

Law of Bourbon A Talk with Brian Haara

- Definitions
 - “Whisky”
 - *Alcoholic distillate from a fermented mash of grain produced at less than 190° proof in such manner that the distillate possesses the taste, aroma, and characteristics generally attributed to whisky, stored in oak containers (except that corn whisky need not be so stored), and bottled at not less than 80° proof, and also includes mixtures of such distillates for which no specific standards of identity are prescribed.*¹
 - “Bourbon”
 - *“Bourbon whisky”, “rye whisky”, “wheat whisky”, “malt whisky”, or “rye malt whisky” is whisky produced at not exceeding 160° proof from a fermented mash of not less than 51 percent corn, rye, wheat, malted barley, or malted rye grain, respectively, and stored at not more than 125° proof in charred new oak containers; and also includes mixtures of such whiskies of the same type.*²
 - “Bourbon” must be produced in the US.
 - *The word “bourbon” shall not be used to describe any whisky or whisky-based distilled spirits not produced in the United States. If whisky of any of these types is composed in part of whisky or whiskies produced in a foreign country there shall be stated, on the brand label, the percentage of such whisky and the country of origin thereof.*³
- Bourbon’s role in IP law development
 - Bourbon’s role in developing concept of trade “branding”
 - Bourbon barrels branded with name of distillery, eventually becoming known by the name on the branding
 - History of distilleries suing to keep other distilleries from using the same name
 - Brand name protection: Pepper v. Labrot⁴
 - Oscar Pepper ran a distillery known as the “Old Oscar Pepper Distillery” that passed to his son James Pepper upon his death. James Pepper sold the property to Labrot & Graham who

¹ 27 C.F.R. § 5.22(b). <https://www.ecfr.gov/current/title-27/chapter-I/subchapter-A/part-5/subpart-C/section-5.22>.

² 27 C.F.R. § 5.22(b)(1)(i). <https://www.ecfr.gov/current/title-27/chapter-I/subchapter-A/part-5/subpart-C/section-5.22>.

³ 27 C.F.R. § 5.22(l)(1). <https://www.ecfr.gov/current/title-27/chapter-I/subchapter-A/part-5/subpart-C/section-5.22>.

⁴ 8 F. 29 (C.C.D. Ky. 1881). <https://law.resource.org/pub/us/case/reporter/F/0008/0008.f.0029.pdf>.

continued call their distillery the “Old Oscar Pepper Distillery” and to use the “Old Oscar Pepper” brand and. James Pepper built a new distillery and used the “Old Oscar Pepper” branding. James Pepper filed suit to enjoin Labrot & Graham’s use of the trademark.

- The Kentucky Circuit Court found that the trademark was a description of the place of manufacture and that James Pepper’s use would deceive and mislead the public about the place of manufacture.
- Consumer confusion
 - Maker’s Mark Distillery, Inc. v. Diageo North America, Inc.⁵
 - Bill Samuels Sr. created Maker’s Mark bourbon in 1953, and his wife, Margie, applied the now-iconic red dripping wax seal. Since 1958, Maker’s Mark applied the red dripping wax seal on its bourbon bottles. In 1985, it registered a trademark for the dripping wax seal but did not denote a specific color. Jose Cuervo (Diageo) began selling a tequila first with a straight-edged wax seal and then with a red dripping wax seal when it introduced the product in the U.S. in 2001. Marker’s Mark filed suit claiming trademark infringement and dilution. Diageo counterclaimed for cancellation of the mark, claiming that wax seals have been extensively used by third parties.
 - The Sixth Circuit found that Diageo’s use constituted infringement. It found Marker’s Mark’s trademark extremely strong and the similarities of the two brands’ dripping wax seal to be high.
- Consumer protection
 - Bottled in Bond Act of 1897
 - In an effort to curb counterfeit whisky and protect consumers, Congress passed the Bottled in Bond Act of 1897. Credited as the first consumer protection law in the U.S.
 - If certain conditions are met, stamp placed on bottle indicating “bottled in bond.”
 - 1906 Pure Food and Drug Act (PL 59-384). First significant and broad consumer protection law.
 - Taft Decision, 1909: clarified what is “straight whiskey,” “blended whiskey,” and “imitation whiskey.”
- False labeling and truth in advertising
 - Whether the following terms on labels are legally defined and regulated

⁵ 703 F.Supp.2d 671, 680-81 (W.D. Ky. 2010).

<https://www.courtlistener.com/opinion/2512644/makers-mark-distillery-inc-v-diageo-north-america-inc/>.

- Small batch: no
 - Concept of mixing two or more barrels and bottling
 - Some distilleries may mix hundreds of barrels in its “small batch” bourbon.
- Single barrel: no
 - But open question of whether bourbon can be labeled single barrel when whiskey is added to a single barrel to top it off or when whiskey from multiple barrels is put in a single barrel for finishing
- Handmade: no
 - “Handmade” is puffery.
 - In a suit against Maker’s Mark, a Florida court ruled that no reasonable person would understand “handmade” to mean that the bourbon was actually made by hand at each step of the process. *Salters v. Beam Suntory, Inc.*, No. 4:14cv659-RH/CAS, 2015 U.S. Dist. LEXIS 62146, at *3 (N.D. Fla. May 1, 2015).
- Craft: no
 - Concept used to describe small distilleries generally, but practically is a meaningless term.
- Finishing: may become defined
 - Concept of taking bourbon that may be ready to be bottled and putting it into sherry, cognac, or other casks to age further. The industry is seeking to determine whether these products can still be bourbon.
- Class action suit against Templeton Rye for claims made on its label, including “Small Batch” and “Prohibition Era Recipe,” settled out of court in 2015. Per the settlement, the two terms were removed from the Templeton Rye label. *McNair et al v. Templeton Rye Spirits, LLC*, Case No. 14-cv-07440, N. D. IL.
- Heaven Hill Distilleries Inc. v. Log Still Distilling LLC⁶,
 - Heaven Hill filed suit against Log Still Distillery alleging trademark infringement and unfair competition for its use of the J.W. Dant brand. Heaven Hill acquired the J.W. Dant trademark in 1993. Log Still Distillery on its website stated its connection to J.W. Dant.

⁶ Case number 3:21-cv-00190. Preliminary injunction granted: <https://digitalcommons.law.scu.edu/historical/2600/>.