did not analyze the issue to its end.<sup>315</sup>

<https://dr.lib.iastate.edu/server/api/core/bitstreams/f8799d8c-4059-4cd0-acf0-63477cf93e76/content>

[<https://perma.cc/BQW2-PNUS>] ("Vidalia onions are an example of how responding to consumer demand with a succession of marketing, legislative, and research events has protected a niche market from becoming oversupplied by producers. And, by protecting the name, quality, and image of an agricultural product through state ownership of the trademark, higher values are realized throughout the marketing chain.")

<sup>311</sup> *Nat'l Products, Inc. v. Arkon Res., Inc.*, 294 F.Supp. 3d 1042 (W.D. Wash. 2018).

<sup>312</sup> *Id.* at 1050.

<sup>313</sup> *Id.* ("[A] plaintiff bears the burden of proving the following elements to establish a violation of the WCPA: (1) an unfair or deceptive practice; (2) occurring in trade or commerce; (3) affecting the public interest; (4) that injures the plaintiff in his or her business or property; and (5) a causal link between the unfair or deceptive act and the injury suffered.")

<sup>314</sup> *Id.*

<sup>315</sup> *Victory Global, LLC v. Fresh Bourbon, LLC*, No. CV 5:21-62-KKC, 2022 WL 785039, at \*7 (E.D. Ky. Mar. 14, 2022) ("Count I, Fresh Bourbon asserts that the Brough Brothers 'website and promotion' of its bourbon currently on the market also uses Kentucky references and imagery to suggest that the bourbon was distilled in Kentucky. . . . Fresh Bourbon alleges that the only bourbon that Brough Brothers currently sells on its website is the bourbon that was distilled in Indiana. . . . Yet, Fresh Bourbon alleges, 'nowhere on the Brough Brothers Internet website do they acknowledge that their bourbon is Indiana Bourbon, or at least not Kentucky bourbon' . . . . Fresh Bourbon alleges that, instead, the website states that Brough Brothers Distillery is 'Kentucky's first African-American owned distillery' . . . . The website's discussion of the Brough Brothers' Kentucky distillery without any

Full exploration of the nuances of this potential mode of recovery moves well outside the scope of this Note.<sup>316</sup> However, multiple avenues of recovery for the misuse of a certification mark—for a mark owner and product consumers—should be contemplated when weighing the benefits of adopting a certification mark because it represents value beyond marketing power and increased sales.

#### CONCLUSION

The bourbon industry is in a precarious position—savor its unprecedented popularity or act before lack of consumer knowledge and misinformation results in dilution of its status as a handcrafted and historical spirit. The industry cannot ignore the education needed to maintain the consumer attention it now holds. Current labelling practices confuse consumers more than helping them to make informed purchases. Furthermore, the current legal protections of bourbon are not inadequate but do little more than inform a consumer of the spirit's American identity. There is so much more to be shared about a bourbon—like the distiller's choices in selecting the ingredients for a mash bill, distillation, aging, bottling, and distribution. This Note urges the industry to create a national organization to develop, own, and administer a mark (or multiple marks) certifying quality, including a Kentucky-specific mark to highlight the land-quality nexus of bourbon and the state. The collaborative efforts of brands across the country can result in standards representative of industry practices, and the ability to create multiple standards through multiple marks will make the certification process inclusive to more distillers. Ultimately, adoption of a certification mark will educate consumers beyond the American origin of bourbon. An education initiative will allow the bourbon industry to strike while the iron is hot so it may forge long-lasting relationships with consumers based on thorough knowledge and appreciation of bourbon's unique characteristics.

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mention of the fact that its bourbon currently on the market was distilled in Indiana could mislead a reasonable consumer about where that bourbon was distilled. Accordingly, Count I of the counterclaim will not be dismissed in its entirety.”)

<sup>316</sup> See generally Theodore H. Davis Jr. & John L. Welch, *Part III. Litigation in the Federal Courts and State Courts of General Jurisdiction*, 109 TRADEMARK REP. 142 (2019) (exploring the overlap of trademark and state consumer laws).