

# Food Law

The newsletter of the Illinois State Bar Association's Section on Food Law

## Current Issues in Food Labeling in the U.S., EU, and France

BY LYNNE R. OSTFELD

Food safety and labeling have come a long way since President Theodore Roosevelt read Upton Sinclair's novel, *Asphalt Jungle*, about life in and near the Chicago stockyards.

Today the consumer has two issues of importance, besides price: adequate labeling to tell him what is in the product; informative label titles so that she is not deceived. These concerns are shared rather universally. They are of particular importance for exported and imported food stuffs.

What is in a product called "tiger milk"?

### Labels

France has four certifications of quality and origin: (1) Appellation of Origin (AOC); (2) label "Rouge" (Red) and regional labels; (3) organic label; (4) certificate of conformity. Through French encouragement, the European Union (EU) has created three Europe-wide quality and origin labels or logos: (1) Appellation d'Origine Protégée (AOP) or Protected Designation of Origin; (2) Indication Géographique Protégée (IGP) or Protected Geographical Indication; (3) Spécialité Traditionnelle Garantie (STG) or Traditional Specialty guaranteed labels/logos.<sup>1, 2</sup>

French products carrying the AOC classification were originally for wines and spirits and then dairy products. Champagne can only come from the

Champagne region. Increasingly, other products are carrying the label, such as farm-raised poultry, fruits and vegetables, olive oil and essential oils.

The national French Label Rouge and equivalent regional labels were created in 1960 to show that a product meets a strict quality control by licensed certifying organizations, at all stages of production.

Organic agriculture in France is identified by the AB logo (Agriculture Biologique). This logo is the property of the French Ministry of Agriculture and Fisheries and identifies the mode of agriculture. It guarantees that the product is produced in accordance with EU Regulation 2092/91.

The Certification of Conformity is a mark of quality certifying that a product is produced according to strict manufacturing rules and contains the properties required by the rules. The certification guarantees to the consumer the quality of the product and the truthfulness of the product label.

The European Union began working with labels in 1992. The Appellation d'Origine Protégée (AOP) identifies food produced, processed and prepared in a specific geographical area. Cheeses are the primary product marked with this logo.

Judges for the European Union Court of Justice (CJEU) have just ruled, on July 14, 2022, that Denmark cannot allow

its dairies to make and sell feta cheese because "Feta" was registered as an AOP and an IGP by Rule No. 1829/2002. Feta is a traditional Greek cheese made from unpasteurized sheep or goat milk. It is not a generic name and must come from Greece. The judges ruled that the Kingdom of Denmark failed to honor its obligations under Article 13, paragraph 3, of Rule No. 1151/2012 of the European Parliament and the Council, of November 21, 2012, relative to the systems of quality which are applicable to agriculture products and the food products resulting. Denmark allowed Danish dairies to make "Feta" cheese. Denmark lost the case and, according to the "loser" pays rule, it is to pay 4/5 of the legal costs of the European Commission, the European Commission is to pay 1/5 and the Republic of Greece and the Republic of Cyprus, a party with Greece, are to pay their own costs.<sup>3</sup>

The Indication Géographique Protégée (IGP) indicates that at least one phase of the product originates in a certain country or region. The product has to have a recognized quality. Products receiving this label are principally fresh meat and offals, cheeses, and fruits and vegetables.

The label Spécialité Traditionnelle Garantie (STG) does not indicate the origin but that it is a product of traditional character, either in the composition or the means of production.<sup>4</sup>

The United States is unsettled as to how to handle inclusion or not of ingredients raised with GMO crops as well as what is organic. But, requirements as to the listing of the nutrition of a product is important, and has been replicated elsewhere. The nutrition facts requirement for labels was updated in 2016.<sup>5</sup> The serving size must be larger and in bolder type, as must the number of calories. Added sugars must now be included and there is a slight change in the listing of some nutrient requirements. The actual amounts must be declared. There is also a new footnote: “The % Daily Value (DV) tells you how much a nutrient in a serving of food contributes to a daily diet. 2,000 calories a day is used for general nutrition advice.” *Id.*

The Food and Drug Administration (FDA) also has Standards of Identity (SOI). These were established in 1939 to help address economic adulteration that was occurring in the marketplace. As an example, jam stated to contain a certain amount of fruit must now contain a minimum amount of fruit. Today there are more than 250 SOIs. The goal is to protect consumers and promote honesty and fair dealing. The SOIs look to ensure that the characteristics, ingredients and production processes of specific foods are consistent with what consumers expect.<sup>6</sup>

In the United States, the fight is less on the type of labels seen in Europe and more on the content in the product.

Lawsuits, often class action, are brought when the label does not reflect the content of the product, e.g., “fudge” cookies containing no butter, “whole wheat” crackers made mostly of refined flour, “smokehouse” almonds not cooked with real smoke. The legal theory is based on state “false claims” and sometimes on the federal Magnuson-Moss Warranty Act. The defense may be on what a “reasonable consumer” would believe. This was the basis for U.S. District Judge Marvin F. Aspen recently dismissing a Pop-Tarts suit in Chicago: no reasonable consumer would believe that the filing in a Pop-Tart contained a certain amount of strawberries based on the image on the package and its use of the term “strawberry.”<sup>7</sup>

## Cell and Vegetable Produced Products

Food made in a lab, such as cell-based meat, is generating new lawsuits and new rules. The traditional are fighting the new and novel.

In 2019 Louisiana adopted two bills to protect its agriculture and dairy industries, as well as to protect consumers from misleading labels. Louisiana Act No. 273, “Truth in Labeling,” broadly bans the use of the terms “meat,” “rice,” or “sugar” on food products produced from non-traditional sources, such as plant-based or cell-derived meats and cauliflower rice. These are significant crops in the state. Louisiana Act No. 184, “Milk Labeling” law, looks to the dairy industry and prohibits a beverage from being labeled as “milk” unless the produce comes from a cow, goat, or other hooved mammal.

The law looks to the definition in the U.S. Food and Drug Administration’s (FDA’s) description:

Description. Milk is the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows. Milk that is in final package form for beverage use shall have been pasteurized or ultrapasteurized, and shall contain not less than 81/4 percent milk solids not fat and not less than 31/4 percent milkfat. Milk may have been adjusted by separating part of the milkfat therefrom, or by adding thereto cream, concentrated milk, dry whole milk, skim milk, concentrated skim milk, or nonfat dry milk. Milk may be homogenized.<sup>8</sup>

However, fights over the term “almond milk” in a different state were won by the manufacturer of “almond milk.” Cynthia Painter brought suit against Blue Diamond Growers that almond milk did not meet the definition of “milk” and should be labeled “imitation milk.” Her suit was dismissed, she appealed, and the dismissal was affirmed.<sup>9</sup> The court found the term not confusing to the average consumer.

Similar laws have been passed in other states to prohibit the labeling of something as meat if it does not come from livestock or poultry (Missouri, Arkansas). An Oklahoma law requires terms such

as “plant-based” to be of equal size and prominence as the product name.<sup>10</sup>

The dairy industry in the United Kingdom (UK) has objected to the use of the word “cheese” by the vegan producer of cheese La Fauxmagerie.

In the EU in general, cell-based meat and dairy are considered to be novel foods, as they are in the United Kingdom (UK - England, Scotland, Wales, Northern Ireland). General Principles governing novel foods have been enacted which must be respected by member nations, though the member nations can apply stricter laws as they see fit.<sup>11</sup>

The Court of Justice of the European Union has ruled that dairy alternative products cannot be sold in the EU under names such as “milk,” “butter” or “cheese.” This followed a referral from German courts due to a dispute involving German vegan and vegetarian food company Tofu Town.

In France, companies starting to produce and widely sell vegetable steaks and vegetable nuggets are being met by complaints from farmer associations. It is the traditional farmer versus the “new farmer.” Just as the EU Court of Justice ruled against TofuTown and held that milk and its by-products must be of an animal origin, the agricultural associations are fighting for the same protection for their work with living animals.

Many of the complaints come from producers of four-legged meat.

As a consequence, France has passed laws banning companies from using meat-related words to describe vegan dishes such as “vegan Shawarma kebab,” “vegetable steak” and “soy sausage.”

Decree No. 2022-947 of June 29, 2022, was adopted prohibiting the use of a legal name for an animal, group of animals, or fish as the name for any product containing vegetable proteins of .5 percent or more. Terminology used by a butcher, sausage maker or fishmonger cannot be used by a company for products containing plant proteins. This takes effect October 1, 2022, although products made or labeled prior to October 1, 2022 can be sold but only until December 31, 2023 at the latest.

However, products legally made or sold in another member state of the EU or in Turkey, or in another state party to an agreement in the European Economic Community or European Community, are not subject to the restrictions of this decree.

Violations are subject to administrative sanction of no more than 1,500 Euros for a person and no more than 7,500 Euros for a company.

The agriculture associations think that this is a start, and not the end.

The companies making cell-based or plant-cultivated products complain that France is pushing them to relocate to other countries to produce their foodstuffs and then sell them in France, rather than doing it all locally with local employment. Environmentalists are up in arms that this encourages more meat eating, with its resultant effect on climate change. Producers of foie gras are horrified that anything other than true duck or goose liver could be called “foie gras.”

In the U.S., complaints are increasingly made about competition with non-traditional products, particularly when the non-traditional cell or plant-based product is sold in the same section as the traditional meat or dairy product.

The Good Food Institute contends that this is censorship and a violation of the First Amendment, Consumer Choice and Safety, and the “Free Market.”<sup>12</sup>

The problem of which U.S. agency regulates cell-based products is looking to be resolved by an agreement between the FDA and the USDA. This was necessitated by the overlap of jurisdictions, most notably with eggs. The agreement addresses what jurisdiction and responsibility are assumed for which products and at what stage by each of USDA-FSIS and HHS-FDA.<sup>13</sup>

The FDA will be responsible for the cell culturing process for meat and poultry products until the harvest stage as well as maintaining sole jurisdiction over seafood. Food safety requirements, including facility registration, hazard analysis and risk-based preventative controls (HARPC) and Good Manufacturing Practices (GMPs) are under the FDA’s jurisdiction. The USDA is responsible for inspection of the meat cells and finished products, along

with its responsibilities under the Federal Meat Inspection Act and Poultry Products Inspection Act.

So, what is “tiger milk”? According to various web sites, it is not milk taken from a lactating female tiger (with difficulty) but the marinade in which ceviche is cooked. Its name comes from the white color of the liquid or was given to it by someone to indicate the strength obtained when it is used for ceviche, or by itself. ■

---

*Lynne Ostfeld is a solo practitioner with her primary office in Chicago. She has a second office on a family farm in Peoria County, Illinois, and is associated with the law firm DMALEX Avocats in Paris, France. Ostfeld has a general civil practice and concentrates on legal assistance to small and medium sized companies and individuals, in the US and in France. She is also general manager of a family limited partnership involved in the production of corn, soybeans and rice along with a hog operation in Iowa. Ostfeld is a former Chair of the Illinois State Bar Association Food Law Section Council and is active in numerous food and agriculture related committees in the CBA, ISBA, ABA and UIA. She earned her J.D. from John Marshall Law School (now the University of Illinois Chicago Law School), where she also was an Adjunct Professor of International Agri-business Law. In 2017, Ostfeld was awarded the Medal of Knight of the French National Order of Merit for her work for the French in the Midwest, as legal advisor to the Consulate of France in Chicago.*

1. USDA, Foreign Agricultural Service, GAIN Report #FR1062, 11/08/2001.
2. <https://agriculture.gouv.fr/aocap-igp-tout-savoir-sur-les-signes-officiels-de-lorigine>.
3. <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:62020CJ0159&from=en>
4. Further information can be obtained from: <https://agriculture.gouv.fr/official-labels-quality-and-origin>; [https://ec.europa.eu/info/food-farming-fisheries\\_en](https://ec.europa.eu/info/food-farming-fisheries_en).
5. <https://www.fda.gov/food/food-labeling-nutrition/changes-nutrition-facts-label>.
6. <https://www.fda.gov/food/food-labeling-nutrition/standards-identity-food>.
7. “Food Fight,” ABA Journal, Vol. 108, No. 3, Jun/Jul 2022.
8. 21 C.F.R. § 131.110.
9. *Painter v Blue Diamond Growers*, Civ. No. 17-2235 (C.D. Cal. May 24, 2017), *aff’d*, 757 F. App’x 517, 518 (9th Cir. 2018).
10. “Food Innovation and Food Labeling: Alternative Proteins,” Jessica Almy, J.D., Director of Policy at the Good Food Institute, panel discussion at American Agricultural Law Association, 10/12/2020.
11. <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0018:0063:en:PDF>.
12. Almy, AALA panel, 10/12/2020.
13. <https://www.fda.gov/food/domestic-interagency-agreements-food/formal-agreement-between-fda-and-usda-regarding-oversight-human-food-produced-using-animal-cell>.