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## "Consumer Protection:" Consumer Strategies and the European Market in Genetically Modified Foods

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INTELLECTUAL PROPERTY

“Consumer Protection”  
Consumer Strategies and the European Market in Genetically  
Modified Foods

*Dr. Johanna Gibson*



# “Consumer Protection”

## Consumer Strategies and the European Market in Genetically Modified Foods<sup>1</sup>

By Dr. Johanna Gibson\*

### I. INTRODUCTION

¶1 The relationship between traditional agricultural communities, regional development, organic agriculture, and the uptake of agricultural biotechnologies and genetically modified (GM) foods and crops is particularly complex in Europe and one which the European Commission has sought to negotiate through proposed regulatory frameworks in co-existence. The Commission defines co-existence as “the ability of farmers to make a practical choice between conventional, organic and genetically modified (GM) crop production. It is also a precondition for consumer choice. The Commission firmly believes that consumers and producers should have a real choice with respect to the type of agricultural products and the type of production they prefer.”<sup>2</sup> This emphasis on co-existence as merely “freedom of choice” has been rejected by many groups as an artificial imposition of the entry of GM into the European market contrary to the “choice” of consumers and farmers and perhaps even threatening that choice through perceived risks of contamination of organic and conventional farms.<sup>3</sup>

¶2 The possibility for successful co-existence frameworks in all Member States is significant for environmentalists, organic farmers, and traditional agriculture communities. This is especially critical in the context of the World Trade Organization (WTO) Dispute Settlement (Dispute DS291) brought by the United States, as well as Canada and Argentina, the other major exporters of GM plants, against the European Communities in 2003, for which the final report was published 29 September 2006.<sup>4</sup> Of critical interest to the present discussion is the cultural and economic significance of the European consumer. Indeed, the impact of consumer strategies and choices may be

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<sup>1</sup> This paper is a revised version of a presentation by the author at the Yale Information Society Project Access to Knowledge Conference, staged at Yale University, 21-23 April 2006.

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<sup>2</sup> *Communication from the Commission to the Council and the European Parliament*, at 3, COM (2006) 104 final (Mar. 9, 2006) (report on the implementation of national measures on the coexistence of genetically modified crops with conventional and organic farming) [hereinafter CCCEP].

<sup>3</sup> See GREENPEACE, IMPOSSIBLE COEXISTENCE (2006), <http://www.greenpeace.org/international/press/reports/impossible-coexistence>.

<sup>4</sup> Report of the Panel, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, § 4.184, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006) [hereinafter Panel Report].

understood as defining and in effect “regulating” value in agricultural markets. In this way, the consumer drives value in ways beyond that which might be suggested and captured by conventional patent and plant variety systems, and in ways that drive regulatory frameworks for these markets.

¶3 Further, consumer strategies and behaviours with respect to genetically modified crops in Europe may be usefully understood in relation to regional and national cultural identities that are especially expressed through traditional agricultural knowledge and farming practices. Indeed, the particularity of European traditional agricultural knowledge and the noted viability of organic markets in Europe suggest a unique entry point in the international market as well as important opportunities for local and regional development.<sup>5</sup> In particular, the significance of cultural diversity and knowledge diversity to innovation in Europe and international competitiveness presents a potential motivation for alternative strategies for protection, commercialisation, and revitalisation of traditional and organic agricultural communities in Europe. This might promise a particular advantage for Europe that would perhaps be defeated by inattention to risks of cross-contamination between these markets.

¶4 This article considers these developments in European agricultural markets and consumer activity, in the context of developing co-existence regulation, together with the US complaint to the WTO. Particularly in the context of international trade and intellectual property protection, it is useful to consider probable political and cultural factors that are perhaps limiting the commercial and agricultural potential of biotechnology in Europe precisely through the location of value in use, rather than through monopolies. Increasingly, the debate concerning markets in GM crops in Europe is taking place not only within the agenda of international and free trade, but also from the perspectives of cultural diversity and national integrity within an expanding Europe and throughout the international knowledge economy. Thus, the case of GM crops provides critical insight into ways in which to re-read the dominant models of finding and exchanging value in an international knowledge economy.<sup>6</sup> The case of competing agricultural markets in Europe and the impact of consumer preference suggest important ways to read the way in which the “value” of intellectual properties in other contexts might be re-considered outside the dominant model of creator and monopoly. Indeed, the knowledge and culture embedded in agricultural activities becomes particularly relevant in the context of the GM debate in Europe.

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<sup>5</sup> The strength of organic production in Europe is of particular commercial significance, growing in response to consumer demand. *See* ADRIAN MYERS, *ORGANIC FUTURES: THE CASE FOR ORGANIC FARMING* 215 (2005).

<sup>6</sup> The term “international knowledge economy” refers to the phenomenon where knowledge and knowledge-intensive activities are recognized as a significant input/output for societies and their economies. In other words, knowledge is itself an important resource and commodity of a society – an economic asset. This is understood in terms of the lessening significance of trade in basic tangible goods and the increased importance of knowledge and knowledge products as economic commodities in trade (consolidated in the WTO Agreement on Trade Related Aspects of Intellectual Property Rights, or TRIPS). The term can be traced to economic commentaries of the 1960s with the increased economic significance of services over that of traditional industries (like manufacturing). *See* PETER DRUCKER, *THE AGE OF DISCONTINUITY: GUIDELINES TO OUR CHANGING SOCIETY* (1969). For a discussion of the contemporary “creative economy” debate, *see* JOHANNA GIBSON, *CREATING SELVES: INTELLECTUAL PROPERTY AND THE NARRATION OF CULTURE* (2006).

¶5 The commercial and developmental value and potential of traditional and organic agricultural knowledge, methods, and production, and the potential for such agricultural knowledge to present genuine advantages to be understood, preserved, and utilised in Europe, is particularly relevant to broader concerns with identifying unique value in knowledge in ways other than through intellectual property monopolies. The sovereignty of consumers in identifying value in particular agricultural markets and in responding in autonomous ways to available products is potentially significant in motivating corporate accountability to genetically modified products.<sup>7</sup> In the context of other industries in which access to knowledge<sup>8</sup> is perhaps compromised – such as the operation of copyright restrictions in music industries and education – the activities of consumers in agricultural markets is a genuine source of insight.

## II. EUROPEAN AGRICULTURAL MARKETS AND CO-EXISTENCE

¶6 In Europe, traditional agricultural methods and organic means of production have emerged as genuine commercial strengths in defiance of GM industries, rather than merely demonised as peripheral social movements, as they are perhaps considered elsewhere.<sup>9</sup> In other words, as far as legislators and governments are concerned, such markets present significant opportunities to facilitate regional and local development in the context of exploiting real advantages for national economies through international trade. It is critical at this time for governments to understand how to enhance cultural and economic diversity through regional development, secure national branding of unique outputs, and recognise legitimate competitive advantages in a global economy.

¶7 Co-existence is thus a critical concern for the European Commission, possibly beyond that seen in other jurisdictions, in that agricultural practices in Europe are rather specific and diverse within a relatively small geographical area. In April 2006, the Commission staged the “Freedom of Choice” conference in Vienna, concerned with co-existence of genetically modified, conventional, and organic crops. Consumer and environmental organisations, including Greenpeace and Friends of the Earth, expressed their concern at the capacity of any co-existence framework to prevent contamination.<sup>10</sup> Co-existence is ostensibly to be devised so as to maintain meaningfully the distinct agricultural markets in Europe. However, whether this distinction will be possible to

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<sup>7</sup> In Europe, the activity of local consumer and civil society organisations is significant, including the coalition “Bite Back,” which runs the campaign, “WTO: Hands Off Our Food!” Bite Back is based in Belgium, care of Friends of the Earth, and includes such members as ActionAid International and Greenpeace International, <http://www.bite-back.org>. See also Friends of the Earth Europe, <http://www.foeeurope.org/> (last visited Oct. 30, 2006).

<sup>8</sup> For a discussion on the concerns of the international coalition of civil society actors in the Access to Knowledge campaign, see Access to Knowledge, <http://www.cptech.org/a2k> (last visited Oct. 30, 2006).

<sup>9</sup> See, e.g., the steady growth charted in the statistics provided by the UK Government Department of Environment, Food and Rural Affairs (DEFRA), at [http://statistics.defra.gov.uk/esg/index/list.asp?i\\_id=130](http://statistics.defra.gov.uk/esg/index/list.asp?i_id=130). See also UK Soil Association, ORGANIC MARKET REPORT 2005.

<sup>10</sup> See Press Release, Friends of the Earth, EU Commission Condemned Over GM Contamination Policy (Apr. 13, 2006), [http://www.foe.co.uk/resource/press\\_releases/eu\\_commission\\_condemned\\_ov\\_03042006.html](http://www.foe.co.uk/resource/press_releases/eu_commission_condemned_ov_03042006.html). See also FRIENDS OF THE EARTH EUROPE POSITION PAPER, CONTAMINATE OR LEGISLATE? EUROPEAN COMMISSION POLICY ON “COEXISTENCE,” (Apr. 2006), [http://www.foeeurope.org/publications/2006/contaminate\\_or\\_legislate.pdf](http://www.foeeurope.org/publications/2006/contaminate_or_legislate.pdf).

maintain remains a serious cause for concern given the very nature of European agricultural systems. In Europe, almost 60% of farms in the current Union are smaller than five hectares,<sup>11</sup> making the possibility that contamination can be contained by co-existence frameworks less plausible. Co-existence has therefore been criticised as an attempt to create the market for GM where it otherwise would not persist given the combination of cultural practices and consumer preferences:

The commission claims that it wants to ensure freedom of choice and democracy. But the systems it is setting up can only lead to authoritarian regulations that impose crop and seed varieties on farmers according to what the seed companies' lobby wants, where and when it wants it. The totalitarian farming that the French Peasants' Confederation denounced 10 years ago, when it attacked the first patented GM crop plantations in France, is becoming a reality.<sup>12</sup>

Indeed, in this respect, the concerns raised regarding attempts to legislate co-existence are relevant in some way to the way in which intellectual property laws have produced market certainty for other forms of "information."

#### A. *GM in Europe – Local Issues, Global Risks*

To date, commercial cultivation of GM in Europe has been very limited – indeed, thus far there have been just the two cases of GM maize (Bt176 and MON810).<sup>13</sup> In February 2005, a network of European regional governments was established in Florence at which the "anti-GM" Charter of Florence<sup>14</sup> was signed by an initial 20 regional governments to which more have now added their support. Just 12 months later, 172 regions and provinces in Europe have declared themselves GM-free.<sup>15</sup> Formally entitled "Charter of the Regions and Local Authorities of Europe on the Subject of Coexistence of Genetically Modified Crops with Traditional and Organic Farming," the Florence Charter is concerned with recognition of traditional and organic agriculture and greater autonomy for regional farmers.<sup>16</sup> Then, in November 2005, the GM-Free Regions Network Declaration of Rennes was concluded, which states its three motivations as:

- a. The right to choose a lasting, GM-free agriculture;

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<sup>11</sup> Robert Ali Brac de La Perriere RA & Frédéric Prat, *Europe: Not in Our Fields*, LE MONDE DIPLOMATIQUE, Apr. 2006.

<sup>12</sup> *Id.*

<sup>13</sup> CCCEP, *supra* note 2, at 4.

<sup>14</sup> CHARTER OF THE REGIONS AND LOCAL AUTHORITIES OF EUROPE ON THE SUBJECT OF COEXISTENCE OF GENETICALLY MODIFIED CROPS WITH TRADITIONAL AND ORGANIC FARMING, EUROPEAN UNION COMMITTEE OF THE REGIONS (Feb. 4, 2005),

[http://www.cor.europa.eu/document/Highlight/Charter\\_of\\_Regions\\_Feb\\_05.pdf](http://www.cor.europa.eu/document/Highlight/Charter_of_Regions_Feb_05.pdf) [hereinafter CHARTER].

<sup>15</sup> Sue Mayer, *Cut and Dried?*, THE GUARDIAN (Feb 15, 2006). *See also* Statement From NGOs at the Coexistence Conference (Apr. 2006), *available at* [http://www.organicwildconference.org/about\\_ifoam/around\\_world/eu\\_group/pdfs/StatementNGOs\\_Vienna\\_GMOconf\\_6.4.06.pdf](http://www.organicwildconference.org/about_ifoam/around_world/eu_group/pdfs/StatementNGOs_Vienna_GMOconf_6.4.06.pdf).

<sup>16</sup> Susanna Cenni, Presentation to the European Conference, Freedom of Choice: Co-Existence of Genetically Modified, Conventional and Organic Crops (Apr. 2006). Ms Cenni, who is the Tuscany Minister for Agriculture and Member of the Assembly of European Regions, was speaking on behalf of the "GMO-Free" European Regions and Local Authorities Network.

- b. Defending biodiversity; and
- c. Control and accountability over the use of GMOs.<sup>17</sup>

¶9

What can be identified in the case of GM crops is the critical importance of the cultural, and thus arguably commercial, value and advantage to be found in the strong recognition and protection of the cultural diversity in various agricultural systems in Europe – as in traditional knowledge and organic markets. On this point, the very development of co-existence laws is advocated by farmers and environmentalists alike as something which must proceed on a regional and local basis. Indeed, this has been recognised by the Commission itself, in a Communication to the Council and European Parliament in March 2006:

Appropriate measures for coexistence are conditioned by numerous factors that vary from one region to another, including climatic and soil conditions, the size and dispersion of fields, cropping patterns and crop rotations, etc. The subsidiarity-based approach to coexistence allows Member States to tailor coexistence measures to the needs of their local conditions.<sup>18</sup>

¶10

Such local conditions arguably must include traditional agricultural practices in so far as these are specific and integral to local conditions and methods. As the Florence Charter sets out in Paragraph 6 of the Preamble, “the protection of agricultural biodiversity requires the native resources of the various types of agriculture to be conserved.”<sup>19</sup> Thus, the guidelines for co-existence necessarily introduce the need to understand European agricultural practices as similarly cultural practices with respect to regional and local development. As the Declaration of Rennes states:

Since individual rules on coexistence cannot be set for obvious reasons, the focus should be put on the strong regional identity carried by agricultural products. The regions therefore insist on the need that they be acknowledged as the relevant working scale for implementing coexistence between GM and non-GM crops.<sup>20</sup>

¶11

Particularly in the case of Europe, the cultural diversity of the Member States, and indeed of local and regional areas within those States, is critical. This is especially relevant when considering new Member States and acceding States, such as Bulgaria<sup>21</sup> and Romania. With programmes for enlargement of Europe, with the accession of Bulgaria and Romania in 2007,<sup>22</sup> questions of national identity and the survival of local

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<sup>17</sup> GM-Free Regions Network, Declaration of Rennes (Nov. 30, 2005), *available at* [http://www.gmo-free-regions.org/fileadmin/files/declaration\\_rennes\\_en\\_051130.pdf](http://www.gmo-free-regions.org/fileadmin/files/declaration_rennes_en_051130.pdf) [hereinafter Rennes].

<sup>18</sup> CCCEP, *supra* note 2, at 3.

<sup>19</sup> CHARTER, *supra* note 14, at 2.

<sup>20</sup> Rennes, *supra* note 17.

<sup>21</sup> The author of this article acted as an expert on the Phare programme in Bulgaria, advising on intellectual property laws. The Phare programme is a programme of pre-accession assistance in areas identified as key priorities in the preparation of candidate countries.

<sup>22</sup> Press Release, The European Commission, Commission Confirms Bulgaria’s And Romania’s EU Accession On 1 January 2007, Completed By A Rigorous Package Of Accompanying Measures (Sept. 26,

markets are raised. In particular, the continued trade in local organic produce in Bulgaria (organic largely because of the lack of financial resources to use pesticides, rather than the recognition of a particular market), where individual market gardeners provide restaurants and so on, would seem to be doubt post-accession.<sup>23</sup> This link to the environment would be relevant to the possible consolidation of such traditional practices and is suggested as possibly relevant to the maintenance of Bulgarian national identity within the European Union. And indeed, this same interest in traditional European groups is relevant when considering the importance of traditional knowledge and cultural diversity.

¶12 Similarly, this cultural diversity and identity that is attached to agricultural practices and products is reinforced and driven by the investment of local communities in those practices and, indeed, the activities of consumers.<sup>24</sup> Thus, in ways that would arguably be defeated by the application of conventional intellectual property monopolies in the construction of markets, agricultural developments present the significance of consumer preference in driving the value. Thus, diversity in the development of knowledge, and the promotion of local and regional capacity through the innovation to be found within traditional communities and organic agriculture, is of particular economic value precisely because of the way in which that value is identified by *use* rather than by *restriction on use*.

¶13 This potential must be examined in order to understand the possible role of traditional knowledge and organic agriculture in consolidating the competitive position of Europe within an international market of agricultural biotechnologies and products. In particular, the competition from organic products must be acknowledged, not only in the domestic market but also in the uptake of agricultural biotechnologies, where entry of the latter may be seen to compromise organic products as otherwise unique entry points in the global market.

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2006). The announcement was accompanied by a final monitoring report: *Monitoring Report on the State of Preparedness for EU Membership of Bulgaria and Romania*, COM (2006) 549 final (Sept. 26, 2006), which imposes strict conditions on the entry of the two countries, particularly in the areas of the justice system, corruption, organised crime, and agriculture. In a speech on the presentation of the accession report, José Manuel Barroso, President of the Commission, indicated that the accession of candidate countries (such as Croatia) remain on the agenda, although further enlargement seems in doubt until there is resolution on constitutional issues in Europe. José Manuel Barroso, President of the European Commission, Presentation of Bulgaria and Romania Accession Report (Sept. 26, 2006). See also Treaty on Accession: Documents Concerning the Accession of the Republic of Bulgaria and Romania to the European Union, June 21, 2005, 2005 OJ (L 157).

<sup>23</sup> Interview with Peter Petrov, Assistant to the Pre-Accession Adviser, PHARE Programme, Bulgaria. Discussed later in this article, of possible relevance to this issue is Council Regulation (EC) No. 1268/1999 of 21 June 1999, art. 2, 1999 L 161/87 on Community support for pre-accession measures for agriculture and rural development in the applicant countries of central and eastern Europe in the pre-accession period. Article 2 allows for the implementation of measures to protect and conserve rural heritage. Whether rural heritage is taken to include the management and structures of traditional agricultural communities requires possible clarification.

<sup>24</sup> In response to the publication of the final report of the WTO Panel, Adrian Bebb, GM Food Campaigner, Friends of the Earth Europe, remarked, "In the real world, legal arguments over whether there is or was a moratorium are totally irrelevant. Europeans will continue to reject genetically modified foods." Press Release, Friends of the Earth Europe (Sept. 29, 2006).

*B. Co-Existence – Value in Use*

¶14 The European Directive on the deliberate release into the environment of genetically modified organisms<sup>25</sup> (GMOs) gives Member States the power to introduce co-existence measures with respect to agricultural markets. This is provided in Article 26a, “Measures to avoid the unintended presence of GMOs,” which was inserted by the 2003 EC Regulation on genetically modified food and feed.<sup>26</sup> Article 26a reads:

1. Member States may take appropriate measures to avoid the unintended presence of GMOs in other products.
2. The Commission shall gather and coordinate information based on studies at Community and national level, observe the developments regarding coexistence in the Member States and, on the basis of the information and observations, develop guidelines on the coexistence of genetically modified, conventional and organic crops.<sup>27</sup>

¶15 However, Article 26a is read in conjunction with Article 22 of the Directive, which states that “Member States may not prohibit, restrict or impede the placing on the market of GMOs, as or in products, which comply with the requirements of this Directive.”<sup>28</sup>

¶16 In 2003, the European Commission adopted a Recommendation on co-existence guidelines to assist Member States in the development of laws at the national level.<sup>29</sup> At the end of 2005, specific coexistence legislation had been adopted only in Germany, Denmark, Portugal and Austria (in 6 Austrian Länder),<sup>30</sup> with only draft co-existence frameworks in other Member States.<sup>31</sup>

¶17 The Commission has ordered Greece to lift its national ban of MON1810 maize, stating that the ban is not properly justified.<sup>32</sup> The Italian Government adopted a decree law, 11 November 2004, which in effect imposed a total ban on GM crops (but importantly did not ban restricted and protected testing)<sup>33</sup> until co-existence measures would be in place.<sup>34</sup> Following a request from the Commission for further information and a subsequent failure to respond, Italy was issued a written warning in October 2005

<sup>25</sup> Council Directive 2001/18/EC, 2001 O.J. (L 106/1) (discussing the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC) [hereinafter Directive 2001/18].

<sup>26</sup> Council Regulation 1829/2003, art. 43, 2003 O.J (L 268/1) (EC) (discussing genetically modified food and feed).

<sup>27</sup> Directive 2001/18, *supra* note 25.

<sup>28</sup> *Id.* at art. 2.

<sup>29</sup> Commission Recommendation 2003/556/EC, 2003 O.J. (L 189/36) (setting forth guidelines for the development of national strategies and best practices to ensure the coexistence of genetically modified crops with conventional and organic farming).

<sup>30</sup> CCCEP, *supra* note 2, at 4.

<sup>31</sup> *Id.*

<sup>32</sup> See *Commission Orders Greece to Lift Its National Ban on GM Maize*, REUTERS, Jan. 11, 2006, available at <http://www.planetark.com/dailynewsstory.cfm/newsid/34421/story.htm>.

<sup>33</sup> The decree, however, banned the cultivation of GM crops in open fields.

<sup>34</sup> For archived discussions on the decree, see GMWatch.org, <http://www.gmwatch.org/archive2.asp?arcid=4801> (last visited Dec. 10, 2006). Significantly in the context of regional and local development, the decree required regions to pass their own co-existence laws in time for an end of 2005 deadline. Of further interest, the decree was approved by the Italian government despite attempts by then-Prime Minister Silvio Berlusconi to block its passage (arguing it was contrary to farmers’ freedom of choice). See also USDA FOREIGN AGRICULTURAL SERVICE, GAIN REPORT IT5003 (2005).

for breach of Article 10 (the duty of cooperation) of the Treaty of Rome (the Treaty Establishing the European Community).<sup>35</sup>

### III. EUROPE AND THE WTO

¶18 In May 2003 the United States,<sup>36</sup> Canada,<sup>37</sup> and Argentina<sup>38</sup> requested consultations with the EC on its dealings with biotech products, and, in particular, its moratorium on GM agricultural and food imports. The complainants alleged a general *de facto* moratorium was applied by the EU since 1998.<sup>39</sup> However, the European Communities argued that there was no such moratorium; rather, each product was assessed on a case by case basis, in accordance with the precautionary principle, which can be found in the European Directive on the deliberate release into the environment of genetically modified organisms.<sup>40</sup> It was argued that Member States were banning imports of biotech products even though the particular products had been approved for import and marking by the EC. The complaint was joined by Australia, Brazil, Canada, Chile, Colombia, India, Mexico, New Zealand, and Peru, with China, El Salvador, Honduras, Norway, Paraguay, Chinese Taipei, Thailand, and Uruguay reserving their third-party rights. The establishment of a panel was requested in August 2003 and was composed in March 2004.<sup>41</sup>

¶19 The final ruling of the WTO Panel was announced 29 September 2006.<sup>42</sup> At the time of the interim report,<sup>43</sup> it was suggested that the European Commission may appeal the decision when finally published,<sup>44</sup> but this remains to be confirmed. The interim report provided an important indication of the conclusions of the Panel subsequently confirmed in the final report, particularly on the question of the general EC moratorium on GM crops, considered to be inconsistent in part with obligations under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). The Panel concluded that, as a legal matter, the EC has acted inconsistently with its obligations under the Annex C(1)(a), first clause, of the WTO Agreement on the

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<sup>35</sup> CCCEP, *supra* note 2, at 5.

<sup>36</sup> United States Complainant, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291 (May 13, 2003) [hereinafter WT/DS291].

<sup>37</sup> Canada Complainant, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS292 (May 13, 2003) [hereinafter WT/DS292].

<sup>38</sup> Argentina Complainant, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS293 (May 14, 2003) [hereinafter WT/DS293].

<sup>39</sup> Panel Report, *supra* note 4, § 4.184.

<sup>40</sup> *Id.* at 64–65. See also Directive 2001/18, *supra* note 25, at art. 1, 4.

<sup>41</sup> Panel Report, *supra* note 4, at 1–3.

<sup>42</sup> *Id.*

<sup>43</sup> Interim Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/INTERIM (Feb. 7, 2006) [hereinafter WT/DS291/INTERIM]; Interim Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS292/INTERIM (Feb. 7, 2006) [hereinafter WT/DS292/INTERIM]; Interim Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS293/INTERIM (Feb. 7, 2006) [hereinafter WT/DS293/INTERIM].

<sup>44</sup> See *WTO Panel Rules EU GMO Moratorium Illegal*, REUTERS, Feb. 7, 2006, available at <http://www.iht.com/articles/2006/02/07/business/gmo.php>.

Application of Sanitary and Phytosanitary Measures (SPS Agreement), and thus with its obligations under Article 8 (Control, Inspection and Approval Procedures).<sup>45</sup>

¶20 Annex C states that:

Members shall ensure, with respect to any procedure to check and ensure the fulfillment of sanitary or phytosanitary measures, that:

(a) such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products.<sup>46</sup>

¶21 In other words, the Panel concluded that the European Communities had acted inconsistently with procedural requirements of the SPS Agreement by applying a general *de facto* moratorium on approvals. In doing so, the EC had acted with “undue delay” in undertaking or completing its approval procedures for biotech products (as reflected in the conclusion on several product-specific EC measures with respect to the moratorium).<sup>47</sup> Both the interim and final reports concluded that in each of the other areas of complaint, either the complainant had not established its position or the EC had not acted inconsistently with any of its other obligations, as set out in the complaint.<sup>48</sup> In the interim report, the Panel also made no recommendation on the moratorium in the complaints of the United States and Canada, stating that the subsequent EC approval of a relevant biotech product brought the general moratorium to an end during its establishment.<sup>49</sup> In response to Argentina’s complaint, the Panel made no recommendations, pursuant to Article 19.1 of the Dispute Settlement Understanding (DSU).<sup>50</sup> Where the Panel has concluded that the measure is inconsistent with the SPS, Article 19.1 obliges the Panel to recommend that it is brought into conformity with Agreement. Article 19.1 also provides the Panel with the authority to suggest ways in which to implement this recommendation. However, in response to complaints from the United States and Canada, the panel made the following recommendation in its final report:

In the light of these conclusions, the Panel recommends that the Dispute Settlement Body request the European Communities to bring the general *de facto* moratorium on approvals into conformity with its obligations

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<sup>45</sup> Panel Report, *supra* note 4, §§ 8.14, 8.34, 8.50. *See also* Edward Alden et al., *WTO Rules Against Europe in GM Food Case*, FIN. TIMES, Feb. 8, 2006; Julian Borger et al., *US Wins WTO Backing in War with Europe Over GM food*, THE GUARDIAN, Feb. 8, 2006.

<sup>46</sup> Agreement on Sanitary and Phytosanitary Measures, Annex C(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A.

<sup>47</sup> Panel Report, *supra* note 4, at 1068.

<sup>48</sup> WT/DS291/INTERIM, *supra* note 43, § 8.14; WT/DS292/INTERIM, *supra* note 43, §§ 8.34, 8.50; WT/DS293/INTERIM, *supra* note 43, at 1044-45. *See also* Panel Report, *supra* note 39, §§ 8.14, 8.34, 8.50.

<sup>49</sup> WT/DS291/INTERIM, *supra* note 43, § 8.16; WT/DS292/INTERIM *supra* note 43, § 8.36.

<sup>50</sup> The Dispute Settlement Understanding (DSU) is a set of rules and procedures that apply to disputes brought under the consultation and dispute settlement provisions of the WTO.

under the *SPS Agreement*, if, and to the extent that, that measure has not already ceased to exist.<sup>51</sup>

¶22 Regarding safeguard measures, the Panel concluded that the EC acted inconsistently with respect to obligations not to maintain measures without sufficient scientific evidence (Article 2.2, Basic Rights and Obligations) and obligations to base measures on appropriate assessment (Article 5.1, Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection) or pertinent information where scientific evidence is insufficient, from relevant international organizations or other Members (Article 5.7).<sup>52</sup> In so concluding, the Panel recommended that the Dispute Settlement Body request the EC to bring the relevant State safeguard measures into line with its obligations under the *SPS Agreement*.<sup>53</sup>

¶23 Arguably, the concern for many consumers, farmers, and environmentalists in Europe is the way in which the *SPS Agreement* proceeds from the implied assumption of the entry of GM as the default.<sup>54</sup> In other words, evidence must be available to show the contrary and to somehow predict and track what might arguably be unnarratable and incomparable risk. Thus, the risk is assumed not by those seeking to enter the market but rather it is imposed upon those seeking to maintain their traditional and organic farming practices.<sup>55</sup>

¶24 This is particularly apparent in the way in which the positions and claims of consumer movements are refuted by GM industry and governments. That is, imposed upon those groups is the burden of providing the scientific and technological evidence, as it were, to support the caution for which they call. This is quite contrary to the usual operation of the precautionary principle which, it would seem sensible, would require that those seeking to introduce potential risk should bear the burden of anticipating that risk.<sup>56</sup> Quite distinct from other areas of consumer advocacy, the authority to speak is vested in the technological expertise that is seemingly the privilege of the industries at stake. Nevertheless, this is instructive, in that the call for “evidence” in current intellectual property debates is increasingly placing that burden upon the consumer in ways contrary to traditional negotiations of fairness, justice, and consumer entitlements. The stakes here are very high. It is necessary to contest them on grounds of cultural diversity and consumer choice rather than the prescribed paradigm of biosafety and phytosanitary measures, which attempt to objectify and universalize the standards of GM products. These are questions of regional and local cultural interests that must resist the application of global standards<sup>57</sup> – and these are the same questions for access to knowledge in other

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<sup>51</sup> Panel Report, *supra* note 4, §§ 8.16, 8.36 (The Panel again, in response to Argentina, made no recommendations pursuant to Article 19.1 of the DSU.).

<sup>52</sup> *Id.* at 1073-76, 1078-81, 1084-87.

<sup>53</sup> *Id.* at 1076, 1081, 1087.

<sup>54</sup> Johanna Gibson, Presentation to the Yale A2K Conference, Panel on Agriculture and Genetically Modified Foods (Apr. 23, 2006).

<sup>55</sup> Johanna Gibson, Presentation to the Yale A2K Conference, Panel on Agriculture and Genetically Modified Foods (Apr. 23, 2006). See also Johanna Gibson, *Patenting Lives: Life Patents, Culture, and Development*, 11 J. INTELL. PROP. RIGHTS 103, 103-12 (2006).

<sup>56</sup> In particular, on this issue, see SABRINA SHAW & RISA SCHWARTZ, UNU-IAS REPORT, TRADING PRECAUTION: THE PRECAUTIONARY PRINCIPLE AND THE WTO (2005).

<sup>57</sup> For a discussion of the problems of universalism in other contexts, see Steven Yearley, *Social Movements as Problematic Agents of Global Environmental Change*, in GLOBALIZATION, GLOBALISM,

contexts. In other words, the “universal” is the consideration of the question of the culture and behavior of access and choice, rather than the prescription of the nature of the product of that that access and choice.

#### IV. THE SOVEREIGN CONSUMER

##### A. *The Response to GMOs*

¶25 Research on the entry of GMOs into the agricultural marketplace has largely emphasised questions of consumer confidence and trust, product liability, and the market. The results of research conducted by Marianne McGarry Wolf, Paola Bertolini, and Jacob Parker-Garcia into consumer acceptance of GM food in Europe more widely suggest that some of the negative perception and consumer rejection of GM food has been based on the notion that it is unhealthy, and that GM food and GM agriculture are themselves health hazards.<sup>58</sup> Similar motives as to health and food safety were also found by Zanoli and Naspetti, at least for the Northern part of Italy.<sup>59</sup>

¶26 However, for the most part, research has shown that the primary reason for rejecting GM in Europe is not safety but, rather, the environment.<sup>60</sup> This same research showed that the only issue upon which Italians “maybe will” purchase GM food would be whether the use of GM technology would reduce the use of pesticides (quite contrary to the “benefits” of products such as the non-interoperable Round-Up Ready Soybean). Other factors such as better nutrition did not influence consumers, making clear that the use of pesticides, that is, the actual direct impact on the immediate environment, was of utmost importance in making the decision to purchase.<sup>61</sup>

¶27 As mentioned earlier, Italy has imposed a total ban on the use of GM. Indeed, the use of GM seeds in open fields has been forbidden in Italy on the basis that such use poses health hazards. This is reflected in the substantially larger commitment to organic farming in Italy, which has the largest organic sector in Europe,<sup>62</sup> and the fastest growth rate for organic production until recently.<sup>63</sup> This may also be linked to the implementation of agri-environmental programmes under the Council Regulation on agricultural production methods compatible with the requirements of the protection of the environment and maintenance of the countryside (1992 Regulation).<sup>64</sup> These programmes provided financial support for most certified land, thus supplementing the

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ENVIRONMENTS, AND ENVIRONMENTALISM: CONSCIOUSNESS OF CONNECTIONS, THE LINACRE LECTURES 2000, 39, 49 (Steven Vertovec & Darrell A. Posey eds., 2003).

<sup>58</sup> Marianne McGarry Wolf et al., *A Comparison of Consumer Attitudes Towards GM Food in Italy and the USA*, in CONSUMER ACCEPTANCE OF GENETICALLY MODIFIED FOODS, 131 (Robert E. Evenson & Vittorio Santaniello eds., 2004).

<sup>59</sup> Raffaele Zanoli & Simona Naspetti, *Values and Ethics in Organic Food Consumption*, in PREPRINTS OF THE THIRD CONGRESS OF THE EUROPEAN SOCIETY FOR AGRICULTURAL AND FOOD ETHICS: FOOD SAFETY, FOOD QUALITY, FOOD ETHICS (M. Paquali ed., 2001). See also STEPHAN DABBERT ET AL., ORGANIC FARMING: POLICIES AND PROSPECTS 21 (2004).

<sup>60</sup> Wolf et al., *supra* note 58, at 131.

<sup>61</sup> *Id.*

<sup>62</sup> See DABBERT ET AL., *supra* note 59, at 10-11; MYERS, *supra* note 5, at 216.

<sup>63</sup> MYERS, *supra* note 5, at 216.

<sup>64</sup> Council Regulation (EC) 2078/92, 1992 O.J. (L 215) (on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside) (no longer in force).

income of organic farmers. Although the 1992 Regulation is no longer in force, repealed in 1999 by the EC Regulation on support for rural development from the European Agricultural Guidance and Guarantee Fund (1999 Regulation)<sup>65</sup> the strength of the organic farming sector in Italy reflects not only the domestic market, but also the significant market for organic exports from Italy to other parts of Europe.<sup>66</sup>

¶28 Also based upon the 1992 Regulation, Slovenia implemented participation programmes for farmers<sup>67</sup> which were conditional upon the non-use of GMOs. However, the Commission recently informed Slovenia<sup>68</sup> that this was contrary to the later 1999 Regulation on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations.<sup>69</sup> In response, Slovenia confirmed this condition would no longer apply.<sup>70</sup> The Commission's argument was that there was no evidence that GMOs presented a threat to the environment if applied with the proper consent, thus making their exclusion from the agri-environmental aid scheme unjustified, according to the Commission.<sup>71</sup>

¶29 But as mentioned earlier, consumer research has demonstrated that a critical reasoning behind consumer choices in Europe is the potential (or unexpected and unpredictable) impact of the introduction of GM on the European environment. This is where the perhaps more positive attitude to organic foods presents a critical nexus with the rejection of GM food, in that organic food is often perceived and marketed as more favourable to the environment. In other words, there is a relationship to be understood between the imperative towards recognising cultural values and integrity in traditional agricultural communities and traditional agricultural practices, the linking of such practices to environmental security and safety, as well as to individual health, and the subsequent harnessing of commercial value in what is largely a means by which the local cultural integrity of traditional groups may be sustained. Thus, traditional knowledge may indeed be commercially viable and of significant importance to local and regional development. Furthermore, the entry into the unique market presented by traditional knowledge may be achieved by promoting the relationship between traditional agricultural practices and environmental health.

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<sup>65</sup> Council Regulation (EC) 1257/1999, art. 55, 1999 O.J. (L 160) (on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations).

<sup>66</sup> DABBERT ET AL., *supra* note 59, at 18.

<sup>67</sup> The Special Accession Programme for Agriculture and Rural Development (SAPARD) is part of the pre-accession mechanism to assist Central and Eastern European countries to prepare for participation in the common agricultural policy of the European single market and, in particular, implement EU legislation in the agricultural sector. The framework is established in Council Regulation (EC) 1268/1999, 1999 O.J. (L 161) on Community support for pre-accession measures for agriculture and rural development in the applicant countries of central and eastern Europe in the pre-accession period. Article 2 provides for areas to which support for agriculture and rural development may relate, including measures relating to consumer protection, marketing, protection of the environment, and protection and conservation of the rural heritage. Arguably the latter would include traditional knowledge and traditional agricultural communities.

<sup>68</sup> CCCEP, *supra* note 2, at 5.

<sup>69</sup> Council Regulation (EC) 1257/1999, *supra* note 65.

<sup>70</sup> CCCEP, *supra* note 2, at 4.

<sup>71</sup> *Id.* at 5.

### B. *The Cultural Diversity in Agriculture*

¶30 The relationship between GMOs and questions of culture and traditional knowledge, has received less consistent attention. Further, despite expression of consumer mistrust in the industry (as distinct from the product), responses have concentrated largely on education in the products rather than a consideration of the importance of corporate accountability and responsibility.<sup>72</sup> As Sylvie Bonney explains, what should be addressed is not necessarily “the GMOs themselves, but rather the context and economic conditions of their production and use.”<sup>73</sup> In particular, in view of developments towards co-existence in Europe as well as current international discussions towards the recognition, identification, and protection of traditional knowledge, the relationship between culture and technology is of particular interest in the European context.

¶31 Indeed, it is in the critical cultural aspects of diverse European agricultural practices that the activity of the consumer is most acute. That is, the consumer participates in the agricultural activity as a particular repository of culture. In ways that offer some insight into various areas of intellectual property frameworks, “use” in agriculture is an important cultural activity in Europe. And indeed, food and agricultural products are subject to very particular cultural branding. Thus, it is not merely a question of informing the consumer (in the notion of consumer sovereignty) but a question of understanding the way in which consumer activity is in itself a cultural aspect of European agricultural markets.<sup>74</sup>

¶32 It is this cultural value in agricultural markets and practices that is of particular significance to Europe and might suggest an important negotiation of the WTO pressure to comply with GM entry purely on the basis of the SPS Agreement. Rather, it is perhaps crucial to consider GM and agricultural markets not merely in terms of sanitary and phytosanitary measures, but also in terms of cultural diversity and measures to preserve that diversity.

¶33 In other words, it may be left to the consumer to render the protection of organic and traditional choices in the European market. The recent Trans Atlantic Consumer Dialogue (TACD) Statement on the WTO decision makes this clear: “clearly consumers’ preference for non-GM food is the true engine of the market collapse for American crops.”<sup>75</sup> Indeed, in the UK, the market has been described as motivated by consumers,

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<sup>72</sup> On mistrust of the industry itself, see Sylvie Bonney, *Factors Explaining Consumer Opposition to GMOs in France and the Rest of Europe*, in CONSUMER ACCEPTANCE OF GENETICALLY MODIFIED FOODS 169, 181 (Robert E. Evenson & Vittorio Santaniello eds., 2004).

<sup>73</sup> *Id.* at 185. See also Clive Barnett et al., *Philosophy and Ethical Consumption*, in THE ETHICAL CONSUMER 11, 19 (Rob Harrison et al. eds., 2005).

<sup>74</sup> For instance, Evenson notes that the politicisation of GMOs is not merely a question of labelling as information, but unlabelled GM products as catalysts in the “globalization backlash.” See Robert E. Evenson, *From the Green Revolution to the Gene Revolution*, in ECONOMIC AND SOCIAL ISSUES IN AGRICULTURAL BIOTECHNOLOGY 1, 12 (Robert E. Evenson et al. eds., 2002). Compare this view with the emphasis on consumer education and information in Valerie Rhoe et al., *Institutions and Institutional Capacity for Biotechnology: A Case Study of India*, in ECONOMIC AND SOCIAL ISSUES IN AGRICULTURAL BIOTECHNOLOGY 269, 274 (Robert E. Evenson et al. eds., 2002).

<sup>75</sup> TACD.org, Statement on WTO Decision on GM Foods, <http://www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/docs.cfg&id=295> (last visited Dec. 10, 2006). This shift in power from the producer to the consumer is considered in Rob Harrison, *Pressure Groups, Campaigns, and Consumers*, in THE ETHICAL CONSUMER 55, 59 (Rob Harrison et al. eds., 2005).

“with demand far outstripping production.”<sup>76</sup> In 2000, organic food sales increased by 55% to £600M and to over £1B in 2002. This was matched by a growth of land under organic cultivation in the United Kingdom to around 700,000 hectares at present, or approximately 4.5% of agricultural land.<sup>77</sup>

### *C. Market Values and the Production of Needs*

¶34 In this way, the case of GM and consumer choice in Europe suggests an interesting insight into the way in which legislative measures intervene to create markets and to supersede and supplant consumer choice. In other words, co-existence measures (and the WTO Panel decision) introduce a market value for GM foods in Europe, and introduce those foods into the market itself, in ways that might not necessarily coincide with consumer interaction with these products. In addition to this, the realities of contamination risks are such that many suggest co-existence will not only introduce the products into the market but will in effect remove consumer choice as to organic and traditional products. At the same time, compromising the capacity for organic and traditional enterprises may prove undermining for individual local and regional communities within Europe for which agricultural integrity and diversity is of critical cultural and social significance.

¶35 This provides some insight into the way in which intellectual property frameworks operate in other areas of innovation and creativity, and which would ultimately interact with co-existence frameworks and the operation of agricultural markets in the case of GM, as well as “technological protection measures” such as terminator<sup>78</sup> and traitor<sup>79</sup> technologies. In other words, in the same way that intellectual property frameworks (bolstered by technological protection measures) operate to ensure the value of certain goods within a market, as distinct from the realities of their use and exchange, measures to ensure the entry of GM into the European market ensure similar “certainty” for the value and exchange of the products. Namely, the introduction of specific monopolies is precisely to identify value in a good. Similarly, co-existence measures are not necessarily about protecting the “freedom of choice” of the consumer or European organic or traditional farmer, but rather, the construction of a market in GM that may not otherwise take hold. That is, the good or the work, and its “protection,” as it were, are mere fictions. What is at stake is the market, not the innovation.<sup>80</sup>

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<sup>76</sup> MYERS, *supra* note 5, at 217.

<sup>77</sup> DEPARTMENT FOR ENVIRONMENT, FOOD & RURAL AFFAIRS, ORGANIC STATISTICS UNITED KINGDOM. JOINT ANNOUNCEMENT BY THE AGRICULTURAL DEPARTMENTS OF THE UNITED KINGDOM (2005). *See also* MYERS, *supra* note 5, at 217-18.

<sup>78</sup> Terminator technology renders seed useless for growing new crops from season to season, thus preventing the traditional practice of “saving seed” for the next season – interfering both with the cultural practices of the farmer as well as the economic viability of the enterprise.

<sup>79</sup> Traitor technology, also known as genetic use restrict technology (GURT), refers to when negative traits are bred into a seed; that is, the technology makes use of an external chemical to switch on or off a plant's genetic traits.

<sup>80</sup> The price of a product has little to do with its value. For instance, pharmaceutical products cost much less to produce than the price would suggest, indicating that the price incorporates as the “product” the marketing and speculation of the industry – the industry as innovator. Similarly, as Naomi Klein has noted, in 1992, Nike paid Michael Jordan more in endorsements than its entire Indonesian workforce. NAOMI KLEIN, NO LOGO (Picador 1999).

## V. CONCLUSION: CONSUMER PRODUCTION

¶36 The very presence of consumer organisations, like TACD and various consumer organisations that have become involved in the debate in Europe,<sup>81</sup> which negotiate directly with the values attributed to certain products and markets, demonstrates both the way in which the legal and regulatory frameworks commodify the cultural and agricultural issues at stake in the European GM debate (that is, it is a consumer issue), while at the same time undermine the passivity often attributed to the consumer as recipient of the product (in the traditional notion of a “creative economy”). Consumer organisations offer instead an active interaction with the way in which the market itself is constructed. It is not a case of citizens being “reduced” to the status of consumer, but the fact that consumers are in and of themselves citizens, and consumption is in and of itself a cultural and political engagement with the process of production. This is not merely a notion of the individual’s identity coming from the consumption of products (a mere shopper). Rather, it is an indication of the activity of individuals as public citizens and as active participants in the economic model of knowledge with which we are presented, and the way in which the activity of consumption can no longer be rendered “outside” that economy, the mere province of regulators in consumer protection. Consumption is no longer a lonely individual and self-indulgent activity; rather, it is the collaborative movement of cultural groups, with consumers effectively identifying the “public” in particular instances and regions.

¶37 Furthermore, this is not merely a return to the neo-classical economic model of consumer sovereignty,<sup>82</sup> which focuses on the products themselves, consumer knowledge of the products, and the way in which the *products* available depend upon what is consumed. Rather, it is a more complex engagement of the consumer directly with the means and context of production itself. This is what is emerging critically in the European GM debate and what is particularly insightful when considered in the context of the access to knowledge debate more widely. Fundamentally, it is not merely knowledge of the products; it is a concern with the ethics and culture of production itself in which the consumer is necessarily a key stakeholder, not a mere spectator.

¶38 Agricultural communities and goods mark distinctive cultural and regional identities in Europe that are somewhat obscured by national identities but realised in the activities of consumers and consumer cultures. In other words, if the European Commission were free to respond to consumer choice in Europe, GM regulation would indeed genuinely react on behalf of those cultural identities as distinct from classes constructed through markets, or citizens constructed through territorial and political borders, or global goods constructed through international trade.

¶39 Indeed, in attempting to render those identities within markets created by co-existence and other frameworks, consumption as a mark of cultural and regional identity necessarily will be significant. If cultural identities become increasingly manifest by virtue of these economic relationships of production and consumption, then necessarily

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<sup>81</sup> For a discussion of the mobilization against GM of consumer groups in Europe, see Bonney, *supra* note 72.

<sup>82</sup> For an interesting discussion of consumer sovereignty, see JOHN BELLAMY FOSTER, *ECOLOGY AGAINST CAPITALISM* 100 (2002). See also Michelle Everson, *Legal Constructions of the Consumer*, in *THE MAKING OF THE CONSUMER: KNOWLEDGE, POWER AND IDENTITY IN THE MODERN WORLD* 99 (Frank Trentmann ed., 2006) (discussing sovereign consumer in legal renditions).

the consumer's position in that economy will be an important realisation of its rights, duties, and citizenry.<sup>83</sup> In this sense, the consumer is not seeking possession (as it is constructed within the dominant legal and policy models of producers and passive consumers), but rather is in active negotiation with the socio-economic and cultural environment. As Canclini explains:

These *political* actions, which elevate consumers to citizens, entail a conception of the market as not only a place for the exchange of commodities, but as part of more complex sociocultural interactions. Similarly, consumption is seen not so much as the individual possession of isolated objects, but rather as the collective appropriation, within relations of solidarity with and distinction from others, of commodities that provide biological and symbolic needs, and that serve to transmit and receive messages ... commercial value is not something contained "naturally" in objects but is rather the result of sociocultural interaction among the people who use them.<sup>84</sup>

¶40 In the present time, the important questions are not questions of "work" but questions of "use."

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<sup>83</sup> On the revitalization of the "user/consumer" in the "creative economy," see GIBSON, *supra* note 6.

<sup>84</sup> NÉSTOR GARCÍA CANCLINI, CONSUMERS AND CITIZENS: GLOBALIZATION AND MULTICULTURAL CONFLICTS 46 (George Yúdice trans., 2001).