



## AT THE BAR WITH BOWDITCH

A Legal Blog for the Craft Brewing Community

### Trick or Treat? “Zombie” Trademarks Can Be Frightening

BY ROBERT G. YOUNG • OCTOBER 31, 2017

Coming up with unique beer names can be a frightening prospect. With so many brewers cranking out so many outstanding beers, it can sometimes seem like all of the best names are already taken. Brewers can let out shrieks of horror when a quick search of the USPTO’s trademark database reveals that the hours of brainstorming for the perfect name for a new IPA were all for naught, as the name was actually trademarked by someone else years ago.

But what about when a brewer announces that it is discontinuing a trademarked beer? Does that release the name for someone else to use?

The answer, unfortunately, is not quite. Generally speaking, a trademark can live forever so long as it is being used in commerce. If an owner stops using a trademark in commerce, it runs the risk of “abandoning” the mark; after three consecutive years of non-use, a presumption of abandonment arises. But that doesn’t automatically mean that anyone else can swoop in and register the trademark in their own name. An abandoned trademark can take on “zombie” status: not alive, but not quite dead either. An owner—or, as the case may be, a new owner—may seek to revive a previously-abandoned trademark, often to capitalize on the nostalgia created by the old mark. Or, an owner may seek to block others from using a seemingly-abandoned trademark by arguing that it does, in fact, plan on using the mark again in the future. These cases can get tricky fast.

The primary takeaway, though, is relatively straightforward: don’t assume that just because someone stops selling a particular beer that the name of that beer is once again up for grabs. You might end up getting a rock thrown into your trick-or-treat bag!