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Brighter Prospects for United States Wine Exports: The 1983 Exchange of Letters of Understanding with the European Economic Community

Very good in its way
Is the Verzenay,
Or the Sillery soft and creamy;
But Catawba wine
Has a taste more divine,
More dulcet, delicious and dreamy.

—Henry Wadsworth Longfellow¹

I. INTRODUCTION

The United States wine market experienced a significant expansion over the last decade so that now Americans consume more wine than ever before. At the same time, the quality of wines produced in the United States has improved. The improvement is due both to technological advances in domestic wine production and to a more sophisticated population of wine consumers. The success of the domestic wine market has spawned an overproduction of wine, which has forced United States producers to look towards Europe as a possible market for further expansion. Paradoxically, however, domestic wine producers found that the very technological advances that contributed to improved wine quality at home posed significant non-tariff barriers to the European market. This situation was exacerbated by the existence of the rather primitive system of domestic wine classification in the United States. This Comment will discuss how United States producers overcame some of these barriers with the aid of the recent exchange of letters of understanding² between the United

1. *Catawba Wine*, in H. LONGFELLOW, *THE POETICAL WORKS OF HENRY WADSWORTH LONGFELLOW* 221 (Household ed. 1883).

2. Letters of Understanding Regarding Wine, July 26, 1983, United States-European Economic Community, reprinted in [1982-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,502 [hereinafter cited as *U.S.-EEC Wine Understanding*]. An exchange of letters of understanding provides an internationally recognized method whereby respective governments enter into bilateral commitments. The letters are used, as here, with respect to technical or commercial arrangements between countries. Ordinarily, they deal with technical matters. While they are not as formal as treaties, they are nevertheless binding. U.S. - E.C. Consulta-

States and the European Economic Community³ (EEC), and the problems resolved through these letters.

For example, the letters resolved the problems arising out of the regulatory differences between the EEC and the United States.⁴ This Comment will discuss recently enacted regulations concerning wine,⁵ and the ensuing litigation challenging them on the basis that they were not necessary.⁶

The exchange of letters also caused some consternation among European consumer groups. They feared that United States wines entering their markets were not fit for human consumption because of their additives.⁷ A discussion of those concerns is also pertinent to this Comment. Finally, this Comment will suggest possible ramifications, in both the United States and abroad, of the agreements made through the exchange of letters.

tions at 2 (an informational document available through the United States Treasury Department). *But cf.* Widdows, *On the Form and Distinctive Nature of International Agreements*, 7 AUSTL. Y.B. INT'L LAW 114, 127 (1981) (explaining that the use of an exchange of letters is not limited to any one subject; they are informal international agreements, but are written in obligatory terms).

In this particular case, William T. Drake, associate director of compliance operations for the Bureau of Alcohol, Tobacco and Firearms, explains the use of such a method as follows:

This exchange of letters was used as a method of acknowledging the mutual understandings of the U.S. and the EEC. It was a formalized approach of documenting where the consultations now stand and in what direction they intend to go.

The letters of understanding do not have the force of a treaty. Further, since either party may withdraw from the consultations at any time, they also do not create a legally binding agreement. However, the letters of understanding are official, publicly made commitments and have proved to be influentially powerful. They are presently providing an invaluable and firm basis for present and future consultations towards the resolution of technical barriers on wine between the U.S. and the EEC.

Letter from William T. Drake to Joan E. Mounteer (Mar. 16, 1984) (discussing the exchange of letters of understanding between the United States and the EEC).

3. The European Economic Community is composed of ten member states: Belgium, Denmark, the Federal Republic of Germany, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, and the United Kingdom. The applications of Spain and Portugal were approved in March, 1985; both will be admitted on January 1, 1986.

4. *U.S. Signs Wine Understanding with the European Economic Community*, TREASURY NEWS, R-2249 (July 26, 1983) [hereinafter cited as TREASURY NEWS].

5. For a step-by-step account of the adoption of the regulations, see Benson, *American Appellations of Origin*, 62 A.B.A.J. 791 (1976); Benson, *As off into the Sunset Rides the B.A.T.F.*, 63 A.B.A.J. 432 (1977); and Benson, *What's Happening to Wine Labels*, 65 A.B.A.J. 830 (1979).

6. For a general account of this wine litigation, see McGinty, *The Wine Label Controversy*, 2 CAL. LAW. 54 (1982).

7. *Consumers: BEUC Denounces Pressure by the United States to Gain Entry to the EEC for American Wines which Do Not Conform to EEC Standards—Commission Accused of Remaining Passive*, EUROPE, No. 3646, July 8, 1983, at 16 [hereinafter cited as *Consumers*] (a newsletter available through the EEC).

II. PROBLEMS RESOLVED BY THE EXCHANGE OF LETTERS OF UNDERSTANDING

A. *History of the Exchange of Letters*

On July 26, 1983, United States Treasury Department officials⁸ signed a letter of understanding with the EEC. This document confirmed the content of the EEC's letter dated July 6, 1983. Both documents resulted in bilateral commitments intended to benefit both parties by ensuring fair competition in their respective wine markets.⁹ One expected result is that the United States will have unprecedented access to EEC markets. It is also expected that the Member States of the EEC will enjoy continued liberal access to the United States market.¹⁰

The negotiations concerning the letters commenced in 1974 when the United States and the Commission of European Communities began a series of meetings to reduce, if not eliminate, the regulatory differences between the respective parties in order to facilitate United States access to EEC markets.¹¹ The consultations began with inter-agency efforts in which the Departments of the Treasury, Agriculture, State, Commerce, Customs, and the Bureau of Alcohol, Tobacco and Firearms (BATF) participated with EEC representatives.¹² These consultations spanned a six-year period during which draft letters were exchanged for four years; the final forms were signed in July, 1983.¹³

As a result of the exchange of letters, wine producers in the United States and the EEC gained several important benefits.¹⁴ Foremost among these was the EEC's recognition of all United States appellations of origin¹⁵ and geographic designations for wine. This was

8. John M. Walker, Assistant Treasury Secretary, and Stephen E. Higgins, Director of the Bureau of Alcohol, Tobacco and Firearms, signed the letter for the United States. Present at the signatory ceremony for the EEC was Sir Roy Denman, head of the delegation of the Commission of the European Communities. *A New Trading Era Has Begun between U.S., EEC, WINES & VINES*, Sept. 1983, at 42 [hereinafter cited as *Trading Era*].

9. TREASURY NEWS, *supra* note 4.

10. *Id.*

11. *U.S.-EEC Wine Understanding*, *supra* note 2.

12. *Id.* See also TREASURY NEWS, *supra* note 4; *Trading Era*, *supra* note 8, at 43.

13. *U.S.-EEC Wine Understanding*, *supra* note 2; see also *Trading Era*, *supra* note 8, at 43.

14. *U.S.-EEC Wine Understanding*, *supra* note 2, ¶ 11,120; see TREASURY NEWS, *supra* note 4.

15. United States appellations of origin may be designated by a country (i.e., the United States), a state or a county. These are commonly referred to as "political" appellations of

an important step for American wines, since the underlying purpose of European labeling regulations has been to verify geographical origin, which Europeans perceive as indicative of quality.¹⁶ EEC wines realized a correlative benefit through the United States' indication that it was prepared to help deter lowering the status of specific European geographical designations by avoiding the use of such designations as generic names.¹⁷ This is important to French wine makers because the terms "Burgundy" or "Chablis" only indicate a type of wine in the United States, rather than a wine derived from a specific geographic region that reflects its quality.¹⁸ Thus, wine producers in Mâcon or in Alsace, for example, will be protected from having wines bearing the name of their respective regions downgraded to the status of "Burgundy" or "Chablis."

B. The Importance of EEC Markets

From 1980 to 1981, human consumption of wine in the EEC amounted to 125 million hectolitres or 3.3 billion gallons.¹⁹ United States consumption for the same period was 478 million gallons.²⁰ The EEC has been described as the most important wine market in

origin. In contrast, an American appellation of origin "geographical" in nature is a viticultural area. Thus, "California Chardonnay," "Monterey County Zinfandel," and "Napa Valley Pinot Noir" are all examples of United States appellations of origin which the EEC has recognized through the exchange of letters. Approved United States' viticultural appellations of origin are defined in 27 C.F.R. § 9.21-9.95 (1983).

16. Benson, *Regulations of American Wine Labeling: In Vino Veritas?*, 11 U.C.D. L. REV. 115, 118 (1978). The appellation of origin standards for the United States are discussed *infra* in notes 135-83 and accompanying text. Varietal standards are described *infra* in notes 114-32 and accompanying text. Vintage date standards are described *infra* in note 134 and accompanying text.

17. *U.S.-EEC Wine Understanding*, *supra* note 2, ¶¶ 11,120-11,121.

18. As used today in the United States, any blend of red wines to a burgundy-type wine may be properly labeled as "Burgundy." It does not mean that the wine is derived from the *Bourgogne* region of France. Similarly, a Chablis is any blend of white wines to make a Chablis-type of wine; it does not indicate that a wine so labeled originates in the *Chablis* region of France. This type of blending is not permitted in France, i.e., a wine bearing the name "Chablis" must originate from that region, just as a "Bourgogne" must originate from the region of that name.

19. *Community Wine Market*, 1982 COMMON MKT. REP. ¶ 525.01 [hereinafter cited as *Community Wine Market*]. One hectolitre contains 100 litres, which equals approximately 26.42 gallons.

20. *Gomberg Puts '82 Wine Market at 525 Million Gallons*, WINES & VINES, Jan. 1982, at 18 [hereinafter cited as *Gomberg*]. The 1981 crush in California alone approached the 2.4 million ton mark in the United States. *Id.* In 1977, 85% more wine was sold in the United States than in 1967. *Flow of Wine Market in U.S. Over 10-Year Period*, WINES & VINES, May 1977, at 32.

the world.²¹ It accounts for forty-four percent of human wine consumption worldwide.²² The wine market of the EEC Member States is, therefore, very attractive to United States producers.

EEC Member States, mainly France and Italy, produce nearly half of the world's wine.²³ Together, these countries account for ninety-nine percent of EEC output.²⁴ The United States and Switzerland are the principal customers of the EEC.²⁵ Naturally, France and Italy have an economic interest to protect by inhibiting United States wine exports to the EEC. This is especially true today, since a downward trend in wine consumption within the EEC has been obvious for years.²⁶ This decline has been evident even in France and Italy.²⁷ United States wine industry forecasters predict that the industry will either decline or remain static in future years.²⁸ Under these circumstances, it is natural to expect that France and Italy would be the most vocal objectors to the measures adopted through the exchange of letters, since it permits United States wines to enter an already over-saturated market. With a static wine market in the United States, careful marketing techniques are expected that would allow United States producers to expand their consumer base.²⁹

C. *Resolution of Regulatory Differences Through the Exchange of Letters*

The exchange of letters resolved certain problems which United States wine producers previously encountered when exporting their wines to EEC Member States. These problems arose because of very strict EEC regulations governing wine labeling,³⁰ production³¹ and

21. A. NIEDERBACHER, WINE IN THE EUROPEAN COMMUNITY Periodical 2-3/1983, at 28 (1983).

22. *Id.*

23. *Community Wine Market*, *supra* note 19, ¶ 525.01.

24. *Id.*

25. *Id.* ¶ 525.04.

26. *Id.* ¶ 525.01.

27. *Id.*

28. *Gomberg*, *supra* note 20, at 18.

29. *Id.*

30. Wine labeling refers to certain information which is required to describe the wine and which must be placed on labels. The EEC regulations governing wine labeling for both EEC produced wines and for wines imported into the EEC from non-Member States are embodied in EEC Reg. No. 2133/74, art. 2, in 13 O.J. EUR. COMM. No. L 227/2-5 (1974).

31. Wine in the EEC must be produced according to certain methods prescribed by the EEC. These include regulations controlling production, as well as planting control. EEC Reg. No. 816/70, in 13 O.J. EUR. COMM. No. L 199/1 (1970).

certification,³² implemented in 1970. These regulations had required that all wines imported into EEC Member States meet the standards established for wines by the EEC. For example, they required United States producers to certify that only EEC-authorized treatments were used in their exports.³³ United States wine producers, however, found these regulations too costly and administratively burdensome.³⁴ Additionally, EEC regulations previously required United States exporters to print separate brand labels³⁵ providing information which the EEC required, but which was not required by the United States.³⁶ As a result of the recent exchange of letters, however, the EEC is now willing to recognize United States exporters' use of strip labels,³⁷ thus reducing the cost incurred by printing two different large brand labels.³⁸

The prior regulatory problems were exacerbated by the fact that EEC standards were very complex and technical, while United States standards were, for all practical purposes, non-existent.³⁹ Since only wines produced and labeled in conformity with EEC standards could be sold in EEC markets, the EEC regulations posed significant non-tariff barriers to United States wine producers who sought access to EEC markets.⁴⁰

Since markets in the EEC and in the United States have not been expanding, and the EEC market has for years been experiencing a

32. Wines in the EEC are certified as to their identity, quality, and origin. A certification is a representation that the wine is, in fact, the one identified on the label and that it is of the indicated quality. A certification also ensures that the wine originates in the area designated on the label. These representations are made in documents which accompany the wine in shipment. EEC Reg. No. 2133/74, in 13 O.J. EUR. COMM. No. L 227/5-6 (1974) (governs official documents and registers which must accompany wines).

33. EEC Reg. No. 816/70, in 13 O.J. EUR. COMM. No. L 199/1 (1970).

34. *Id.*

35. A brand label is that which carries "in the usual distinctive design, the brand name of the wine." 27 C.F.R. § 4.10 (1984). Examples of a brand name are "Gallo," "Christian Brothers," etc.

36. *U.S.-EEC Wine Understanding*, *supra* note 2, ¶ 10,502.

37. A strip label is a smaller label that can be used in addition to the brand label to provide mandatory and supplemental information required to be on wine labels of wines sold in the EEC, when the same information is not required on wine labels of wines sold in the United States. It contains no "distinctive design," as its purpose is merely to present information to the European consumer.

38. *U.S.-EEC Wine Understanding*, *supra* note 2, ¶¶ 11,120-11,121.

39. The problem was remedied, however, with the revision of 27 C.F.R. § 4.25 (1978), amended by 27 C.F.R. § 4.23a (1983). These amendments upgraded United States standards for appellations and varietals and represented a step toward bringing United States wine regulations in closer conformity with those of the EEC Member States.

40. TREASURY NEWS, *supra* note 4.

decline, the United States has the most to gain by the exchange of letters. While these documents protect EEC wines in the United States, the market has removed certain technical and economic barriers to permit United States wines access to EEC markets. Hence, the United States market has expanded in Europe. This is a logical result, since the United States could have used its leverage as the EEC's main customer and negotiated to shrink entry of EEC wines into the United States market. This could have been accomplished by applying higher tariffs on wine exports or by setting limits on the amount of wine allowed into United States markets. Instead, by using its leverage to its advantage, the United States gave small concessions of protection to EEC wine producers, while gaining greater concessions of economic significance to United States wine producers.

III. ADOPTION OF NEW UNITED STATES REGULATIONS: A STEP TOWARD FACILITATING SUCCESS

A. *Regulations Promulgated by the Bureau of Alcohol, Tobacco and Firearms*

The Secretary of the Treasury, pursuant to its rulemaking authority,⁴¹ issued regulations governing the varietal content⁴² and appellations of origin⁴³ of wine in December, 1935. These regulations remained unchanged and in effect for forty-three years. In 1973, the BATF, pursuant to its recently acquired authority,⁴⁴ promulgated new regulations governing varietal content⁴⁵ and appellations of origin.⁴⁶ The new regulations differ slightly from their predecessors. For example, under the original regulations, a label could bear the name of a single grape variety, such as "Chardonnay" or "Pinot Noir," if fifty-one percent of its volume was composed of such grapes.⁴⁷ The 1973 regulation raises the percentage minimum to seventy-five percent.⁴⁸ Similarly, under the original regulations, a label

41. "[R]egulations are to be prescribed by the Secretary of the Treasury, with respect to . . . labeling . . ." 27 U.S.C. § 205(e) (West. Supp. 1983).

42. 27 C.F.R. § 4.23 (1935).

43. *Id.* § 4.25.

44. The Secretary of the Treasury has delegated to the BATF the power to perform the duties and functions of the former under the Federal Alcohol and Administration Act, Pub. L. No. 74-401, 49 Stat. 977 (1935). 43 Fed. Reg. 11,696 (1972).

45. 27 C.F.R. § 4.23a (1984).

46. *Id.* § 4.25a.

47. *Id.* § 4.23 (1935).

48. *Id.* § 4.23a (1984).

could bear the name of a geographical region,⁴⁹ such as "Sonoma County" or "Napa Valley," if seventy-five percent of the volume of the wine derived from grapes grown in that region. The 1973 regulation⁵⁰ distinguishes political regions, such as states or counties, from those "viticultural areas" which have distinguishing geography, soil and climate.⁵¹ The "Napa Valley" is one such "viticultural area."⁵²

The BATF continued to propose further revisions of the original regulations throughout the 1970's. In 1976, the BATF published a proposal recommending that the rules governing representations as to grape origin be modified to require a ninety-five percent volume content for wines bearing a vintage date on the label.⁵³ In 1977, the BATF recommended further revisions, including an increase in the percentage of varietal grapes from fifty-one to seventy-five percent, with mandatory disclosure on the label of the varietal and blending grapes.⁵⁴ The revisions pertaining to geographical representations would have required that ninety-five percent of the grapes originate from the area indicated on a label bearing a vintage date or vineyard name.⁵⁵ A requirement mandating that eighty-five percent of the grapes be grown in the viticultural area indicated on the label was also proposed.⁵⁶

The BATF held extensive public hearings regarding its proposals in both Washington, D.C.,⁵⁷ and in San Francisco⁵⁸ spanning a two-year period from 1976 through 1977. The written statements and oral testimony contributed at these hearings fill twenty-four volumes of the BATF's administrative record.⁵⁹ In 1978, the BATF issued its regulations in final form.⁶⁰ These regulations, however, contained substantial revisions of the earlier proposals that the BATF had made.

49. *Id.* § 4.25 (1935).

50. *Id.* § 4.25a (1984).

51. *Id.* § 4.25a(e)(1)(i) (defining a viticultural area as "[a] delimited grape growing region distinguishable by geographical features . . ."). Recognized viticultural areas are listed in *id.* §§ 9.21-9.95 (1984).

52. *Id.* § 9.23 (1984).

53. 41 Fed. Reg. 50,004 (1976).

54. 42 Fed. Reg. 30,517 (1977).

55. 42 Fed. Reg. 30,518 (1977).

56. *Id.*

57. The Washington, D.C., hearings were held in April, 1976, and in February and September, 1977.

58. The San Francisco hearings were held in April, 1976, and in February and November, 1977.

59. *Wawszkiewicz v. Department of the Treasury*, 480 F. Supp. 739, 746 (D.D.C. 1979).

60. 27 C.F.R. §§ 4.20-4.39 (1982).

While they retained the seventy-five percent varietal minimum, they dropped the mandatory varietal percentage statement.⁶¹ Additionally, they retained the minimum geographical percentage at eighty-five percent for wines labeled with a viticultural area, but they did not adopt the ninety-five percent minimum for vintage-dated or vineyard wines.⁶²

*B. Litigation Arising Out of the Adopted Regulations:
Wawszkiewicz I*

The regulations as adopted by the BATF gave rise to an action which sought declaratory relief. This action, *Wawszkiewicz v. Department of the Treasury*,⁶³ was filed in the district court in Washington, D.C., by four wine consumers.⁶⁴ The plaintiffs argued that the regulations failed to require accurate, adequate representations as to the variety and geographic origin of the grape used. They claimed that this failure violated the statutory mandate for truthfulness and disclosures as set forth under the enabling statute. This statute mandates that the label provide the consumer with adequate information, including the wine's identity, quality and age. It also prohibits "false" or "misleading" label statements.⁶⁵

The plaintiffs did not argue that the BATF should have required one hundred percent purity for wines designated by a particular region or grape. Rather, they took the position that a wine label should expressly identify precise percentages for all grape varieties and geographical regions which contribute to the labeled wine. They further argued that the adopted regulation was "arbitrary, capricious and an abuse of discretion" because the BATF's final statement in the

61. 43 Fed. Reg. 37,672 (1978).

62. *Id.*

63. 480 F. Supp. 739 (D.D.C. 1979).

64. Edward J. Wawszkiewicz, a professor of microbiology who teaches in the department of enology at the University of California, Davis, and a part-owner of a small California vineyard; Robert W. Benson, an administrative law professor at Loyola Law School in Los Angeles, author of a wine book and a wine column for the American Bar Association Journal; H. Donald Harris and R. Frederic Fisher, lawyers and wine connoisseurs.

65. Under this regulation, interstate commerce in wine is not permitted unless it is: labeled in conformity with such regulations, to be prescribed by the Secretary of the Treasury . . . as will prohibit deception of the consumer . . . and as will prohibit, irrespective of falsity, such statements . . . as the Secretary of the Treasury finds to be likely to mislead the consumer; . . . as will provide the consumer with adequate information as to the identity and quality of the products . . . [and] as will prohibit statements on the label that are false [or] misleading. . . .

27 U.S.C. § 205(e).

rulemaking record failed to provide a basis for allowing deceptive and uninformative language.⁶⁶

The BATF moved for summary judgment, arguing that its position was a reasonable interpretation of its statutory authority. It asked the court to defer to its interpretation of the legislative language, because that language dated from within four months of its ratification. The BATF also argued that it had considered all relevant factors: it had balanced the varied information needs of the ordinary consumer against those of the sophisticated consumer and had set forth in its preamble a rational basis for its decision.⁶⁷

The district court partially agreed with the plaintiffs. It deemed as "clear and direct" the statutory language concerning false and misleading label statements.⁶⁸ The court relied on the ordinary meaning of the words (i.e., as an ordinary consumer would understand), and reasoned that if a label carried only the word "Chardonnay," it clearly implied that the wine was made from Chardonnay grapes only, even if the label did not specify such wine as "all Chardonnay" or "100% Chardonnay."⁶⁹ Additionally, the court noted that Congress had directed that wine label terminology be understandable to the ordinary consumer.⁷⁰ The court reasoned that this required that wine labels bear, at least, concise explanations of any terminology used where principal grape varieties and chief geographic origins are represented to the consumer.⁷¹ The percentage of the labeled variety and the geographic origins of the grapes used in the winemaking must be communicated truthfully to the consumer.⁷²

The court, however, also agreed in part with the defendants. It refused to grant plaintiffs' request for an order mandating a more elaborate labeling statement,⁷³ notwithstanding the statutory call for regulations requiring labels to provide consumers with "adequate information as to the identity and quality [sic]" of the wine.⁷⁴ The court reasoned that ensuring adequate disclosure was a different obligation from that of the absolute prohibition against false and misleading

66. 480 F. Supp. at 742.

67. *Id.* at 743.

68. *Id.*

69. *Id.* at 743-44.

70. *Id.* at 745.

71. *Id.*

72. *Id.*

73. *Id.* at 746.

74. *Id.* at 745.

statements.⁷⁵ Because the statute itself offered no guidance as to what constituted "adequate disclosure," and because such a determination was not feasible by reference to the ordinary meaning of those words,⁷⁶ the court held that the obligation implied discretionary judgment on the part of the Treasury Secretary.⁷⁷

C. Wawzkiewicz II

On appeal, the Circuit Court of Appeals for the District of Columbia affirmed the district court's holding in part and reversed in part.⁷⁸ It affirmed as to the labeling regulations concerning the use of geographical terms.⁷⁹ It referred these regulations back to the BATF so that it could demonstrate that they meaningfully controlled misleading labeling. The court noted that during the hearings, the BATF had argued that using geographical names which have no relationship to the origin of the grapes could confuse the consumer.⁸⁰ The lower court also had based its decision upon the fact that the BATF never explained why it chose to regulate certain types of misleading geographical names and not others.⁸¹ Furthermore, the BATF had not referred the court to anything in the record to justify such a disparity in treatment; it did not even give a reason that attempted to harmonize the regulations with section 205(3), which prohibits misleading label information.⁸²

The appellate court, however, refused to uphold the district court's ultimate determination.⁸³ It acknowledged that the lower court's interpretation of the governing statutory language was "logical,"⁸⁴ but did not agree that the BATF's varietal labeling rule was "irrational."⁸⁵ The court noted that there was ample evidence in the record to support the BATF's conclusion that varietal percentage listings would not assist in providing much useful information to the consumer.⁸⁶ Further, it noted that testimony in the record suggested

75. *Id.* at 746.

76. *Id.* at 745-46.

77. *Id.* at 745.

78. *Wawzkiewicz v. Department of Treasury*, 670 F.2d 296 (D.C. Cir. 1981).

79. *Id.* at 304.

80. *Id.* at 303 (citing 41 Fed. Reg. 50,005 (1976)).

81. 670 F.2d at 303.

82. *Id.* See *supra* note 65 for the relevant text of § 205(e).

83. 670 F.2d at 304.

84. *Id.* at 302.

85. *Id.*

86. *Id.*

that such a requirement might mislead the consumer to believe that higher percentages would translate into better wines.⁸⁷ Moreover, it reasoned, such a requirement would result in "extremely cluttered" labels and cause cost problems.⁸⁸ The court concluded that the regulations allowing twenty-five percent of the volume to be composed of grapes other than those indicated on the label was the "product of a reasoned and amply elucidated process"⁸⁹ and thus would be upheld.⁹⁰

D. Deceptive Labeling: What Does It Mean After Wawszkiewicz?

The inconsistencies in the outcome of the *Wawszkiewicz* litigation can be explained by the fundamentally different focus of the two courts. The district court, faced with the argument that the varietal regulations were likely to be deceptive or misleading to the consumer, looked to legal precedent for a resolution. It did not have to look far, as the question of what constitutes misleading label information had been posed before in the District of Columbia Circuit.⁹¹ Yet, the appellate court did not refer to the legal precedent it had established in this area, choosing instead to focus upon the rule-making proceedings. The court used a rational basis test to determine the soundness of the regulations.⁹² It looked to whether the BATF had shown a "rational connection" between the facts found and the regulations as actually adopted.⁹³

It is difficult to explain why the appellate court eschewed its own precedent on appeal. If it had not done so, the varietal labeling rule of

87. *Id.* (citing 43 Fed. Reg. 37,672 (1978)).

88. *Id.* (citing 43 Fed. Reg. 37,672 (1978)).

89. *Id.* at 303.

90. *Id.*

91. *See, e.g., Armour & Co. v. Freeman*, 304 F.2d 404 (D.C. Cir. 1962) (holding that the Secretary of Agriculture's mandatory regulation requiring packers to affix the label "imitation ham" to smoked hams containing added moisture content up to ten percent of their uncured weight was arbitrary and capricious); *American Public Health Ass'n v. Butz*, 511 F.2d 311 (D.C. Cir. 1974) (holding that official inspection labels placed on raw meat and poultry products by the Department of Agriculture and bearing the statement "U.S. Passed and Inspected" or "U.S. Inspected for Wholesomeness" were not false and misleading so as to constitute misbranding, notwithstanding failure to warn against dangers of food poisoning); and *Federation of Homemakers v. Butz*, 466 F.2d 462 (D.C. Cir. 1973) (holding that "All Meat" label on frankfurters which contained only 85% meat and used to distinguish those containing 81% meat was false and misleading).

92. "To uphold the agency action, however, the court must find a 'rational basis for the agency's decisions . . . in the facts of the record.'" *Wawszkiewicz*, 670 F.2d at 301 (citing *Almay, Inc. v. Califano*, 569 F.2d 674, 681 (D.C. Cir. 1977)).

93. *Id.*

the district court would have been upheld. Among the several analogous food labeling cases the appellate court could have relied upon⁹⁴ one of particular relevance is *Federation of Homemakers v. Butz*.⁹⁵ In that action, frankfurter labeling regulations promulgated by the Secretary of Agriculture were challenged. Under the challenged regulations, manufacturers could put "All Meat" on product labels if the frankfurters contained eighty-five percent meat, to distinguish them from frankfurters containing 81½% meat. Although the meat content for frankfurters was limited at eighty-five percent, the court held that the label term "All Meat," when applied to a product containing only eighty-five percent meat, could imply that the product was, in fact, all meat, containing no fillers, and thus was false and misleading.⁹⁶ The court reasoned that the words used on the label were "clear and unequivocal" and imparted a description which could not properly be associated with a product that was only part meat, or meat and fillers.⁹⁷ The court stated flatly: "[t]he fact is that frankfurters labeled 'All Meat' are simply not all meat."⁹⁸

Although the *Federation* court looked to the facts in the record,⁹⁹ it relied principally upon the issue of whether there was a reasonable basis for the plaintiff's conclusion that the disputed label designation conveyed to an ordinary consumer the idea that a frankfurter so labeled does not contain fillers.¹⁰⁰ The court reasoned that it was "plain" that an ordinary consumer who bought "All Meat" frankfurters would not expect that they contained eighty-five percent meat, as opposed to 81½% meat.¹⁰¹

The factual similarities between *Federation* and *Wawzkiewicz* are inescapable. The issue in *Wawzkiewicz* was whether a label bearing the word "Chardonnay" is false and misleading to the consumer when regulations require that seventy-five percent of the wine be derived from grapes of that type. In *Federation*, the court held that it was misleading to the consumer to label frankfurters "All Meat" when in fact they contained only eighty-five percent meat. The district court in *Wawzkiewicz* noted that the labels did not contain the

94. 670 F.2d at 303.

95. 466 F.2d 462 (D.C. Cir. 1972).

96. *Id.* at 466.

97. *Id.* at 464.

98. *Id.*

99. *Id.* at 465.

100. *Id.*

101. *Id.*

words "All Chardonnay," but nevertheless the court warned that the ordinary consumer would expect to be buying a wine made from one hundred percent Chardonnay.¹⁰² The court focused upon the meaning an ordinary consumer would attribute to the term and found that "[t]he clear implication of a label bearing only 'Chardonnay' is that the wine is made from the Chardonnay variety grape and no other."¹⁰³

By ignoring its own precedent and focusing instead upon the rule-making proceedings, the appellate court weakened the integrity of the line of cases it had established on the question of false and misleading information of food labels. While it did not expressly overrule that line of cases, its decision implies that such prohibitions are not applicable to wine labels, perhaps in the belief that wine is not "food." But the court's opinion is silent on this aspect as well. Thus, the appellate court, after determining the soundness of the rule-making proceedings, refused to take the next step in the analysis and examine whether the rules promulgated under those proceedings conformed to the common law rules it had itself established.

The decision of the appellate court also would seem to go against the congressional mandate noted by the district court,¹⁰⁴ that wine labeling terminology should be understandable to the consumer.¹⁰⁵ By accepting the respondent's contention that the district court's order would result in "cluttered" wine labels which would be confusing to the consumer, the appellate court demonstrated a lack of concern for the congressional mandate upon which the district court relied for its decision.¹⁰⁶

E. The Wawszkiewicz Litigation: Reaction in the Wine Community

The *Wawszkiewicz* litigation aroused a limited amount of acerbic reaction within the wine community. Louis Martini, the respected Napa Valley vintner, ridiculed the one hundred percent proposal made at the hearings, where he testified, "as a winemaker, whether or

102. *Wawszkiewicz*, 480 F. Supp. at 743.

103. *Id.*

104. See 27 U.S.C. § 205(e).

105. "[I]nterstate commerce in wine is not permitted unless it is labelled so . . . as to provide the consumer with adequate information as to the identity and quality of the products . . ." 27 U.S.C. § 205(e) (1976).

106. See *id.*

not it is 100% is not important."¹⁰⁷ Leon D. Adams of the Wine Institute, and a respected writer on wines, criticized the plaintiffs as "publicity seekers" who had unjustifiably attacked the "best wine regulations in the world."¹⁰⁸ A. Dinsmoor Webb, a professor of enology at the University of California, Davis, pointed out that some wines can be greatly enhanced by blending plant varieties or grapes grown in different regions.¹⁰⁹ He claimed that even a seventy-five percent requirement is too high for some varieties and wondered whether the plaintiffs were truly seeking to improve varietal blending requirements or were simply hoping for better truth-in-labeling requirements.¹¹⁰

Senior counsel for the Wine Institute, James M. Seff, noted the burdensome recordkeeping that such regulations would require.¹¹¹ He has illustrated his point by the complex task of accurately tracing the varietal and geographic origins of, for example, a Cabernet bottled at a Napa winery. This wine will have used eighty-five percent Cabernet grapes, seventy-five percent of which were grown in Napa, and ten percent of which were grown in Sonoma. It would then be blended with a Merlot, ten percent of which was grown in Napa and five percent of which was grown in Mendocino.¹¹² Mr. Seff noted that the benefits of such a system would be outweighed by its ultimate costs to the consumer who, he claims, only cares that "the wine is pleasing to the senses and has an affordable price."¹¹³

IV. EEC LABELING REGULATIONS VS. UNITED STATES LABELING REGULATIONS: THE FORMER BARRIERS

A. *The Problem: Varietal Names and Vintage Dates*

1. Varietal names

All wines imported into EEC Member States must comply with EEC regulations.¹¹⁴ These regulations govern wine imported from among the Member States of the EEC as well as wine imported from non-Member States. The EEC categorizes wines in three ways: wines

107. McGinty, *supra* note 6, at 96.

108. *Id.* Undoubtedly, France would disagree.

109. *Id.*

110. *Id.*

111. *Id.* at 98.

112. *Id.*

113. *Id.*

114. *U.S.-EEC Wine Understanding*, *supra* note 2. The EEC regulations concerning wine labels are found in Reg. No. 2133/74, in 13 O.J. EUR. COMM. No. L 227/1 (1974).

which derive from geographical areas;¹¹⁵ wines which derive from political areas; and wine products, such as grape must.¹¹⁶ This Comment will discuss only the geographic and political categories, since the appropriate use of these categories gave rise to the exchange of letters.

EEC labeling requirements for wines described by a geographical or viticultural area¹¹⁷ provide that the label must present certain mandatory information. The required information includes the name of the viticultural area,¹¹⁸ the volume of the wine,¹¹⁹ the name of the importer, the area in which the producer's headquarters are located,¹²⁰ and an indication of the non-Member country from which the wine originates.¹²¹ Additionally, certain supplemental information is to be included on labels,¹²² such as whether the wine is red, white or rosé,¹²³ the name of one or two wine varieties,¹²⁴ the vintage year,¹²⁵ and the alcoholic content.¹²⁶

115. For a discussion of the distinction between geographic and political categories, as used in wine terminology, see *supra* note 15.

116. Grape must is crushed grapes or grape juice ready to be fermented. M. AMERINE, WINE: AN INTRODUCTION 57 (2d ed. 1977).

117. EEC Reg. No. 2133/74, art. 28, in 13 O.J. EUR. COMM. No. L 227/13 (1974).

118. "The description on the labels of imported wines . . . described by reference to a geographical area . . . shall include * * * the name of the geographical unit situated in the non-member country concerned . . ." EEC Reg. No. 2133/74, art. 28 (1)(a), in 13 O.J. EUR. COMM. No. L 227/13 (1974).

119. "The description on the labels of imported wines . . . described by reference to a geographical area . . . shall include . . . the nominal volume of the imported wine . . ." EEC Reg. No. 2133/74, art. 28(1)(b), in 13 O.J. EUR. COMM. No. L 227/13 (1974).

120. "The description on the labels of imported wines . . . described by reference to a geographical area . . . shall include [where these wines have been bottled inside or outside of the Community], * * * the name or business name of the importer and the local administrative area or part thereof in which his head offices are situated . . ." EEC Reg. No. 2133/74, art. 28(1)(c), in 13 O.J. EUR. COMM. No. L 227/13 (1974).

121. "The description on the labels of imported wines . . . described by reference to a geographical area . . . shall include * * * the non-member country of origin . . ." EEC Reg. No. 2133/74, art. 28(1)(d), in 13 O.J. EUR. COMM. No. L 227/13 (1974).

122. "The description on the label of the wines referred to in paragraph 1 may be supplemented . . ." EEC Reg. No. 2133/74, art. 28(2), in 13 O.J. EUR. COMM. No. L 227/14 (1974).

123. "The description on the label of [imported] wines . . . may be supplemented by . . . a statement as to whether the wine is red, rosé, or white . . ." EEC Reg. No. 2133/74, art. 28(2)(a), in 13 O.J. EUR. COMM. No. L 227/14 (1974).

124. "The description on the label of [imported] wines . . . may be supplemented by . . . the name of one or two vine varieties . . ." EEC Reg. No. 2133/74, art. 28 (2)(d), in 13 O.J. EUR. COMM. No. L 227/14 (1974).

125. "The description on the label of [imported] wines . . . may be supplemented by * * * the vintage year . . ." EEC Reg. No. 2133/74, art. 28(2)(e), in 13 O.J. EUR. COMM. No. L 227/14 (1974).

It was this supplemental information which caused difficulty for United States producers and which the exchange of letters helped to resolve. The EEC regulations which govern such supplemental information differ substantially from United States regulations. For example, if the varietal name(s) were indicated on the label, EEC regulations require that the wine be made entirely from the indicated varietal grapes.¹²⁷ This contrasts with the United States requirement that only seventy-five percent of the wine must derive from the varietal grape listed on the label.¹²⁸ An exception exists for wines made from any *Vitis Labrusca*¹²⁹ variety, where the required varietal content is reduced to fifty-one percent of the label designation.¹³⁰

In the unusual case where a single wine contains two or more varieties, however, the United States regulations conform with the EEC labeling regulations. In those cases, both sets of regulations require that all of the grapes used to make the wine be specifically noted on the label.¹³¹ Paradoxically, it was only when United States producers sought to export wines bearing the name of *one* varietal grape, instead of two or more, that the EEC regulations acted as a non-tariff barrier to their efforts to do so.¹³²

126. The description on the label of [imported] wines . . . may be supplemented by * * * the actual and/or total alcoholic strength" EEC Reg. No. 2133/74, art. 28(2)(f), in 13 O.J. EUR. COMM. No. L 227/14 (1974).

127. "The indication of the name of a vine variety . . . to describe an imported wine on the label may be used only if * * * the product concerned is made entirely from grapes of the variety which it is intended to indicate." EEC Reg. No. 2133/74, art. 32(1)(b), in 13 O.J. EUR. COMM. No. L 227/16 (1974).

128. "The name of a single grape variety may be used as the type designation if not less than 75 percent of the wine is derived from grapes of that variety" 27 C.F.R. § 4.23a(b).

129. *Vitis Labrusca*, literally "foxy grape," is a species of wild grape vine native to eastern North America. Not many of the grapes used to make wine are pure *Labrusca* because most have been accidentally cross-pollinated with other species, including *vinifera*. All *Labrusca*-type wines share, to a certain degree, a characteristic aroma and flavor traditionally described as "foxy." A. LICHINE, ENCYCLOPEDIA OF WINES & SPIRITS 72 (1963).

130. Wine from any *Vitis Labrusca* variety (excluding hybrids with *Labrusca* parentage) may be labeled with the varietal name if "[n]ot less than 51 percent of the wine is derived from grapes of that variety" 27 C.F.R. § 4.23a(c)(1)(i). The lower varietal requirement for *Labrusca* grapes may be explained by the fact that this grape is very strong-flavored and wine connoisseurs do not favor its "foxy" flavor.

131. "The names of two or three grape varieties may be used as the type designation if (1) [a]ll of the grapes used to make the wine are of the labeled varieties" 27 C.F.R. § 4.23a(d)(1). Cf. EEC Reg. No. 2133/74, art. 32(1)(b), in 13 O.J. EUR. COMM. No. L 227/1 (1974) ("The indication of the name of a vine variety . . . to describe an imported wine on the label may be used only if * * * the product concerned is made entirely from grapes of the variety which it is intended to indicate").

132. U.S.-EEC Wine Understanding, *supra* note 2.

2. Vintage dates

Before the exchange of letters, United States producers could not export vintage wine to EEC markets unless all of the grapes used in the wine were harvested during the indicated year.¹³³ United States regulations have only a ninety-five percent content requirement.¹³⁴ Therefore, once again the EEC label regulations acted as a non-tariff barrier to United States producers.

The exchange of letters, however, resolved the problems United States producers faced as a result of the differing vintage date regulatory requirements. The EEC agreed to recognize United States vintage date percentage standards for American varietal wines. With the EEC's recognition of United States percentage standards for United States vintage dates, more United States wines will have access to EEC markets.

B. Another Problem: Appellations of Origin

Among the most significant accomplishments realized through the exchange of letters was the EEC's recognition of all United States appellations of origin.¹³⁵ The EEC's willingness to accept the United States appellation system was due partially to the recently revised American regulations governing appellations of origin,¹³⁶ which became mandatory in January, 1983. One commentator has cautiously described these revisions as "quasi-historic."¹³⁷ Under the new regulations,¹³⁸ appellations of origin are determined by geographic location. This revision represents a substantial move away from the general scheme of appellations of origin as conceived under the for-

133. "The indication of the vintage year . . . shall be allowed on the labels of imported wines only if * * * all the grapes used for the production of the wine concerned were harvested during the year which it is intended to indicate . . ." EEC Reg. No. 2133/74, art. 33(1)(a), in 13 O.J. EUR. COMM. No. L 227/16 (1974).

134. 27 C.F.R. § 4.27 (1984).

135. Appellation of origin refers to a system of classifying wine according to region, and traditionally has indicated the quality of the wine. Benson, *supra* note 16, at 118. In France, for example, the appellation system is very complex. In general, its scheme goes from largest region to smallest region, and the smaller the region from which the wine is derived, the higher the quality of the wine. A. LICHINE, *supra* note 129, at 92. European appellations of origin are discussed *infra* in notes 169-87 and accompanying text. American appellations of origin are defined *infra* in notes 139-68.

136. 43 Fed. Reg. 27,672 (1978).

137. Benson, *What's Happening to Wine Labels*, 65 A.B.A.J. 830 (1979) ("In a quasi-historic step the regulations require appellations of origin . . . to be delimited by precise geographic boundaries shown on maps").

138. 27 C.F.R. § 4.25a (1983).

mer section, and brings United States regulations closer to uniformity with those under the European scheme.

Under the new section, an American wine is entitled to an American appellation of origin if it is labeled "United States."¹³⁹ Generally, if the wine is labeled "American," it is entitled to an appellation of origin if it meets two requirements: (1) seventy-five percent of the wine must be derived from grapes grown in the indicated appellation area; and (2) the wine must be fully finished¹⁴⁰ in the United States.¹⁴¹

Under the newly adopted appellation regulations, a state may also be an American appellation of origin.¹⁴² In that case, the label must bear the name of the state and seventy-five percent of the wine must be derived from grapes grown within that state.¹⁴³ Multi-state appellations are permitted, provided they comprise no more than three contiguous states.¹⁴⁴ Such multi-state appellations of origin require that all of the grapes be grown in the indicated states, rather than seventy-five percent of them. The percentage of wine derived from grapes grown in each state must conform to the oenological and labeling standards of each state.¹⁴⁵

139. "An American appellation of origin is: The United States" *Id.* § 4.24a(a)(1)(i).

140. Finishing techniques refer to the final steps in winemaking before the wines are placed on the market. For instance, the potentially harmful effects of oxidation in the bottle headspace and dissolved in the wine may be stripped of dissolved oxygen by passing nitrogen or carbon dioxide and filled so as to displace the gas without introducing air, and may be vacuum-sealed. M. AMERINE, *supra* note 116, at 114.

141. An American wine is entitled to an appellation of origin other than a multicounty or multistate appellation, or a viticultural area, if * * * [a]t least 75 percent of the wine is derived from fruit or agricultural products grown in the appellation area indicated; (ii) it has been fully finished (except for cellar treatment pursuant to § 4.22(c), and blending which does not result in an alteration of class or type under § 4.22(b)) . . . within the labeled State or an adjacent State.

27 C.F.R. § 4.25a(b)(1)(i) & (ii).

142. "An American appellation of origin is . . . a State" *Id.* § 4.25a(a)(1)(ii).

143. A wine may bear a state appellation if:

[a]t least 75 percent of the wine is derived from fruit . . . grown in the appellation area indicated; (ii) it has been fully finished (except for cellar treatment pursuant to § 4.22(c) and blending which does not result in an alteration of class or type under § 4.22(b)) . . . within the labeled State or an adjacent State

Id. § 4.25a(b)(1)(i)-(ii).

144. "An American appellation of origin is . . . two or no more than three States which are all contiguous" *Id.* § 4.25(a)(1)(iii).

145. An appellation of origin comprising two or no more than three States which are all contiguous may be used, if (1) All of the grapes were grown in the States indicated, and the percentage of the wine derived from grapes grown in each State is shown on the label, with a tolerance of plus or minus 2 percent; (2) it has been fully finished (except for cellar treatment pursuant to § 4.22(c), and blending which does not result in an alteration of class or type under § 4.22(b)) in one of the labeled appellation States; (3) it conforms to the laws and regulations governing the composi-

An American appellation of origin may also be designated by the name of a county.¹⁴⁶ Under those circumstances, seventy-five percent of the wine must be derived from grapes grown within the county.¹⁴⁷ The new regulation also permits multi-county appellations of origin, which consist of a maximum of three counties in the same state.¹⁴⁸ The counties need not be contiguous, as required with multi-state appellations.¹⁴⁹ Multi-county appellations require that all of the grapes be grown in the indicated counties and that the percentage of wine derived from grapes grown in each county be shown on the label.¹⁵⁰

The viticultural area is the narrowest geographical area entitled to an appellation of origin.¹⁵¹ A viticultural area is a delimited grape growing region, which is distinguishable by its geography.¹⁵² It is thus distinguished from the other appellation categories, which are described as "political" appellations.¹⁵³ Well-known viticultural areas are Napa Valley and Sonoma Valley in California, and the Finger Lakes region in New York. This category of appellations has the strictest minimum requirement for grape content in that it mandates eighty-five percent of the wine be derived from grapes grown within

tion, method of manufacture, and designation of wines in all the States listed in the appellation.

Id. § 4.25a(d)(1)-(3).

146. "An American appellation of origin is . . . a county (which must be identified with the word 'county,' in the same size of type and in letters as conspicuous as the name of the county). . . ." *Id.* § 4.25a(a)(1)(iv). Examples of such an appellation would be "Sonoma County" and "Monterey County."

147. A wine may carry a county appellation of origin if:

[a]t least seventy-five percent of the wine is derived from fruit . . . grown in the appellation area indicated; (ii) it has been fully finished (except for cellar treatment pursuant to § 4.22(c) and blending which does not result in an alteration of class or type under § 4.22(b)) . . . within the State in which the labeled county is located.

Id. § 4.25(b)(1)(i)-(ii).

148. An appellation of origin comprising two or no more than three counties in the same State may be used if all of the grapes were grown in the counties indicated, and the percentage of the wine derived from grapes grown in each county is shown on the label, with a tolerance of plus or minus 2 percent.

Id. § 4.25a(c).

149. *Id.*

150. *Id.*

151. "An American appellation of origin is . . . a viticultural area . . ." *Id.* § 4.25a(a)(1)(vi).

152. An American viticultural area is defined as "[a] delimited grape growing region distinguishable by geographical features, the boundaries of which have been recognized and defined in Part 9 of this chapter." *Id.* § 4.25a(e)(1)(i).

153. A "political area" in an appellation of origin is distinguished from those areas whose boundaries are drawn according to distinctive geographical features, i.e., viticultural areas. Thus, a county, state, country and province are known as political-type appellations of origin.

the viticultural boundaries.¹⁵⁴

These revisions of the Code of Federal Regulations take a step toward defining American appellations of origin by geographic designations typical of the European appellations of origin. These revisions allow a certain convenient degree of flexibility in that they start with the very broad category of country (i.e., the United States)¹⁵⁵ and proceed to the narrower categories of states,¹⁵⁶ counties,¹⁵⁷ and viticultural areas.¹⁵⁸ Even more flexibility is provided by the multi-state¹⁵⁹ and multi-county¹⁶⁰ appellations of origin.

The United States' regulatory system for appellation of origin has always differed fundamentally from the European system.¹⁶¹ Under former regulations,¹⁶² wine was entitled to an American appellation of origin if it met three prerequisites: (1) a minimum of seventy-five percent of its volume must have been derived from grapes grown in the indicated appellation region; (2) the wine had to be fully manufactured and finished within the state in which the appellation region is located; and (3) a wine had to conform to the regulations governing the production and labeling of wines for home consumption (as opposed to wines destined for food services, restaurants, etc.).¹⁶³

The language of the former regulation was very general and focused on alcohol content, production methods, and relevant regional manufacturing and labeling requirements of the appellation area. The original regulation, unlike the current standards, did not recognize viticultural areas as appellations of origin.

Additionally, the original regulation did not mention appellations of origin for foreign wines. In contrast, the new regulations categorize foreign appellations either as political or geographical areas. Thus, a county, province or viticultural area may be an appellation of origin for imported wines under the new regulations.¹⁶⁴ If the foreign

154. An American "wine may be labeled with a viticultural area appellation if * * * [n]ot less than 85 percent of the wine is derived from grapes grown within the boundaries of the viticultural area" *Id.* § 4.25a(e)(3)(ii).

155. *Id.* § 4.25a(a)(1)(i).

156. *Id.* § 4.25a(a)(1)(ii)-(iii).

157. *Id.* § 4.25a(a)(1)(iv).

158. *Id.* § 4.25a(a)(1)(vi).

159. *Id.* § 4.25a(a)(1)(iii).

160. *Id.* § 4.25a(a)(1)(v).

161. Benson, *supra* note 16, at 118.

162. 27 C.F.R. § 4.25.

163. *Id.* § 4.25(a)(1)-(3).

164. "An appellation of origin for imported wines is: (i) A country (ii) a state, province,

wine bears an appellation of origin from a political area, at least seventy-five percent of the wine must be derived from grapes grown there. The wine must conform to the requirements under the relevant foreign laws which govern the composition, production and labeling of wines within the country of origin.¹⁶⁵ If the foreign wine bears a viticultural appellation of origin, it must derive from a delimited place or region whose boundaries have been recognized and defined by the foreign country.¹⁶⁶

European regulations, on the other hand, have always been based upon the premise that the precise geographical origin of a wine, and the customary winemaking methods of a particular wine, are mainly responsible for determining wine quality.¹⁶⁷ Thus, an appellation of origin under the European scheme is a geographical name exclusively reserved for wines produced through certain methods which meet EEC regulatory standards.¹⁶⁸ EEC regulations governing geographical origin as represented on wine labels are strictly construed, and any indication not expressly permitted by the regulations is forbidden.¹⁶⁹ Therefore, the exclusive use of the name is legally protected by liability in legal proceedings.¹⁷⁰ For example, in France, illegal appropria-

territory, or similar political subdivision of a country equivalent to a state or county; or (iii) a viticultural area." *Id.* § 4.25a(a)(2)(i)-(iii).

165. An imported wine is entitled to an appellation of origin other than a viticultural area if (i) at least 75 percent of the wine is derived from fruit . . . grown in the area indicated by the appellation of origin; and (ii) the wine conforms to the requirements of the foreign laws and regulations governing the composition, method of production, and designation of wines available for human consumption within the country of origin.

Id. § 4.25a(b)(2)(i)-(ii).

166. "A delimited place or region (other than an appellation defined in paragraph (a)(2)(i) or (ii)) the boundaries of which have been recognized and defined by the country of origin for use on labels of wine available for consumption within the country of origin." *Id.* § 4.25a(e)(1)(ii).

167. Benson, *supra* note 16, at 118.

168. *Id.* at 120. A discussion of the manufacturing methods is quite technical and beyond the scope of this Comment. For a thorough exposé on this subject, see M. AMERINE, *THE TECHNOLOGY OF WINE MAKING* (1960). For excellent sources which focus solely on the technical aspects of wine making, see M. AMERINE, *WINE MUST ANALYSIS* (1974), and M. AMERINE, *LABORATORY PROCEDURES OF ENOLOGISTS* (1965).

EEC regulations governing enological practices for wines in the Community are found in Reg. No. 816/70, in 13 O.J. EUR. COMM. No. L 199/1 (1970).

169. This principle is echoed throughout EEC Reg. No. 2133/74 governing wine labels. For example, under Article 3(1), "[o]nly the information referred to in Article 2 shall be allowed for the description on labels of table wine," which must include the words "table wine" and its nominal volume. Article 13(1) mandates the same for quality wines (a higher designation than table wines). EEC Reg. No. 2133/74, in 13 O.J. EUR. COMM. No. L 227/1, 7 (1974).

170. Benson, *supra* note 16, at 118.

tion would subject the producer to liability for deception as to origin or substantial quality,¹⁷¹ or for fraudulent affixation or use of an appellation of origin.¹⁷² The Lisbon Arrangement of October 31, 1958,¹⁷³ also addresses fraudulent use of any appellation of origin, and thus serves as an additional source of protection on an international level. The protection is based upon a concern against misleading the consumer by fraudulent use of appellations of origin. This concern is expressly stated in EEC regulations¹⁷⁴ which prohibit label information from creating false impressions or confusion regarding quality or origin of wine.¹⁷⁵

In France, deception is determined by case law on an ad hoc basis.¹⁷⁶ The courts look to the likelihood of confusion in the buyer's mind between the name used and the actual appellation of origin.¹⁷⁷ Two cases are illustrative of this process. The first, *Fédération Nationale de Production de la Bière et du Cidre v. M. Bataille*,¹⁷⁸ concerned the use of the name "Pilsheim," as opposed to the appellation of origin "Pilsen, Pilsner." The plaintiffs charged unlawful imitation of appellation of origin because "Pilsheim" was too close to "Pilsen, Pilsner." In its decision of June 12, 1978, the Cour de Cassation¹⁷⁹ denied the claim, holding that such a charge is sustainable only where the name used is likely to create confusion in the buyer's mind.¹⁸⁰ In

171. Law of Aug. 1, 1905, on the prevention of fraud, *cited in id.* at 124 n.43.

172. Law of May 6, 1919, on the protection of appellation of origin; Law of Dec. 13, 1973, relating to appellations of origin in the field of wine production.

173. Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration, as revised at Stockholm in 1967, *reprinted in* 3 S. LADAS, PATENTS, TRADEMARKS AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTION (Appendix 7) (1975) [hereinafter cited as the Lisbon Agreement].

174. EEC Reg. No. 2133/74, art. 43, ¶¶ 1 & 2, in 13 O.J. EUR. COMM. No. L 227/1 (1974).

175. "The description and the presentation of the products referred to in Article 1(3) . . . must not be liable to confusion as to the nature, origin and composition of the product * * * The description and presentation . . . must be such as not to create a false impression of the product . . ." *Id.*

176. Laprugne, *Trademarks and Geographical Names in the French Wine Production*, 81 PAT. & TRADEMARK REV. 60, 64 (1983)

177. *Id.*

178. *See id.* at 64-65.

179. The Court of Cassation is France's highest court.

180. Laprugne, *supra* note 176. *See also* EEC Reg. No. 2133/74, arts. 8, 18 & 34, in 13 O.J. EUR. COMM. No. L 227/1 (1974) ("Labels used for description of a . . . wine . . . may not bear brand names showing words, parts of words, signs or designs which . . . are likely to create a false impression or confusion in the buyer's mind about the origin or substantial qualities of the wine . . .").

the Pilsheim case, the court held no confusion was likely to occur.¹⁸¹

On the other hand, in *Vins de Gravillons v. Fédération Nationale de Production de Vins de Table*,¹⁸² the Criminal Court of Bordeaux, in its judgment of June 23, 1952, recognized the offense of fraudulent imitation of the established appellation of origin "Graves," on the ground that the name used by the defendant, "Vins de Gravillons," was likely to create confusion between the two.¹⁸³ The court noted that despite its diminutive form,¹⁸⁴ the word "Gravillons," by its root, was actually "among the nearest derivations of the word 'Graves' derived from the old word 'Graves,' which in the Gironde region designates the producing soils."¹⁸⁵

The protection of appellations of origin under the European scheme also rests on the idea that certain products owe distinctive characteristics to their geographical origin.¹⁸⁶ These characteristics may be due to the region's climate and soil, or to the local materials or production methods peculiar to the area.¹⁸⁷ On the other hand, United States regulations have traditionally avoided such fine geographic distinctions.¹⁸⁸ The United States has traditionally regulated wines and wine production mainly to assure that the wine sold is sanitary and salable¹⁸⁹ (i.e., healthful for human consumption).

V. CONSUMER REACTION TO EXCHANGE OF LETTERS

The effect of these breakthroughs has been favorable not only for United States producers, but should prove favorable to European consumers as well. The purpose of a label should be to inform the consumer about the wine being purchased. The accomplishments realized by the exchange of letters not only allows the United States export market to expand abroad, they also provide the European con-

181. Laprugne, *supra* note 176, at 65.

182. *See id.*

183. *Id.*

184. The suffix *-illons* forms a diminutive noun in French.

185. Laprugne, *supra* note 176, at 65.

186. Benson, *supra* note 16, at 120.

187. *Id.*

188. *Id.* at 118. An American appellation of origin was defined in the original 27 C.F.R. § 4.25 as a State or as a region within a State. No smaller or more precise geographical area was contemplated as an American appellation of origin.

189. Benson, *supra* note 16, at 118-19. *Cf.* Lisbon Arrangement, *supra* note 173, art. 2(1) ("In this Agreement, 'appellation of origin' means the geographical name of a country, region or locality, which serves to designate a product originating therein, the quality and characteristics of which are due to exclusively or essentially to the geographical environment, including natural and human factors").

sumer with more information about the wine. The European consumer will now be able to purchase United States wines bearing vintage dates and varietal names. The European consumer will be informed by the label that such wines are not produced under standards similar to their domestic wines. This should enable consumers to expand their choice of wines and make more informed decisions about the wines available for sale.

Not all European consumers would agree with this assessment, however. Consumer reaction has been limited primarily to EEC concessions concerning the more technical aspects covered in the exchange of letters, rather than the entry of wine not produced in conformity with EEC labeling regulations. For example, the European Bureau of Consumers' Unions (BEUC) accused the EEC of having accepted dangerous standards which are incompatible with European oenological practices.¹⁹⁰ It also charged that the United States sought EEC acceptance of a set of practices and products which are prohibited in the Member States, although allowed in the United States.¹⁹¹ The BEUC criticized the EEC for buckling under economic pressure, citing the fact that the letters of understanding would guarantee the continued export of EEC wines to the United States, which amounts to approximately four million hectolitres a year.¹⁹²

In particular, the BEUC was concerned with both the use of certain mineral oils in wine production and the treatment of wine with certain ion converters.¹⁹³ United States producers use mineral oil to cover the surface of wine in containers which are not completely full.¹⁹⁴ This protects the wine from air which would otherwise oxidize the product.¹⁹⁵ The mineral oil used must conform to standards

190. *Agriculture: the European Commission Disputes that the Wine Agreement with the U.S. Permits the Importing of Products Dangerous to Health*, EUROPE No. 3650, July 14, 1983, at 13 [hereinafter cited as *Agriculture*]. Cf. H. LONGFELLOW, *supra* note 1, at 221:

"Drugged is their juice
 For foreign use,
 When shipped o'er the reeling Atlantic,
 To rack our brains
 With fever pains,
 That have driven the Old World frantic."

191. *Consumers*, *supra* note 7.

192. *Agriculture*, *supra* note 190.

193. *Id.* See also *Consumers*, *supra* note 7.

194. *Agriculture*, *supra* note 190.

195. *Id.* Wine whose surface has been exposed to air, or "oxidized wine," has a "bitter," "metallic" or "vinegar" taste to it which is not favored among connoisseurs.

established by the United States Food and Drug Administration.¹⁹⁶ The BEUC objected to importation of American wines which have been in contact with mineral oil, even when it conforms to United States standards and even though no trace of the substance is permitted when the wine is put on the market.¹⁹⁷ Additionally, the BEUC criticized the EEC for permitting the importation of American wines into EEC markets when those wines have been in contact with ion exchangers,¹⁹⁸ due to the "dangers of abuse and of radical changes in the composition of the wine treated."¹⁹⁹

The BEUC begrudgingly recognized certain concessions the EEC obtained through the exchange of letters. For example, it noted the reciprocal recognition of geographical names, which would assure that the names of European wines such as "Champagne," which derives from the region of France of the same name, would not be downgraded to a generic denomination when imported into the United States.²⁰⁰ The BEUC recognized that this concession would protect the integrity of European wines in the United States, since European names are exclusive and cannot be attributed to wines having similar characteristics.²⁰¹ Nonetheless, the BEUC viewed these concessions as having been made at the expense of the European consumer,²⁰² and motivated by purely economic reasons on the part of the EEC.²⁰³

Despite this reaction, the BEUC has generally shown a curious lack of interest in the new wine labeling provisions of the exchange of letters. European labeling regulations have always had as their objective the authentication of the origin of winemaking methods,²⁰⁴ with a view to preventing fraud. On the other hand, United States regulations have sought to govern winemaking methods mostly to assure that the wine sold is sanitary.²⁰⁵ The BEUC has thus taken a peculiarly American stance in its objections to the accomplishments real-

196. *Agriculture*, *supra* note 190.

197. *Id.*

198. Ion-exchange treatment is a modern method of removing potassium in wine. It converts potassium bitartrate to sodium bitartrate. This is desirable, as it prevents the precipitation of tartrate from the wine. The pH level of the wine may also be lowered by this treatment. The composition of the wine may also be modified by removing calcium, magnesium, iron and copper ions. M. AMERINE, *supra* note 116, at 112-13.

199. *Agriculture*, *supra* note 190.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. See *supra* notes 167-87 and accompanying text.

205. *Agriculture*, *supra* note 190.

ized through the exchange of letters. While one would expect them to press for requirements mandating a description of the differences between United States and EEC varietal and vintage year percentage standards, the BEUC instead has chosen to object to what it perceives as the unhealthful aspects of United States wines exported to the EEC. This may indicate that the European consumer may also begin to press for stricter EEC regulations ensuring that the wines produced in the EEC are healthful, sanitary and safe for human consumption.

VI. CONCLUSION

The exchange of letters of understanding should provide United States wine producers an opportunity for greater access to European markets which they had not been able to enjoy previously. The EEC's recognition of United States standards for varietal names and vintage dates, and its recognition of all United States appellations of origin, has removed non-tariff barriers so that more American wines should be permitted to enter Community markets. The expansion opportunities afforded to wine producers in the United States should have substantial economic significance for them. This opportunity may be dampened, however, by the currently oversaturated wine market in Europe, coupled with a downward trend in wine consumption there. In addition, the continued strength of the United States dollar in Europe will adversely affect our exports.

Nevertheless, the United States guaranteed no further downgrading of European geographical designations into generic names. This is a small concession, however, when compared to the economic significance for United States producers, who now find many more doors open to them as a result of the exchange of letters. The *Wawszkiewicz* litigation upgraded labeling standards for United States wines, thus bringing them into closer conformity with European standards (the BATF has yet to comply with the court's order, however). Some European consumer groups are concerned about the quality of United States wines entering their markets. For those Europeans not similarly concerned, though, the exchange of letters will afford Europeans the opportunity to enjoy a broader array of United States imports. Hopefully, they will find American exports as pleasing as did Mr. Longfellow.²⁰⁶

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206. H. LONGFELLOW, *supra* note 1.

