Hoyt McElroy

My name is Chip McElroy. I am the founder and majority owner of Live Oak Brewing Co. in Austin, TX.

At the risk of making Texas brewers sound fickle, I am asking that you recommend eliminating the distinction between beer and ale, which Texas brewers asked to be made distinct just 80 some-odd years ago.

Many people think that we got this beer/ale distinction in order to satisfy some imagined compromise between wet's and dry's or to appease religious concerns or to warn would-be beer drinkers that the liquid contained within may be stronger than they think or just to complicate a simple situation with misapplied bureaucratic-think. But that is not the case as we can see from examining the historical record contained within our own Texas State Archives just to the east of us.

Within the archives are three or four boxes of the Texas Brewers' Institute which contain a wealth of fantastic information about beer in Texas both before and after the period of national alcohol prohibition. The Texas Brewers' Institute was a trade association formed with the ten Texas breweries in 1935.

During prohibition people homebrewed using malt extracts and the like. They were not professional brewers and could not use the cold temperature requiring lager yeast – the yeast that professional brewers in Texas used to make BEER. Instead they used ALE yeast which would work at higher temperatures and would ferment to a higher alcohol concentration. And they tried to make as strong an alcoholic beverage as they could.

Did you ever wonder why our higher strength beers are referred to as "malt liquor"? It's a funny name if you think about it. Thirsty Texas drinkers may not have had any real "liquor" but Bubba may have made up a batch of that strong "malt liquor" which was as close as they were going to get even though it was about 3 to 5-fold less strong than proper liquor.

So, drinkers throughout the nation got used to drinking homebrewed ALE and MALT LIQUOR of higher alcoholic strength than professionally brewed beer. (See TBI's third press release)

Upon Repeal, professional brewers went right back to making the same old beer they always had – namely, lager beer brewed to be just under 5% ABV (or 4% alcohol by weight). Some beer drinkers clamored for beer brewed to the strength that they had gotten used to during the homebrew days of prohibition. The professional brewers heard them and complied with their wishes...sort of. Instead of brewing something different than their normal 5% abv lager beers, they just put false and misleading labels on their bottles to trick the consumer into thinking they were getting a strong beer, when actually, they were not. (See "Trick" Labels ca. 1935)

The Texas Brewers' Institute was formed in 1935 and the first thing they did was to propose a Code of Ethics. And the second thing they did was to come out against the "trick" beer labels. (see Record of TBI Activities). Evidently the Texas brewers all complied but there were still imports from "certain out-of-state brewers" (Louisiana) that refused to stop using the misleading labels. (see TBI's Third Press Release).

So they lobbied to have a law made which required alcoholic strength to be determined and certified to correspond with the label(s) on the bottle. The line was drawn at 5% abv and if you claimed it to be higher alcohol, then it had to actually be higher than 5% and you had to use the words "ale" or

"malt liquor" on the label. If it was lower, you had to use the word beer. I presume, but don't know, that they made the tax higher on ale to further discourage misleading imports.

If you have lingering doubts that this lobbying effort ended up in our alcoholic beverage regulations and for the precise reasons that I have stated, look at the wording in TBI's Fourth Press Release – "pre-war strength" and "full old-time alcoholic strength", etc. – and compare it to our TABC Rules, December 2009. Wording so unique could hardly be coincidental.

The law was made, not to protect the consumer from unwittingly drinking something too strong – as is often assumed - but from being duped into drinking something weaker than he presumed. Today we have labeling requirements to state the alcoholic strength on the label.

Today's consumer is a much savvier consumer. They can tell you the difference between a Double IPA and an Imperial IPA or between a Czech and a German Pilsner. Though the reason for the beer ale distinction may have been rational at the time it was made, it is no longer necessary. And as the Jester King lawsuit showed, along with being contrary to the First Amendment right to free speech, the labeling requirements were downright misleading in the context of contemporary consumer sophistication. It disallowed an English Mild Ale, with low alcohol strength, from being labeled an ale. And it required a Bavarian Oktoberfest beer, the quintessential German lager, to be called an ale. Thank goodness those days are behind us.

Let's finish the job. The lingering effects of this antiquated beer/ale distinction are still a burden on all layers of the alcoholic beverage system. Most burdened is the TABC which has to manage two types of manufacturer licenses, two types of manufacturer self-distribution licenses, two types of wholesaler licenses, two types of warehouse licenses, multiple permutations of retailer licenses and the list could go on. Wholesalers and manufacturers are also burdened with these redundant licenses that could more rationally be combined into one license.

The record keeping for tax and compliance is more than twice as difficult because one must first separate the types of fermented malt beverages and <u>then</u> fill out two forms instead of one. And to pour salt into the wound, federal tax and compliance documents are for combined beer and ale, so we have to put it all back together again for the TTB.

Marketing practices differ for beer and ale. The differing allowances and requirements are byzantine and far from intuitive. It is difficult enough for well-intentioned breweries and wholesalers to follow the various laws when essentially like-strength beverages like a 4.9% abv Pilsner and a 5.1% Hefeweizen are regulated entirely differently. To expect that the TABC can enforce those regulations effectively and consistently is not reasonable.

For the sake of our regulators, all of the stakeholders and the consumers, we ask that you recommend that the beer/ale distinction be totally removed.

Thank you.