

The Law of “Handmade”

What the Term Does or Should Mean



American Distilling Institute • April 1, 2015 • Louisville, KY

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1930s to 2014, 1

1. Few lawsuits

a. Mostly trademark

- i. Green Hat v. Greenhook (2013)
- ii. Red Wax (2003-2012)



1930s to 2014, 2

1. Few lawsuits

- a. Stolichnaya (2004-2006)
 - i. Russian v. Latvian
- b. Skinnygirl
 - i. Is it “All-Natural”?
 - 2011-now



Pom

1. Then Pom

- a. Pom v. Coke, U.S. Supreme Court, June 12, 2014

2. Pom argued deception

- a. Coke's Minute Maid product 0.3% pomegranate juice
- b. May meet FDA rule, but not sufficient



Pom 2

1. Unanimous against Coke

- a. if there is trickery on food labels, and it hurts a competitor, of course they can do something about it, even if FDA (for whatever reason) does not

2. Shows TTB, states are a floor

- a. Not the totality, not the ceiling
- b. Court very skeptical of agency expertise

3. Differs from the spirits cases (so far)

- a. Pom is brand v. brand
- b. Spirits cases are class v. brand

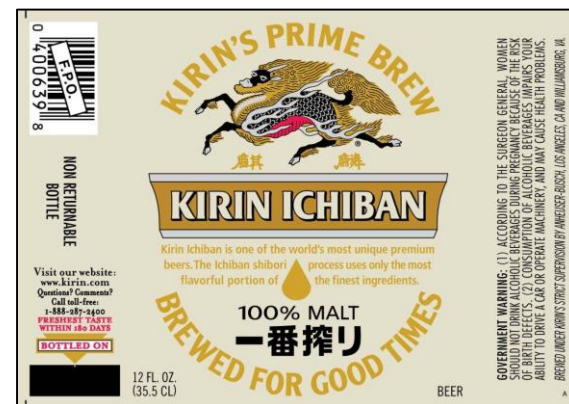


2014-Present

1. A flood of private lawsuits since mid-2014 (Pom)

- a. Predicted 1/20/14 and 6/13/14
 - i. Some said sky not falling
- b. Focus on spirits here
 - i. But, many beer cases too (pre- and post-Pom)
 - Kirin, Beck's (origin, 2013)
 - Bud (watering down, 2013)
 - Lime-A-Rita (light, 11/2014)

The screenshot shows the 'CONSUMER CLASS ACTIONS' website, described as 'AN ONLINE COMMUNITY FOR CONSUMER ADVOCACY'. It features a section titled 'Have You Purchased "Small-Batch" Whiskey?' with a sub-header: 'If so, you may be entitled to take part in a consumer class action to get your money back!'. Below this, it says 'Fill out the form on the right for a free attorney review.' followed by a double arrow icon. A paragraph explains that attorneys are investigating whether certain 'small-batch' whiskey brands falsely advertise their origin. A list of brands is provided: Templeton Rye, Rancho de Los Luceros Destilaria, Breaker Bourbon, WhistlePig Rye, Angel's Envy Rye, Bulleit Rye, George Dickel Rye, Redemption Bourbon & Rye, and Seagram's 7 Blended Whiskey. To the right, there is a form titled 'Have a Case? Be Heard.' with fields for First Name, Last Name, State (a dropdown menu), Phone Number, and Email Address. It also includes a question 'What whiskey brand did you purchase?' and a checkbox for 'I agree to the Terms & Conditions'.



Timeline



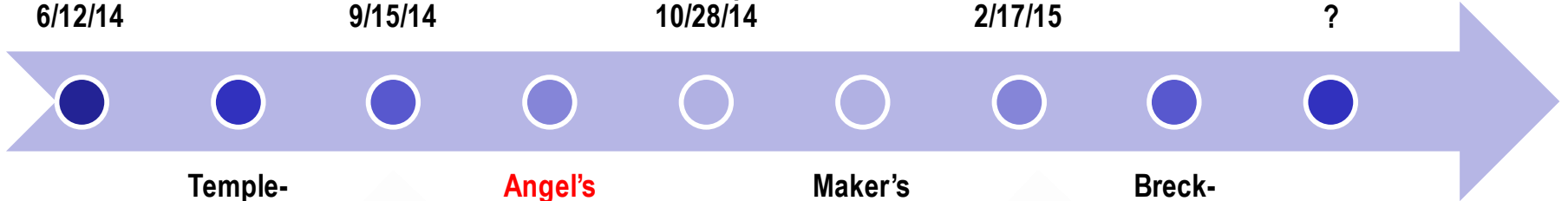
Pom
6/12/14

Tito's
9/15/14

Tincup
10/28/14

**Jim
Beam**
2/17/15

?



**Temple-
ton**
9/9/14

**Angel's
Envy**
10/28/14

**Maker's
Mark**
12/5/14

**Breck-
enridge**
3/3/15



Tito's 1

1. Hoffman v. Fifth Generation (Tito's)

- a. Filed September 15, 2014
- b. San Diego County, then Federal
 - i. Several copycat lawsuits filed
 - IL, FL, NJ, NV

2. About “handmade” v. “devoid of human hands”

- a. Not much prior law on this point, surprisingly



Tito's 2

1. Claims

- a. Fraudulent, deceptive, unfair
 - i. Made via a highly-mechanized process that is devoid of human hands
 - ii. Nothing handmade about the vodka; made from GNS trucked in, large industrial complex, modern stills, extremely large quantities
- b. It's not puff
 - i. Puff is vague, not believable, opinion
 - ii. By contrast, “misdescriptions of specific or absolute characteristics of a product are actionable”
 - Even if impossible to make vodka wholly by hand, some may still be deceived



Tito's 3

1. Defenses

- a. Tito has over 30 COLAs from 1997 to 2013
 - i. But plaintiff says no safe harbor; no law permits saying handmade if not
 - court rejected this in Beck's case
 - shows that COLA is not the be-all-end-all
- b. The 2013 *Forbes* article put all on notice
 - i. But law should not require plaintiff to read all *Forbes* and all other magazines
- c. Truth, various TTB inspections
 - i. But no short plain statement that no GNS trucked in
 - ii. But no TTB standard, though Tito claims standard met



Tito's 4

1. Judge Miller, March 18, 2015

- a. Order agreed with Plaintiffs on most
 - i. Gave them a chance to fix a few things
- b. Consumers care a lot about “processes and places of origin”
- c. The court was not impressed with the safe harbor arguments
 - i. “the court concludes that [Tito] has not shown that the safe harbor bars Plaintiff’s claims”
 - ii. Said TTB’s review was peripheral and informal at most, especially in view of the fact that TTB does not even have standards or rules for the term at issue



TTB, Canada

1. **TTB has not much definition**
2. **Canada (CFIA), “artisan made” (not “handcrafted”)**
 - a. *small batches*
 - b. *traditional and rudimentary*
 - c. *involving a significant portion of manual labour and a limited use of machines, mass quantities of food, compared to similar products*
3. **UK (FSA)**
 - a. Significantly made by hand
4. **OED (from Tito complaint)**
 - a. “[m]ade by hand, not by machine, and typically therefore of superior quality”

Maker's Mark 1

1. Nowrouzi v. Maker's Mark

- a. Filed December 5, 2014
- b. USDC, Southern California
 - i. Same court, P Lawyers, Ds as Beam
 - ii. Copycat suit in FL a few days later



2. Claims deception about “Handmade”

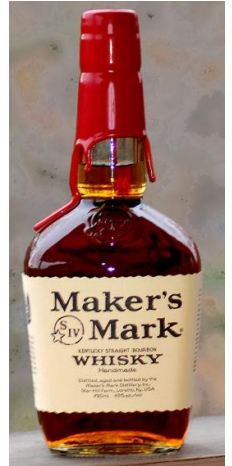
- a. Highly automated



Maker's Mark 2

1. Defense

- a. COLAs
- b. Nobody could think “the bourbon is literally made entirely by hand and without the use of any machinery”
- c. No effort to hide how it's really made = no intention to deceive
- d. The term is puff
- e. No real damage



Jim Beam 1

1. Welk v. Beam Suntory

- a. Filed February 17, 2015
- b. USDC, Southern California

2. Handcrafted v. assembly line

- a. Highly automated
 - i. Lots of images from web, plant tours



Jim Beam 2

3. Claims

- a. CA false advertising
- b. CA unfair competition
- c. Negligent misrepresentation
- d. Intentional misrepresentation

4. Defense

- a. Tiny, puff, safe harbor



Templeton

1. McNair v. Templeton Rye

- a. Filed September 9, 2014
- b. Cook County, then Federal

2. About deception

- a. Iowa v. Indiana
- b. Small Batch
- c. Limited comments on this controversy

3. Guesswork, contradictions in complaint

- a. Conflate Made v. Distilled
- b. Allege no work in Iowa
- c. Assume MGP cheap source/inferior v. premium price
 - i. Ignore price if made how they say it should be



Angel's Envy

1. Aliano v. Louisville Dist. Co. (AE)

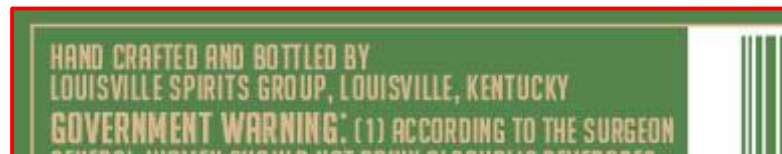
- a. Filed October 28, 2014
- b. Cook County then Federal
 - i. Same plaintiffs as AE, Tito, Templeton cases
 - Consumer, restaurant

2. Broad

- a. KY v. IN
- b. Small batch v. not
- c. Unique v. stock
- d. Handcrafted v. not

3. Transfer to rum barrels in KY

- a. Not really “Rye Whiskey”



Tincup 1

1. Aliano v. Proximo

- a. Filed October 24, 2014
- b. Cook County

2. May 5, 2013 COLA

- a. One big, one small reference to CO
- b. No reference to MGP or IN
 - i. 27 CFR § 5.36(d)

3. About Colorado v. MGP origin

- a. Mentions surge from 40 to 450 craft distillers over 10 years



Tincup 2

1. Claims

- a. NJ fraud, deception, misleading, omission of material fact
- b. IL fraud, deception
 - i. The purported Colorado origin is “the central reason” consumers bought it
- c. Unjust enrichment (common law)

2. Hinges on “premium price” for Colorado whiskey

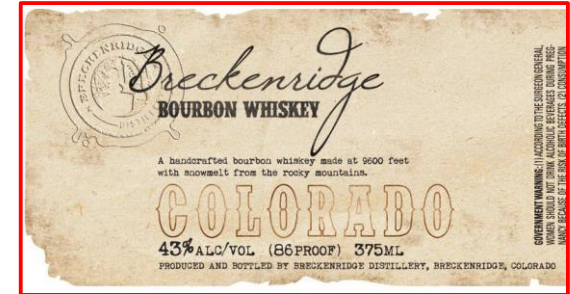
- a. 11 mentions; true?
 - i. MGP may lower costs; economies of scale
 - ii. Most expense in the aging?



Next?

1. Plenty more suits

- a. Like shooting fish in a barrel
 - i. After decades of assuming ATF/TTB is the ceiling, floor, focal point
 - Aging rules (one more field, like vintage or appellation)
 - State of distillation (one more field)
 - Also, vodka “produced by”

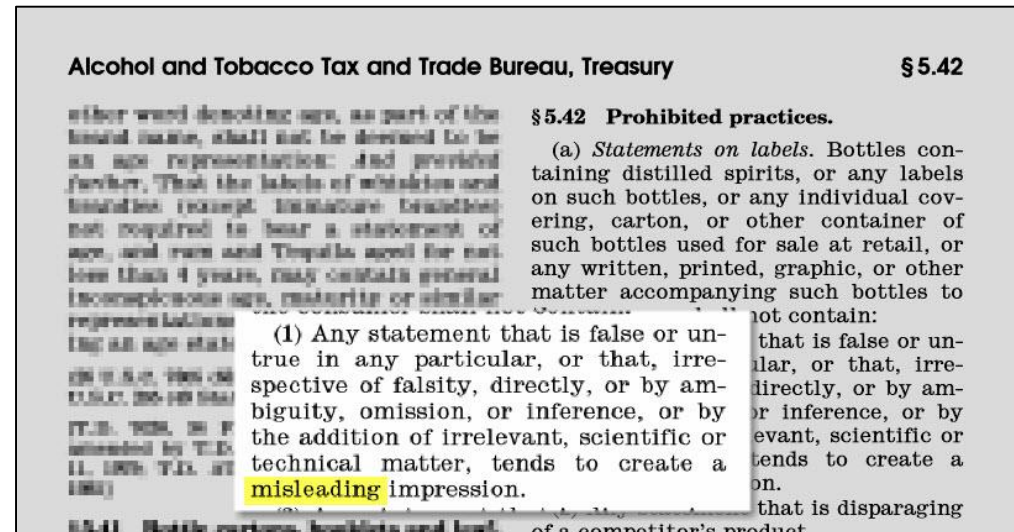


2. Unless Tito and other brands make it very expensive

- a. By the time this is over, rulemaking and regulators might not look so slow and expensive

TTB's Role

1. Should not be a bystander on big label issues
2. Broad control over anything “misleading”
 - a. 27 CFR § 5.42



TAS Applied

1. Also, the “Truthful, Accurate and Specific” rule

- a. But wine-only, 27 CFR § 4.38(f)

2. As applied to

- a. Handmade, Handcrafted
 - i. How so?
 - ii. Note Tito does not claim it's puff
- b. Small Batch
 - i. How small?
- c. Natural
 - i. What's in it?

WATER OF OTHER BEVERAGES.

(f) *Additional information on labels.* Labels may contain information other than the mandatory label information required by §§4.30 through 4.39, if such information complies with the requirements of such sections and does not conflict with, nor in any manner qualify statements required by this part. In addition, information which is **truthful, accurate, and specific**, and which is neither disparaging nor misleading may appear on wine labels.

Puff

1. List of Puff Terms

- a. Premium
- b. Smooth
- c. Silver, Gold
- d. Traditional
- e. Better
- f. Pure
- g. Rare



Real v. Puff

1. Craft

- a. Should it be real or puff?
 - i. Also, Artisanal
- b. Lots of groups trying to define
 - i. Working on a plan to make it real
 - Not just big v. small
 - Not just beer or wine or spirits, all
 - Objective criteria
 - Batch size
 - Place of fermentation and distillation



Craft Standards

1. Good standards avoid

- a. The lawsuits
- b. More regulations
- c. Draining the term of all meaning
 - i. Pernod claims already happening

2. Fits within TTB's current framework

- a. A bit more TAS than now
- b. But less specific than ketchup



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