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Trademark Issues Are Bubbling Up Around Hard Seltzer

“Meteoric,” “phenomenal,” and “massive” are frequently used to describe the growth of the hard seltzer category across the U.S. alcoholic beverage industry. Sales of hard seltzers ballooned from around \$500 million in 2018 to more than \$4 billion in 2020.

Many producers who have traditionally offered beers, spirits or wines have added hard seltzers to their product offerings. For example, Boston Beer Company, Anheuser Busch, Constellation Brands, Smirnoff, Jose Cuervo and Barefoot Wine have all released hard seltzer inspired beverages.

However, as producers rush to capitalize on the burgeoning hard seltzer market they are encountering novel legal issues and, for some, finding themselves in contentious trademark disputes.

What is a trademark?

A trademark is any word, symbol, design or combination of those that identifies the source of goods or services and distinguishes them from the goods or services of another party. For example, APPLE, AMAZON and GOOGLE are well-known trademarks.¹ It is important to note that trademarks are always connected to the specific goods or services which are sold to customers in association with the trademark (e.g. APPLE for computers, AMAZON for providing an online marketplace, and GOOGLE for search engine services).

In the U.S., trademark rights can be created by American businesses or individuals by using the mark in

commerce (common law) and by registration upon a showing of use in commerce. For example, trademark owners can choose to register a trademark with individual states and/or with the United States Patent and Trademark Office (“PTO”).

A state registration protects a trademark in the state where it is registered while a federal registration confers a legal presumption upon the trademark owner that it owns the trademark and has the exclusive right to use the mark in all 50 states and U.S. territories in connection with the goods or services listed in the registration.

Trademark law bars registration of a mark that is so similar to a registered mark that it is likely consumers would be confused, mistaken, or deceived as to the source of the goods of the parties.

In other words, if a trademark owner attempts to register a trademark that is confusingly similar to an existing mark for the same, or related, goods and services, it will be refused registration (e.g. SALT WORKS BREWING COMPANY for beer was refused registration due to a likelihood of confusion with SALTWORKS PROPERTY for spirits). Although this “likelihood of confusion” analysis depends upon numerous factors, generally, the key considerations are the similarity of the marks (are the marks similar in appearance, sound, connotation and commercial impression) and the relatedness of the goods or services (are the goods or services similar, commercially related or complimentary, or are they sold through the same trade channels).

For administrative purposes, the PTO organizes trademark registrations

into 45 different international classes, or categories, of goods and services.

Alcoholic beverages are organized into two classes: class 32 covers “light beverages” including beer and class 33 covers “alcoholic beverages except beer,” including wines, spirits and hard seltzer. Although certain goods and services may fall into the same class, it does not necessarily mean that they are related. For example, although soft drinks and beer are both Class 32 goods, they are not presumptively related.

Conversely, just because goods or services are categorized in different classes, does not mean that they are unrelated. For example, although there is no per se rule that all alcoholic beverages are related, the PTO has frequently found wine and/or spirits (class 33 goods) to be related to beer (class 32 goods) for purposes of the likelihood of confusion analysis.

However, there is also case law that has found that beer and wine are distinct products which serve different purposes such that consumers are not likely to be confused between similar marks on such goods. Moreover, from a practical perspective, wineries and breweries oftentimes co-exist in the marketplace using similar marks and do not feel compelled to litigate over trademarks given the differences between their products, but hard seltzer might change that.

What is hard seltzer?

Although reasonable minds can differ about how to define hard seltzers, in their simplest form they contain carbonated water and alcohol. Some are made by combining distilled spirits or wine with a carbonated base. Others are brewed, like beer, from a malted barley base, a sugar base, or

¹ In running text, trademarks are often distinguished by using all capital letters.

other legally recognized substitute for malt (like rice, grain of any kind, bran, glucose or molasses). Given the various methods for producing hard seltzer, it is something of an enigma among alcoholic beverage products. Is it a distilled spirit? Is it a beer? Is it a wine? Is it in a category of its own? These, and related legal questions, are presenting unique challenges for trademark owners.

For example, in 2013, Cerveceria Modelo de Mexico licensed certain U.S. rights in its popular Corona brand to Constellation Brands. The license allows Constellation to use the CORONA trademark in the U.S. for “beer, ale, porter, stout, malt beverages, and any other versions . . . of the foregoing.” Notably, when the parties entered into the license agreement, there were no products called “hard seltzers” being sold in the market.

The parties peacefully coexisted until February 2020 when Constellation launched CORONA hard seltzer. Shortly thereafter, Modelo notified Constellation that it was infringing Modelo’s CORONA trademarks and in breach of the license because

Constellation’s CORONA hard seltzer is not a “beer” or a version of beer. Constellation, however, continued to market and sell its CORONA hard seltzer.

In February 2021, Modelo filed a lawsuit against Constellation for trademark infringement and breach of contract. According to Modelo, it never agreed that Constellation could use the CORONA mark for hard seltzer because Constellation’s hard seltzer is brewed from a sugar base (rather than a malted barley base).

In May 2021, Constellation filed a motion to dismiss the complaint claiming that the license agreement does not exclude sugar-based hard seltzers from its definition of “beer.” Constellation argued that its hard seltzer is an innovative product that is a fermented beverage brewed from a legally recognized substitute for malt (i.e., sugar). Given that the license defined “beer” as “malt beverages” and all other “versions” of such, Constellation argued that its hard seltzer fell within the definition of “beer.”

Modelo opposed Constellation’s

motion arguing that under the terms of the license agreement, and the plain meaning of the word, CORONA hard seltzer is not a “beer.” Modelo pointed out that it is well known that beer is a beverage brewed with malted barley (or some other grain) and flavored with hops.

In June 2021, the court denied Constellation’s motion to dismiss, acknowledging that Modelo’s claims were plausible, and allowed the lawsuit to proceed. If the case results in a judgment, will it provide a definitive definition for hard seltzer? Perhaps.

One thing, however, is clear. Hard seltzer is blurring the lines between traditional alcohol beverage products and alcohol beverage producers can no longer rely upon perceived marketplace differences to differentiate their goods when adopting new marks for alcoholic beverages. The continued expansion of brewers, wineries and distillers into the hard seltzer category will very likely result in increased trademark litigation and make things that much more difficult when adopting a new mark in the alcohol beverage sector.

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