

Mistakes Happen Part One

By Sara Schorske and Alex Heckathorn

At all but the smallest wineries, label design and label approval are usually done by different people. Often, the label text and layout is specified, or at least approved, by marketing personnel, and everyone knows how much marketing folks know, or care, about compliance rules! All kidding aside, lack of regulatory expertise isn't the only reason labels sometimes end up with legal errors. To err is human. Mistakes do happen, even to the experts. So it occasionally happens that illegal labels get printed, and even applied to bottles.

It's also human to want to bury our mistakes. But, as you'll see later in this article, in the case of an illegal wine label it is better to ask for permission than for forgiveness. Fortunately, ATF is fairly permissive in this regard. It has a well-established procedure permitting wineries to get conditional approval for labels that don't qualify for approval otherwise. Conditional approval, normally granted for a limited amount of time or for a limited number of cases, is called a "use-up" because it allows the winery to use up the wayward labels rather than reprinting them—if the winery can demonstrate a sufficient hardship.

It's So Beautiful, How Could It Be Illegal?

There are two types of mistakes that

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can cause a label to be illegal. The first is the one you've probably already guessed—the label fails to pass muster at ATF's Alcohol Labeling and Formulation Division (ALFD) in Washington, DC. As you know, specialists there evaluate the text and other design elements for compliance with the regulations. If the label you submit fails to fulfill the published regulatory requirements or inadvertently violates one of

ATF's unwritten labeling policies, it will not be approved.

The second type of mistake is a little more subtle. In this case, the label is approved by ATF with flying colors, but there's one small detail that the specialists in Washington couldn't possibly have noticed: the wine in the bottle doesn't match the intended label. Even if you have an approved label on the bottle, the label will not be

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legal if the wine is not what the label says it is. For example, you have an approved label that says the wine contains 13.8% alcohol, but the actual alcohol content is 14.2%. The labeling specialists at the ALFD in Washington have no way of knowing whether the label they just approved is appropriate for the bottled wine that will wear it.

Examples of Common Labeling Mistakes

This second type of mistake is quite easy to make. One of the most com-

mon mistakes produces the example we just mentioned. Wine stored in barrels over an extended period of aging increases in alcohol concentration. If winery personnel neglect to re-test the alcohol content between racking the wine out of barrels and bottling it, they may be in for a surprise later on. A blend that was well below 14% when it went into barrels could come out in a new tax class! This mistake later gets noticed when wine is analyzed for export or interstate shipment.

Another version of this type of mis-

take frequently occurs at larger wineries, which often have to place their order for label printing before the winemaking staff has finalized the blend. Sometimes, everybody's best guess is just not within legal tolerances for error! In addition, even when the blend is already made before the labels are printed, there's always the possibility of mathematical mistakes when calculating appellation, varietal, or vintage percentages. There are many other examples of this type of mistake, far too numerous to mention.

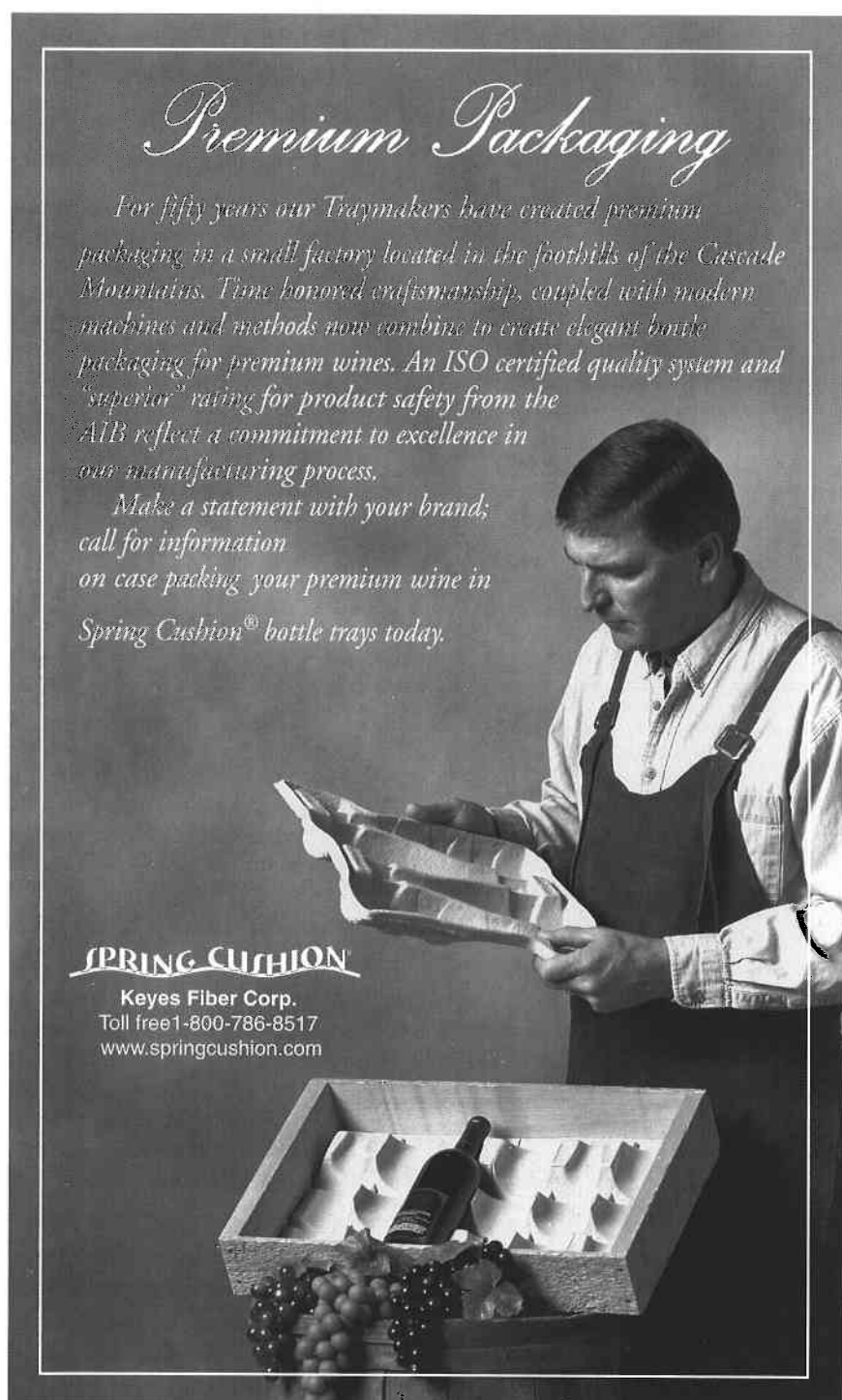
Asking for Permission Is Better than Forgiveness

While it is tempting to hope such mistakes might remain unnoticed, there are compelling reasons to apply for a use-up. ATF exercises a second, completely independent level of label review in the form of a product integrity audit. In this review, ATF inspectors visit the winery to ensure that label approval has not been forgotten (yes, that also happens sometimes!) and that the labels being used are correct for the wine inside the bottle. While not every label is reviewed by an inspector, labels are randomly chosen for examination and inspectors seem to have a sixth sense for picking problematic samples. Winery records are then carefully reviewed to determine if the selected bottle of wine is entitled to the claims made on its label.

While it may seem like a hassle to ask for a label use-up, the situation is worse if the erroneous label is caught by ATF during an audit. At that point, not only do you need to get that use-up, in a hurry, but you also have to deal with being written up for a violation. It's even more of a hassle, if not downright embarrassing, to be asking for forgiveness. You will have to write a repentant letter explaining why the mistake was made and what steps you plan to take to avoid repeating it in the future, and you can also face possible penalties. Plus, you have to live with your history of violations, which stay in the winery's "prejudice file" even after they have been resolved. In contrast, the winery is not considered to be in violation when it discovers and corrects its own labeling mistakes. Asking for permission before being caught rather than forgiveness later shows your willingness to self-comply and actually enhances your reputation.

The Process for Obtaining a Use-Up

To obtain a use-up the bottling win-



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ery should submit the following to the ALFD in Washington, DC:

(1) A new application for Certificate of Label Approval (COLA), in duplicate

(2) A letter requesting temporary approval. The letter should state the following information:

- identification of the wine label(s) involved
- a description of what is wrong with the label and what caused the problem
- a statement that the problem will be corrected when the label is reprinted (and, if possible, a description of the winery's plans for avoiding the same mistake in the future)
- the reason a use-up is needed (rather than simply reprinting the labels or relabeling the wine). In this area of the letter, provide details of the monetary hardship reprinting represents, or problems with tight timing such as pending large orders. We have found that timing considerations are often more persuasive than financial pleas, although if your timing is so tight that you need expedited approval of your request, you'll need to plead both time and money constraints. If the labels have been already applied, the additional cost and time required to soak them off and re-label the bottles are also compelling.
- the time duration of approval required (the length of time needed to complete the bottling and removal of the wine on which the label(s) will be used. The shorter this period of time is, the more likely approval will be granted.)
- number of cases involved
- marketing plans for the wine (to what type of customers is the wine being sold, and in how many states). Smaller lots of wine, and wines sold in more limited geographic areas, are more likely to be granted conditional approval.
- if the wine is in a different tax class than shown on the label, a statement that the tax will be paid at the correct tax rate.

The Significance of the Termination Date on the Use-Up

When a use-up is given by ATF, the COLA is given a termination date, and sometimes, an indication of the number of cases covered. (When an importer discovers that an incoming shipment has problematic labels, ATF will usually limit the conditional approval to the quantity of wine already

en route.) Six months is commonly allowed, but one year is the longest time period that is ever specified on a conditional label approval. We are commonly asked, what operations must the winery complete before the conditional approval expires?

According to current ATF interpretation, the winery must bottle, label and remove from bond all wine bearing the problem label by that date. Section 4.50(a) of the regulations states: "No person shall bottle or pack wine, . . . or remove such wine . . . unless an application is made to the director and the approved Certificate of Label Approval is issued." Since the regulation doesn't mention aging or sale, the expiration date does not limit the time the winery has for completing those processes. However, Susan Stewart, Chief of the ALFD, says Section 4.50 requires the winery to remove and pay the excise tax on the wine prior to the termination date stated on the COLA.

This policy may mean a winery will have to remove the wine from bond and pay the taxes prior to its planned release. We asked Ms. Stewart, "Isn't it a hardship for a winery to have to pre-

pay its taxes?" She replied, "They can take one of the two economic hardships. It's their choice. Either they can re-label their wine and keep their wine in bond as long as they like, or they can obtain a use-up, which may require them to remove it and pay the tax earlier than they wanted." She also noted that if the wine would not be removed in the coming year, there would be adequate time for the winery to reprint and relabel the wine, and the cost of doing so could most likely be comfortably budgeted over that period of time.

Avoiding the Pinch

Use-ups are not a magic bullet. They may help you in a pinch, but they won't necessarily prevent your wallet from feeling a pinch! Therefore, it is always prudent to exercise care to avoid the need for use-ups.

This article will be continued in the next issue of *Vineyard & Winery Management*. In the second part, we will discuss what types of mistakes are eligible for conditional approval, and what type are not. We will also provide tips for avoiding the need for use-ups, even for us imperfect human beings. ❁

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