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New AVAs Are Threatening Existing Brand Names

Should we let geographic indicators trump brand names?

The issue of geographic brand names has cast a troubling shadow over the American wine industry for many years now. Readers of this column may recall we've written about this problem five times in the last decade—and with increasing frequency and depth in recent times. In this column we've made it our subject once again, because it seems to us the issue is coming to a head, and the industry may finally be ready and willing to solve it.

THE DILEMMA

The basic dilemma is this: How can the industry fairly balance the rights and investments of individual brand owners of viticulturally significant brand names against our very legitimate collective need to protect the integrity of appellations of origin, many of which have also been promoted at significant cost by the wineries and growers who produce wines from the area? Awareness of this dilemma has reached an all-time high due to the combined influence of a few current events.

First, the protracted court battle over California's statute protecting Napa Valley AVA names was recently decided, upholding the new law. The California courts held that Bronco Wine Company's use of its viticultur-

SHORT COURSE

- ▶ New AVAs are threatening existing brand names with increasing frequency.
- ▶ This problem could strike any brand—even coined or family names.
- ▶ The time is ripe to solve this longstanding and worsening problem.
- ▶ We must protect industry investments in both AVA recognition and geographical brands.
- ▶ Finding a fair solution requires caring about both sides of the issue.

ally significant brand names (Napa Creek Winery, Napa Ridge, and Rutherford Vintners) was misleading, and not entitled to free speech or property rights protection. The recent court decision ended the moratorium on enforcing section 25241 of California's ABC Act. Now no wine produced or marketed in California may use the name Napa, or the name of any viticultural area located entirely within Napa County, on labels or advertising materials, unless the wine qualifies for a Napa County appellation.

Second, riding the wave of this court victory, an international

meeting was convened in Napa Valley on July 26 on the topic of protecting geographical place names. Producers from France, Portugal, and Spain met with representatives of vintners associations from California, Washington, and Oregon to reinforce their efforts to protect the integrity of prestigious place names worldwide. European producers have long objected to TTB labeling regulations that allow American wineries to use foreign geographical names (such as "Champagne," "Burgundy," and "Chablis") on US-grown wines. TTB regulations allow the use of such names, provided that they have been officially declared to be "semi-generic," and the label dis-

plays an accurate appellation of origin for the wine.

Here in the US, the rising awareness of the importance of protecting American appellations gave the Europeans new allies for their cause. The participants at the July 26 meeting created a joint declaration vowing to protect the names of their regions and prevent their misuse on labels.

Third, TTB is currently processing three viticultural areas—all of which are in the final rule stage—that threaten existing brand names. The three areas are Chehalem Mountains AVA in Washington, Eola Hills AVA in Oregon, and Calistoga AVA in California. This is not the first time AVA approvals have jeopardized the continued use of existing brand names, but never in our memory has the conflict generated so much interest. The Eola Hills AVA alone received almost one hundred public comments, and nearly all of them urged TTB not to curtail the rights of Eola Hills Wine Cellars to its brand name. (To review the comments on line, you can use this link: http://www.ttb.gov/foia/nprm_comments/ttbnotice15_comments.htm.)

The popularity of geographic brands, and their tendency to generate concern and opposition, is not new. Anheuser-Busch has been engaged in a legal dispute with a Czech brewery for over one hundred years. The German immigrant who founded the huge American brewery adopted the Budweiser brand in 1876, because the brand name reminded the founder of his homeland, and the company's beer was to be brewed in the traditional Czech/German lager style.

But as it happened, "Budweis" is

the German name for the Czech town Ceske Budejovice, and "Budweiser" is the specific term that describes beer brewed in that region. A Czech brewery which began marketing its brand "Budejovicky Budvar" in 1895 soon came into conflict with the Budweiser brand when the Czech company began exporting its products outside Europe. Since the two companies learned of each other's existence, lawsuits have been fought in numerous countries, and different venues have variously awarded victories to each side. The fight continues to this day.

TWO CURRENT CASE HISTORIES

The case of Eola Hills is a great example in favor of protecting the rights of brand owners. Eola Hills Wine Cellars is one of the largest and most successful wineries in Oregon, and the Eola Hills area was virtually unknown before its wines became popular. Nevertheless, under current regulations, if Eola Hills AVA is approved,

the winery would be limited to using its well-respected brand name only on wines made from grapes grown in the Eola Hills appellation. Unfortunately, given the winery's sales volume, the Eola Hills area could not possibly supply the amounts and kinds of grapes needed by the winery, even if it wanted to comply.

Section 4.39(i) of the federal wine regulations makes it illegal to use a brand name "of viticultural significance" unless the wine meets the appellation of origin requirements for the named geographical area. An exception under certain conditions is made for brands that pre-dated the regulation's effective date—but Eola Hills received its first COLA just a few months too late to benefit from the legal loophole.

The case of Calistoga AVA represents an interesting variation on the same theme. The winery most affected, Calistoga Vineyards, has used its brand name for less than ten years, and the winery did not "put the place

on the map" as Eola Hills Wine Cellars did for their area. In fact, an official at TTB commented that they've never seen a viticultural area petition with stronger name evidence than the Calistoga AVA petition has. But the affected brand owners point out that, while their winery stands to lose millions if their use of their brand is restricted by the approval of the AVA, it is difficult to say anyone's financial success rides on the establishment of Calistoga as an appellation. Any vineyard that qualifies for the Calistoga appellation could legally use Napa Valley on its label, and that's hard to pout about. In contrast, the approval of a pending appellation in a region with no previously approved AVAs could have a much more significant and timely effect on the ability of the growers in the area to identify and promote their grapes.

Also, the owners of Calistoga Cellars argue, the name Calistoga is not as well-known as a source of grapes, as it is for being a famous tourist destination, hot springs resort, and home of a world-famous brand of sparkling mineral water. Therefore, there is less risk of consumer confusion from the winery's continued use of their brand name on out-of-area grapes.

THE OTHER SIDE OF THE STORY

Any resolution that would allow existing brand owners to continue to use their brand names without restriction, following the approval of an AVA with the same or a similar name, runs the risk of undermining these two important purposes. As the Bronco case showed, a name used by a winery located in a geographic area and bottling wines from that area could easily be sold to another winery outside the area. The new brand owner could then use the name for wines made from grapes grown anywhere. And, when that happens with a very prestigious appellation, chances are that consumers' conscious or subliminal associations with the geographic area mentioned in the brand name may influence their buying decisions more than the information about its actual appellation does.

The current regulation clearly does not do an adequate job of striking the needed balance between these

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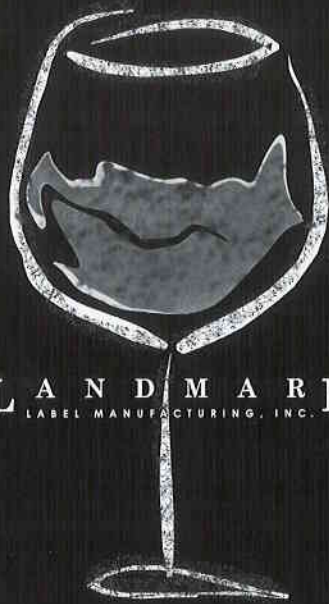
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conflicting values. Section 4.39(i) prohibits the use of a "viticultrally significant" brand name on wines that do not come from the named area. It makes a small concession to previous brand owners, but only if they used the name on existing certificates of label approval issued prior to July 7, 1986. As that date recedes into the mists of the past, the ranks of wineries left without recourse grow. Outside of California, few wineries have been around long enough to benefit from the existing grandfather date.

A brand name that satisfies the date requirement can be used on wines outside the area if it is labeled with an accurate appellation of origin that meets certain criteria specified in the regulation, or with some other statement that dispels the impression that the brand name is indicative of the origin of the wine. Given the large number of existing appellations and the relative ignorance of consumers about their precise locations and relationships to each other, simply using an accurate appellation may not sufficiently dispel confusion. That exact fear was the impetus for the California legislation. However, to date TTB has never approved an alternative statement for this purpose.

YOU COULD BE NEXT

Obviously, this issue has a big impact on a few producers, but why should it concern the industry as a whole? There are two good reasons.

First, protection of geographic indicators is currently a hot topic internationally. Balancing the rights of trademark holders against nations' efforts to protect geographic indicators has become the subject of active and ongoing discussion in the World Trade Organization. It behooves wineries in the US to decide where our industry stands on the issue. Otherwise, we may end up simply being at the receiving end of decisions made by our trading partners, at least with respect to areas abroad. Better that we should have a position that is clear, consistent, and fair to all concerned to contribute to the debate.

Second and even closer to home, the problem could end up on almost anyone's doorstep. You never know when a viticultural area with a name similar to your brand may be proposed—either in your backyard, in

another state, or another country. It has happened.

The famous "Martha's Vineyard" brand, named after the grower's wife, unexpectedly came into conflict with an AVA proposed on an equally well-known island in Massachusetts. Fortunately, Heitz Cellars had created its Martha's Vineyard brand before the section 4.39(i) cut-off date, so the brand has been allowed to co-exist with the well-deserved AVA.

Even a family name could show up on a town somewhere, and end up with "viticultrally significance." This actually happened to the Torres family of Spain and their well-established Torres brand several years ago when a group of disgruntled former employees moved to the town of Torres Vedras in Portugal and got their new hometown recognized as a Portuguese appellation. After a long legal battle, the Torres family retained the right to use their name. But if something similar happened to you, and the ground rules for the fight were set by current TTB regulations, would you be so fortunate?

Moreover, an increasing number of names are being recognized as having viticultural significance. Many of our clients have recently had difficulties getting re-approvals for new versions of previously approved labels, because something on the label had gained viticultural significance in the interim.

What does it mean to have "viticultrally significance"? That's an excellent question! If it's the name of an existing or pending AVA, a place name will certainly be considered viticultural significant. But there are no published guidelines for what is and isn't viticultural significant. And that can cause problems. It has in the past.

In 1992, TTB threatened to revoke Hecker Pass Winery's COLAs, simply because the place Hecker Pass was mentioned in an AVA petition! The California Wine Institute came to the winery's rescue and got the enforcement action reversed. But the moral of the story is still true: Regulatory discretion can be a dangerous thing when exercised in the absence of written definitions and guidelines.

THE WISDOM OF KING SOLOMON NEEDED NOW!

Even if your brand name dodges the

A Word About POSSIBLE SOLUTIONS TO THE PROBLEMS OF GEOGRAPHIC BRAND NAMES

IF YOUR CREATIVITY—or sense of fairness—inspires you to help solve this problem, here are some ideas for starters. Some or all may have obvious flaws, but we present them in the hope that they may inspire you to think of an improved version... or something completely different!

- Update the grandfather date in 4.39(i) or adopt a “rolling grandfather date,” so that each AVA would allow continued use—with or without restrictions—of conflicting brands established before its effective date.
- Require the volumes and grape sources of grandfathered labels to conform to historical patterns (effectively preventing such brands from growing or using different appellations than formerly).
- Adopt a sunset provision that limits the lifespan of grandfathered brands and allows brand owners to transition to new packaging in a slow and orderly fashion.
- Discourage the proliferation of geographical brand names by adding a notice to all approved COLAs, such as: “Warning: If your brand name refers to a real place where grapes could be grown, either near you or not, there is the possibility that this name, or a similar name, could acquire ‘viticultural significance’ sometime in the future. If that were to happen, wines bottled under your brand name would need to meet the requirements of 27 CFR 4.25(e)(3). Specifically, if your brand name cannot be traced to a COLA approved before July 7, 1986, your wine would be required to meet the appellation requirements for the geographic name.”
- Officially sanction the use of a modifier or statement which dispels the impression that a grandfathered brand name indicates the wine’s origin, such as: “[Brand name] is an established brand in use before approval of [AVA] as a viticultural area. This bottle contains ___% wine made from grapes grown in the [AVA].”

geographical brand name bullet, the fact that an increasing percentage of your fellow industry members are affected should be enough to warrant concern and justify real thought on the subject.

Admittedly, solving the problem is challenging. The issue would have already been resolved if it were easy to do—and there have been attempts. In 1992, ATF re-opened the subject. In a Notice of Proposed Rulemaking, ATF wrote:

“Present regulations provide that a brand name of viticultural area significance, which cannot meet the appellation of origin requirements for the geographic area named, may not be used unless it was previously used in a certificate of label approval issued prior to July 7, 1986. Therefore, a viticultural area approved on or after July 7, 1986, would effectively cancel any certificates of label approval issued after this date with a brand name containing the name of that approved viticultural area. A proprietor with a geographical brand name approved after July 7, 1986, should not be penalized for any viticultural area established after the geographical brand name approval date. The proposed revision of 27 CFR 4.39 would correct this regulatory oversight.”

However, no Final Rule ever resulted from that initiative.

In 1997, the California Wine Institute formed a subcommittee on geographic brand names, which met many times and laboriously studied the problems and possible solutions. They, too, failed to reach an official position, due to wide differences of opinion among the membership. All of the proposals seemed to represent a relaxation of the restrictions on the use of geographical brand names, but a large contingent of wineries from the Napa Valley—understandably sensitized to the issue—insisted that policies should be made more strict, not less.

In order to finally solve this long-standing and ever-escalating problem, we have to be willing to think outside of the box in order to come up with a solution that is feasible, effective, and fair. We can hope to hit that elusive target only if we remember that both sides of the issue are valid and deserving of respect and protection—not just the side we think our particular slice of bread is buttered on. In short, we have to be both wise and dispassionate, like old King Solomon. 🌿

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