

## 6. Defending the Scottishness of Scotch Whisky

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### INTRODUCTION

Scotch Whisky is one of the best known, global brands. Its status as ‘Scotland’s national drink’ is undisputed and it is widely recognized as Scotland’s ‘biggest export’.<sup>1</sup> Scotch Whisky’s recognition is second to none: it is even claimed that throughout the world, ‘the word “whisky” is “Scotch” and “Scotch” is “whisky”’.<sup>2</sup> Scotch Whisky, in other words, is now elevated to a well-understood shorthand referring to whisky in general, most likely to the frustration of the producers of other whiskies. And what makes this iconic product Scotch Whisky is the place, Scotland. Consequently, in marketing terminology, Scotch Whisky is a place brand, in particular, a type of ‘strong territorial brand’.<sup>3</sup> Befitting for one of the best known place brands, Scotch Whisky has been registered as a Geographical Indication (GI) with the European Union (EU).<sup>4</sup> A GI is a legal instrument to protect the brand’s identity with respect

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<sup>1</sup> ‘Scotch Whisky’ (VisitScotland) <<https://www.visitscotland.com/things-to-do/food-drink/whisky>> accessed 9 October 2024.

<sup>2</sup> Alistair Durie, Ian Yeoman and Una McMahon-Beattie, ‘How the History of Scotland Creates a Sense of Place’ (2006) 2(1) Place Branding 43, 46.

<sup>3</sup> Michael Moss and John Hume, *The Making of Scotch Whisky: A History of the Scotch Whisky Distilling Industry* (Canongate Books 2000); S R H Jones ‘Brand Building and Structural Changes in the Scotch Whisky Industry Since 1975’ (2003) 45(3) Business History 72; Andy Smith, ‘Territory and the Regulation of Industry: Examples from Scotland and Aquitaine’ (2008) 18(1) Regional and Federal Studies 37; Andy Smith, ‘Industries as Spaces for the Politics of Territory: The Case of Scotch Whisky’ (2010) 20(3) Regional and Federal Studies 389; and Steve Charters and Nathali Spielmann, ‘Characteristics of Strong Territorial Brands: The Case of Champagne’ (2014) 67(7) Journal of Business Research 1461.

<sup>4</sup> Scotch Whisky was recognized as a Geographical Indication in the EU in 2008. See: Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, label-

to its geographical origin. Where the regulation of GIs does not apply, the Scotch Whisky Association (SWA),<sup>5</sup> the powerful trade body for Scotch Whisky, seeks to secure trade mark and other forms of registration to protect Scotch Whisky's integrity and reputation. In short, the SWA strives to protect the identity of Scotch Whisky through the system of intellectual property (IP) protection.

While under legal protection afforded to all manners of IPs, the brand of Scotch Whisky as a place brand is qualitatively different from some other IPs such as a certification mark that a place brand is fundamentally tied to a place, not to a set of quantified description. A place certainly refers to a physical location which can be described with geographic coordinates. However, what distinguishes a place from a space is that the former is imbued with symbols, emotions and meaning, something that evades quantitative capture.<sup>6</sup> In other words, a place brand is linked to images of the place it is tied to, and this is where the social relationship surrounding GIs can be observed. In the case of Scotch Whisky, it is existentially tied to Scotland, or more precisely, certain images of Scotland. It follows that, in practice, GIs are means to protect and prevent misuse of these images. There are, however, a multitude of images of Scotland and, while some of them are conducive to the promotion of Scotch Whisky the brand, some of them may not be appropriate or relevant. In other words, there has to be a process through which some images are adopted and promoted while some are rejected by the industry in its endeavor to protect the brand of Scotch Whisky. The chapter provides a broadly sociological exploration of this dynamic rather than legal arguments of IP. It looks into questions including what image(s) of Scotland is/are associated with Scotch Whisky, how the Scottishness of Scotch Whisky has been established by various actors, including the SWA, how the SWA has defended the brand and the ways in which the images the SWA have chosen to defend Scotch Whisky related to those in other attempts to brand Scotland.

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ling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89 [2008] OJ L39/16. With the UK's withdrawal from the EU (commonly known as Brexit), it was also registered as a GI in the UK GI scheme on 31 December 2020 <[www.gov.uk/protected-food-drink-names/scotch-whisky](http://www.gov.uk/protected-food-drink-names/scotch-whisky)> accessed 4 October 2024.

<sup>5</sup> See <<http://www.scotch-whisky.org.uk/>> accessed 21 October 2024.

<sup>6</sup> George Ritzer and J Michael Ryan (eds), *The Concise Encyclopedia of Sociology* (Blackwell Publishing Ltd 2011), 443-4.

## THE SCOTTISHNESS OF SCOTCH WHISKY

Scotch Whisky is a type of whisky, which is a type of spirit, an alcoholic beverage distilled from fermented grain mash. As a type of distilled alcoholic beverage, its history could go back a long way, but the earliest record of what could be directly attributed to today's Scotch Whisky was from the fifteenth century and it is found in the tax record of the day.<sup>7</sup> As the production of distilled spirit increased, it attracted the Scottish Government's attention as a source of taxation and the first tax on Scotch Whisky was levied in 1644; since then, the story of Scotch Whisky is dominated by the cat and mouse game between the government, first the Scottish and then the United Kingdom (UK) Government, wanting to tax the drink and producers trying their utmost to avoid taxation.<sup>8</sup> The taxation system has become more sophisticated, and tax has largely ceased to be the focus of governmental attention on Scotch Whisky. With the expansion of trade and commerce, Scotch Whisky has grown into a major industry in Scotland as well as the UK. The SWA cites the following to describe its industry as of 2022:

- in 2022, Scotch Whisky exports were worth £6.2 billion;
- in 2022, Scotch Whisky accounted for 77% of Scottish food and drink exports and 25% of all UK food and drink exports;
- in 2022, Scotch Whisky accounted for 26% of all Scotland's international goods exports and 1.5% of all UK goods exports;
- the Scotch Whisky industry provides £5.5 billion in gross value added (GVA) to the UK economy (2018);
- more than 11,000 people are directly employed in the Scotch Whisky industry in Scotland and over 42,000 jobs across the UK are supported by the industry;
- 7,000 of these jobs are in rural areas of Scotland providing vital employment and investment to communities across the Highlands and Islands.<sup>9</sup>

As shown above, the Scotch Whisky industry is indeed large and carries non-negligible economic weight for both Scotland and the UK. This is, unsurprisingly, one of the reasons why the protection of the brand of Scotch Whisky is important for both the industry as well as various authorities. This in turn implies that Scotch Whisky the brand in fact constitutes a space in which

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<sup>7</sup> 'Story of Scotch' (Scotch Whisky Association) <<https://www.scotch-whisky.org.uk/discover-scotch/story-of-scotch/>> accessed 9 October 2024.

<sup>8</sup> Ibid.

<sup>9</sup> 'Facts and Figures' (Scotch Whisky Association) <<https://www.scotch-whisky.org.uk/industry-insights/facts-figures/>> accessed 9 October 2024.

actors with varied interest in it engage with negotiation, if not outright power struggles \*, to maintain influence on what Scotch Whisky is and means.

Naturally, the awareness of Scotch Whisky the brand emerged as it slowly became a global commodity chiefly on the back of the expanding British Empire. The first attempt to legally define Scotch Whisky was made in 1933 in the form of the Finance Act 1933.<sup>10</sup> Later in the century, the UK Parliament enacted the Scotch Whisky Act 1988, a piece of legislation dedicated to Scotch Whisky. This suggests the UK Government's acknowledgement of the importance of Scotch Whisky in the UK economy. The Act has now been superseded by the Scotch Whisky Regulations 2009 which cover every aspect of its making, bottling, labelling and promotion. The SWA summarizes the Regulations as follows:

Scotch Whisky is whisky wholly produced and matured in Scotland. With the exception of Single Malt Scotch Whisky, it may be bottled overseas by verified companies but the only permitted additions are water and, if necessary, plain caramel colouring to adjust the final colour of the spirit. The use of any other additive, such as sugar, flavouring or other alcohol is illegal and means that the product cannot be sold as Scotch Whisky.<sup>11</sup>

The Regulations are the tool by which Scotch Whisky the brand is legally protected in the UK. While they define protected localities and regions in reference to Scotch Whisky (Regulation 10), they only give location information and do not provide any description of geographical or environmental features that are supposed to make Scotch Whisky Scottish. In other words, what the Regulations convey is more technical than symbolic, a feature that distinguishes the Regulations from the GIs.

In contrast, the GIs, given that they are a formalized/legalized expression of the idea of *terroir*, the essential link between the location of production

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<sup>10</sup> Finance Act 1933 s 24 Amendment as to permits and certificates accompanying spirits:

For the purpose of subsection (9) of section one hundred and five of the Spirits Act, 1880 (which relates to the accuracy of the description of spirits in a permit or certificate), spirits described as Scotch whisky shall not be deemed to correspond to that description unless they have been obtained by distillation in Scotland from a mash of cereal grains saccharified by the diastase of malt and have been matured in a bonded warehouse in casks for a period of at least three years.

<sup>11</sup> 'Help Protect Scotch Whisky' (Scotch Whisky Association 2021) <[www.scotch-whisky.org.uk/media/1895/help-us-protect-scotch-whisky\\_july2021.pdf](http://www.scotch-whisky.org.uk/media/1895/help-us-protect-scotch-whisky_july2021.pdf)> accessed 9 October 2024.

and specific quality attributes<sup>12</sup> or a socio-cultural construct produced through communicative action among a wide range of stakeholders,<sup>13</sup> are more explicit in signalling certain images of the place.<sup>14</sup> According to the EU, its GIs system ‘protects the names of products that originate from specific regions and have specific qualities or enjoy a reputation linked to the production territory’.<sup>15</sup>

Accordingly, the role of geography in making Scotch Whisky Scotch whisky is detailed in the *Technical File for Scotch Whisky*,<sup>16</sup> one of the provisions to maintain Scotch Whisky’s GI.<sup>17</sup> The *Technical File* consists of several sections and following a few business-like sections such as ‘Description of Scotch Whisky’, ‘Geographical areas concerned’ (accompanied by a coloured map of Scotland) and ‘Method of production for Scotch Whisky’, which are filled with technical details such as the physical property of Scotch Whisky, geographical coordinates, description of the terrain, equipment to be used to produce Scotch Whisky and physical conditions under which it should be produced, comes a section entitled ‘The links with geographical origin and environment’. Here, the geography, geology as well as climate of Scotland, water, peat, factors influencing fermentation and influence of climate on maturation are listed as ‘natural factors in the geographical area’ that distinguish Scotch Whisky from other whiskies. The section then describes how the reputation of Scotch Whisky is linked to ‘the geographical area’, that is, Scotland. The first point is history:

1. **Historical origins** – Scotch Whisky has been produced in Scotland for more than 500 years and has been exported from Scotland for around 200 years. The term “whisky” derives originally from the words in the Gaelic language

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<sup>12</sup> Martijin Huysmans and Johan Swinnen, ‘No Terroir in the Cold?: A Note on the Geography of Geographical Indications’ (2019) 70(2) *Journal of Agricultural Economics* 550.

<sup>13</sup> Eric Casteló, ‘The Will for Terroir: A Communicative Approach’ (2021) 86 *Journal of Rural Studies* 386.

<sup>14</sup> Ordinarily, this signalling is carried out through words as we shall see below.

<sup>15</sup> The European Commission, ‘Geographical Indications and Quality Schemes Explained’ (European Commission) <[https://agriculture.ec.europa.eu/farming/geographical-indications-and-quality-schemes/geographical-indications-and-quality-schemes-explained\\_en](https://agriculture.ec.europa.eu/farming/geographical-indications-and-quality-schemes/geographical-indications-and-quality-schemes-explained_en)> accessed 9 October 2024.

<sup>16</sup> Department of Environment, Food and Rural Affairs, *Technical File for Scotch Whisky* (Department for Environment, Food & Rural Affairs 2019) <[www.gov.uk/protected-food-drink-names/scotch-whisky](http://www.gov.uk/protected-food-drink-names/scotch-whisky)> accessed 4 October 2024.

<sup>17</sup> The other instrument is the Verification Scheme operated by the HMRC. See ‘Protecting Scotch Whisky outside the UK’ (Scotch Whisky Association) <<https://www.scotch-whisky.org.uk/industry-insights/protecting-scotch-whisky/>> accessed 9 October 2024.

“Uisge Beatha” or “Usquebaugh”. Gaelic is the traditional language spoken in the Highlands of Scotland and Ireland. The Gaelic description first evolved into “Uiskie” and then “Whisky”. A Royal Commission was set up in 1908 in the United Kingdom to decide what restrictions should apply as to how Scotch Whisky was made. It issued its report in 1909. The Immature Spirits (Restriction) Act 1915 required ageing of Scotch Whisky in barrels for at least 2 years, which was extended to 3 years in 1916. Subsequently, Scotch Whisky was defined by statute in UK law in 1933, and it has been defined in UK legislation since that date.<sup>18</sup>

The fact that a ‘technical’ document to make the case of the connection between a product and a geographical area contains a description of history clearly shows that a place is inevitably imbued with meaning. Scotland is not just a geographical location with a particular climate pattern where pure and authentic ingredients are obtained but where the spirit has been continuously produced and enjoyed by generations; Scotch Whisky is therefore intricately intertwined with experiences and memories of people who have lived in Scotland and beyond. This makes a place brand yet another arena where actors involved in the project constantly negotiate what the brand should symbolize.

*The Technical File* then goes back to the description of the impact of geography and geology by identifying ‘Specific characteristics of the spirit drink attributable to the geographical area’ and provides a detailed description of how natural ingredients such as water, peat and the endogenous barley enzymes and climatic features of Scotland make Scotch Whisky distinctive.

The image of Scotland, where Scotch Whisky is produced, that emerges from the *Technical File* is that of a land of pristine nature with a cool and wet climate. The emphasis on the unspoilt environment in a description of Scotch Whisky’s GI is not surprising as the document’s aim is to make the case for unrivalled quality of the product which is anchored to the natural environment where it is produced. In other words, the emphasis on the pristine nature of Scotland is not in itself particularly ideological. Given the necessary link to the natural environment, it is not too difficult for the description of Scotch Whisky’s GI to be aligned with some form of environmentalism, but this has not been particularly prominent.<sup>19</sup>

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<sup>18</sup> DEFRA (n 16), 15.

<sup>19</sup> While the SWA now has the Scotch Whisky Industry Sustainability Strategy based on the concern for the protection of the environment (Scotch Whisky Association, ‘Sustainability in the Scotch Whisky Industry’ (Scotch Whisky Association) <<https://www.scotch-whisky.org.uk/industry-insights/sustainability/>> accessed 9 October 2024), it does not have a strong link with the Scottish Greens, for instance. In fact, the Scottish Greens are seen to be attacking the Scotch Whisky industry by jointly proposing the ban on the use of peat with the SNP.

What is interesting in Scotland is that this image happens to correspond to an already well-established image of Scotland, ‘the romantic view of ancient mists and braes’<sup>20</sup> created and propagated by Scottish Romantics including James Macpherson (1736–96), Robert Burns (1759–96) and Walter Scott (1771–1832), which has been continuously (and perhaps relentlessly) commodified and commercialized since then. Among others, Murray Pittock has pointed out the importance of Scotland’s Romanticism in the creation of a national brand.<sup>21</sup> He draws attention to the context in which a Romantic view of Scotland emerged and propagated: until sometime after the defeat of the Jacobite rebellion in 1746, the last military challenge to the sitting power on the British mainland, the inaccessible landscapes of Scotland were seen as a source of internal threat. Scotland, in particular as represented by the Highlands, was seen a wild place where militant savages resided and would challenge the civilized way of life in England. However, with the expansion of the British Empire they were increasingly seen as a source of its external military power that would confront the hostile forces at the frontier. The emergence, acceptance, and propagation of a Romantic view of Scotland therefore reflected certain power relationship in the eighteenth century where the militant and uncivilized Scots (= the Highlanders) were subjugated by the civilized English and made to work for the benefit of the Empire: the taming of the Scots. Once Scotland ceased to be seen as a source of internal threat, a particular image of Scotland defined by its landscape was produced and projected domestically as well as globally, therefore stimulating inbound tourism to Scotland.<sup>22</sup> In Pittock’s words, the Scottish landscape:

... was a magical landscape full of mighty men, a countryside as violent, sudden, torrential, and dark as the moods and valour of its inhabitants. To many across the world, Scotland remains this country of bagpipes and tartan, mountain and flood, castles, clans and conflict, whisky and golf, a territory simultaneously rural and organic, long associated with the supernatural’.<sup>23</sup>

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<sup>20</sup> Gillian Black, Rachael Craufurd Smith, Smita Kheria and Gerard Porter, ‘Scotland the Brand: Marketing the Myth?’ (2015) 24(1) *Scottish Affairs* 47, 49.

<sup>21</sup> Murray Pittock, *Scotland: The Global History: 1603 to the Present* (Yale University Press 2022).

<sup>22</sup> There are many comments on the relationship between the consumption of food and tourism in modern society. See, for instance, Ian Cook and Philip Crang, ‘The World on a Plate: Culinary Culture, Displacement and Geographical Knowledges’ (1996) 1(2) *Journal of Material Culture* 131.

<sup>23</sup> Pittock (n 21), 199.

The Scottishness of Scotch Whisky outlined and secured by the IP system is therefore that of a Romantic Scotland with a focus on pristine, and often unforgiving, nature, that produces the pure and authentic ingredients of Scotch Whisky, namely, water, yeast and grains. The same climate also creates a just-right climate for its maturation. In line with their contemporaries, the Scottish Romantics sought unspoilt places, an embodiment of authenticity, in Scotland, which they found in the Highlands, a place of wilderness with rugged terrain and largely emptied of people. The place was emptied because the 'old way' of life in the Highlands was defeated by a modern one, and because people were either left or removed due to changes in power as well as industrial structures in the form of the Clearances.<sup>24</sup> The Scottish Romantics went about making this image as *the* image of Scotland, and one of the consequences of this was the making of the Highlands as an essentially imagined place.<sup>25</sup> Sociologically speaking, the image of Scotland that is evoked by Scotch Whisky reflects a particular phase of Scottish history in which certain power relationships produced a place which was devoid of people, and which was cultivated for the entertainment of the moneyed class – a space with particular meanings.

## THE PROTECTION OF THE SCOTTISHNESS OF SCOTCH WHISKY

The IP does not have agency, and someone has to work on its behalf. The main agent that defends the Scottishness of Scotch Whisky that has been secured by the current IP regime is the SWA, the Scotch Whisky Association. The SWA is widely seen as a most effective trade body in exerting influence on taxation and trade.<sup>26</sup> The SWA was founded in 1942 but its predecessor, the Wine & Spirit Brand Association, was formed in 1912 in order to protect the sector against the potential fallout of the threat of tax hike proposed by the then Chancellor Lloyd George.<sup>27</sup> The Association changed its name to the

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<sup>24</sup> The Highland Clearances refer to forced evictions of inhabitants of the Highlands and Western Isles that started in the mid-eighteenth century. It is one of the contentious points in Scottish history, and often seen as embodying the tradition of emigration from Scotland. David McCrone, *The New Sociology of Scotland* (SAGE 2017), 91–4.

<sup>25</sup> Ibid., Ch 16.

<sup>26</sup> Julie Bower and David Higgins, 'Litigation and Lobbying in Support of the Marque: The Scotch Whisky Association, c. 1945–c. 1990' (2023) 24(1) *Enterprise & Society* 286.

<sup>27</sup> The history of the SWA draws from the SWA's website: Scotch Whisky Association <<https://www.scotch-whisky.org.uk>> accessed 9 October 2024,



Whisky Association in 1917 to champion Scotch and Irish whiskies' interest and has been working to protect and promote Scotch Whisky since 1942. The SWA has been effective in exerting influence on UK legislation on taxation on alcohol and the definition of the product, not only at the domestic level but also at the European and international levels. The SWA is credited with having successfully lobbied the UK legislature to provide statutory definition of Scotch Whisky as an appellation so that legislation would be extended to consumer protection.<sup>28</sup> At the international level, too, the SWA is seen as one of the major participants in securing three victories in the World Trade Organization (WTO) panel in reference to differentiated taxation on imported spirits in the 1990s.<sup>29</sup>

The SWA, a representative of individual producers, who are sometimes at odds with each other,<sup>30</sup> has proven to be a skilled political operator in protecting and promoting the Scottishness of Scotch Whisky. One recent occasion in which the SWA had to tread very carefully was the Scottish independence referendum of 2014.<sup>31</sup> Being a strong territorial brand, the association with Scotland is at the heart of Scotch Whisky the brand. It follows that an independent Scotland could further enhance the brand of Scotch Whisky, a point the then Chief Executive David Frost acknowledged in the SWA's annual review of 2013. Rather than coming out as a strong supporter for independence in order to further strengthen the Scottishness of Scotch Whisky, however, the SWA as a trade body played a 'good citizen' card by pledging they would respect the referendum outcome because it was a democratic exercise while citing their concern with ensuring stability and predictability in economy. As soon as the referendum result came through, the SWA first reiterated the inseparable link between Scotland and Scotch Whisky and vowed to continue working for the future success of Scotch Whisky and the Scottish nation. It also expressed its willingness to empower the Scottish Parliament in respect to tax-raising, spending and policy making in its submission to the Smith Commission on Devolution, using a type of language that the Scottish National Party (SNP) would use. Despite not aligning itself with the pro-independence

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Ronald Ranta and Atsuko Ichijo, *Food, National Identity and Nationalism* (2nd edn, Springer Nature Switzerland AG 2022), Ch 3, and Bower and Higgins (n 26).

<sup>28</sup> Bower and Higgins (n 26).

<sup>29</sup> Andy Smith, 'How the WTO Matters to Industry: The Case of Scotch Whisky' (2009) 3(2) *International Political Sociology* 176.

<sup>30</sup> As for conflict among Scotch Whisky producers, see Bower and Higgins (n 26).

<sup>31</sup> Ranta and Ichijo (n 27), 98–101.

side, the SWA managed to emerge from the 2014 referendum with its reputation of the defender of Scotch Whisky unscathed.<sup>32</sup>

Two years later, in the run-up to the EU membership referendum of 2016, the SWA was, like many other business organizations and in line with some major players in the industry such as Diageo and Pernod Richard, firmly in the pro-Remain camp.<sup>33</sup> They argued that the UK's EU membership was central to the healthy development of the Scotch Whisky industry. Still, as in the case of the Scottish independence referendum of 2014, David Frost, the then Chief Executive of the SWA, who later was appointed as the UK's Brexit negotiator, did not forget to add that the SWA would respect the outcome of the referendum, which was a democratic exercise, and that Scotch Whisky would continue to thrive regardless of the referendum outcome. When the referendum result was confirmed, the SWA was quick to urge UK politicians to act swiftly to secure certainty about Scotch Whisky trade in particular with respect to the protection of Scotch Whisky the brand (that is, its GI status) and fair taxation. The concern over the future of Scottish protected food names, including Scotch Whisky's GI, was aired by the Scottish Government, which, together with various trade bodies, attempted to exert pressure on the UK Government to maintain protected food names and GIs by setting up a UK GI system compatible with the EU one as quickly as possible.<sup>34</sup>

The Brexit negotiation has highlighted the importance of GIs in trade in today's world. By 31 January 2021 when the UK formally left the EU in accordance with the European Union (Withdrawal Agreement) Act 2020, the Department of Food, Environment and Rural Affairs (DEFRA) had set up the UK GI scheme, largely replicating the EU system, to ensure the continuity of the protection of GIs.<sup>35</sup> As Scotch Whisky had been registered as a GI with the EU prior to the date of the UK's withdrawal, Scotch Whisky was automatically given the same protection under the newly set up UK GI scheme in Great Britain (England, Wales and Scotland) and the protection under the EU

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<sup>32</sup> This may not be surprising as the Scottish independence referendum mainly revolved on the question of democracy rather than of securing the Scottishness of the Scottish nation.

<sup>33</sup> Atsuko Ichijo, 'What Has the Brexit Process Done to Scotch Whisky?' (2019) 90(4) *Political Quarterly* 637.

<sup>34</sup> The Scottish Government, 'News: Protected Food Names Under Threat' (The Scottish Government 2018) <<https://www.gov.scot/news/protected-food-names-under-threat/>> accessed 4 October 2024.

<sup>35</sup> See: Department for Environment, Food & Rural Affairs, 'Protected Geographical Food and Drink Names: UK GI Schemes' (Department for Environment, Food and Rural Affairs 2020) <[www.gov.uk/guidance/protected-geographical-food-and-drink-names-uk-gi-schemes](http://www.gov.uk/guidance/protected-geographical-food-and-drink-names-uk-gi-schemes)> accessed 4 October 2024.

scheme in Northern Ireland and the EU territories continued unlike those products which had not been registered as GIs prior to 31 January 2021. Legally speaking, the SWA's concern with the protection of Scotch Whisky's GI was satisfactorily addressed at the time of the UK's withdrawal. However, the SWA raised its concern regarding some EU member states requesting further certification of Scotch Whisky as explained in the Scottish Government's letter to the Secretary of State for Environment, Food and Rural Affairs on 8 February 2021.<sup>36</sup> While the SWA continues to speak up to defend the Scotch Whisky industry's interests, their concern regarding the fallout of Brexit has moved from the protection of Scotch Whisky's GI to ensuring unhindered and fair trade of Scotch Whisky.

In the Brexit negotiation, the SWA intensely lobbied both the Scottish and UK Governments in order to secure the continued protection of Scotch Whisky's GI and to maintain a level playing field in terms of taxation. Elsewhere, it has been noted that, prior to Brexit, the SWA was engaged with frequent litigation in order to protect Scotch Whisky's GI and the SWA's activity is not confined to the UK level but extends to the international one.<sup>37</sup> One of the recent cases, which sheds light on how the SWA protects the Scottishness of Scotch Whisky, is that of Glen Buchenbach, a whisky produced by a German distiller, Waldhorn Distillery. In 2013, the SWA took the distillery represented by Michael Klotz to the Hamburg Regional Court arguing the distillery's use of 'Glen' in the name of its product was in breach of Scotch Whisky's EU GI, as the word 'Glen' was closely associated with Scotland and therefore, Scotch Whisky. The Hamburg Regional Court then referred the case to the Court of Justice of the European Union (CJEU) for the clarification of the EU's Spirits Regulation in ruling on the case, and the CJEU's judgment was delivered on 7 June 2018.<sup>38</sup> The CJEU clarified the Hamburg Regional Court needed to decide whether consumers would think directly of the geographical indication, Scotch Whisky, when they saw a similar product using the term 'Glen' and articulated that the evocation criterion of the law could be considered in the absence of a visual or phonetic similarity.<sup>39</sup> Following the judgment by the

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<sup>36</sup> Fergus Ewing Cabinet Secretary for Rural Economy and Tourism, 'Letter to George Eustice: Whisky Trade Issues: Post-Brexit' (The Scottish Government 2021).

<sup>37</sup> Bowers and Higgins (n 26); Smith (n 29).

<sup>38</sup> C-44/17 *Scotch Whisky Association v Michael Klotz* [2018] ECR I-415; Vadim Mantrov, 'Do You Prefer Scotch or German Whisky? CJEU Judgment in the Scotch Whisky and Glen Buchenbach Dispute' (2018) 9(4) *European Journal of Risk Regulation* 719.

<sup>39</sup> Michael Loney, 'Does "Glen" Make Consumers Think of GI Protected Scotch Whisky?', 7 June 2018 *Managing Intellectual Properties*.

CJEU, the Hamburg Regional Court ruled in 2019 that the distillery breached Scotch Whisky's GI since the use of 'Glen' in the name of its product could imply that it was produced in Scotland and that the distillery had to drop the word from the product's name. The distillery appealed to the Hanseatic Higher Regional Court in Hamburg, which, in 2022, upheld the original ruling by the lower court. The SWA announced its victory in the case on 20 January 2022.<sup>40</sup>

When the appeal court upheld the lower court's original ruling, Waldhorn Distillery dropped the case and the SWA won praise from the industry. 'We'll give it to the Scotch Whisky Association: they're nothing if not determined' is how one industry press has described the court case that lasted for nine years.<sup>41</sup> The SWA's work to protect the Scottishness of Scotch Whisky is therefore widely recognized by the industry. As pointed out earlier, the image of Scotland that is associated with Scotch Whisky via its GI is that of a Romantic Scotland with its historical baggage. In the case of Glen Buchenbach, therefore, the SWA fought tooth and nail to preserve this particular image of Scotland in order to protect the brand of Scotch Whisky.

Moreover, the case against Glen Buchenbach has led to further legal clarification, in particular, the evocation criterion in determining if a GI has been breached or not, which experts on IP protection are interested in. Before the Glen Buchenbach case, the evocation was found in the partial incorporation of a GI in the sign or a visual or phonetic similarity such as the designation, 'Cambozola', given to a blue cheese made in Austria. However, in its judgment in the case of Glen Buchenbach, the CJEU stated that a breach of a GI through evocation could occur if there is close conceptual proximity even if there was no partial incorporation of a GI nor a visual or phonetic similarity. In other words, the CJEU ruled what was decisive was 'whether, when the consumer is confronted with a disputed designation, the image triggered directly in his or her mind is that of the product whose geographical indication is protected'.<sup>42</sup> The court found 'glen', a Gaelic word for a deep valley in the Highlands, was conceptually sufficiently close to what was associated with

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<sup>40</sup> Scotch Whisky Association, 'Decision Over Glen Buchenbach Upheld by the Appeal Court' (Scotch Whisky Association 2022) <[www.scotch-whisky.org.uk/newsroom/decision-over-glen-buchenbach-upheld-by-appeal-court/](http://www.scotch-whisky.org.uk/newsroom/decision-over-glen-buchenbach-upheld-by-appeal-court/)> accessed 4 October 2024.

<sup>41</sup> Jelisa Castrodale, 'Don't Put the Word "Glen" on a Whisky Bottle if it's Not Actually From Scotland, European Court Rules' (*Food and Wine Newsletter*, 15 February 2022) <<https://money.yahoo.com/dont-put-word-glen-whisky-152352785.html?guccounter=1>> accessed 9 October 2024.

<sup>42</sup> Manon Verbeeren and Olivier Vrins, 'The Protection of PDOs and PGIs Against Evocation: A "Grand Cru" in the CJEU's Cellar?' (2021) 16(4-5) *Journal of Intellectual Property Law & Practice* 316, 320.

Scotland and Scotch Whisky. In ruling this way, the CJEU effectively authenticated the Romantic image of Scotland as being entitled to legal protection, thus affording inadvertent support for the propagation of this particular image of Scotland. This is an example in which what appears to be a purely legal action could have unexpected ramification in society. In other words, this is yet another case to demonstrate that law is never consigned to the isolated courtroom but is part and parcel of society.

## SCOTCH WHISKY AND THE PROJECTION OF SCOTLAND

As we have seen, the SWA's efforts to protect the Scottishness of Scotch Whisky through lobbying and ensuring legal protection of Scotch Whisky's GI have firmly established the Romantic view of Scotland, a land of rugged and wild landscape, of pristine nature and of a mystic past, as the image of Scotland. However, this is not the only image of Scotland that is currently projected, to state the obvious. At the opening of the Scottish Parliament on 1 July 1999, for instance, the First Minister of Scotland, Donald Dewar waxed lyrical about Scotland's past:

The shout of the welder in the din of the great Clyde shipyards;  
The speak of the Mearns, with its soul in the land;  
The discourse of the enlightenment, when Edinburgh and Glasgow were a light held to the intellectual life of Europe;  
The wild cry of the Great Pipes;  
And back to the distant cries of the battles of Bruce and Wallace.<sup>43</sup>

Scotland's past described in his speech encompasses its shipbuilding industry, life in a rural village in Scotland, intellectual achievement during the Enlightenment and conflict with England, each of which can be mobilized to brand Scotland the place with a different flavor. In fact, the Scottish Government has been monitoring 'Scotland's Reputation' in respect of six dimensions (exports, governance, culture, people, tourism and immigration/investment) using the Anholt-Ipsos Nation Brands Index since 2008.<sup>44</sup> The

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<sup>43</sup> The Scottish Parliament, 'Donald Dewar's Speech at the Opening of the Scottish Parliament 1 July 1999' <[www.parliament.scot/-/media/files/history/donalddewarsspeech1july1999.pdf](http://www.parliament.scot/-/media/files/history/donalddewarsspeech1july1999.pdf)> accessed 4 October 2024.

<sup>44</sup> Scottish Government, *The Anholt-Ipsos Nation Brands Index: 2022 Report for Scotland* (Scottish Government 2023). It finds 'natural beauty' continues to be perceived as the strongest attribute of Scotland.

question therefore is where the Romantic view of Scotland that Scotch Whisky projects is situated in a wider endeavor of branding Scotland, the place.

It is evident that Scotch Whisky plays a prominent role in the promotion of inbound tourism both by the Scottish Government and relevant industries. In 2018, Scotland Food & Drink Partnership, a collaboration between industry organizations, research institutes, Scottish Government, and its agencies, published *Ambition 2030: A Growth Strategy for Farming, Fishing, Food and Drink*, and presented what they call 'the Scottish brand in 2030' as follows: 'It's 2030 and Scotland is famous as a Land of Food and Drink. We are known not just for our diversity of world-class products but as champions of responsible and sustainable production'.<sup>45</sup> In order to achieve annual turnover of £30 billion by 2030, the document proposes working with the tourism industry to increase the number of visitors to Scotland from the rest of the UK and internationally. The Scotch Whisky sector's success in increasing export on the back of its strong brand is also singled out as a model to emulate.<sup>46</sup> In response to *Ambition 2030*, the Scottish Tourism Alliance, representing 250 organizations involved in tourism in Scotland, published *Food Tourism Scotland: Creating a Global Tourism Destination and Unlocking a £1 Billion Growth Opportunity*, its action plan in 2019.<sup>47</sup> The action plan highlights visits to whisky distilleries as an example of food tourism, which is already thriving and, quotes an industry insider: 'Scotland's natural larder combined with its enviable reputation for whisky, makes it ideally placed to becoming the next must-explore food tourism destination'.<sup>48</sup> In these policy documents, the strength of the brand of Scotch Whisky in evoking authenticity as well as a wholesome environment which is indispensable in producing quality food is well recognized.

Scotch Whisky is also valued in these strategies for its capacity to produce a story line. Food Tourism Scotland suggests 'a visit to a castle becomes more meaningful with a dram of whisky in hand'<sup>49</sup> because of Scotch Whisky's evocation of the Romantic or mystic past of Scotland. Another report on the

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<sup>45</sup> Scotland Food & Drink Partnership, *Ambition 2030: A Growth Strategy for Farming, Fishing, Food and Drink* (Scotland Food & Drink Partnership 2018), 7.

<sup>46</sup> *Ibid.*, 8.

<sup>47</sup> Scottish Tourism Alliance, *Food Tourism Scotland: Creating a Global Food Tourism Destination and Unlocking a £1 Billion Growth Opportunity* (Scottish Tourism Alliance 2019).

<sup>48</sup> *Ibid.*, 16.

<sup>49</sup> *Ibid.*, 20.

impact of Robert Burns, Scotland's national bard, on the Scottish economy also points out:

that because of the strong association between Burns, described as "Scotland's most famous tax collector" by the SWA,<sup>50</sup> and Scotch whisky, a strong story line could be created to encourage food tourism to Ayrshire as well as Scotland.<sup>51</sup> Scotch whisky, the brand which projects the Romantic view of Scotland, is therefore highly valued in efforts to grow the economy through encouraging inbound tourism.

There is plenty of evidence that Scotch Whisky has established itself as one of the chief attractions of Scotland. Surveys on visitors and potential visitors to Scotland frequently refer to Scotch Whisky. For example, VisitScotland's analysis of the 2015 and 2016 visitor surveys has found that a visit to a whisky distillery is one of the 20 top activities for tourists to engage in in Scotland and that these visits are most popular among overseas visitors, who are most likely on their first visit to Scotland.<sup>52</sup>

VisitScotland has also been carrying out a 'social listening' with online conversations to capture first-hand views of visitors and potential visitors to Scotland, and its 2022 report analyzes their 2019 exercise.<sup>53</sup> It has found in all regions the analysis has been carried out, consisting of Aberdeen and Aberdeenshire, Ayrshire and Arran, Cairngorm National Park, Glasgow and Orkney, the words whisky and distillery make frequent appearance suggesting a strong interest in Scotch Whisky among the actual and potential visitors to Scotland.

The brief survey of the role Scotch Whisky plays in the promotion of inbound tourism shows that the Scottishness of Scotch Whisky is well established and well recognized, and it facilitates attracting more tourists to Scotland. This is supported by solid legal protection. However, the image of Scotland that Scotch Whisky evokes is, as it has been repeatedly pointed out in the chapter, that of a Romantic Scotland with an emphasis on the savage beauty of wilderness, which could be problematic at certain levels. As noted earlier, the Scottish Government monitors its national reputation in respect to six dimen-

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<sup>50</sup> Scotch Whisky Association, 'Story of Scotch' (Scotch Whisky Association) <[www.scotch-whisky.org.uk/discover/story-of-scotch/](http://www.scotch-whisky.org.uk/discover/story-of-scotch/)> accessed 4 October 2024.

<sup>51</sup> Murray Pittock, *Robert Burns and Scottish Economy: Final Report* (University of Glasgow funded by Scottish Government's Economic Development Directorate 2019).

<sup>52</sup> 'Insight Department: Whisky Tourism – Facts and Insights' (*VisitScotland* 2018).

<sup>53</sup> 'Regional Social Listening Analysis: Insights Into Whisky' (*VisitScotland* 2022).

sions: exports, governance, culture, people, tourism, and immigration/investment, which, somewhat awkwardly, summarize the images of Scotland the Scottish Government wants to project to the outside world. At first glance, it is rather obvious that Scotch Whisky's contribution to the promotion of Scotland as a place of good governance or a desirable destination for migrants would be limited. In fact, if we recall the Romantic view of Scotland is entrenched with certain outcomes of changes in the power and industrial structures of the late eighteenth century Scotland, this is not surprising. A close look at the latest report provides interesting material to consider.<sup>54</sup> For instance, it finds that Scotland's ranking in the panel of 60 countries is lowest in 'export', a category that attempts to capture 'a sense of the economic strength and potential of a country'. Scotland's overall ranking out of 60 participating countries is 21st despite the *Ambition 2030* project discussed above.<sup>55</sup> Moreover, in regard to the question about the contribution to innovation and science, Scotland ranks 26th. It is not too surprising if the strong brand of Scotch Whisky, drawing heavily from the Romantic view of Scotland, does not translate into a high evaluation of Scotland's prowess in science and innovation, and this is where there is a potential pitfall in the strong brand of Scotch Whisky exists in what it could bring to the national branding of Scotland. Scotch Whisky the brand could interfere with or occlude other images of Scotland that various actors are trying to promote. Humza Yousaf, the then recently appointed First Minister, articulated his vision for Scotland as 'equality, opportunity and community', which respectively stands for 'tackling poverty and protecting people from harm', 'a fair, green and growing economy' and 'prioritising our public service'.<sup>56</sup> While this vision primarily targets the domestic audience, that is, Scottish voters, images of Scotland taking on and getting rid of poverty or bumping up public service are not conveyed by Scotch Whisky.<sup>57</sup>

The focus on natural beauty has the potential to tie in with the environmental movement. However, rather troublingly, the promotion and entrenchment of the image of Scotland associated with Scotch Whisky could conceal certain

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<sup>54</sup> Scottish Government (n 44).

<sup>55</sup> Interestingly, the respondents associated 'agriculture', 'food' and 'craft' with Scottish export, which suggests that while Scottish export's association with agriculture and food is well established in line with the governmental efforts, the image of Scotland as a place of science and innovation has not caught on.

<sup>56</sup> Scottish Government, *Equality, Opportunity, Community: New Leadership – A Fresh Start* (Scottish Government 2023).

<sup>57</sup> There are conscious efforts on the part of the industry to address the questions of climate change and sustainability as seen in the SWA's strategy for 2023-2025, 'People. Planet. Prosperity'. See: 'Who We Are' (Scotch Whisky Association) <<https://www.scotch-whisky.org.uk/who-we-are/>>.



realities of Scottish history and society. In relation to Scotch Whisky, the image of Scotland that is evoked is that of the Romanticized Highlands. There is plenty of literature on how this version of the Highlands has been manufactured and reproduced.<sup>58</sup> Behind the Romanticized view of the Highlands as Scotland thus produced, the rugged, wild, and pristine landscape with very few people, is the pattern of land ownership, which meant a large sway of the Highlands was kept as a play (hunting) ground for aristocrats. What was required in such a space was wildlife – stags and grouses – not peasants. Cairngorms National Park, the largest national park in the UK, was established as recently as in 2003, after the establishment of the devolved Scottish Parliament, though the campaign to open up access to the wider public started in late 1920s.<sup>59</sup> The delay is usually attributed to problems in Scotland's system of land ownership, on which the Scottish Government has been working.<sup>60</sup> In short, the Scottish land ownership system is seen as highly problematic and undemocratic, entrenching ancient privileges. Moreover, the Romanticized view of Scotland, the imaginary Highlands, is what the outsiders, usually from a comfortable background, would see and what has been reproduced in literature, painting and music, not a view of those who lived there. As such, the Romanticized view of Scotland is a product of a certain power relationship of the late eighteenth century when a certain group of people, usually with assets, had power to define what was important and what was not and impose it on the rest of the population. This relationship has been continuously reproduced. These days, what is reproduced is perhaps not so much for the maintenance of the class relationship but for sustaining economic growth or the development of capitalist economy. 'Natural beauty', an image Scotch Whisky's GI conveys, brings tourists to Scotland and sells its products, thus bringing positive economic impact in Scotland while the underlying realities such as inequality remain hidden. Obviously, it is not the role of a territorial brand to be the flag bearer of social improvement. The main role of GIs is to protect consumers by providing trustworthy information about the product. However, as with any other institution, GIs are social constructs, which means that they could have impact beyond trade and commerce.

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<sup>58</sup> For example, Hugh Trevor-Roper, 'The Invention of Tradition: The Highland Tradition of Scotland' in Eric Hobsbaum and Terence Ranger (eds), *The Invention of Tradition* (Cambridge University Press 1983); McCrone (n 24), Chs 15–17; Pittock (n 51), Ch 4.

<sup>59</sup> Melisa Butcher and Andy Morris, 'Mapping Home' in Karim Murji (ed), *Investigating the Social World 1* (Open University 2015).

<sup>60</sup> 'Land Reform' (Scottish Government) <<https://www.gov.scot/policies/land-reform/>> accessed on 9 October 2024.

## CONCLUSION: GIS AND PLACE-BRANDING IN SCOTLAND

Scotch Whisky is a powerful place-based or territorial brand, and its GI has been effectively used to promote the product as well as Scotland with which it is associated. The Scotch Whisky industry has a skilled political operator to defend its interest through the protection of Scotch Whisky's GI in the form of the SWA, and the SWA has been effective in lobbying governments at various levels and using litigation to protect the Scottishness of Scotch Whisky. However, the image of Scotland associated with Scotch Whisky is of a particular kind, the Romanticized Highlands of Scotland, which can be at odds with other images of Scotland the Scottish Government and other industries might wish to project. Moreover, the image Scotch Whisky conveys could work to gloss over long-standing problems in land ownership and inequality in general in Scotland. Place-branding is not a means of social improvement but a marketing tool. Still, a close examination of what is being projected by a place brand can serve as a window to understanding social realities of the place.