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The Internet of Things

Also:

- Cybersecurity and IP
- Native Advertising and Consumer Protection
- Privacy Risks around Wearable
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- Expanding the First Sale Doctrine to Digital Goods



n addition to coming up with a creative name that represents your brewery and beer, picking a beer brand that is both available for ownership as a trademark and permissible for use as a beer brand is not easy. This article will discuss a few of the particularities regarding federal trademark registration for the beer industry and will familiarize the reader with additional industry-specific issues that may not be readily apparent to or known by the typical trademark practitioner.

Craft Beer Is Crowded

We are in the golden age of American craft beer . . . and trademark disputes. The 3,464 breweries operating in the United States in 2014 was the highest number in over 140 years. This does not take into account the more than 1,700 breweries that are currently in planning in the United States. Craft beer production has steadily increased in the United States over the last 30 years, having doubled in the last five years alone, with production totals expected to eclipse 25 million barrels of beer in 2015 (see fig. 1, page 40). Craft beer is clearly big business, as demonstrated by the number of breweries and millions of barrels produced.

Even the most devout craft beer fan may not be aware of the volume of trademark disputes in craft beer today. The number of disputes is likely to increase with thousands of existing and planned breweries (not to mention other beverage producers) fighting for an increasingly small pool of quality names. While many of these "disputes" are quickly handled over a beer, opposition and cancellation proceedings and federal trademark lawsuits are becoming more common.

Below are six important lessons in branding for the craft beer industry, including the interactions between its competitors (or collaborators), the personalities of its customers, and the countless legal restrictions and requirements at the state and federal levels. Each of these elements is important to branding because each of these constraints on creativity can be costly if they are not taken into consideration.

File Fast or Lose It

Now, while we suggest brewers consider their risks prior to putting a name on a label, seeking label approval, and filing a trademark application, the alternative concern is that a competitor could file an application first. So, they must act quickly. As mentioned above, the pool of quality beer names is shrinking fast, particularly when the United States Patent and Trademark Office (USPTO) often considers similar

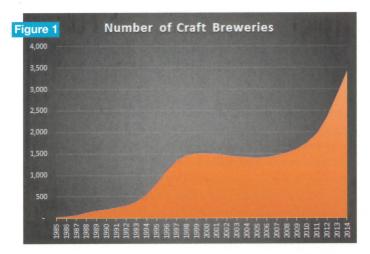
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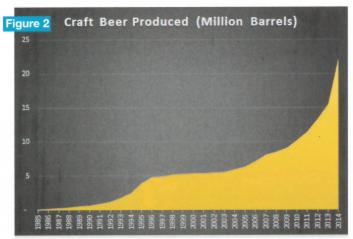
marks in wine, distilled spirits, water, energy drinks, bars, and restaurants—and other famous marks. Based on current trends, it appears that well over 5,000 trademark applications will be filed at the USPTO in 2015 in connection with beer (see fig. 2, page 40).

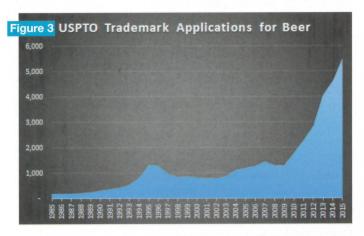
Recently, a craft brewer from Kansas City, Missouri, reminded craft brewers why it is so important to file an application before your competitor does—even if only by one day. On February 5, 2015, Martin City Brewing Company (MCBC) filed a trademark application for the mark HARD WAY IPA based on their use of the mark.³ One day later, on February 6, 2015, Anheuser-Busch (A-B) filed a trademark application for BREWED THE HARD WAY.4 The USPTO suspended A-B's application pending the resolution of the previously filed MCBC's application. The backstory behind A-B's use of the phrase "Brewed the Hard Way" provides craft brewers with a certain level of schadenfreude. On Sunday, February 1, 2015, during the Super Bowl, A-B aired a one-minute commercial telling consumers why they should drink A-B's beer instead of craft beer (e.g., "let them sip their pumpkin peach ale"), displaying the tagline "Brewed the Hard Way." Many craft beer

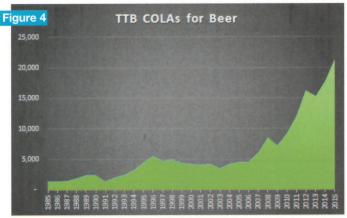
Mark	Descriptive/Generic	Brewery
NITRO	Describes a style of beer that incorporates nitro- gen, creating a smoother, creamier beer.	Left Hand Brewing Company
IPA	Describes a class of beers that have gained popu- larity with the craft beer boom: India Pale Ale.	Lagunitas Brewing Company
STEAM	Describes a style of beer and manner of making the beer, historically left outside (on the roof) in open-topped bins to allow the wort to chill, giving rise to the steam.	Anchor Brewing Company
TANGERINE WHEAT	Describes a particular flavor (tangerine) of a class of beers (wheat), and describes two ingredients of the beer that provide particular flavor and characteristics.	Lost Coast Brewery
SESSION	Describes a style of beer that is lower in alcohol content, so someone can enjoy more than one over a period of time (a "session").	Full Sail Brewing Company

Table 1. Trademarks That Have Been Challenged (Sometimes on Social Media)









fans raised their glass to cheer a craft brewer who was able to beat one of the goliaths in the race to the USPTO.

Short-Term Savings May Increase Costs over Time

It is safe to say that many brewers are do-it-yourselfers who prefer mastering the art of home brewing. Many of these do-it-yourselfers would not consider it necessary to hire a trademark attorney to file a trademark application. Assuming pro se filings are at least as high for beer trademarks as they are for other goods and services (about 30 percent⁶), it is conservative to estimate that there will be at least 1,500 pro se trademark filings in connection with beer in 2015. Given the increased number of trademark applications for beer, as well as wine and distilled spirits, hundreds of unrepresented applicants will undoubtedly encounter refusals to register due to a likelihood of confusion with prior applications and registrations, mere descriptiveness, false connection with a person or organization, immoral or obscene subject matter, and/or one of several other grounds of refusal at the disposal of trademark examining attorneys.

Many breweries will need skilled and experienced trademark attorneys to argue with the USPTO, and many more will need help fighting with other breweries and companies at the Trademark Trial and Appeal Board (TTAB) and in federal court. While some brewers are amazing at branding and are innovative marketers, most breweries would prefer to spend their time making great beer, not searching for trademarks or fighting over names. As U.S. Magistrate Judge Iain Johnston said in the Rockford Brewing Co. v. Rockford Brewing Co. case involving breweries from Michigan and Illinois, "If there was ever a case in which the parties should sit down over a beer and resolve their disputes, without question, this is that case." In our experience, this tends to be good advice for all breweries. However, having discussions with an attorney familiar with this industry from the outset could help avoid some foreseeable disputes and other legal issues.

Alternatively, breweries that cannot avoid legal conflict may incur the cost of rebranding and renaming their brewery and beers. For example, Maplewood Brewery & Distillery (Maplewood) of Chicago, Illinois, threw a themed party when it had a dispute over its previous name Mercenary, which was confusingly similar to Fort Collins, Colorado–based Odell Brewing Company's registered trademark MYRCENARY for beer. Maplewood fittingly celebrated its name change by throwing a "we-were-going-to-besued-so-we-had-to-change-our-name" party.⁸

Don't Be Overzealous in Filing Trademark Applications

Sometimes the best advice a trademark attorney can give a client is that it should not file a trademark application. Trying to lay claim to a name that is either (a) already being used by a competitor, or (b) a common beer term can, at best, make your client look bad in the public eye or, at worst, land your client on the wrong end of a trademark dispute. Craft breweries provide a local, sometimes hyperlocal, source of geographic pride for consumers. And craft beer fans can be passionate, loyal, and outspoken about their allegiances, particularly when the defendant is a small, local brewery.

Filing a trademark application may provoke a competitor to

take action against you. Innovation Brewing in Sylva, North Carolina, recently found itself involved in such a dispute after it filed a trademark application for the mark INNOVATION BREW-ING for "beer." Unfortunately for Innovation Brewing, one of the oldest and most beloved craft breweries in the United States, Bell's Brewery (Bell's) out of Kalamazoo, Michigan, owns two trademark registrations for INSPIRED BREWING, and claims common-law rights to the phrase BOTTLING INNOVATION SINCE 1985 in connection with beer. 10 Bell's might not have taken any action against Innovation Brewing, or even noticed it, if Innovation Brewing had not tried to register its name as a trademark. Now, instead of dedicating its undoubtedly limited startup funds to developing its new business, it is now entrenched in an expensive fight over its name.

Similarly, Syracuse, New York-based Empire Brewing Company's (Empire's) efforts to trademark EMPIRE STRIKES BOCK—after allegedly using the mark on beer for approximately 10 years—caused Lucasfilm to file an opposition based on its famous Star Wars brand THE EMPIRE STRIKES BACK.11 Empire's motion to dismiss was denied on March 27, 2015; it did not file an answer before the deadline, resulting in a default, and the opposition proceeding was terminated on July 8, 2015.

Another case involved Left Hand Brewing Company (Left Hand) in Longmont, Colorado, and its attempt to register a highly descriptive beer term. Left Hand filed trademark applications at the USPTO to register the brands MILK STOUT NITRO and NITRO.12 "Nitro," or "on nitro," is a common beer term referring to beers on tap at a bar "propelled by a mix of carbon dioxide and nitrogen."13 Left Hand's own website provides a similar explanation: "The addition of Nitrogen to a beer gives way to much smaller bubbles, creating a smoother, creamier experience. Beyond mouthfeel, there are variances in appearance and smell as well."14 After public pressure mounted—and A-B positioned itself to challenge these applications—Left Hand abandoned the applications, saying:

It was never meant to piss anybody off, but to protect a ton of money and time that we had spent on it We were trying to protect ourselves from having one of the big guys come out with a package like that. But we said if we are going to get all this flak for it, then we don't want to do it.15

Don't Be Overzealous in Defending Your Brands Either

On January 12, 2015, the Lagunitas Brewing Company (Lagunitas) sued Sierra Nevada Brewing Company (Sierra Nevada) over its use of the acronym "IPA." This short-lived lawsuit involved two of the largest breweries in the United States, and the two largest in the state of California.¹⁷ Lagunitas owns several registered trademarks that contain the distinctive letters "IPA," which is an acronym for one of the most popular styles of craft beer, India Pale Ale. While the asserted marks contained more than just those three letters (see fig. 3, page 40), Lagunitas alleged that consumers would see Sierra Nevada's Hop Hunter IPAincluding the large black capital letters "IPA" located in the center of the label—and would be likely to be confused as to source, sponsorship, or collaboration. Lagunitas historically does not collaborate, while Sierra Nevada is known for some of its

collaborations, such as Beer Camp Across America.¹⁸

The social media backlash was fast and furious. Many argued that no one company can have a trademark to "IPA" because it is descriptive of the style of beer. Because of the social media response, Lagunitas dismissed its lawsuit within a few days after filing the complaint. One day after filing the lawsuit, Lagunitas's founder Tony Magee stated on Twitter: "Today was in the hands of the ultimate court; The Court of Public Opinion and in it I got an answer to my Question; Our IPA's TM has limits."1

On June 25, 2015, Full Sail Brewing Company (Full Sail) of Hood River, Oregon, filed a petition for cancellation²⁰ of San Francisco-based Speakeasy Ales & Lagers Inc.'s (Speakeasy's) registered trademark for SUDS SES-SION.²¹ Full Sail owns several registered trademarks for the word SESSION and marks that contain the word SESSION, including one claiming use of the mark SESSION since at least December 1, 2004.²² On July 16, 2015, Speakeasy filed a counterclaim to cancel certain of these marks and require disclaimers as to others. This and several other cancellation actions recently filed by Full Sail are still pending.

Full Sail's previous efforts to oppose marks containing "session" resolved quickly when the applicant withdrew the application (FLAVOR IS NOW IN SESSION23 and SINGLE SPEED SESSION²⁴) or failed to respond to the opposition resulting in a default (ALPHA SESSION²⁵). Today, Drake's Brewing Company, from San Leandro, California, includes a description of the words "alpha" and "session" on the labels of its Alpha Session bottles.

A 2011 petition to cancel Full Sail's SESSION trademark, filed on behalf of Christopher Lohring, cited to the Brewers Association's Beer Style Guidelines' definition of "session" to show Notch Brewing's use of the word was legally permissible: "Consumers of ales, beers and lagers recognize the term 'session' as a generic or purely descriptive term for drinking a large quantity of beer during a specific period of time (a 'session') without becoming intoxicated."26

There are two lessons to be learned. First, if a brewery intends to use a word that is registered to a competitor, it must use the word in a descriptive manner, rather than to indicate source or sponsorship. One brewer cannot exclude others from using those words to describe their own product. For example, the USPTO makes applicants disclaim descriptive or generic words, such as "ale," "brewing," and "company." For example, if a brewery uses the word "ale" in a descriptive way to describe its ale, then no one can exclude it from using that word, even if someone has a trademark of the word "ale" used in a witty manner, such as WHAT THE ALE!27

The second lesson is that even if a brewery obtains a federally registered trademark for a descriptive or generic word, it may prove difficult to enforce that trademark. Each step of the branding and enforcement process is made more difficult if the applicant's mark is generic or descriptive. A unique, fanciful brand name (that also meets the other requirements discussed above), such as "Tröegs" by the Tröegs Brewing Company in Hershey, Pennsylvania, will be easier to obtain and enforce. According to its website, the name is a made-up word combining the family name, Trogner, with the Flemish word for pub, "Kroeg."28 The first application for the unique mark TRÖEGS

was registered just more than nine months after filing.²⁹

If the brewery has a beer name that is a witty play on words of a famous movie, song, character, band, or beverage, it might be in the brewery's best interest not to file an application for a trademark. Sometimes it is a better decision to rely on your common-law rights because an application for a trademark will draw the attention of your competitors, particularly those that have a history of enforcing and protecting their registered trademarks. Some of these companies are the larger alcoholic beverage companies, but you also have to be concerned with other famous brands that transcend classes of goods and services.

Make Sure TTB Will Approve Your Brand

In order to sell a beer in more than one state, a brewery (or importer) must first get the Alcohol and Tobacco Tax and Trade Bureau's (TTB's) approval (i.e., a certificate of label approval, or COLA) for that beer's label. As clarified by TTB's ruling in 2013, beers merely sold in a single state are not required to obtain a COLA, unless that single state requires it (which many do).³⁰ In 2014, there were 17,773 beer labels approved by TTB. Based on current trends, that number projects to increase to well over 20,000 in 2015 (see fig. 4, page 40).

In order to get approved by TTB, a label must meet several requirements in 27 C.F.R. part 7, and may not include any of the following "prohibited practices":

- false, untrue, or misleading statements (irrespective of falsity);
- 2. obscene or indecent statements;
- 3. statements that disparage a competitor's products;
- 4. misleading use of the name of a prominent, living individual or private organization;
- 5. spirits terms, including words like "strong" or "full strength" (except brand names or cocktail names);
- 6. government stamps, flags, seals, coats of arms, crests, or other insignia; and
- 7. health claims.31

While some of these prohibited practices are reminiscent of terms that are ineligible to serve as trademarks under Trademark Act § 2,³² these standards are often not as similar as they appear. For instance, what the USPTO considers immoral or obscene under § 2(a) does not necessarily coincide with what TTB considers obscene or indecent. For instance, in 2012 TTB approved a label for a beer with the name F*CK ART LET'S DANCE! (censorship added).³³ There is little doubt that the USPTO would refuse an application for that brand under § 2(a).

Unlike TTB, the USPTO *does not* prohibit the use of spirits terms on beer marks. For example, Lagunitas's could register WILCO TANGO FOXTROT as a trademark for beer³⁴ but could not obtain a COLA for beer with the word "whiskey" on the label (i.e., "Whiskey Tango Foxtrot").³⁵ This presents the likely scenario where a brewery smartly secures early rights in a brand through an intent-to-use trademark application, only to learn months or years down the road that the brand cannot be used on a beer label. Of course, there are exceptions and nuances to this rule. For example, Goose Island obtained a COLA for beer using the word "bourbon" as part of its brand name BOURBON COUNTY BRAND STOUT.³⁶ Trademark practitioners can save their

client from future heartache if they can help rule out brands that TTB will not approve early on.

Several of these prohibited practices seem common sense on their face, such as a prohibition on using false, untrue, or misleading statements on a beer label or advertisement. In application, however, the result may not be so straightforward. For instance, TTB has refused to approve a flavored malt beverage label that included a picture of a piece of fruit because the flavor included in the product was not named after that fruit.

Notably absent from the list of prohibited practices is the use of competitor's trademarks. For the most part, TTB is not concerned with trademark issues, and will certainly not take time to investigate whether a brand used on a label is owned by a competitor. The good news is that TTB does give the public access to all approved labels in its public Cola Registry.³⁷ All trademark monitoring and clearance searches for beer brands must include a search of this database.

Don't Forget about the States

Breweries need to keep in mind the rules and regulations of the states in which they plan to sell. While many state requirements are largely consistent with TTB's requirements, breweries often face unique challenges at the state level. Two typical scenarios include the use of allegedly obscene content and content that is likely to induce minors to drink alcohol.

According to the Center on Alcohol Marketing and Youth at the Johns Hopkins Bloomberg School of Public Health, as of 2012, nine states (including Alabama, Delaware, Maine, New Hampshire, North Carolina, Oregon, Utah, Vermont, and Virginia) have broad rules and regulations in place to expressly prohibit alcohol advertising that would reasonably be expected to induce minors to purchase or consume alcoholic liquor. Other states take a narrower approach, prohibiting the use of specific images or references on beer labels.

New Hampshire, for instance, currently does not allow the use of images of children on beer labels. In response to this statute, Founders Brewing Co. (Founders) in Grand Rapids, Michigan, recently obtained two different COLAs for its very popular Breakfast Stout, one with a child and one without.39 These approvals, not likely coincidentally, came just weeks after New Hampshire Governor Maggie Hassan vetoed legislation that would have struck down the prohibition on the use of images of minors on beer labels. 40 Fortunately for Founders, and for fans of the beer, the bill found adequate support in the state's Senate and House to override the veto, and the bill became law on August 23, 2015.41 Even though the outright ban on images of children on beer labels was lifted, there is still a requirement that beer labels not contain any "subject matter or illustrations that the commission determines is likely to induce minors to drink."42 Until the state's commission gives its final approval to the original label, Founders will undoubtedly keep its newly approved label design in its back pocket.

Some states have also refused to approve beer labels using imagery like elves, Santa Claus, and the like. For instance, in 2006 the New York State Liquor Authority (NYSLA) refused to approve a beer called SANTA'S BUTT WINTER PORTER, alleging that the label would be appealing to children. Shelton Brothers, the beer's importer, sued on First Amendment grounds, and NYSLA

relented just seven days after the lawsuit was filed.⁴³ Similarly, Ohio law provides: "No advertisement shall represent, portray, or make any reference to children . . . [or] to Santa Claus."44

A similar case was brought by Frederick, Maryland-based Flying Dog Brewery (Flying Dog) against the Michigan Liquor Control Commission (MLCC) and its commissioners, alleging a violation of its First Amendment rights. MLCC had refused to approve one of Flying Dog's labels, alleging "the proposed label which includes the brand name 'Raging Bitch' contains such language deemed detrimental to the health, safety, or welfare of the general public."45 Two years later, MLCC finally relented and approved the label. Nonetheless, Flying Dog continued pursuing its case for damages against the individual commissioners. In a decision with potentially far-reaching implications, the U.S. Court of Appeals for the Sixth Circuit found that the commissioners were not entitled to quasi-judicial or qualified immunity, and remanded the case for further proceedings on the issue of whether the commissioners violated Flying Dog's First Amendment rights.⁴⁶

Clearly, state liquor authorities are a force to be reckoned with in the alcohol beverage branding landscape. Nonetheless, if clients have the time and money to see it through, breweries have found recent success bringing First Amendment claims against these authorities and their commissioners.

Conclusion

Branding in the beer industry involves more than a typical trademark clearance search and application. In addition to those considerations listed above, brewers should be accurate in the descriptions used on their labels, or else they could be the next defendant in a class action lawsuit for truth in labeling, like MillerCoors, which was recently sued for advertising its Blue Moon brand of beers as craft beers. 47 Practitioners who fail to take into account these beer industry-specific considerations may end up wasting their client's time and money, get them into hot water with their passionate clientele, or land them in court.

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new innovations, new patent rights, and new competition. It will also likely lead to a new front in the ongoing smartphone patent war. The question remains—will it be a hot war with companies launching volleys of patent suits at each other or a cold competition with grudging exchanges of cross-licenses and agreements not to sue?

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