



Learning from Recent Trademark Cases

BY
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Recent cases offer lessons for brewers navigating the often-tricky obstacles surrounding the selection, use, and enforcement of trademarks. Whether a brewery is choosing a logo or naming a new beer, the latest decisions highlighted below underscore the importance of doing due diligence when it comes to trademarks.

SCANDALOUS TRADEMARKS

Erik Brunetti's ongoing legal battle to federally register his trademark FUCT for use in connection with clothing came to a close in June when the Supreme Court issued its opinion in *Iancu v. Brunetti*.¹ The United States Patent and Trademark Office (USPTO) had refused registration of Brunetti's application based on the Lanham Act's prohibition of the federal registration of "scandalous or immoral" marks. On appeal, the United States Court of Appeals for the Federal Circuit found that the provision was unconstitutional, and the Supreme Court agreed.

Only two years prior, the Supreme Court held that another provision in the Lanham Act—which prohibited the registration of trademarks that disparaged persons, institutions, or national symbols—violated the First Amendment.²

The *Brunetti* decision provides clarity for brand owners seeking to register provocative trademarks. Nonetheless, brewers should keep in mind that the *Brunetti* decision only affects the *federal registration* of scandalous or immoral trademarks and does not impact any restrictions imposed by trade associations or the ethical standards of consumers related to the use of such marks.

POP CULTURE REFERENCES

It can be tempting to incorporate a pop culture reference when selecting a brand name for a new product. Cultural phenomena often take over the internet, inspiring late-night television jokes, memes, and social media posts shared thousands of times over. Capitalizing on the popularity of these cultural sensations can seem

like good marketing. The ubiquity of certain references, however, does not necessarily mean that they are free to use as part of a product name, marketing campaign, or in any other commercial respect.

For example, in *Gordon v. Drape Creative Inc.*,³ Christopher Gordon sued a greeting card company for trademark infringement. Gordon is the narrator of the viral YouTube video titled *The Crazy Nasty** Honey Badger*, which has been viewed more than 91 million times and inspired numerous internet memes and pop culture references. Gordon owns registrations for his trademark, HONEY BADGER DON'T CARE, for use in connection with various products.⁴

In cases involving expressive works (in this case, greeting cards), courts balance the free speech protections of the First Amendment with the Lanham Act's protection of trademarks.⁵ Under this test, the First Amendment interests usually prevail (thus permitting use of the trademark) unless such use 1) has no artistic relevance to the underlying creative work; or 2) explicitly misleads consumers as to the source or content of the work. Breaking from the norm, the United States Court of Appeals for the Ninth Circuit reversed the lower court's finding that First Amendment considerations protected Drape Creative's right to use Gordon's trademarks, remanding the case to the district court for further consideration as to whether the cards added any artistic expression separate from Gordon's trademarks.

In a different case, the United States Court of Appeals for the Fifth Circuit recently held that elements of a television series can be protected as trademarks.⁶ Viacom International (Viacom) sued IJR Capital Investments (IJR), alleging that IJR's seafood restaurant named The Krusty Krab infringed Viacom's common-law trademark rights in KRUSTY KRAB. Even those who do not regularly watch *SpongeBob SquarePants* may recognize the Krusty Krab as the name of the fictional burger restaurant featured in Viacom's popular television show.⁷ The Fifth Circuit held that Viacom uses the Krusty Krab as a source-identifying trademark due to the integral role that it played in the television show (it appeared in more

than 80 percent of episodes), its appearance in two *SpongeBob SquarePants* movies and a Broadway show, and its use in connection with various licensed products. Moreover, the court held that there was a likelihood of confusion between the marks given that, among other things, the marks are practically identical, both identify restaurants, and "Viacom could naturally develop a real The Krusty Krab restaurant based on the fictional eatery."⁸

Unlike *Gordon*, in *Viacom*, the allegedly infringing use was in a purely commercial sense. The name of a restaurant—like the name of a brewery or beer—does not receive the same level of free speech protections that expressive works (e.g., books, art, etc.) typically receive. Nonetheless, both cases provide a cautionary tale about the use of third-party trademarks (whether federally registered or not) in expressive works or in connection with commercial products/services such as restaurants, breweries, beer, or related merchandise.

FALSE ADVERTISING

Anheuser-Busch Companies, LLC (Anheuser-Busch) used its pricey *Special Delivery* Super Bowl LIII ad to attack its competition, Miller Lite and Coors Light:

"Oh, brewers of Miller Lite, we received your corn syrup, by mistake."

"That's not our corn syrup. We received our shipment this morning...Try the Coors Light Castle. They also use corn syrup."

The implication of the advertisement: Bud Light does not use corn syrup in its beer; Miller Lite and Coors Light do. The *Special Delivery* advertisement was one of many from Anheuser-Busch that commented on corn syrup. The campaign prompted MillerCoors to sue Anheuser-Busch for false advertising,⁹ which, like trademark infringement, is prohibited by the Lanham Act.¹⁰

While MillerCoors does in fact use corn syrup during the fermentation process for Miller Lite and Coors Light, there is no corn syrup present in either final product. MillerCoors argued that Anheuser-Busch intended to mislead consumers into believing that corn syrup is in the beer ultimately sold to consumers and hoped to

capitalize on consumers confusing “corn syrup” with “high-fructose corn syrup.”

According to MillerCoors, all of Anheuser-Busch’s statements concerning corn syrup misleadingly implied that Miller Lite and Coors Light beer contain corn syrup and argued that, in light of Anheuser-Busch’s alleged intent, the preliminary injunction should also prohibit statements that Miller Lite and Coors Light use or were brewed with or made with corn syrup.

Ultimately, the district court partially granted MillerCoors’ motion for a preliminary injunction, prohibiting Anheuser-Busch from using the following statements in its advertisements:

- Bud Light contains “100 percent less corn syrup”;
- Bud Light in direct reference to “no corn syrup” without any reference to “brewed with,” “made with” or “uses”;
- Miller Lite and/or Coors Light and “corn syrup” without including any reference to “brewed with,” “made with” or “uses”; and
- Describing “corn syrup” as an ingredient “in” the finished product.

In its opinion, the district court explicitly asked for guidance from the U.S. Court of Appeals for the Seventh Circuit concerning the role of intent in analyzing whether a statement is false or misleading. MillerCoors has appealed in hopes of enjoining Anheuser-Busch from using all

allegedly misleading statements, including that Miller Lite and Coors Light use or are brewed with or made with corn syrup; the appeal remains pending.

Regardless of the outcome on appeal, brewers should consider all advertising and marketing messages—explicit or implied—to ensure they are truthful and not misleading. Though advertisements that directly compare or discuss competitors or their products are not prohibited, they can easily provoke lawsuits or retaliatory advertising.

REFERENCES

1. 588 U.S. ____ (2019).
2. *Matal v. Tam*, 137 S. Ct. 1744 (2017).
3. 909 F.3d 257 (9th Cir. 2018).
4. Gordon also owns a pending trademark application for HONEY BADGER DON’T GIVE A SH**, which was suspended in part due to the now-decided Brunetti case.
5. *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).
6. *Viacom Int’l v. IJR Capital Invs., LLC*, 891 F.3d 178 (5th Cir. 2018)
7. *Id.*
8. *Id.*
9. *MillerCoors, LLC v. Anheuser-Busch Companies, LLC*, No. 19-CV-218-WMC, 2019 WL 2250644 (W.D. Wis. May 24, 2019)

10. Section 43(a) of the Lanham Act: “Any person who . . . uses in commerce . . . any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.” 15 U.S.C.A. § 1125.

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