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The Regulatory Ordeal Of The Craft Distiller: Legal Processes And Considerations In Labeling Distilled Spirits

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During the 19th Century and prior to the enactment of prohibition in the 1920's, it is estimated that as many as 14,000 craft distillers existed in the U.S. In the 21st Century, government statistics show eight hundred and sixty (860) craft distillers were federally licensed as of 2012 with dozens more seeking new licenses each year. These modern craft distillers are subject to new regulations imposed by Congress, which present a significant learning curve to the craft distilling industry.

Craft distillers must be knowledgeable about the organic chemistry of fermentation and the mechanics of barrel aging, but must also be cognizant of the mountain of regulations governing seemingly every aspect of their industry. For instance, there is a regulation that requires a distiller to pay an "intake fee" for the simple act of moving a distilled product from the distilling operation to a locked storage room, even one 25 feet away or down the hall in the same facility. While stored, the distiller must pay an additional "storage fee" and, once the product is aged, finished, and readied for removal, another fee for "outtake." Thus, the old adage that "the difference between 'Moonshine' and whiskey is---"**the federal regulations**"--- never rang more true.

The regulations impose the same requirements and regulatory infrastructure on a producer of 50 gallons of whiskey as a producer of a million gallons of product. These regulations present some competitive challenges for craft distillers versus the larger, industrial distilleries; who, incidentally, spill as much product in one day as the average craft distiller produces in one year. Craft distillers must develop their brand and product label in accordance with state and federal law to protect themselves from liability and competitors who may wish to capitalize on their success. In this article, we introduce the most critical legal issues pertaining to the development and production of a new product label: the COLA and Trademark processes.

Labeling, COLA's and Federal Regulation

The Federal Alcohol Administration Act requires distillers, including craft distillers, to obtain pre-approval of their beverage labels before placing these products into interstate commerce.¹ This approval is called a Certificate of Label Approval (“COLA”). The Alcohol & Tobacco Tax & Trade Bureau (“TTB”) administers the labeling process for the federal government.

Federal regulations surrounding labeling approval ensure that labels are not misleading to consumers with regard to an alcoholic beverages’ class and type,² quantity and method of manufacture,³ and traceability (i.e. mandatory information identifying who distilled the product and where they are located, etc.).⁴ Mandatory label information includes:

- brand name
- alcohol content
- name and address of the distiller/bottler/packer
- net contents
- government warning statement
- class type and designation of alcoholic beverage

The regulations also establish minimum requirements for the size, font, placement and legibility of this information.⁵

To obtain pre-approval from the TTB, the establishment that will actually distill the alcoholic beverage (commonly referred to as “distilled spirit”), must submit two relatively complicated forms found on the TTB website.⁶ If the product is unique, new or requires a formula approval from TTB, then the formula approval needs to be attached to the form.⁷ TTB uses the formula information to determine if the craft distiller’s application complies with the requirements for the specific class and type of distilled product for which approval is sought. The label itself, in color, as it will actually appear on the bottle (with a drawing of its position on the bottle, front and back), must also be included.⁸ Craft distillers who need help navigating this complex process can retain an attorney or trade association agent who specializes in submitting the COLA forms with all proper attachments to the TTB.

1 Even if a distiller is only distributing its product within state, it must file a COLA form asking for an exemption from the COLA requirements.

2 27 CFR Part 5

3 *Id.*

4 *Id.*

5 Certain mandatory label requirements vary for the class and type of distilled product, but these elements are mandatory on all classes and types.

6 www.ttb.gov

7 Prior approval of formula is a necessary step that proceeds the label pre-approval process. More on that in a subsequent piece.

8 There are special regulations that apply to a label that will painted, embossed or printed on the bottle.

The TTB has basically three options when it receives the craft distiller's label. It may:

1. approve the application in its entirety allowing the distiller to bottle and distribute the product in interstate commerce with the approved label;
2. approve the label with qualifications allowing the distiller to bottle and distribute the product only after it makes required modifications or in a limited manner; or
3. issue a rejection letter with a statement explaining fully why the label was rejected.

A rejection letter does not necessarily end the process. Rather, after heeding the letter's contents and revising the label to be in compliance with the shortcomings dictated by the letter, the craft distiller may re-submit the revised label for further consideration and approval.

It is important to understand that the COLA process is a necessary **regulatory** step in securing the distiller's ability to package, label, bottle and ship its product. But this process should not be confused with the process for protecting the product's brand name, logo or other trademarks. The process of label and/or regulatory approval should parallel the trademark process to ensure proper protection and approval of the distiller's brand in a timely manner.

There are many more federal regulations pertaining to craft distilling, not the least of which is federal permitting or licensing. For further information, craft distillers are encouraged to consult regulatory legal counsel specializing in this area.

Considering State and Federal Trademark Law

In addition to complying with TTB regulations, craft distillers should consider state and federal trademark law when designing their labels. Trademark law protects a business's brand names, logos, and even product packaging. Once exclusive rights are established, the trademark owner may prevent others from using confusingly similar marks in their product packaging or advertisements. For example, in 2012, a federal appeals court recognized Makers' Mark Distillery, Inc.'s exclusive right to use a red dripping wax seal on bottled spirits.⁹

Before selecting a trademark, logo, or other brand identifier, all businesses are well advised to commission a search of federal and state trademark registries, websites, and other directories.¹⁰

⁹ *Maker's Mark Distillery, Inc. v. Diageo North America, Inc.*, 679 F.3d. 410 (6th Cir. 2012). This opinion, available at <http://www.ca6.uscourts.gov/opinions.pdf/12a0126p-06.pdf>, is a fun read and offers a brief history of bourbon distilleries.

¹⁰ Prices vary depending on the vendor and requirements, but a search can generally be accomplished for under \$800.

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A well considered search will take into account translations and variations in spelling. It does not pay to invest time and money in a brand that someone else is already using. Moreover, when launching a new product, the last thing a business needs is a distracting lawsuit, the outcome of which could require changing the product label (and perhaps repeating the COLA process), paying damages, or both.

In addition to respecting the trademark rights of others, craft distillers should take advantage of the opportunity that federal law provides to reserve their own exclusive rights from the beginning. Names that are fanciful or have no real meaning (e.g., Google®, Verizon®) eventually make stronger trademarks but may have a harder time gaining traction initially. Descriptive trademarks, which describe a product's characteristics, cannot be protected unless and until consumers recognize the term as a brand identifier rather than a product description. Generic terms for a type of product (e.g., whiskey) cannot be reserved at all. Over time, a trademark may become generic if consumers begin to associate the mark as a designation of a product type as opposed to a particular brand of product (e.g., Aspirin).

Federal registration with the United States Patent and Trademark Office ("USPTO") is inexpensive¹¹ and offers the most protection, although some states also have a process for trademark registration. A company can reserve its chosen brand with the USPTO before it starts advertising or selling its product, even before applying for TTB approval of the product label. But, in general, trademark rights are created and maintained by consistent use of the mark to sell or advertise the product. Part of what is being protected is a consumer's expectation that a product or service bearing the mark will meet certain standards.

Once the trademark is registered, the craft distiller must monitor the marketplace to ensure that others are not using the mark in a way that may confuse or mislead consumers. Periodic web searches are helpful but may not reveal uses limited to a small geographic area. A monitoring service will periodically check state and federal trademark registries, websites, business directories, and other sources and notify the client of potentially infringing uses. United States' Custom and Border Protection ("CBP") may also identify potentially infringing products as they enter the country. Once a mark is federally registered, the owner may record the registration with CBP to help custom's officials identify confusingly similar marks on products as they pass through customs. The officials can then seize the potentially infringing products and notify the trademark owner of their findings.

11 A trademark may be registered with the USPTO online (www.uspto.gov) for as little as \$275 depending on the scope of protection desired. It is advisable to hire an experienced attorney to help negotiate this process.

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If a craft distiller discovers a potentially infringing use of its trademark, the best practice is to contact an attorney with expertise in this area **before** contacting the potential infringer. Simply sending a letter that generally describes the owner's trademark rights may allow the potential infringer to file its own lawsuit against the owner.¹²

Lastly, a craft distiller may license others to use its trademarks. A franchise, joint venture, or other licensing arrangement may allow a company to grow its brand more quickly with less capital investment. It is best to involve an attorney in any such licensing to make sure that the ownership of the trademark is clear, the scope of the license is appropriately limited, and the owner maintains the right and ability to monitor the use of the trademark. Otherwise, the owner's rights can be diminished or lost. On the other hand, if care is taken to select, grow, and maintain them, trademarks can become the most valuable assets of any business.

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¹² *Poly-America, LP v. Stego Indus., LLC*, 694 F. Supp. 2d 600, 606 (N.D. Tex. 2010) (holding that even "general statements communicating ownership of intellectual property rights and a general willingness to enforce those rights" may allow an infringing party to bring a Declaratory Judgment Action under 28 U.S.C. § 2201(a)) (internal quotation marks omitted); see also 6 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 32:51.50 (4th ed. 2012) ("[I]t appears that the [Federal Circuit] will allow a declaratory judgment suit in almost every case in which the recipient of an invitation to take a patent license disputes the need for a license and decides to file a declaratory judgment."); *Geltech Solutions, Inc. v. Marteel, Ltd.*, No. 09-CV-81027, 2010 WL 1791423, at *5 (S.D. Fla. May 5, 2010) ("[D]eclaratory judgment actions involving trademarks are analogous to those involving patents.") (internal quotation marks omitted).