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Making My Mark: One Law Student's Experience Opening a Microdistillery

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MAKING MY MARK: ONE LAW STUDENT’S EXPERIENCE OPENING A MICRO-DISTILLERY

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I. INTRODUCTION

About four years ago, I made two monumental life decisions. First, I stopped deferring a long-held goal and finally applied to law school. Nearly simultaneously, I stumbled into another project, one which I never saw myself undertaking: launching a micro-distillery together with several members of my family. At the time, I knew law school would take me three years to complete. Never in my wildest dreams did I imagine that it would take almost exactly the same amount of time for the distillery to open its doors. This synchronicity recently led to a positively manic summer in which I not only studied for the New York State Bar Exam, but also ensured that the distillery would be ready for its opening—which happened only a few weeks after I sat for the Bar.

My distillery, Lakeward Spirits, is a micro-distillery operating in a former barrel factory in Buffalo, New York.² I own it, together with three members of my wife’s family. We currently produce vodka, gin, and rum. We make the vodka and gin using a mixture of locally-grown wheat, barley, and rye, and make our rum with US-grown cane sugar

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² LAKEWARD SPIRITS, <http://www.barrelfactory.com/lakeward-spirits.html> (Last visited Mar. 8, 2018).

and Barbados molasses. We sell our vodka and gin by the bottle, in cocktails in our on-site tasting room, and in a growing number of local liquor stores, bars, and restaurants. Our vodka is a traditional Russian-style vodka which preserves some of the body of the grain, notably the rye, and finishes extremely smoothly due to the use of wheat. Our first two gins include a traditional London dry style gin and a more contemporary style featuring several floral botanicals. We anticipate releasing other gins, such as navy-strength gin and Old Tom. Currently, we sell a white rum and we are barrel aging rum in former bourbon barrels. Lakeward Spirits will also produce several types of whiskies, brandies, and liqueurs. Our goal is to produce spirits which are exemplary within existing categories and to put new twists on classic spirits and create unique and fascinating flavors.

Whenever possible, we source our raw materials from local and family-owned farms as part of a commitment to the local economy and fellow small businesses. Additionally, because we produce our spirits with 75 percent or more New York State agricultural products, we are allowed to act as our own wholesaler, to sell at retail for on- and off-premises consumption, and to offer tastings and tours to visitors.³ New York is currently a leading state in liberalizing its laws and regulations regarding craft beverage producers, a change which is creating jobs not only directly in those industries, but with the farmers, maltsters, and other suppliers who serve our industry. Not only was distilling a major industry in Buffalo before Prohibition, but so were the supporting industries, like grain production and malting.⁴ I am proud to be a part of a renaissance, not only in the craft of distilling, but in the economic renaissance of a city hit hard by years of deindustrialization.

The impetus for founding Lakeward Spirits came from my brother-in-law, Adam, and my father-in-law, Steve, who now serve as our Head Distiller and President, respectively. Adam had dreamed for

³ N.Y. ALC. BEV. CONT. LAW, 1 § 3-20(c) (Consol. 1980) states that, “‘New York State labeled liquor’ means liquors made from fruit, vegetables, grain and grain products, honey, maple sap or other agricultural products, at least 75 percent the volume of which were grown or produced in New York state.”

⁴ Paul Emmett Sweeney, *Locational Economics and the Grain Trade and Flour Milling Industry of Buffalo* 130 (1942) (unpublished Ph.D. diss., SUNY at Buffalo) (on file with the University at Buffalo Libraries).

many years of operating a distillery, while Steve was looking to leave a less-than-fulfilling career in software sales. Their recruitment pitch to me was, to say the least, underwhelming. At its essence, they told me that they thought it would be fun for them to operate a distillery, *but* because the industry is so heavily regulated, they would need someone to handle the compliance work while they made booze. Because of my previous work as a Congressional staffer and my impending legal education, they thought I might make a valuable addition to the team.⁵ As it happened, I had some time after my previous job ended but before law school started, and I found myself filling that time with research on the legal and regulatory requirements for opening and operating a distillery. By the time law school started, the project had become an important part of my life, and vice versa.

II. MY RUN INS WITH THE LAW

I wish I could say that law school prepared me for boot-strapping a startup business and operating a distillery. That is to say, I wish I had finished law school before starting the project, rather than working on both at the same time. The competition for my time, attention, and energy between the two projects was furious, but I really wish that I had learned the law before starting the company – so that I could have benefited from more than a layman’s crude understanding. Frankly, had I taken Administrative Law before starting up, I would have saved myself countless hours. As any attorney who works with entrepreneurs will immediately recognize, an entrepreneur will interact daily with a myriad of areas of law, including: corporations, tax, contracts, administrative, environmental, land-use and zoning, employment, and, of course, intellectual property.

One of the earliest tasks small businesses undertake is developing the name and imagery, which will become their trade or service marks. We were no different in this respect. We initially formed our LLC under a hastily chosen name with the intention of doing businesses

⁵ Sasiadek worked as a Constituent Affairs and Community Liason in the Office of Congresswoman Kathleen Hochul from 2011 to 2013.

under a well-thought-out name to be determined later. When my partners and I were developing our name and marks, I had yet to take any courses on law, much less any on intellectual property or trademarks. However, my colleagues worked through this process without counsel and with only an intuitive understanding of trademark law. For example, we conducted Google searches of possible company names to see if existing businesses used them or used similar names. I am carefully not saying that we ever “googled” anything, because saying so might contribute to the genericide of Google’s well-known mark.⁶ We considered several names using the word “Buffalo,” our geographic location, but we were dissuaded from doing so because one of the existing distilleries in Buffalo told us they had planned on doing so until they received a cease and desist from Sazerac, the manufacturers of Buffalo Trace.⁷ We abstractly understood that place names were treated specially in trademark law, but we could cite neither case nor statute to support this.

The name we chose, “Lakeward Spirits,” was the result of a long and intensely debated process. It has many meanings: literal, figurative, personal, commercial, and, hopefully, secondary. Our distillery is located very close to the Buffalo River, a river which flows literally lakeward into nearby Lake Erie. Like kayakers and boaters, we are typical of so many of the people of our city in that our very spirits are centered on the lake. The lake is a source of life: water for drinking, for industry, for transportation, and for recreation. While we make distilled spirits, we are also ourselves spiritually drawn lakeward. Our distillery is located in a former barrel factory in a neighborhood built by Irish immigrants and Irish-Americans who worked in the grain industry: in mills, malhouses, and towering silos flanking the river.⁸ This neighborhood, the Old First Ward— or “the Ward” to locals— finds itself referenced in our name as well.⁹

⁶ For an explanation of genericide, See John Dwight Ingram, *The Genericide of Trademarks*, 2 BUFF. INTELL. PROP. L.J. 154, 154-63 (2004).

⁷ SAZERAC COMPANY, INC., <http://sazerac.com> (Last visited Apr. 18 2018).

⁸ Catherine Callahan, *Reforesting the Grain Elevator District*, in RECONSIDERING CONCRETE ATLANTIS 80, 81 (Lynda H. Schneekloth ed., 2007).

⁹ *Id.*

Our discussions, rightfully, focused on the meaningfulness of the company name to its stakeholders: the owners, the neighborhood, the city, and the craft spirits community. Legal considerations were treated as secondary. Frankly, this was a huge risk on our part. Our investment in the name was not only emotional, but financial as well. If we were to have needed to rebrand our company, even in the earliest stages, this would have required a heavy outlay of capital for design work, printing, labeling, and the investment of effort to rebuild consumer awareness of the new name. In this highly-regulated industry this would also mean that in addition to redesigning and reprinting all of our labels, we would have needed to have them reapproved by both the Alcohol and Tobacco Tax and Trade Bureau (TTB),¹⁰ the federal regulatory agency which oversees alcoholic beverage production and the New York State Liquor Authority (NYSLA).¹¹

While building the identity of the company was a group effort amongst the four owners, with input from friends and family, I was also given personal areas of responsibility within the company. The first major project which fell under my individual purview was to obtain the requisite licenses from both the NYSLA and from the TTB. Spirits distillation is one of a handful of industries that is heavily regulated by both state and federal governments.

Thankfully, I took Constitutional Law during my first semester of law school. While I never thought that Constitutional Law would be particularly useful for a distillery owner to know, a robust understanding of federalism helped direct my labor in the licensing process. Initially, when applying for our federal basic permit, I exerted energy in describing our efforts to prevent fires (high proof alcohol is very flammable), to prevent rodents from infesting our facility and neighborhood, and to control that no alcohol would be served to minors. I soon realized that the government of the United States, having no general police power, is not particularly interested in any of these matters. The federal government does, however, have a broad

¹⁰ ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, www.ttb.gov (last visited Mar. 8, 2018).

¹¹ NEW YORK STATE LIQUOR AUTHORITY, www.sla.ny.gov (last visited Mar. 8, 2018).

power to tax, and most of the federal licensing process revolves around the federal government's ability to effectively assess and impose excise tax.¹² New York, however, does exercise a general police power, and is interested in regulating for health, safety, and welfare—while robustly exercising their concurrent taxing power.

The course I really wish I had taken before starting this project was Administrative Law. Perhaps my view of the law was biased toward statutes because of my legislative experience, but at the time, I did not know the difference between the Federal Register and the Code of Federal Regulations.¹³ I did not understand the rulemaking process or the role of the agencies in promulgating, enforcing, and interpreting said rules. I relied, as so many entrepreneurs do, on instinct, second or third-hand interpretations, and, what I like to call “the law firm of Google, Yahoo & Bing.” That is to say, that in lieu of professional advice, I looked it up online. There are multiple dangers in this strategy. The first is relying on incorrect, incomplete, or outdated information. But, perhaps more importantly, it is the Rumsfeldian quagmire of “unknown unknowns.” I am proud to say that I was able to obtain our TTB basic permit in about six weeks. What I did not know at the time was that financing roadblocks would stall the project for almost a year after our permits were in place.

Attorneys who work with startups or who own startups of their own will find familiarity in this story. Almost none of the potential problems we identified in the business plan stage caused delays; rather, there were a number of delays we thought unlikely, or to which we gave no thought whatsoever. For example, we had initially anticipated no problems with our financing, but feared that red-tape might delay

¹² U.S. CONST., art. I, § 8, cl. 1.

¹³ The *Federal Register* is the official daily publication for Federal government rules, proposed rules, and notices, as well as executive orders and other Presidential documents. The *Federal Register* announces ongoing activities of the agencies and notifies you when you can comment on a proposed regulation. Once a rule is issued in the form of a final regulation, the regulation is then codified when it is incorporated into the *Code of Federal Regulations*. This is where you can look up any current federal rule or regulation by number. Frequently Asked Questions, NATIONAL ARCHIVES, <https://www.archives.gov/about/regulations/faqs.html> (last visited Mar. 8, 2018).

our permits by as much as eighteen months, based on anecdotal evidence from other distillers and from our trade association. To make matters worse, I was applying for our federal basic permit during the time that the Republican Congress had forced sequestration and government shutdowns, which furloughed the employees charged with reviewing and approving permit applications. While we planned for our permits to be delayed, we were confident in our funding. Instead, our permits were approved with haste, while our funding wallowed, preventing us from ordering equipment and materials.

III. INTELLECTUAL PROPERTY AND WHAT I LEARNED

A startup invests an enormous amount of itself into its intellectual property. While the capital investment that a small business puts into the development and promotion of its trademarks is easily dwarfed by the capital investment of a Nike, Anheuser-Busch, or Bacardi, the intellectual property that form the brand and identity of a startup are often very personal and, therefore, exceedingly valuable to the owners of the business. Instead of focus groups of strangers clustered around long tables in nondescript rooms in shopping centers, the startup's branding process consists often of family members and friends gathered around the dining room table.

While the market value of our marks are arguably small, they are of great personal significance. For Lakeward Spirits, our name is intensely personal; the identity of the company is imbued with the personalities of its four owners, and the company looms large in our own personal identities as well. Any intellectual property attorney working with a small business should be aware of this connection between owners and their intellectual property. I think of the situation as being similar to a wills, trusts, and estates attorney involved in settling an estate where a bauble of modest cost, but intense emotional significance, is fought over more intensely than real property or financial instruments worth its market value many times over. As counselors, we should apprise ourselves of these hidden values when working with clients.

I have also found the community of brewers, vintners, and

distillers to be one of the most welcoming group of people I have ever been privileged to join. Instead of treating one another as competitors and throwing sharp elbows, we support one another. Instead of fighting for one another for pieces of a pie, we see ourselves as baking a bigger pie. I am in debt to several fellow brewers and distillers for advice of all types: from hints on how to rush NYSLA approval, to tricks for keeping yeast happy and productive. Because of this sense of comradery, many craft beverage producers are less active in ensuring the exclusive use of their marks than might be prudent. Few in the community are eager to ask another craft producer to abandon use which may be infringing. Even fewer are comfortable dispatching a cease and desist letter.

Part of this reluctance is due to the nature of the market. It was only a few years ago that almost all of the beer and spirits consumed in the United States were produced by a handful of very large companies.¹⁴ Whereas it was difficult to find an IPA twenty years ago, today the shelves overflow with them, and many can only be found within a short drive of their brewery.¹⁵ It is only natural that producers will have similar ideas for names and for artwork.

I caution my fellow attorneys and fellow craft beverage producers to not be complacent because of two changes in the market. The first is the growth of small firms. Firms which may have been content to risk some consumer confusion when brewing out of a garage, are less likely to do so when they have multi-million dollar rigs and investors to answer to. In 2015, Lagunitas filed a trademark infringement lawsuit against Sierra Nevada Brewing regarding the similarity in the fonts used on the latter's IPA label.¹⁶ A day later, owing to consumer outrage

¹⁴ As recently as 2012, Anheuser-Busch InBev and MillerCoors owned almost 90% of beer production in the U.S. Barry C. Lynn, *Big Beer, A Moral Market, and Innovation*, HARV. BUS. REV. (Dec. 26, 2012).

¹⁵ RESURGENCE BREWING, <http://www.resurgencebrewing.com/> (last visited Mar. 8, 2018). PEARL STREET GRILL & BREWERY, <https://pearlstreetgrill.com/> (last visited Mar. 8, 2018). HYDRAULIC HEARTH, <https://hydraulichearth.com/> (last visited Mar. 8, 2018).

¹⁶ Jonathan Kaufmann and Steve Rubenstein, *Beer lovers Torpedo Lagunitas Lawsuit against Sierra Nevada*, SF GATE (Jan. 14, 2015, 9:39 PM), <https://www.sfgate.com/news/article/Beer-lovers-torpedo-Lagunitas-IPA-lawsuit-6015913.php>

vented via social media, Lagunitas dropped the suit.¹⁷ In addition to small firms changing as they become larger, small brewers are being purchased by the big brewing companies at a furious rate. This trend is only beginning to take hold in the distilling world with the recent purchase of Westland Distillery by Remy Cointreau and High West Distillery's sale to Constellation Brands.¹⁸ Because these large corporate brewers and distillers have aggressively enforced their intellectual property rights in the past, it stands to reason that they will aggressively enforce their rights in the intellectual property which they acquire with these and future purchases. I take this to signify the need for caution on the part of small distillers who may rest easy with a collegial relationship that may change overnight with an acquisition.

I can honestly say that my legal education benefited greatly from the insight that I acquired as I launched Lakeward Spirits. I likewise can say that my work with Lakeward is better because of my legal education. Lawyers with an understanding of small businesses, who can speak to entrepreneurs in an entrepreneurial language, are invaluable. I will close by inviting all the readers of this journal to visit for a taste and a tour; we can talk shop as much or as little as you like.

¹⁷ *Id.*

¹⁸ Susannah Skiver Barton, *Westland Distillery Sold to Rémy Cointreau*, WHISKEY ADVOCATE (Dec. 1, 2016), <http://whiskyadvocate.com/2016/12/01/westland-distillery-sold/>. Bubba Brown, *High West Distillery Sold for \$160 Million*, PARK RECORD (Oct. 5, 2016), <https://www.parkrecord.com/news/business/high-west-distillery-sold-for-160-million/>.