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Crystal blue persuasion: For offbeat products, place can be a brand

In the hit AMC series “Breaking Bad,” protagonist Walter White is a high school chemistry teacher who becomes a producer of high-grade crystal meth to provide for his family after a diagnosis of terminal cancer. One of the key storylines was Walter’s efforts to brand his product by providing a premium blue meth.

Although Walter’s marketing plan provides a strange case study in creating market share through brand identity, Walter never attempted what is often perceived as a critical step in any such plan — securing legal protection for his brand through trademark registration. Given the nature of his product, such reluctance is understandable.

In the United States, even producers of legal fringe products, such as medical marijuana, have discovered the difficulty in securing trademark protection before the U.S. Patent and Trademark Office. Internationally, however, another form of brand identity — geographic indications, or GIs — may provide relief.

GIs for products such as Champagne for sparkling wine and Parmigiano Reggiano for cheese have served as powerful marketing tools for products that owe their special qualities to their geographic source. Even the Agreement on Trade-Related Aspects of Intellectual Property Rights, or TRIPS, recognizes the unique role of GIs by prohibiting under Article 23 the use by others of GIs for wines and spirits. All other GIs are protected under Article 22.

GIs are not precisely trademarks. Instead, they are geographic source indicators, generally owned by cooperatives or other collective organizations that establish the standards for products carrying the GI. Because they do not require “distinctiveness,” GIs are considered a relatively low-cost method for developing countries to achieve a brand identity without engaging in costly adver-

tising and registration campaigns.

As a collectively owned brand, the cost of marketing GI-branded products is also reduced, as the costs are spread across the group. Like Walter’s blue meth, GI-labeled products earn market share by their unique characteristics.

Although Walter’s product could not be protected by a GI, since blue meth does not refer to any particular geographic source for the product, Jamaica has already established GIs for “Jamaican” cannabis (marijuana) and “Cannabis Sativa” (ganja).

These GIs are intended for use in the marketing of marijuana to those markets where it is legal, including for medical marijuana and in states like Colorado where recreational use is lawful.

Their protection is not limited to Jamaica, however. To the contrary, Jamaica has already entered into a bilateral agreement with Switzerland that requires Swiss protection of these two GIs (among others). If a revised Lisbon Agreement for the Protection of Appellations of Origin is established at the May diplomatic conference in Geneva, Jamaica may have the opportunity to strengthen the protection for its marijuana-related GIs worldwide.

GIs (geographic indications) are not the solution for all marketing issues. But for goods, like marijuana, they provide a strong platform to support international marketing efforts.

The original Lisbon Agreement provides even stronger protection for GIs than TRIPS. While TRIPS limits absolute prohibitions against unauthorized uses to GIs on wines and spirits, the Lisbon Agreement requires signatory countries to prohibit “any usurpation or imitation” of registered “appellations of origin,” or AOs, on any product.

AOs are a subcategory of GIs, involving products whose special characteristics “are due exclusive-

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ly or essentially to the geographical environment, including natural and human factors.”

Under Article 6, a registered AO “cannot ... be deemed to have become generic, as long as it is protected ... in the country of origin.” This absolutist approach strengthens the value of a GI as a marketing tool. In a country such as the United States where immigrants introduce a range of terms and goods, however, Article 6 would remove such recognized generic terms as chablis, pilsner and fontina from local producers. This failure to permit consideration of local meanings in the country where a GI-branded product is being marketed has limited the Lisbon Agreement’s popularity: Only 28 countries have joined.

With the exception of France and Italy, most developed countries, including the United States, are not members. Neither is Jamaica.

The purported aim of the revised Lisbon Agreement is to expand its appeal. But in Article 12 of the draft treaty (wipo.int/meetings/diplomatic_conferences/2015/en), the obligation to protect a GI regardless of its generic meaning in the country

where the good is being marketed currently remains.

A meeting in Geneva at the end of March did not resolve this issue. If Article 12 remains unaltered, Jamaica might wish to join, as would most countries of the European Union that already provide such absolutist protection for GIs, but the United States plainly would not.

So long as marijuana remains a Schedule 1 controlled substance, the U.S. Patent and Trademark Office will not register product marks. This leaves U.S. producers without a sufficient platform to launch international protection for their brands. GIs provide a strong alternative branding opportunity, but producers of alternative products should take these steps to strengthen this protection:

- Organize producers to select GIs for locally sourced goods and create standards for their application.
- Promote the special qualities of GI-branded goods to enhance their marketability, spreading the costs among member producers.
- Get involved in the international efforts to strengthen GI protection. Contact the U.S. Patent and Trademark Office and stress the economic harm local producers face in their inability to compete with foreign products due to inadequate GI protection for their goods.

The scope of GI protection is currently being debated in connection with both the revised Lisbon Agreement and the ongoing trade negotiations between the U.S. and European Union for a free trade agreement.

- Register GIs with the appropriate state trademark office. Such registration will at least provide a local basis for stopping unauthorized use while the GI gains traction.

GIs are not the solution for all marketing issues. But for goods such as marijuana, they provide a strong platform to support international marketing efforts. All it takes is organization, planning and products with a geographic uniqueness to support the niche GIs can create.