



AT THE BAR WITH BOWDITCH

A Legal Blog for the Craft Brewing Community

Say What Now? Scandalous Beer Trademarks Are Protected By The 1st Amendment

BY AIVI NGUYEN • JANUARY 15, 2016

There are some (while hilarious) probably offensive beer names and labels out there that are just cleverly hidden: Sweetwater's Happy Ending Imperial Stout; Stark's Mt. U Golden Cream Ale; Clown Shoes' Tramp Stamp; Rogue's Yellow Snow – you catch my drift. Edgy brewers have relied on double entendres out of necessity. Why? Because historically, if they named their beer something outright offensive they would not get trademark protection from the U.S. Patent and Trademark Office or the Tax and Trade Bureau because the law bars registration of any mark that is offensive or disparaging.

Well, the game may have just changed.

Last summer, the Federal Circuit court heard the appeal of Simon Shiao Tam, the lead singer of the Asian-American rock band called The Slants. The question before the court was whether the USPTO violated The Slants' First Amendment Right to free speech by barring them from trademarking their band name because it was deemed offensive to Asians. See my article covering the issue [HERE](#). Some brewers were paying close attention to this case because a decision in Tam's favor may open the floodgates for them to finally register their offensive trademarks. Put your waders on, my friends.

On December 22, 2015, the Federal Court issued its decision, holding that the requirement that trademarks not be disparaging or offensive is unconstitutional. The court found that "the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." Translation, the government cannot bar someone's right to free speech simply because the government thinks that speech is offensive.

While this is a huge triumph for craft brewers, they are not totally in the clear yet. Trademarks still need to be approved by the TTB, which also has a ban on labels that are "obscene or indecent." However, if the Federal Circuit's ruling stands and is not overturned by the Supreme Court, it is likely that the TTB's big brother position will be changed to

mirror that of the USPTO.