

*Consumer protection: labeling, conformity to health and safety rules
and identification of origin: new forms of protection?*

The Example of Wine Labeling in the United States

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To one extent or another, all product labels are regulated, but alcoholic beverages, and wine in particular, stand out, due to intersecting considerations of consumer protection, public health and intellectual property. The United States prohibits sale of wine without prior label approval, although the mandatory label contents are relatively limited. The designation of origin, seen from both the standpoint of consumer protection and from that of intellectual property, is very different from the statement of national origin typically required for the importation of goods, and has been the subject of extensive negotiation between the United States and other wine-growing regions of the world, in particular those located in the European Union.

U.S. Wine Label Requirements

Within the United States, the competent federal authority for regulation of alcoholic beverages is the Alcohol and Tobacco Tax and Trade Bureau (“TTB”), housed within the U.S. Department of the Treasury. Its Advertising, Labeling and Formulation Division reviews alcoholic beverage labels as well as advertisements to verify that they provide adequate information concerning the identity and quality of alcoholic beverages and do not mislead consumers.

All alcoholic beverage production must also comply with individual state requirements. While some states, such as California, require only that a wine label meet the federal regulations, other states, such as Oregon, have their own wine label requirements which are more restrictive than the federal requirements.

Each unique product/label combination must have a valid Certification of Label Approval (“COLA”) from the TTB before an alcoholic beverage can be bottled or distributed in the

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Paper submitted on the occasion of the AIJA seminar *Global Distribution and Local Legal Strategies*, Montreal, Canada, November 15, 2012

U.S.¹ The same requirement applies to imported products. Without a valid COLA, U.S Customs will reject imports of alcoholic beverage products.

Certain information is mandatory on wine labels, including Brand name, Class and Type designation, Alcohol content, and in some cases Appellation of Origin.

- Brand name: This may be the producer's name, winery name, growing area, the name of the appellation where the wine originated, the grape variety, or a trademark name. If a brand name includes a vineyard, orchard, farm, or ranch name, at least 95 percent of the contents must come from the vineyard, orchard, farm, or ranch referred to in the name. In the absence of an actual brand name, the name of the bottler or importer is deemed a brand name. A brand name may not mislead the consumer about the age, identity, origin or other characteristics of the wine. The TTB does not address trademark issues, but ensures that a descriptive name is accurate.
- Alcohol content A statement of alcoholic content by volume is required, but the printed percentage does not necessarily indicate the amount of alcohol that was measured. For wines which contain 14 percent alcohol by volume or less, the range is +/- 1.5%. For wines above 14%, the range is +/- 1.0%.
- Class and Type designation: The TTB divides wine into a number of classes, including general ones such as "grape wine," and "sparkling wine." Types include "red table wine" and "sweet table wine." If a varietal designation such as "Cabernet Sauvignon" is used, then at least 75 percent of the grapes used must be of that variety,² and the label must provide an appellation of origin. The designation "table wine" cannot be used for a wine with an alcohol content above 14 percent by volume.

¹ Separate from the COLA requirement, wine producers, wholesalers and importers must have a permit from the TTB. Retailers are regulated at the state level, but they are required to file a registration form with the TTB and are subject to certain federal recordkeeping obligations. Most states have implemented a three-tier licensing system for distribution of alcoholic beverages, maintaining a distinction between producers, wholesalers/distributors (who may also be licensed as importers), and retailers.

² States can require a higher percentage. Oregon, for example, requires up to 90 percent of the grapes used be that of the named varietal in order to use the varietal name on the label.

There are additional mandatory items which must be included, but may appear on a side, back, or neck label that does not carry the brand name. These items include:

- Bottler's Name and Address: The name and address of the bottler or packer must be shown on a label. A producer may only state that the wine was “produced” at a certain address if at least 75 percent of the wine was fermented at that address. Imported wine labels must show the name and address of the importer as well.
- Net Content: Wine must be bottled or packaged in a metric standard of fill. Net contents may be blown or branded into the bottle in lieu of, or in addition to, stating the net contents on the label.
- Health Warning Statement: Every beverage containing 0.5 percent or more alcohol by volume must carry the following warning: “(1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems.”³
- Declaration of Sulfites: The statement “Contains sulfites” must appear on a label if the sulfur dioxide level in a wine is above ten parts per million. Wines labeled as “Organic” will be free of any artificially added sulfites, while those labeled “Made with organically grown grapes” are not subject to that restriction.

Additional non-mandatory label information

A variety of additional information can appear on a wine label, including:

- “Estate Bottled” indicates that 100% of the wine comes from grapes on land owned or controlled by the winery, which must be located within a recognized viticultural area. The winery must have crushed and fermented the grapes on its premises, as well as finished, bottled and aged the wine without it having left the winery's premises.⁴
- Vintage: Wine may be labeled with the year of harvest of the grapes, provided that it also carries an appellation of origin, and at least 85% of the wine is derived

³ 26 U.S.C. §215.

⁴ 27 C.F.R. §4.26.

from grapes harvested in that year (95% if the appellation of origin is a recognized viticultural area).⁵

- Varietal: A varietal name such as “cabernet sauvignon” or “sangiovese” may be used so long as the label also includes an appellation of origin and at least 75% of the wine is derived from grapes of that variety, grown in the stated appellation of origin.⁶
- Vineyard designation: The name of a vineyard or other agricultural production location may be used, if at least 95% of the wine was produced from “primary winemaking material grown on the named vineyard, orchard, farm or ranch.”⁷
- Labels may contain additional information that otherwise complies with the labeling requirements and does not conflict with or qualify the statements that are required on the labels, as well as other information that is truthful, accurate and specific, so long as it is neither disparaging nor misleading.⁸

Prohibited label statements

Any statement that is “false or untrue in any particular, or that, irrespective of falsity, directly or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific or technical matter, tends to create a misleading impression” is prohibited on wine labels. The same is true of any “statement, design, device or representation” that (i) tends to create the impression that a wine contains distilled spirits, is comparable to a distilled spirit, or has intoxicating qualities, (ii) is of, or relates to, analyses, standards or tests, which the TTB finds are likely to mislead consumers, or (iii) is obscene or indecent.⁹

Designation of origin

It is not necessary to designate the location where the grapes were grown (referred to in the TTB regulations as “appellation of origin”), but if the label contains this information, the available alternatives are:¹⁰

⁵ 27 C.F.R. §4.27.

⁶ 27 C.F.R. §4.23.

⁷ 27 C.F.R. §4.39(m).

⁸ 27 C.F.R. § 4.38(f).

⁹ 27 C.F.R. §4.39.

¹⁰ 27 C.F.R. §4.25

- A country
- A U.S. state or the foreign equivalent
- For U.S. wine, a listing of up to 3 states (multi-state appellation)
- A U.S. county or the foreign equivalent
- For U.S. wine, a listing of up to 3 counties (multi-county appellation)
- A U.S. or foreign government recognized delimited grape-growing area (referred to as a “viticultural area” under U.S. regulations).

Typically, at least 75% of the grapes must have been grown within the designated area. The TTB approves an American Viticultural Area (“AVA”) based on evidence of distinct climatic and geographical features. In order to display an AVA on a wine label, a minimum of 85% of the grapes must come from within the named AVA.

Label Approval and Trademarks

Trademark rights in the U.S. are developed through actual use of the mark in association with specific goods. Those rights can be extended through federal registration at the U.S. Patent and Trademark Office, but registration is not required. The TTB does not review proposed labels for possible infringement of trademarks, which leaves trademark owners to monitor and take action against perceived infringement.¹¹

Certification Trademarks and Collective Trademarks

The perceived value in the potential exclusive rights for a particular designation like “Napa Valley” can be high, but the rights cannot be claimed by a single wine producer, as is true for an ordinary trademark. U.S. law does however provide for registration of “collective marks” and “certification marks,” which are available for use by more than one producer.

The main feature of a collective mark is that it is used as an indication that goods or services originate from a member of a particular association. It is therefore a sign of membership. A certification mark is one that it is used not by the proprietor of the mark but instead by authorized users, for the purpose of guaranteeing to the relevant public that

¹¹ Confusion is possible even between AVAs that have been approved by the TTB. *See, e.g.*,: “Red Hills Lake County” AVA in California, and “Red Hill Douglas County” AVA in Oregon.

goods or services possess a particular characteristic. The proprietor's mark certifies the presence of the characteristic, which can include place of origin.

Registered and unregistered collective marks and certification marks have been recognized in the fields of alcoholic beverages and agricultural production of food. "Cognac" for instance has been recognized as a certification mark and protected by the administrative court which oversees the activities of the USPTO:¹² "Scotch Whiskey" has been protected in a civil action brought in part by an association of Scottish distillers,¹³ and the registered certification mark "Roquefort" has been the basis for protecting the French-origin cheese in the U.S.¹⁴

Geographical Indications

Geographical indications are defined in the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") as "indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."¹⁵ A geographical name can therefore operate as a geographical indication once a given quality, reputation or other characteristic of the product using the name is essentially attributable to the geographical origin. Under Article 23 of TRIPS, wines and spirits are afforded additional protection. Members are required to provide remedies against the use of geographical indications for wines and spirits that do not originate in the place indicated by the geographical indication, without regard for whether consumers will be misled, including in cases where the true place of origin is indicated or is used in conjunction with "kind," "type," "style," "imitation" or the like.

Conflict Between Traditional U.S. Designations and Geographic Indications

Many designations for wine have been used in the U.S. for extended periods of time, and can be considered "traditional" within the context of the U.S. wine market, even if they

¹² *The Institut National des Appellations d'Origine and the Bureau National Interprofessionnel du Cognac v. Brown-Forman Corporation*, Opp. No. 97,417 (TTAB, May 29, 1998)

¹³ *Scotch Whiskey Assoc. v. Barton Distilling Co.*, 338 F. Supp. 595 (N.D.Ill. 1971), aff'd in part, rev'd in part 489 F.2d 809 (7th Cir. 1973).

¹⁴ *Community of Roquefort v. William Faehndrich, Inc.*, 303 F.2d. 494 (2nd Cir. 1962)

¹⁵ TRIPS Agreement, Article 22.

originally referred to a growing region or style of wine produced in Europe. As an example, the Korbel Winery in Sonoma County has produced and marketed a sparkling wine labeled “California champagne” since the 1890s. Under federal regulations, “Champagne” is one of a number of “semi-generic” designations that could be used by U.S. wineries so long as the label also indicated the actual place of origin (such as “California”).

Beginning in 2006, only wineries that have previously used names such as Champagne, Burgundy, Chablis, Port, and others listed in an annex to the March 10, 2006 Agreement between the European Community and the United States on Trade in Wine¹⁶ may continue to use those designations, and only in conjunction with the actual place of origin. No new labels can be approved for example for “California Burgundy,” unless the producer was using that designation prior to March 10, 2006.

¹⁶ Official Journal of the European Union L87/2 24 March 2006. The full list of affected designations is: Burgundy, Chablis, Champagne, Chianti, Claret, Haut Sauterne, Hock, Madeira, Malaga, Marsala, Moselle, Port, Retsina, Rhine, Sauterne, Sherry and Tokay.