

PAIRING STURGEON WITH CHAMPAGNE: TOWARDS A DUE CAUSE EXCEPTION IN THE LAW OF GEOGRAPHICAL INDICATIONS

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It is commonly lamented that geographical indications (GIs) receive extravagant protection under European Union (EU) law. Yet due to the special nature of GIs it can be hard to conceptualize sensible limitations to protection and so far the question where such limits (if any) should lie has received little attention in scholarship. This essay advances the argument for a due cause exception in the law of GIs. It examines two categories of use that may legitimately benefit from such an exception: descriptive uses and uses that fall within the scope of freedom of expression provisions, for instance use of GIs as part of artistic works or parodies. The essay argues that these and other uses should be evaluated according to a two-pronged test to establish whether they are objectively justified and in accordance with honest practices. Lastly, it argues that even if no express due cause exception is or becomes part of the applicable GI regulations, guidance by the European Court of Justice (ECJ) on the interpretation of EU law in light of EU primary law mandates observance of countervailing fundamental rights also within the contours of the current regulations. Because the categories of use outlined in this essay fall within the scope of the freedom to conduct a business and the freedom of expression and the arts, at least some allowance must be made for these uses when interpreting and applying the protection due to GIs.

1. Introduction

In a recent opinion piece, Annette Kur expresses concern about a 'blind spot' in the scholarship on geographical indications (GIs).¹ It surprises her that the absence of meaningful limitations to GI

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¹ A Kur, 'No Strings Attached to GIs? About a Blind Spot in the (Academic) Discourse on Limitations and Fundamental Rights' (2023) 54 *IIC* 87.

protection in European Union (EU) law has 'not stirred any reactions from the academic community'.² In my view, that criticism is not entirely correct: the interpretation by the European Court of Justice (ECJ) of the so-called concept of evocation, in particular, has attracted considerable criticism.³ At the same time, Kur is surely right that in recent decades the legal protection afforded to GI's has steadily increased to what Dev Gangjee has called 'absolute' protection, which no longer depends on the public's understanding of a sign but protects the sign *per se*.⁴ This essay therefore takes up Kur's challenge to conceptualise a possible 'due cause' exception in situations where a competitor directly or indirectly uses the GI in its entirety.⁵ Its scope is limited to what might be called, within the EU *sui generis* system for GI protection, 'sub (a)' cases, although the occasional reference to the ECJ's case law on evocations (falling under 'sub (b)') cannot be avoided.⁶

Reflections on the appropriate limits to GI protection are particularly timely as a proposal for a consolidated regulation for the protection of GI's is currently pending (referred to hereinafter as the 'proposed GI regulation').⁷ As Kur also notes, this proposal maintains the current ultra-strong protection regime and would at times go even further, while limits to protection go virtually without mention.⁸ It is thus high time to consider what these limits ought to be. While the analysis

² Ibid 88.

³ See, for instance, V Díaz-Marta and A Kyrylenko, 'The ever-growing scope of Geographical Indications' evocation: from *Gorgonzola* to *Morbier*' (2021) 16 *Journal of Intellectual Property Law & Practice* 442, 445; S Xinzhe, 'A closer look at the elephant in the room: the distinctiveness of geographical indications' (2021) 11 *Queen Mary Journal of Intellectual Property Law* 25, 37.

⁴ D Gangjee, *Relocating the Law of Geographical Indications* (CUP 2012) 300.

⁵ Kur (n 1) 91.

⁶ The various EU regulations that concern GI protection contain four categories of uses against which registered names 'shall be protected'. Whereas categories (b), (c), and (d) cover a broad range of uses that may be suggestive of the GI or otherwise mislead consumers, category (a) must be interpreted strictly as limited to uses of indications with a particularly high degree of similarity to the GI, 'close to indenticality': Case 783/19 *Comité Interprofessionnel du Vin de Champagne* EU:C:2021:713 (*Champanillo*), para 38.

⁷ COM(2022) 134 final (Brussels, 31 March 2022).

⁸ Article 28 of the proposal makes allowance for use of a GI to indicate ingredients in composite foodstuffs as per Case 393/16 *Comité Interprofessionnel du Vin de Champagne*, EU:C:2017:991 (*Champagner Sorbet*), but imposes an additional restriction in section (2). Interestingly, Article 70 contains 'Exceptions for certain uses', including 'good faith' uses of denominations in labelling, but its effect is seemingly limited to Traditional Specialties Guarantees (Chapter 1 of Title III).

is limited to EU law, its implications are not. As is well known, GI protection is a key political interest of the EU and in particular some Member States and protection for 'crown jewel' GIs, modelled on the EU regime, is pursued in all trade agreements to which the EU is a party.⁹ As a result, the acceptance in the EU of a 'due cause' exception to GI protection would have direct repercussions at least in those EU trading partners that have agreed to protect European GIs on the EU's or similar terms.

The essay proceeds in three parts. The first part outlines the 'sub (a)' protection that GIs currently enjoy and that will be maintained in the proposed GI regulation. It shows that, although protection is nominally limited to cases where use 'exploits, weakens, or dilutes' the GI's reputation, exploitative use of a GI is easily assumed. Consequently, almost all uses of a GI that do not conform with the product specification risk infringement. The second part offers a number of scenarios where such absolute protection might be problematic. My focus is on two scenarios in particular: honest descriptive use of GIs and use of GIs as parts of artistic expressions or parodies. The third part considers how the EU law of GIs could make allowance for such uses. While conceding that the best way forward would be codification of a due cause exception, it argues that the competing interests in GI use discussed in Section 3 are recognised and protected in the EU's Charter of Fundamental Rights (CFR) and must therefore be considered when GI protection is interpreted and applied. In particular, because EU law (including the regulations laying down GI protection) must respect primary law and strike a fair balance between all Charter rights at stake, consideration of competing rights is mandatory, if need be through purposive interpretation of the requirement that exploitation of the GI's reputation must be shown.

2. Straight, no chaser: the protection of GIs against direct or indirect use

The first category of uses against which GIs are protected is listed under (a) in the various GI protection provisions and reads as follows in the current version of Article 13(1)(a) of Regulation 1152/2011:

Registered names shall be protected against:

(a) any direct or indirect commercial use of a registered name in respect of products not covered by the registration where those products are comparable to the products

⁹ T Engelhardt, 'Geographical Indications Under Recent EU Trade Agreements' (2015) 46 *IIC* 781, 796. Unsurprisingly, the continued protection of European GIs also found a hard-fought place in the Brexit Withdrawal Agreement: S Peers, 'The End – or a New Beginning? The EU/UK Withdrawal Agreement' (2020) 39 *Yearbook of European Law* 122, 167.

registered under that name or where using the name exploits, weakens or dilutes the reputation of the protected name, including when those products are used as an ingredient;

This precise wording is also used in the proposed GI regulation. The provision extends to direct (on the goods or packaging) and indirect (in advertising) use of any sign that is identical or very nearly identical to the GI as registered.¹⁰ It provides two types of protection, in each case against use of the GI in respect of products not compliant with the product specification. If these products are 'comparable' to the products for which the GI is registered, no further conditions apply and such use is deemed per se illegal. Although this form of protection is not entirely without potential problems – see the discussion of formerly compliant 'outsiders' below – it can generally be accepted, given that use of a GI for non-compliant yet comparable goods will easily risk confusing consumers, eroding the GI's reputation, or both. In addition, any use of the GI (regardless of the type of product) is illegal if it 'exploits, weakens, or dilutes the reputation of the protected name'. As others have observed, the provision is thus concerned with protecting the reputation of GI's and it is the only section of the EU scheme on GI protection that makes express reference to this goal.¹¹

Variants of the above-cited 'sub (a)' provision appear in various foodstuff-specific regulations and the ECJ has held that these provisions must be consistently interpreted.¹² However, a notable incongruence between the provisions has arisen since the recent adoption of Regulation 2021/2117, which primarily sought to implement the EU's objectives for its Common Agricultural Policy after 2020. At the same time, it amended Article 103 of Regulation 1308/2013 and Article 13 of Regulation 1151/2012, which lay down GI protection for a range of agricultural foodstuffs including wines and (since Regulation 2021/2117) aromatised wines.¹³ The amendments

¹⁰ On the distinction, see Case 44/17 *Scotch Whisky Association*, EU:C:2018:415 (*Glen Buchenbach*), para 32.

¹¹ Díaz-Marta and Kyrylenko (n 3) 446; M Verbeeren and O Prins, 'The Protection of PDOs and PGIs against evocation: a 'Grand Cru' in the CJEU's cellar?' (2021) 16 *Journal of Intellectual Property & Practice* 316, 327-328. As I have argued elsewhere, the same criterion should govern 'sub (b)' cases: L Dijkman, 'Of Treats and Treaties: The Forgotten Chapter of European Geographical Indications Law', in: H Boscher and E Rosati, *Developments and Directions in Intellectual Property Law* (OUP 2023) 476. Support for this position is found in Case 614/17 *Fundación Consejo Regulador de la Denominación de Origen Protegida Queso Manchego*, EU:C:2019:344 (*Manchego*) para 35.

¹² *Champagner Sorbet* (n 8) para 32.

¹³ While Regulation 215/2014 on aromatised wines still exists, GI protection for these products now falls within the scope of Regulation 1151/2012: see Article 16a.

expanded the reach of 'sub (a)' by adding to the list of objectionable GI uses those that weaken or dilute the GI's reputation: formerly, the second 'level' of 'sub (a)' protection only listed use that exploits the GI's reputation. Curiously, this is still the case in Article 21(2)(a) of Regulation 2019/787, which lists the protection granted to spirit drink GI's. This is presumably an omission, as it seems unlikely that the European legislator consciously sought a more limited protection for spirit drink GI's and the proposed GI regulation provides identical protection for all GI's, including against uses that would weaken or dilute the GI's reputation. The change was introduced alongside many others by the European Parliament and it is not clear from the publicly available legislative history what its intended purpose was.¹⁴ Either way, it seems likely that 'exploitation' of a GI's reputation will remain, in practice, the most important ground for holders to object against uses of their GI. In trade mark law, at least, the evidentiary burden for establishing that unfair advantage is taken of a trade mark's reputation is generally considered 'very light' and in any event lighter than proving detriment to the mark's reputation or distinctive character.¹⁵ So far, use that 'exploits' the GI's reputation has been interpreted analogously to the concept of 'taking unfair advantage' of a trade mark's reputation by the European Union Intellectual Property Office (EUIPO) in opposition proceedings based on GIs.¹⁶ We might therefore expect that 'weakening' and 'diluting' the GI's reputation will be interpreted analogously to the concept of 'detriment' in Article 9(2)(c) of Regulation 2017/1001, with concomitantly higher evidentiary thresholds. In this essay, I will focus on the concept of exploitation of a GI's reputation, as that has been and is likely to remain the most important element of 'sub (a)' protection.

It certainly seems that not much is needed to conclude that a GI's reputation is exploited when it is used in any way for products not compliant with the product specification. For GIs, as for trade marks, exploitation may occur when use would transfer the GI's image of luxury and prestige to the products or services it is used on. Although the EUIPO's Guidelines state that general allegations will not suffice to establish exploitation so that the GI holder must 'demonstrate specifically how the alleged injury might occur', the General Court (GC) readily accepts that a GI's reputation might be transferred to the competitor's goods where the GI is used in its entirety,

¹⁴ See Outcome of the European Parliament's proceedings (6 November 2020, doc 12147/20, interinstitutional file 2018/0218(COD)), amendment 263/rev.

¹⁵ J Schovsbo, "'Mark My Words"—Trademarks and Fundamental Rights in the EU' (2018) 8 *UC Irvine Law Review* 555, 576. See Case 252/07 *Intel Corporation*, EU:C:2008:655 [2008] ECR I-8823, para 29.

¹⁶ E.g. EUIPO BoA *CIVC v Breadway* [2020] R 1132/2019, para 26. See also *Champagner Sorbet* (n 8) para 40 (equating the 'exploitation of the reputation of a PDO' to 'use of the PDO that seeks to take undue advantage of the reputation enjoyed by the PDO').

even for strongly dissimilar goods.¹⁷ Those cases invariably concern trade mark registrations and the desire to use a GI as part of an indication of the goods' commercial origin may suggest an intention to benefit from the GI's reputation. But at least for highly reputed GI's it seems that exploitation is readily accepted for virtually any unauthorized use. National case-law concerning use of the GI 'Champagne' in a variety of contexts confirms this picture.¹⁸ Thus, although GI protection formally employs a criterion to distinguish allowable uses from unallowable uses – exploitation of the GI's reputation – this criterion appears to have little substance and in practice protection seems virtually absolute.¹⁹ The only exception appears to be where, despite literal or near-literal use of the GI, the GI's image is not triggered in the mind of consumers due to the context in which it is used. This may occur where, in addition to indicating a geographical area or product, the GI also has separate semantic content. The best-known example from the European case law is the registration of the mark 'Port Charlotte' for whisky: the ECJ held that in this context, 'Port' did not call to mind the GI Porto but the concept of a harbour.²⁰

With respect, it is submitted that this approach cannot be correct. The ECJ said as much in the context of use of a GI to designate an ingredient present in a foodstuff: such use, according to the ECJ, 'cannot be regarded, in itself, as an unfair use' so that 'it is for the national courts to determine, in the light of the particular circumstances of each individual case, whether such use *is intended* to take unfair advantage of the reputation of a PDO' (emphasis mine).²¹ The wording

¹⁷ E.g. Case 624/13 *The Tea Board v OHMI* EU:T:2015:743 (*Darjeeling*), para 139; Case 417/20 *Esteves Lopes Granja v EUIPO*, EU:T:2021:663 (*Porttwo Gin*), para 52. See, however, Part C, Section 6, para 3.1.1. of the EUIPO's Guidelines.

¹⁸ See, for instance, two cases concerning slogans decided by the German Federal Supreme Court: GRUR 2002, 426 (*Champagne bekommen, Sekt bezahlen*); and GRUR 1988, 453 (*Ein Champagner unter den Mineralwässern*). See further Tribunale di Milano 5 September 2017, No 49440/2014 (forbidding a 'Champagnerie Malafemmena' as the name for a lounge bar); Tribunal de Grande Instance Paris 27 November 2014, No. 13/14291 (forbidding 'Le Champagne' as the name for a restaurant because it would transfer to the restaurant's atmosphere Champagne's reputation of a 'wine for parties and celebrations'); Tribunal de Grande Instance Paris 14 December 2005, No 04/15816 (forbidding 'Le Champagne' as the name of an online wine shop); *Taittinger SA v. Allbev Ltd* (1993), FSR 641 (... 'a reference to Champagne imports nuances of quality and celebration, a sense of something privileged and special').

¹⁹ Gangjee (n 4) 174 aptly describes this degree of protection as treating GI's as 'things', rather than as 'protected status depending on the message these signs communicate at any given point of time'.

²⁰ Case 56/16 P *EUIPO v Instituto dos Vinhos do Douro e do Porto*, EU:C:2017:693 (*Port Charlotte*), para 113-115; cf. also Case 774/16 *Consejo Regulador del Cava v EUIPO*, EU:T:2018:441 (*Cave de Tain*), para 58-59.

²¹ *Champagner Sorbet* (n 8) para 46.

suggests that specific intent to take advantage of a GI's reputation must be present and additionally that such advantage must be unfair; it seems that neither requirement should be automatically considered satisfied in every case. Also outside the specific context of use of a GI to indicate an ingredient, it seems that some use scenarios must be considered as insufficiently likely to 'exploit, weaken, or dilute' the GI's reputation, lest those requirements for protection become meaningless. Section 3 lists a number of use scenarios that, in my view, pose serious challenges to the virtually absolute protection currently afforded to GI's in the EU.

As a preliminary point, it could be argued that these and other use scenarios could be addressed simply by more rigorous scrutiny of allegations that a GI's reputation is exploited. In trade mark law, after all, not every use of a reputed mark or highly similar sign is forbidden, even if the threshold for finding unfair advantage in these cases is fairly low.²² And yet, due to the specific features of GIs differentiation of cases by degree of harm to reputation may prove difficult. In trade mark law, key considerations for a finding of unfair advantage are the strength of the mark's reputation, its degree of distinctive character, and the degree of similarity of the signs at issue.²³ All of these circumstances need to be proven by the trade mark proprietor. Depending on the evidence adduced, courts can differentiate between highly distinctive marks with a very strong reputation and less distinctive or reputed marks and decide accordingly. By contrast, the applicability of 'sub (a)' protection presupposes a very high degree of similarity, while GI's are also presumed to be reputed and, in their own peculiar way, distinctive.²⁴ In other words, the conditions that trade mark law sets for finding an exploitation of reputation are largely met in the GI context without the GI holder having to prove anything at all.²⁵ As a practical matter, that makes it hard for courts to differentiate between uses that exploit the GI's reputation and those that do not. Without evidence on the matter it will be difficult for a court to substantiate that a GI

²² Cf. for instance *Oatly AB v Glebe Farm Foods Ltd* [2021] EWHC 2189 (IPEC), para 98 (no infringement despite strong reputation, identical goods, and existence of link because descriptive elements of mark are used); District Court The Hague 20 May 2020 ECLI:NL:RBDHA:2020:4542 (*Mediq/MedQ*), para 4.31 (no infringement because 'Med' is commonly used in relevant industry and evidence that defendant relies on its own network and reputation for business development); Corte d'Appello Firenze 5 June 2014, No 1346/2012 (*Gap*), p. 25 (no infringement despite use of identical mark because of strong dissimilarity of goods).

²³ Case 487/07 *L'Oréal*, EU:C:2009:378 [2009] ECR I-5185 para 44.

²⁴ On the different connotations of distinctiveness of trade marks vis-à-vis GI's, see Xinzhe (n 3) 32-34.

²⁵ Cf. T Georgopoulos, 'How Much Loneliness Can the PDO Champagne Afford?' (2020) *Ius Vini* 157, 159 (arguing that perhaps some PDO's should be considered 'more equal than others' because of their stronger reputation).

like Armagnac has a weaker reputation than a GI like Champagne and accordingly is less deserving of protection. What is more, such reasoning would run counter to the logic underlying the European system of GIs, even though it can hardly be disputed that Champagne is more famous than Armagnac. That logic assumes 'an intrinsic link between product or foodstuff characteristics and geographical origin' (recital (17) of Regulation 1151/2012). The purpose of European GI protection is simply to protect this link, not (or only in second place) to reward efforts at building a GI's reputation, as is an accepted function of trade marks.²⁶ In light of this purpose, the anomaly is really the appearance in 'sub (a)' of the GI's reputation as a key element of the infringement analysis, not the assumption by the European instances that all GIs are inherently reputed.²⁷ An analysis that turns on *actual* usurpation, which requires familiarity of the relevant public with the GI and is favoured by authors like Gangjee, simply seems incompatible with what the EU wants GIs to be.²⁸ That also explains why the ECJ has held that a GI can be infringed even in the absence of any confusion.²⁹ Indeed, protection of an 'intrinsic link' between product and geographical origin presupposes not only that this link in fact exists, but also that this link bestows on the relevant product at least some renown. Use of the resulting GI by others, then, necessarily risks transferring some of this renown to their products.

This is not to defend the exorbitant protection that EU law currently affords to GI's. It is, however, to argue that an approach to GI protection rooted in 'passing off' (as was historically the case in England) and similar to how infringement of reputed marks is evaluated – whereby the extent of the sign's reputation is established by the court, which then assesses the risk of actual usurpation thereof – is unlikely to result in satisfactory limitations on this protection. Instead, our best hope of coming to limitations that are fair and sensible is through an inquiry conceptually distinct from the exploitation inquiry, ideally based on clear and objective criteria. The next Section suggests some use types that might form the basis for these criteria, which are further developed in Section 4. As I argue in more detail there, use that meets these criteria could be deemed incapable of (sufficiently) exploiting, weakening, or diluting the GI's reputation, though the best solution would be codification of a due cause exception.

²⁶ Cf. M Vivant, 'Revisiting trade marks' (2013) 3 *Queen Mary Journal of Intellectual Property* 307, 310 ('The consumer buys into a dream', which 'presupposes investment').

²⁷ This assumption is criticized, *inter alia*, in Diaz-Marta and Kyrylenko (n 3) 447 and Georgopoulos (n 25) 159.

²⁸ Gangjee (n 4) 168 *et seq* critically discusses a number of cases, which he concludes (at 179) are far removed from protection of '[a] collectively generated reputation' as originally intended.

²⁹ Case 75/15 *Viiniverla*, EU:C:2016:35 para 45 (in the context of evocation).

3. Do Champagne Socialists wear Bordeaux red? On descriptive, artistic, and parodic use of GIs

The general outline above suggests that use of a GI in virtually any context will very quickly risk exploiting the GI's reputation. We also saw that, due to the specificities of GI law, the guidelines developed for assessing unfair advantage under trade mark law are not very suitable to differentiate between allowable and unallowable uses. And yet there are certain 'use scenarios' that arguably warrant a nuance to the virtually absolute protection that GIs currently enjoy. The aforementioned *Champagne Sorbet* provides one example – the only one accepted by the European courts to date – where the GI product is used as an ingredient in another foodstuff.³⁰ Kur makes several other suggestions in her opinion piece.³¹ I will build on one of these and suggest another: conflicts with freedom of expression.

Kur identifies two possible problems in the first category. The first is what she calls the 'outsider problem': the rights of producers based in the same geographical area but making non-GI compliant products wanting to inform consumers on the origin of their goods.³² Under the ECJ's case-law as it stands, allusions to the GI by such producers are considered unallowable evocations, even though the reference may be intended to refer (just) to the region more generally.³³ Thus, a wine producer based in the Chianti region of Tuscany would likely not be allowed to use images of roosters on their bottles if the wine does not comply with the product specification for the Chianti Classico GI, which uses as its symbol the silhouette of a black rooster. Conversely, I would argue it is allowable to mention Chianti as part of the wine producer's address, which in some cases must be printed on the bottle.³⁴ Where GI products are used as ingredients in other foodstuffs, the European Commission considers mention of the GI as

³⁰ *Champagner Sorbet* (n 8). The tension between GI protection and the need of competitors to refer to ingredients had been noted before by the European Commission: 'Guidelines on the labelling of foodstuffs using protected designations of origin (PDOs) or protected geographical indications (PGIs) as ingredients' (2010/C 341/03).

³¹ Kur (n 1) 90-93.

³² *Ibid* 91.

³³ *Manchego* (n 11), para 35-36.

³⁴ That is, when the wine producer is the 'food business operator' as per Article 8(1) Regulation 1169/2011. Kur (n 1) 91 mentions specifically the permission, under trade mark law, to 'use one's own name or address' and may thus harbour some doubts that use of a GI as part of an address is allowable.

part of the list of ingredients allowable without further requirements.³⁵ While there are no guidelines on the indication of a producer's address if this results in use of a GI, it seems plausible to treat this situation analogously to use of a GI in a list of ingredients. In my view, any references to 'Chianti' beyond the address seem problematic, also in light of the 'sub (b)' prohibition on 'imitations', deriving from Article 23(1) TRIPS.³⁶ After all, those references will very quickly cause either confusion (for instance, if used on a white wine) and/or usurp the Chianti Classico GI's reputation, whereas it is difficult to think of an objective justification. In this respect, Kur cites the example of formerly compliant producers that no longer meet the requirements of the product specification after modification by a 'recognized producer group' in which they are not represented.³⁷ But if it is accepted that producers no longer willing or able to comply with the product specification lose the right to use the GI, as Kur seems to do, then it is hard to imagine why they should nevertheless be granted some residual right to keep making 'reference[s] to geographical origin, even in an indirect, allusive form'.³⁸ It is certainly true that the loss of the right to use the GI affects such producers' rights to impart information and conduct one's business, as Kur notes, but that seems equally true for producers in the region who were never compliant in the first place. Under the proposed GI regulation producers may be bound by rules established in bodies in which they are not represented, but the solution to that problem seems to lie in organizational safeguards rather than allowing them to keep using the GI or alluding to it (and we should keep in mind that even if such producers had been represented, they may have been outvoted).³⁹

Kur also mentions GI uses 'for descriptive or referential purposes' and it seems to me this category of uses raises a serious issue for our current standards of GI protection. As a starting point it should be recalled that GIs can never become generic (cf. Article 27(6) of the proposed GI regulation) so, for instance, Champagne can never be used to describe or refer to sparkling wine in

³⁵ Guidelines (n 30) at 2.1., no. 1. In *Champagner Sorbet* (n 8) para 45 the ECJ considered these guidelines an authoritative source when interpreting the 'sub (a)' protection for GI's in this specific context.

³⁶ Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994) 33 ILM 619, Annex 1C (Agreement on Trade-Related Aspects of Intellectual Property Rights).

³⁷ Kur (n 1) 92.

³⁸ *Idem*.

³⁹ To be clear, my argument here relates to prospective use of the GI after the change. I would agree with Kur that e.g. forcing relabelling of bottles already produced would be disproportionate.

general.⁴⁰ Indeed, the ECJ held that even if this is the name by which the relevant public usually refers to this product, 'Champagner Sorbet' is not an appropriate name for an ice cream with sparkling wine flavour unless certain additional conditions are met.⁴¹ We may wonder whether that finding extends to cases where the customary name is not just a convenient shorthand (as with 'Champagner Sorbet') but the only name under which the composite foodstuff is known, as can happen with cocktails. Thus, it would surely be impermissible to use 'Scotch & Soda' to refer to the well-known drink if it did not actually contain Scotch Whisky. 'Scotch & Soda', however, is also the name of an international fashion brand with numerous European trade mark registrations. Of course this is no guarantee that use of 'Scotch & Soda' for clothing does not infringe the Scotch Whisky GI, but it seems plausible to argue that in this case the designation refers to an end product that is sufficiently conceptually distinct from the GI. Turning back to Champagne, consider the following variation on the 'outsider problem'. It seems settled that use of Champagne in the name of, for instance, a restaurant is unallowable because this would exploit the GI's reputation.⁴² But what if the restaurant is based in the Champagne region and its name seeks to express this? In other words, what rights do regional providers of services and producers of dissimilar goods have to refer to the region in their names and marks?

Furthermore, it is certainly possible to conceive of uses of GIs to describe attributes other than the foodstuff as such or geographical origin. For instance, the German Federal Supreme Court was confronted with the question whether the indication '*Aus der Champagner-Bratbirne*' ('Made from Champagne Pear') was allowable on an alcoholic beverage obtained from the so-called Champagne pear, which had locally been known under that name for over 150 years.⁴³ It did not allow the indication, but hinted that the outcome might have been different had the use been limited to what was necessary to inform consumers of the pear type used (and not, as was the case here, a prominent display on the front label).⁴⁴ Colours are another example: 'Bordeaux red' and 'Cognac brown' are ubiquitous indications for specific shades of red or brown, respectively. Note that all

⁴⁰ R Knaak, 'Geographical Indications as Intellectual Property Rights – Beyond Transition and Coherence', in: N Bruun et al (eds.), *Transition and Coherence in Intellectual Property Law* (CUP 2020) 415 (arguing that 'any generic use of a PDO contravenes its protection').

⁴¹ *Champagner Sorbet* (n 8) para 46-67.

⁴² See e.g. the '*Champagnerie Malafemmena*' and '*Le Champagne*' cases (n 18); cf. in the context of evocation *Champanillo* (n 6), para 50-51.

⁴³ BGH 19 May 2005, I ZR 262/02, *GRUR* 2005, 957 (*Champagner-Bratbirne*).

⁴⁴ *Ibid* II.3.c.

these cases are distinct from *Port Charlotte* and similar cases where allegations of exploitation were rejected.⁴⁵ In 'Port Charlotte', the context of use suggests an unrelated semantic concept (a harbour rather than Porto), whereas in the examples here listed the context of use suggests the GI is being used to reference not the GI product but some other object or attribute.

Another category of uses that in my view may have a legitimate claim to due cause is where the GI is used in an exercise of free speech. In 2019, the Benelux Court of Justice ruled on the conflict between protection of reputed trade marks and artistic expression.⁴⁶ The case concerned paintings of scantily-dressed women holding Dom Pérignon Champagne bottles or even just outlines of these bottles and their iconic labels. The Benelux Court of Justice held that use of a trade mark for artistic expression is allowable where it is the original result of a creative design process which does not aim to harm the trade mark or its holder. For our purposes, it is interesting to consider whether a similar outcome could have been reached in a GI case. Indeed, it is easy to imagine the GI Champagne or in any event a recognizable depiction of a Champagne bottle as part of a painting or photograph and in such cases, arguably some allowance should be made for artistic expression. Similarly, advertising with a parody of a competitor's reputed trade mark will quickly support a finding that unfair advantage is being taken of the mark's repute.⁴⁷ It nevertheless seems to me that a parody is a special form of expression at least somewhat more deserving of protection than ordinary usage of signs similar or identical to reputed trade marks.⁴⁸ The same should arguably apply to parodies of GIs. For instance, an expression like 'Champagne Socialist' might be treated differently from common, non-parodic uses of the GI Champagne, depending of course on the context and specifics of use.⁴⁹ The *Jack Daniel's* case, currently pending before the US Supreme Court, also comes to mind.⁵⁰ That case concerns a rubber whisky bottle for use as a dog toy, in the shape of Jack Daniel's Old No. 7 Tennessee Whisky bottles and with a label in similar colours, but with the text 'The Old No. 2 on Your Tennessee Carpet'. Jack Daniel's filed a suit for trade mark infringement but its claims were rejected by the US Court of

⁴⁵ *Port Charlotte* (n 20).

⁴⁶ BCJ 14 October 2019, A 2018/1/8 (*MHCS/Cédric Art*).

⁴⁷ See recently the Italian Corte di Cassazione 38165/2022 (*Zorro*), p. 28-29.

⁴⁸ S Jacques, 'A parody exception: why trade mark owners should get the joke' (2016) 38 *European Review of Intellectual Property Law* 471, 480-481 (drawing on examples from French case law).

⁴⁹ It appears that Milan is home to a wine bar called 'Champagne Socialist', whose self-declared philosophy is 'Wine tonight, revolution tomorrow'.

⁵⁰ *Jack Daniel's Properties, Inc. v. VIP Products LLC* (Docket No 22-148).

Appeals for the Ninth Circuit, which held that while the dog toy is 'surely not the equivalent of the *Mona Lisa*', it is nevertheless a protected artistic expression and incapable of diluting or tarnishing the Jack Daniel's trade mark.⁵¹ In the EU, this might (also) have been a GI case and in any event it is easy to imagine someone getting the idea that European doggos might like to put their teeth in a Scotch Whisky or Polish Vodka bottle.⁵²

As we consider these examples we should keep in mind that whereas trade marks are indicators of origin for individual undertakings, GIs are collective rights that designate tradition, terroir, and history, not specific producers. Consequently, GIs might be considered part of Europe's collective cultural heritage in a way that even iconic trade marks cannot.⁵³ While on the one hand that justifies their strong protection, also overseas, on the other it should arguably result in a more permissive attitude towards creative (re)uses: if GIs are part of a common European culture, Europeans should also be permitted to build on this part of their culture through artistic expression or parody. A similar logic applies to copyright law, which may protect works that also form part of collective cultural heritage and consequently is more allowing of parodies and novel creative expressions than trade mark law.⁵⁴ To be sure, there are already some safeguards in place for artistic expressions and parodies because the protection granted to GIs under 'sub (a)' is limited to commercial uses. But artistic expressions are deserving of some protection even if used commercially.⁵⁵ After all, a commercial motive does not negate the artistic or parodic nature of an expression and the constitutional right to freedom of expression also covers commercial speech.⁵⁶

⁵¹ *VIP Products LLC v Jack Daniel's Properties Inc* No 18-16012 (9th Cir 31 March 2020).

⁵² Tennessee Whisky is protected in the EU by virtue of an Agreement in the form of an exchange of letters between the European Community and the United States of America on the mutual recognition of certain distilled spirits/spirit drinks (25 March 1994, OJ L 157/37).

⁵³ See, for instance, the Commission's proposal for the new GI regulation (n 7) 1, where it argues that 'strengthening the system of GIs' is 'key to provision of high quality food and protecting cultural, gastronomic and local heritage across the Union'.

⁵⁴ Cf. *Zorro* (n 47), where the Italian Corte di Cassazione suggested a parody of Zorro in an advertisement may well be allowable under copyright law but left much less room under trade mark law; *but see* Opinion of AG Jääskinen Case 324/09 *L'Oréal*, ECLI:EU:C:2010:757, fn23: 'In so far as the legal protection of trade marks with a reputation as brands is enhanced it becomes more and more important to ensure that freedom of expression relating to parody, artistic expression and critique of consumerism and mockery of life styles related to it is not unduly hampered.'

⁵⁵ Cf. *Jacques* (n 48) 480.

⁵⁶ Case 555/19 *Fussl Modestraße Mayr*, EU:C:2021:89 para 81.

4. Fundamental rights take root in terroir: towards a due cause exception for GI law

The examples in the previous paragraph should hopefully demonstrate that there are at least some cases where the use of a GI may be justified. Kur suggests inserting 'a general due cause defence' into the protection provision of the proposed GI regulation, arguing that 'a firm basis in the written law' is important given the 'rather intransigent attitude' the ECJ generally takes towards GI protection.⁵⁷ That would indeed be the best course of action. Even if some of the infringements outlined in the previous section seem speculative or unlikely to be pursued in the real world – Oasis' 'Champagne Supernova' (1996) remains a radio favourite with over 100 million views on YouTube⁵⁸ – a clarification of the limits to GI would be very welcome for the many real-world cases where users cannot be sure whether using a GI exposes them to liability. Such a due cause exception could serve as an open-ended legal framework for the development of rights-based limitations to GI protection.⁵⁹

In my view, harm to or exploitation of a GI's reputation might be presumed in all cases where the GI is used or evoked with a commercial purpose. The onus is then on the party using the GI or evocation to establish at least one of two defences: (i) the GI's reputation is not harmed or exploited, or (ii) there exists due cause for the use. As for (i), I have argued elsewhere that if exploitation of a GI's reputation is to be a criterion to differentiate between allowable and unallowable uses of GI's, it should apply to both sub (a) and sub (b) cases.⁶⁰ As noted in Section 2, I am sceptical that arguments on the absence of reputational harm can be reconciled with the logic underlying the EU's regime of GI's, but *Champagner Sorbet* offers at least one example where use of a GI does not necessarily harm the GI's reputation and the case-law might reveal others. Naturally, the user would also succeed if they demonstrate that the GI is not triggered in the consumer's mind at all due to the context of use, as in *Port Charlotte*. As for (ii), it seems to

⁵⁷ Kur (n 1) 92.

⁵⁸ A song with such massive commercial success and yet no link to Champagne whatsoever arguably risks weakening or diluting the GI's reputation (cf. Jacques (n 48) 480, who cites the example of the car brand Lada filing suit, albeit unsuccessfully, against a film production for including the following joke in the movie: 'What's the difference between a Lada car and AIDS? Try passing your Lada to someone else!'). Additionally, it appears that Oasis now itself claims some rights to the use of Champagne by preventing the release of a dance cover of this song, as reported on the 'Champagne Supernova' entry on Wikipedia: <https://en.wikipedia.org/wiki/Champagne_Supernova> accessed 6 February 2022.

⁵⁹ For an analogous argument on the function of the due cause exception in European trade mark law, see Schovsbo (n 15) 577 *et seq.*

⁶⁰ Dijkman (n 11) 477.

me that a due cause defence should consist of two prongs. First, the GI's use should be in accordance with honest practices, analogously to Article 14(2) Regulation 2017/1001. Just as in trade mark law, this aspect of the due cause test would check whether the underlying purpose of the use is to profit of the GI's reputation, for instance through prominent display of the GI despite a nominally descriptive intention.⁶¹ Second, there should be an objective justification for the use. Objective justifications would include the types of uses outlined in Article 14(1) Regulation 2017/1001, but the term should be broad enough to encompass specific scenarios that may arise under GI law, such as uses by formerly compliant producers. Artistic, parodic, and other uses with a claim to protection under Articles 11 and 13 CFR could also be evaluated under this prong. As noted above, the unique position that GIs occupy in Europe's history and culture may mean that this prong of a potential due cause defence would develop markedly different from trade mark law and come closer to copyright law's regime for parodies.⁶²

It follows from the previous paragraph that the due cause defence should be considered distinct from the defence that no harm to or exploitation of the GI's reputation occurs, and available to also to parties who do not succeed on the latter ground. But it is fair to ask whether such a separate defence is allowable under the current (and proposed) text of the provisions on GI protection, assuming the EU legislator does not codify it. Admittedly, the express inclusion of a due cause exception in a provision that shares many structural similarities with GI protection – the protection of reputed trade marks in Article 9(2)(c), on top of the limitations expressly contained in Article 14 of Regulation 2017/1001 – could support an *a contrario* argument that the EU legislator must not have envisaged a comparable exception in the law of GIs. In my view, however, that argument would overlook the limiting force that EU primary law, and particularly competing Charter rights, have on the rights of GI holders. Thus, while the ECJ has not addressed the relation between GI protection and competing fundamental rights, it seems reasonable to assume that, like other IP rights, the interests of GI holders are safeguarded by Article 17(2) CFR; but that, as is the case for other IP rights, this protection is not absolute. Instead, protection must be determined in relation to the right's social function.⁶³ In addition, EU law must be interpreted in light of primary Union law and in a way that allows a fair balance to be struck between the

⁶¹ This was presumably the main reason that the German Federal Supreme Court disallowed use of *Champagner Bratbirne* in its aforementioned decision (n 43).

⁶² Cf. Case 201/13 *Deckmyn en Vrijheidsfonds*, EU:C:2014:2132, para 33 (laying down conditions for an expression to qualify as a parody under Article 5(3)(k) Directive 2001/29). Schovsbo (n 15) 560 views *Deckmyn* as indicating the potential of the 'constitutionalization' of European IP law.

⁶³ Case 200/96 *Metronome Musik v Music Point Hokamp*, EU:C:1998:172 [1998] ECR I-1953, para 21.

various rights and interests at stake.⁶⁴ These admonitions have given rise to a well-known and elaborate debate on the capacity of fundamental rights to limit the scope or exercise of intellectual property rights.⁶⁵ Kur notes, as others have, that using Charter rights 'as an external balancing tool is not feasible' following a triplet of ECJ decisions in the field of copyright law.⁶⁶ But those decisions concerned the interpretation of Article 5(3) of Directive 2001/29, listing an elaborate set of exceptions to copyright protection which moreover must be given a broad interpretation where this is necessary to protect the underlying fundamental rights and freedoms.⁶⁷ By contrast, we have seen that the current and proposed provisions on GI protection contain virtually no exceptions. Under those circumstances, the ECJ may well be more willing to read limitations into the relevant protection provisions stemming from competing fundamental rights, as it did repeatedly on previous occasions.⁶⁸

If we grant that competing fundamental rights may limit GI protection, what would be the type of behaviours deserving to be exempted from its scope? Starting from the 'social function' of GIs, the ECJ has not explicitly defined what it comprises and it seems difficult to formulate a compelling justification for the virtually absolute protection currently afforded to GIs.⁶⁹ The case law to date suggests various arguments and assumptions are cobbled together to justify the far-reaching restrictions imposed by the GI regime (internal references omitted):

⁶⁴ Case 12/11 *McDonagh*, EU:C:2013:43 para 44; Case 601/15 *PPU N.*, EU:C:2016:84 para 68, 70.

⁶⁵ Cf. among many others and limited to copyright law, C Geiger and E Izyumenko, 'The Constitutionalization of Intellectual Property Law in the EU and the *Funke Medien*, *Pelham* and *Spiegel Online* Decisions of the CJEU: Progress, But Still Some Way to Go!' (2020) 51 *IIC* 282, 298 (arguing that open-ended exceptions to copyright protection grounded in the right to freedom of expression are 'really necessary for the proper functioning and balanced construction of copyright law in the EU'); C Sganga, 'Multilevel Constitutionalism and the Propertisation of EU Copyright: An Even Higher Protection or a New Structural Limitation?', in: J Griffiths & T Mylly, *Global Intellectual Property Protection and New Constitutionalism* (OUP 2021) 262 (arguing for delineation of copyright's scope in accordance with 'social function doctrine').

⁶⁶ Case 469/17 *Funke Medien NRW*, EU:C:2019:623 para 62; Case 516/17 *Spiegel Online*, EU:C:2019:625 para 47; Case 476/17 *Pelham and Others*, EU:C:2019:624 para 63.

⁶⁷ Sganga (n 65) 247.

⁶⁸ Cf recently Case 817/19 *Ligue des droits humains*, EU:C:2022:491, where the ECJ set detailed and fairly far-reaching limitations on the uses of passenger data under Directive 2016/680. Sganga (n 65) 263 cites other examples of ECJ-imposed exceptions and limitations, 'sometimes even in disregard of legislative indications'.

⁶⁹ Cf Gangjee (n 4) 275 *et seq.*

Next, it must be recalled that, in accordance with the Court's case-law, EU legislation displays a general tendency to enhance the quality of products within the framework of the common agricultural policy, in order to promote the reputation of those products through, inter alia, the use of designations of origin which enjoy special protection. It also aims to satisfy the consumers' expectation regarding product quality and identifiable geographical origin, and to enable producers, in conditions of fair competition, to secure higher incomes in return for a genuine effort to improve quality.

Finally, designations of origin fall within the scope of industrial and commercial property rights. The applicable rules protect those entitled to use them against improper use of those designations by third parties seeking to profit from the reputation which they have acquired. They are intended to guarantee that the product bearing them comes from a specified geographical area and displays certain particular characteristics. They may enjoy a high reputation amongst consumers and constitute for producers who fulfil the conditions for using them an essential means of attracting custom. The reputation of designations of origin depends on their image in the minds of consumers. That image in turn depends essentially on particular characteristics and more generally on the quality of the product. It is on the latter, ultimately, that the product's reputation is based. For consumers, the link between the reputation of the producers and the quality of the products also depends on his being assured that products sold under the designation of origin are authentic.⁷⁰

There is a bit of everything in these paragraphs: avoidance of consumer confusion, incentivizing efforts to improve product quality, ensuring producers obtain a fair reward for their efforts, protection of the GI's reputation against exploitation and dilution... Thus conceived, the 'social function' of GIs is so broad that a potential problem might be identified in virtually any use of the GI other than by compliant producers. Nevertheless, as we have seen the resulting right must be balanced against other rights, first and foremost the right of third parties to conduct a business.⁷¹ It has been argued that Article 16 CFR may 'offer a strong platform' against adoption of overreaching secondary EU law in pursuit of some policy objective.⁷² Thus, even if strong

⁷⁰ Case 596/18 *Caseificio Cirigliano and Others*, ECLI:EU:C:2019:873 para 35-36 (references to case-law omitted).

⁷¹ Kur (n 1) 92 (suggesting that a 'strict prohibition' against any good-faith use of the GI might result in a 'disproportional encroachment' of this right).

⁷² X Groussot et al, 'Weak right, strong Court -- the freedom to conduct business and the EU Charter of Fundamental Rights', in: S Douglas-Scott & N Hatzis, *Research Handbook on EU Law and Fundamental Rights* (Edward Elgar 2017) 342.

protection of GIs is a key strategic interest of the EU, it must have limits that are set, in part, by the capacity of market actors to compete in a viable manner. That capacity might be too severely hindered where, for instance, 'outsiders' in a GI-covered area are precluded from using the area's name to indicate provenance, especially where it concerns dissimilar goods or services. The same might be said of honest descriptive use of GI's in the sense described in Section 3: where use of the GI is necessary to engage in 'normal and fair commercial activity', there will be a strong argument deriving from Article 16 CFR that such use is allowed.⁷³ Artistic expressions and parodies clearly fall within the scope of Articles 11 and 13 CFR.⁷⁴ These provisions thus should provide safeguards for uses of GI's as parts of artistic expressions or in a parodic manner, although in the context of commercial expression these may not amount to much.⁷⁵ Still, absolute and unqualified protection for GI's seems untenable, especially where its artistic or parodic use cannot reasonably be considered detrimental to the GI's overall reputation.⁷⁶

If it is accepted that fundamental rights offer a compelling argument for limiting the protection of GI's in certain cases, it may not matter much that no due cause exception is expressly codified in the applicable regulations, present or future. After all, EU law must be interpreted in conformity with primary law as a whole and in particular with provisions of the Charter.⁷⁷ Thus, if GI protection conflicts with other fundamental rights – as I think it undeniably does at least in some cases – then the provisions setting out that protection must be interpreted and applied in a manner capable of resolving the conflict. This principle of interpretation of EU law has a long history and

⁷³ Schovsbo (n 15) 580 (but in context of trade mark law).

⁷⁴ *Pelham* (n 66) para 35; *Deckmyn* (n 62) para 25.

⁷⁵ D Doukas, 'Commercial speech and freedom of expression in EU law: a paradigm of a sliding scale of review for the European Court of Justice?' (2019) 44 *European Law Review* 741, 764 (finding that the ECJ's standards of scrutiny for interferences with commercial speech fall behind those applied by the European Court of Human Rights because of a perceived assumption on the part of the ECJ that 'commercial speech makes no (significant) contribution to public discourse').

⁷⁶ Cf. *Pelham* (n 66) para 36-38, where the ECJ exempted from the scope of copyright protection samples modified to such a degree that it becomes 'unrecognisable to the ear', *inter alia* because such sampling 'would not interfere with the opportunity which the [record producer] has of realising satisfactory returns on his or her investment'.

⁷⁷ *Ligue des droit humains* (n 68) para 86. See generally K Lenaerts and J Gutiérrez-Fons, 'To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice' (2014) 20 *Columbia Journal of European Law* 3, 20.

has resulted in, among others, the infamous *Sturgeon* decision.⁷⁸ That case concerned Regulation 261/2004 on common rules for airline passenger compensation, Article 5 of which made clear that compensation was due to passengers only in the event of cancellations, not delays. The ECJ nevertheless interpreted the Regulation as mandating compensation also in the event of long delays, reasoning that if it did not, the Regulation would violate the EU law principle of equal treatment and for that reason be (partially) invalid.⁷⁹ Despite the ensuing controversy, the ECJ upheld its *Sturgeon* ruling in the subsequent *Nelson* case, *inter alia* because the 'objective of consumer protection' was sufficiently important to justify 'even substantial negative economic consequences for certain economic operators', in this case airline operators.⁸⁰ For our purposes, while 'ad hoc' balancing of GI protection and conflicting fundamental rights likely will not be allowable, *Sturgeon* and its progeny show that consideration of these rights within the framework of the GI regulation(s) is necessary. To do so, courts need not go nearly as far as the ECJ did in *Sturgeon* because the relevant 'sub (a)' provisions already contain language through which the conflict can be resolved: the requirement that the GI's reputation is exploited, weakened, or diluted. In other words, courts could simply find that honest descriptive uses, creative expressions, or parodies of GI's do not satisfy these requirements and must therefore be tolerated. As stated above, this is a second-best solution because it lacks the clarity and legitimacy that a codified due cause exception would offer, but it is reassuring to think that even without a codified exception competing rights can – and in my view, must – be respected.

5. Conclusion: Champagne and roses for the one and only?

As I completed this essay on Valentine's Day it struck me that Annette Kur, in her piece that provided the inspiration for mine, conjures up the image of an EU so enamoured with GIs that protection for its muse comes with 'no strings attached'. Indeed, with just a bit of imagination the ECJ's decisions almost invariably strengthening protection for GIs, and the EU institutions' sustained insistence that they are 'key' to our shared heritage, seem a bit like love letters. Here, too, love makes blind as there is hardly anything EU law will not allow this jealous lover. But

⁷⁸ Joined cases 402/07 and 432/07 *Sturgeon and Others*, EU:C:2009:716 [2009] ECR I-10923. The controversy is outlined in S Garben, 'Sky-high controversy and high-flying claims? The *Sturgeon* case law in light of judicial activism, euroscepticism and eurolegalism' (2013) 50 *Common Market Law Review* 15.

⁷⁹ *Sturgeon* para 47-48 and 58-59; Lenaerts and Gutiérrez-Fons (n 77) 21. It is thus fair to argue, as Garben does, that by choosing consistent interpretation over invalidation the ECJ opted for 'the lesser evil': Garben (n 78) 34.

⁸⁰ Joined cases 581/10 and 629/10 *Nelson and Others*, EU:C:2012:657, para 81.

setting boundaries is a vital aspect of a healthy relationship and this essay investigates where they might be set. To this end, it made three points. First, under EU law as it stands, virtually any use of a GI risks violating its 'sub (a)' protection, no matter how far removed from the actual GI product.⁸¹ That is the direct consequence of the EU's conception of GIs, which cares far more about protecting tradition and the link between product and origin than about an actual reputation earned in the marketplace. I have argued that as a consequence, we should be careful to rely on established principles of GI law's foxy friend, trade mark law, to identify allowable GI uses not likely to exploit, weaken, or dilute the GI's reputation.

My second point has been that there are nevertheless types of GI uses that should be allowable. Section 3 elaborated on two such use types: honest descriptive uses, for instance to indicate the origin of products not comparable to the GI products or to indicate product attributes unrelated to origin, and uses with a claim to protection as artistic expressions, such as parodies or use of GI's in works of art. I have argued that if GIs are indeed understood as part of our shared European heritage, this may imply a greater right to reimagine them in playful and artistic ways than exists under trade mark law. The third and final point advanced in this essay is that the use types I discuss support introduction of a two-pronged due cause exception in the EU law of GIs, under which use would have to be (i) in accordance with honest practices in trade and (ii) objectively justified. While codification of a due cause exception along these lines would be the preferred outcome, I have argued that even without it, the Charter rights underpinning the competing interests that legitimate the exception must be considered when GI protection is interpreted and applied. As a consequence, uses such as those outlined in Section 3 may come to be known simply as uses not liable to exploit, weaken, or dilute a GI's reputation, though not because the user can empirically prove that the GI's reputation is not affected but because due cause criteria are satisfied that place the use beyond the reach of GI protection. In my view, this need not result in broken hearts but on the contrary provides the breathing space needed for a long and fortuitous coupling of GIs and other Charter rights.

⁸¹ A good example is the case which inspired the title of this conclusion: EUIPO Opposition Division 27 January 2010, B 949 984 *CIVC v Atronic* page 19 ('Champagne and Roses' not allowable as a mark for casino slot machines).