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The Malt House is Back!

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Why Your Whiskey Label is Probably Wrong

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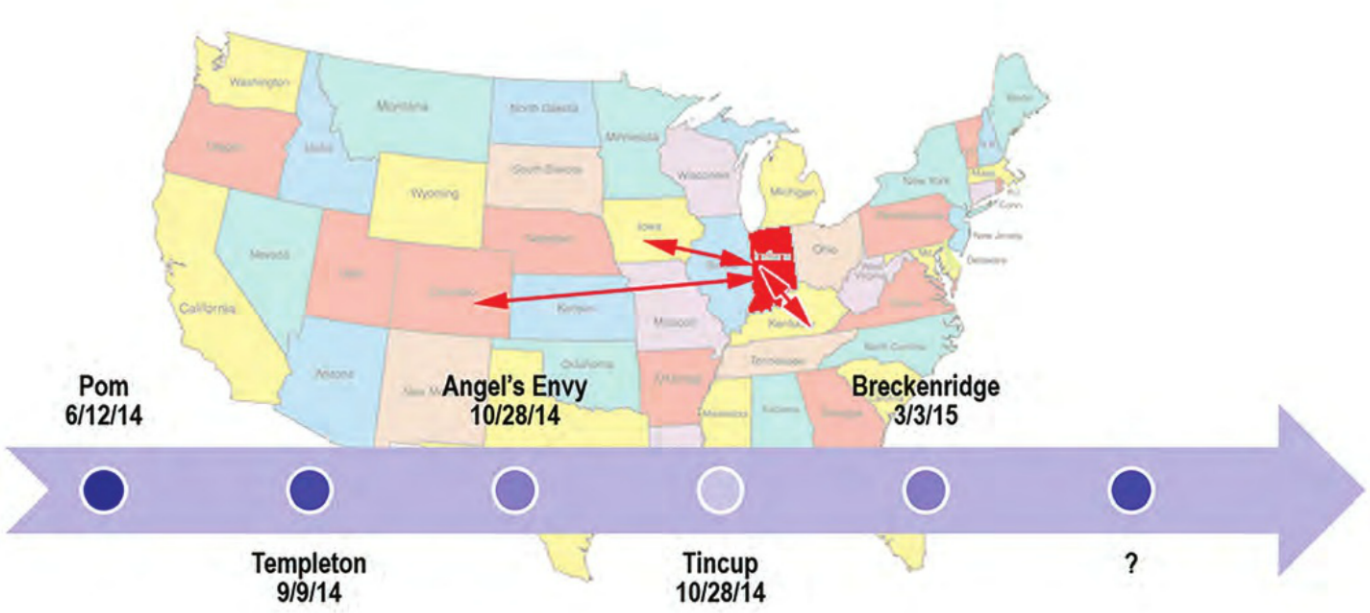
It is no surprise that a great many federal rules apply to craft beer and all manner of distilled spirits products. Even more rules apply to whiskey. Beyond the page after page of rules about other spirits products, the Code of Federal Regulations has well over 1,000 additional words pertaining to how whiskey should be produced, aged, how the age should be disclosed, and how the origin must be disclosed. If there was ever any doubt that these rules can be tricky and important, that doubt should be resoundingly put to rest by a spate of recent lawsuits.

This is not just a few lawsuits. It is a flood of lawsuits, and the tide is rising, ever since the *Pom v. Coke* case of June, 2014. This U.S. Supreme Court case stands for the proposition that various private parties have a right of action to make sure labels are correct and non-misleading. Pom brought this case because Coke's directly competing Minute Maid product only had less than 1% pomegranate juice. The labeling made it appear to have much more. The Supreme Court unanimously decided that Pom, with 100% juice, could be injured by the competing product, and has a right to do something about it, regardless of whether Coke complied with FDA's rules, or whether FDA chooses to do anything about it. This was a surprise to many. It tends to show that TTB- and FDA-type food labeling rules are a floor, and not a ceiling. For many decades prior, most people had assumed the federal rules were the floor and the ceiling and the be all and end all in most such inquiries.

Even if the TTB rules should only be understood as a floor, the floor is still crucially important (just as the foundation is crucially important for any building) and so we will focus on the key TTB rules affecting whiskey.

Most at issue in the news is the rule about state of distillation, at 27 CFR 5.36(d). This is the rule that has ensnared the Angel's Envy, Templeton, Breckenridge and Tincup brands of whiskey in expensive and messy lawsuits, just since September of 2014. Chuck Cowdery brought this rule to the attention of many, with his excellent whiskey blog, over the past few years. The rule tends to say that for most types of whiskey, if the product is distilled in a state other than the one shown on the label (where the bottler's city and state are shown), the state of distillation must be clearly shown on the label. This rule seemed to gather dust for many decades until the massive and recent upsurge in demand for whiskey, and the coincidental shift in ownership and business plans for one giant distillery in Indiana. That distillery is MGP, and the



Whiskey lawsuits (based on origin) since Pom

shift is toward making whiskey for a large number of third parties. This is instead of making the whiskey mainly for distillery-owned brands as had been common for decades under the many previous owners of this huge plant (such as Pernod, Seagram and Angostura). The fact that, by all accounts, MGP is fearsomely good at making whiskey, only accelerated the deluge.

The lawsuits claim that Angel's Envy is distilled in Indiana, but the label does not mention Indiana. Instead, the label mentions Kentucky, where the whiskey is bottled. This would be a direct conflict with 5.36(d), whether or not the label is approved. The plaintiffs claim this is deceptive. In the other three cases, the whiskey is also made by MGP in Indiana, but the labels fail to mention the state of distillation as required. The labels instead focus on the place of bottling. The Templeton label mentions Iowa. The Breckenridge and Tincup labels sing the praises of Colorado.

These cases could grind on for months or years. It is fairly easy to see the conflict with the regulations, but the damages are much less clear. To the extent MGP really makes such superb whiskey in Indiana (nobody seems to say otherwise), it is not clear that the consumer is much worse off, if the product is not really made by a probably less experienced distiller, at much greater cost, somewhere else.

The next major rule, fairly likely to trip up other than the most careful whiskey producer, is 27 CFR 5.40. This is the rule that covers the amount of age necessary. It says most whiskey must be aged in charred new oak barrels for at least four years, or the label must show the minimum period of age. Another rule says the whiskey shall be designated as "straight" if and only if it is aged at least two years. I have tried to paraphrase the rules, so they don't sound too messy. But they are a tad more confusing when intermixed with lots of other rules, and set out in over 900 words about age rules for spirits (according to Microsoft Word). TTB's Beverage Alcohol Manual (just for spirits, and just in the chapter about age statements) has another 7,646 words, as per Word.

There is a direct connection between the two rules highlighted here. Many craft distilleries and whiskey brands are quite new, and so it is very difficult for them to yet have large stocks of whiskey aged beyond the key four year threshold. This has pressed many of them to buy whiskey from other companies, with older whiskey – and this in turn can cause them to violate the origin rules, by failing to adequately show the other state, where distilled. In their zeal to play up a brand's regional bona fides, and play down anything inconsistent with the desired branding, many companies can trip and fall over these rules.

TTB could do a lot more to help companies comply. Under the current system, TTB has no easy way to administer the rules at issue in this article. It would be very easy to fix this. All TTB has to do is add two fields to the COLA form, one for each rule. Lest anyone say it's more red tape, it is nothing more than what TTB has already done for decades, when it comes to wine. In the case of wine, TTB has asked the applicant to fill in the claimed appellation of origin and vintage – even though they already appear self-evidently on the label. Likewise, the COLA form calls for the applicant to set out the grape varietal(s). Does anyone see any reason why whiskey should be worthy of lesser concern, especially in the midst of all these messy lawsuits? There is no easier way for the TTB reviewer, or any other reviewer, to readily ascertain the state of distillation, and the minimum age. It should not take

the applicant more than an extra minute to fill in these boxes, and it could save the applicant millions of dollars in payouts to clamorous class action lawyers. This would impose a trivial burden on whiskey applicants, and need not impose any burden at all on wine or beer applicants (the whiskey-only fields could be suppressed, easily, on beer and wine applications, just as the wine-only fields could or probably should be suppressed on spirits applications).

There are plenty of other traps for the unwary whiskey marketer. It gets ever less easy to avoid clashing with another trademark, as the brands proliferate. In recent months, Buffalo Trace (Sazerac) and Bison Ridge (Intercontinental Packaging Co.) went at it over trademarks for whiskey. Crown Royal (Diageo) and Crown Club (Mexcor) whiskey have also clashed similarly in court. All of the above is without mentioning the looming controversies over the fairly promiscuous use of the terms "handcrafted," and "handmade." TTB does not specifically define these terms, but it is very possible the court system is on the verge of doing so, in the pending Tito's vodka case (filed in 2014), as well as the pending Maker's Mark and Jim Beam cases (filed in 2015). These brands, mentioned above and taken together, account for millions of cases per year. And this is just the first year since Pom made it clearer that even heavily regulated, government reviewed and approved booze labels are fair game. If the initial torrent of lawsuits draws blood (and money), we can probably expect to see a lot more. It is not hard to find at least a few soft spots on most labels. For example, even if the whiskey is more than four years old, if the label prominently touts the age, a proper age statement becomes mandatory. And even if you got all of the above right, you still might need an approved formula, or a color disclosure (such as COLORED WITH CARAMEL).

If it ever made sense for an intern to review and file your labels, or a marketing guy to design your labels, without review by a person well versed in the rules, that simpler time has probably passed.

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