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**TRADEMARK PROTECTION IN THE CRAFT BREWING
INDUSTRY: A BEER BY ANY OTHER NAME MAY BE AN
INFRINGEMENT**

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I. INTRODUCTION

Imagine you have a typical nine-to-five job. You work hard and enjoy what you do, but you live for the evenings and weekends when you can engage in your favorite hobby: home brewing. You have had a passion for beer for years, and you love crafting your own brews. You spend your free time planning your next batch, carefully selecting what ingredients to use and deciding whether to try something new or stick with an old favorite. You spend hours in your garage making sure to get the recipe just right, working carefully through each stage of the process until the last drop of your creation is bottled. Your friends and family greatly appreciate your hobby, and many people have suggested that you could sell your beer. After toying with the idea of making your beer available to consumers, you decide to go all in and try to make it as a craft brewer.

After picking a name and logo, you begin selling your beer to the public. Due to your amazing knack for pairing ingredients, your initial beers are a huge success, and you decide to expand your operation. In the midst of your growth, you receive a call from a fellow brewer who claims you are using a name for your beer that he has been using for many years. As a show of goodwill, you apologize and agree to change the beer's name. After all, the other brewer was really nice about it, and you are new to the industry and do not want to step on anyone's toes. As time goes on and you add more and more beers to your portfolio, however, you start to get more calls from other brewers. Before you know it, you are receiving cease-and-desist letters insisting that you change the name of one of your beers, or even the name of the brewery itself. You are stunned that your fellow brewers, who you thought were laid back and collegial, are resorting to legal means to keep you from using certain names.

Unfortunately, one brewer has become particularly bothersome and is making what you believe are unreasonable demands, including threats of a lawsuit. Having just started your own business, you do not have the excess funds necessary to hire an attorney and take the dispute to court. Instead, you can either work with the other brewer, likely being forced to give in to his demands, or you can appeal to your close knit community of supporters via word of mouth and social media in an attempt to get the other brewer to back down. You may even hope that if you publicly shame the other brewer enough, he might drop the dispute. If you decide to engage in a social media campaign to publicly disparage the other brewer and ruin his reputation, he may return the favor and begin doing the same or he may follow through on his threat and file a complaint. Either way, you are likely to end up in a long, bitter conflict with no immediate

end in sight, and even if a resolution is eventually reached, you will not soon forget your sour experience.

Such a scenario is one that almost every modern craft brewer faces. While craft brewing focuses on using unique ingredients to create one-of-a-kind beers, there exists a limited universe of creative names for breweries and their products. The limited naming options have become strained as more and more craft breweries open every day in America and more of the older, well-established craft breweries seek trademark protection for their brand names. By seeking such protection, these breweries are sending a message to the rest of the industry that they are willing to use the legal system to protect their brands.

This article will explore the inherent tension between the attitude and culture of the craft brewing industry and the acquisition and enforcement of trademarks. As the industry continues to grow, this tension has become more pronounced, as evidenced by the many disputes that have recently arisen between industry members.¹ While views on the issue differ throughout the industry, the burgeoning conflict suggests that the industry, through its trade organization, should develop and implement its own standards for trademark protection and dispute resolution.

First, this article will introduce the basics of both the craft brewing industry and trademark registration and enforcement. It will then explore how the nature of the federal trademark system has created tension within the craft brewing industry. This tension will then be illustrated by examining two recent examples of trademark disputes between industry members. Finally, this article will conclude by exploring possible solutions to this tension, including the possibility of industry self-policing through the implementation of a mandatory non-binding mediation scheme required as a condition of membership in the industry's trade organization and the education of members new to the industry.

II. BACKGROUND

A. An Introduction to Craft Brewing

As a subset of the alcohol industry, the craft beer industry is made up of a wide variety of breweries, each with its own unique focus and style. According to the Brewers Association, the craft brewing industry's trade organization, a craft brewer is one that is small,

¹ See examples *infra* Parts II.D.1–2.

independent, and traditional.² A brewery is considered small if it has an annual production of six million barrels of beer or less and independent if less than 25% of the craft brewery is owned or controlled by an alcohol industry member who is not a craft brewer themselves.³ Finally, a brewery is traditional if the majority of its products are malt based and derive their flavor from fermentation, as opposed to additives that lighten the flavor.⁴

In addition to meeting the Brewers Association's three-part definition, another key feature of craft breweries is their focus on innovation, with brewers developing new styles, using non-traditional ingredients, or using traditional styles in new ways.⁵ For example, Holy City Brewing, a Charleston, South Carolina brewery established in 2011, brews a bacon-flavored beer titled "Notorious P.I.G."⁶ Other brewers have also featured unique ingredients—including jalapeños, peanut butter cups, moon dust, and lobster—and created non-traditional flavors, like key lime pie, ham, and watermelon, just to name a few.⁷ This experimentation often results in beer too far afield from what the average beer drinker is used to, so in order to be successful, craft brewers must focus first on building a local fan base instead of mass-producing and distributing their product.⁸ It is this regional focus, with an emphasis on connecting individually with their customers and giving back to the local community, that often creates a strong, loyal fan base for craft breweries.⁹

Over the past few years, the craft brewing industry has experienced rapid growth and market expansion.¹⁰ Today a majority

² *Craft Brewer Defined*, BREWERS ASSOCIATION, <http://www.brewersassociation.org/pages/business-tools/craft-brewing-statistics/craft-brewer-defined> (last visited Sept. 27, 2014).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Chris Morris, *It's Official: Craft Brewers Are Now Beating Big Beer*, CNBC (Mar. 2, 2014, 1:00 PM), <http://www.cnbc.com/id/101435252>.

⁷ See *About Our Beers: Fire in the Ham*, JACK'S ABBY BREWING, LLC, <http://jacksabbybrewing.com/beer.php#> (last visited Sept. 27, 2014); "*Celest-jewel-ale*" *Brewed with Moon Dust, Served in Space-Suit Koozies*, DOGFISH HEAD CRAFT BREWERY, <http://www.dogfish.com/community/blogfish/members/justin-williams/celest-jewel-ale-brewed-with-moon-dust-served-in-space-suit-koozies.htm-0> (last visited Sept. 27, 2014); *Choc Lobster*, DOGFISH HEAD CRAFT BREWERY, <http://www.dogfish.com/brews-spirits/the-brews/brewpub-exclusives/choc-lobster.htm> (last visited Sept. 27, 2014); *Hell or High Watermelon*, 21ST AMENDMENT BREWERY, <http://21st-amendment.com/beers/hell-or-high-watermelon/> (last visited Sept. 27, 2014); see also Morris, *supra* note 6.

⁸ *Craft Brewer Defined*, *supra* note 2; Morris, *supra* note 6.

⁹ See *Craft Brewer Defined*, *supra* note 2.

¹⁰ See Morris, *supra* note 6.

of Americans live within ten miles of a craft brewery.¹¹ In 2013, there were a total of 2,822 breweries in the United States, 2,768 of which were craft breweries.¹² This number is a steady increase from the 2,033 craft breweries in existence in 2011 and the 2,401 breweries in operation in 2012.¹³ A comparison of the number of breweries opening versus the number closing in 2012 also illustrates the industry's growth.¹⁴ While 450 total craft breweries opened in 2012—110 brewpubs and 340 microbreweries—only 28 brewpubs and 19 microbreweries closed, for a total of 47 closures.¹⁵ Even with this recent boom in the industry, demand still exceeds supply.¹⁶ As a result, in addition to these openings, there are an estimated 1,500 craft breweries in the planning stages.¹⁷ Most interestingly, while sales rates of Anheuser-Busch and MillerCoors products—the “Big Two” breweries in the United States—have consistently fallen, craft beer sales have risen steadily since the recession in 2007.¹⁸

Anheuser-Busch and MillerCoors have taken notice of the craft brewing industry's rapid growth and have attempted to capitalize on it.¹⁹ The “Big Two” recognize the unique features of the industry and have tried to enter the market by both buying smaller breweries and producing craft-like beer which they then mass market to consumers as if it is genuine craft beer, as defined above by the Brewers Association.²⁰ For example, many consumers are unaware that Blue Moon is produced and distributed by MillerCoors, while Anheuser-

¹¹ *Craft Brewer Defined*, *supra* note 2.

¹² *Number of Breweries*. BREWERS ASSOCIATION, <http://www.brewersassociation.org/statistics/number-of-breweries/> (last visited Sept. 18, 2014).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See Tom Rotunno, *More Pour into Craft Beer Market, But It's Not a Bubble*, CNBC (Oct. 19, 2013, 3:00 PM), <http://www.cnbc.com/id/101124259>.

¹⁷ *Id.*

¹⁸ Jason Nottle, *Why 2013 Could Be Last Call for Craft Beer*, THE STREET (Dec. 31, 2013, 8:30 AM), <http://www.thestreet.com/story/12182391/1/why-2013-could-be-last-call-for-craft-beer.html>.

¹⁹ See Tom Daykin, *MillerCoors Draws Profits from Craft Beers*, JOURNAL SENTINEL (Aug. 14, 2012), <http://www.jsonline.com/business/millercoors-draws-profit-from-craft-beers-v16fsoe-166194536.html>; Brad Tuttle, *That Craft Beer You're Drinking Isn't Craft Beer. Do You Care?*, TIME (Aug. 13, 2013), <http://business.time.com/2013/08/13/that-craft-beer-youre-drinking-isnt-craft-beer-do-you-care/>.

²⁰ Daykin, *supra* note 19; Ricardo Lopez, *Anheuser-Busch Buys Craft Brewer Blue Point Brewing Co.*, LA TIMES (Feb. 5, 2014, 9:50 AM), <http://www.latimes.com/business/money/la-fi-mo-anheuser-busch-inbev-blue-point-brewing-co-20140205,0,4948012.story#axzz2uUdex8Sj>; Tuttle, *supra* note 19.

Busch markets and sells Shock Top, both of which are commonly thought to be craft beers.²¹ This encroachment by the “Big Two” into the craft beer market is a testament to the industry’s continued success.²²

Because of its history and size, the craft brewing industry has a unique culture. The industry started with home brewing in basements and garages and has a long history of and focus on producing high quality, unique products.²³ Unlike Anheuser-Busch and MillerCoors, who focus on mass production of a limited range of traditional beers, craft breweries focus on experimentation and pushing the limits of what beer can be.²⁴ Craft breweries generally do not have the resources to mass market their products, so instead they focus their energy on the local community, tailoring their distribution to local bars, restaurants, and beer festivals.²⁵ In addition to a local focus, collaboration is a key part of the industry’s culture, with brewers frequently joining forces to create and brew collaboration beers.²⁶ For example, there were more than 250 collaborations between craft brewers in 2012 alone.²⁷ Such joint efforts allow breweries to let loose and brew highly experimental concoctions while simultaneously supporting each other by providing access to markets that each brewer would normally be unable to reach.²⁸ This culture of collaboration and the cultivation of local community support are key characteristics that have combined to create a close-knit industry with a strong sense of camaraderie.²⁹

²¹ Tuttle, *supra* note 19.

²² See Daykin, *supra* note 19; Tuttle, *supra* note 19.

²³ See *History of Craft Brewing*, BREWERS ASSOCIATION, <http://www.brewersassociation.org/brewers-association/history/history-of-craft-brewing/> (last visited Sept. 18, 2014).

²⁴ See Morris, *supra* note 6.

²⁵ See *Craft Brewer Defined*, *supra* note 2; See Morris, *supra* note 6.

²⁶ *Craft Beer Collaborations Explode*, AMERICAN CRAFT BEER (July 24, 2012), <http://americancraftbeer.com/item/craft-beer-collaborations-explode.html>; Morris, *supra* note 6.

²⁷ Don Russell, *One-Off Brewer Collaborations a Trend That’s Going Global*, PHILLY.COM (July 20, 2012), http://articles.philly.com/2012-07-20/entertainment/32747941_1_red-ale-small-breweries-monk-s-caf.

²⁸ Jim Clarke, *All Together Now: Sometimes Two (or Three or Four) Brewers are Better than One*, IMBIBE, available at <http://imbibemagazine.com/Beer-Collaborations> (last visited Mar. 6, 2014); *Craft Beer Collaborations Explode*, *supra* note 26.

²⁹ See Clarke, *supra* note 28; *Craft Beer Collaborations Explode*, *supra* note 26; Morris, *supra* note 6.

B. Trademark Basics

As defined by the Lanham Act of 1946, a trademark is any word, name, symbol, device, or combination of any of the four used or intended for use in interstate commerce that distinguishes a good or service and identifies its source.³⁰ Producers use trademarks in marketing and advertising to make it easier for consumers to identify their products or services.³¹ A trademark signals to a consumer that this product or service is from a certain source and will be of consistent quality each time it is purchased.³² Because consumers recognize trademarks and expect consistency, producers have an incentive to maintain a certain level of quality in their goods or services in order to preserve and grow their customer bases.³³ Over time, trademarks can develop a great deal of value because of the positive reactions consumers have to them.³⁴ Therefore, trademark law serves to reduce consumer confusion by clearly identifying the source of goods and services and encourages competition by giving producers the exclusive right to the use of their trademarks and the good will associated with them.³⁵

Trademarks are governed by both federal statute and state common law.³⁶ Federally, trademarks are governed by the Lanham Act, which was intended to promote competition by protecting individuals' and businesses' intellectual property rights.³⁷ Federal trademark registration can be acquired in one of two ways. An applicant can either file a use-based application under 15 U.S.C. § 1051(a) or an intent-to-use application under § 1051(b).³⁸ If the application is approved, the mark is placed on the United States Patent and Trademark Office's Principal Register, and the mark holder has an exclusive right to use the mark in connection with its particular good

³⁰ Lanham Act, 15 U.S.C. § 1127 (2012).

³¹ J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 3:2 (4th ed. 2014).

³² *Id.* at § 3:10.

³³ *Id.* at § 3:5.

³⁴ *Id.* at § 2:15.

³⁵ *Id.* at § 2:1.

³⁶ See Lanham Act §§ 1051–1141; MCCARTHY, *supra* note 31, at § 22:1.

³⁷ Joseph E. Edwards, Annotation, *What Constitutes "in Commerce" within Meaning of § 32(1)(a) of Lanham Trade-Mark Act (15 U.S.C.A. § 1114(1)) Giving Right of Action for Infringement of Trademark "in Commerce,"* 15 A.L.R. FED. 368 (1973).

³⁸ Lanham Act § 1051.

or service.³⁹ After acquiring the mark, it is up to the mark holder to defend it by informing users of confusingly similar marks that they must cease their potentially infringing use of the mark.⁴⁰ If the infringer does not respond appropriately to the mark holder's requests, the mark holder may pursue legal action against the infringer.⁴¹ This federal system of self-policing allows mark holders to obtain nationwide injunctions in order to prevent the use of an infringing mark.⁴²

Marks not used in interstate commerce, and therefore ineligible for federal protection, can be protected by state registration.⁴³ Much like federal registration, most states base registration on actual use of the mark and require that the mark continue to be used in order for protection to be maintained.⁴⁴ While some states provide state registrants with trademark protection throughout the entire state, most state mark holders can only enforce their rights within a certain geographic area and cannot stop others outside of that area from using similar marks.⁴⁵ Therefore, although state trademark protection exists for goods and services not used in interstate commerce, it is not as expansive as the national protection afforded by federal trademark registration under the Lanham Act.⁴⁶

Generally, craft breweries start out small and focus on supplying their products to the local community.⁴⁷ As such, few are likely to be engaged in interstate commerce in their early stages, meaning they are ineligible for federal trademark protection.⁴⁸ However, the older and more successful a brewery becomes, the more capable it is of distributing its beer in interstate commerce.⁴⁹ Therefore, the breweries eligible for the most federal trademark protection are likely to be the ones that have the resources to distribute their products in interstate commerce and also monitor and enforce their trademark rights.

³⁹ Lanham Act § 1051; *Trademark Basics*, UNITED STATES PATENT & TRADEMARK OFFICE, <http://www.uspto.gov/trademarks/basics/> (last visited Sept. 21, 2014).

⁴⁰ *Trademark Basics*, *supra* note 39.

⁴¹ *Id.*

⁴² Lanham Act § 1116(a).

⁴³ MCCARTHY, *supra* note 31, at § 22:1.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *See id.*

⁴⁷ *See Morris*, *supra* note 6.

⁴⁸ Lanham Act § 1051(a).

⁴⁹ *See Morris*, *supra* note 6; Tuttle, *supra* note 19.

C. Tension Between Craft Brewing Industry and Federal Trademark Law

Since federal trademark law is based on mark holders using the legal system to police and enforce their own marks, there is an inherent tension within the craft brewing industry because of its unique culture of camaraderie and brotherhood.⁵⁰ While in other industries a business may be able to register a mark and then enforce it without facing any fallout from other industry members, the same is not true for craft brewers.⁵¹ What is more important in the craft brewing industry than intellectual property protection is to be perceived by customers and industry members alike as laid back, easygoing, and focused mainly on brewing great beer.⁵² Therefore, filing a lawsuit against another brewer in order to enforce trademark rights would significantly harm a brewer's reputation and likely have lasting negative effects.

What may, in another industry, be an ordinary trademark dispute involving cease and desist letters or the filing of a complaint, may appear to craft beer consumers to be a petty attempt to limit creativity by bullying another brewery into stopping its use of a certain mark. As a result, brewers must take extra care in enforcing their trademark rights, being sure to take into account the potential fallout from a marketing standpoint.⁵³ The average beer consumer is not well-informed about intellectual property law, and likely does not care whether one brewery has a registered mark and actual legal rights to use the mark.⁵⁴ With the advent of multiple social media platforms, breweries of all sizes can now reach consumers directly and attempt to portray themselves in the best possible light, often by berating the other parties' trademark enforcement actions.⁵⁵ Because of the craft brewing industry's culture, trademark disputes serve to simultaneously create animosity between industry members and undermine intellectual property rights.⁵⁶

While in many industries the federal trademark registration system furthers the purpose of the Lanham Act by promoting competition and protecting companies' branding and marketing efforts, it has the opposite effect on craft brewers. Essentially, mark holders in the craft

⁵⁰ See *Craft Beer Collaborations Explode*, *supra* note 26.

⁵¹ Telephone Interview with Shauna Barnes, General Counsel, Dogfish Head Craft Brewery (Jan. 17, 2014).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See examples *infra* Parts II.D.1-2.

brewing industry are faced with the choice between taking a significant reputational hit or forgoing enforcing the trademark rights they paid for and to which they are legally entitled.⁵⁷ This reputational hit is especially detrimental in the craft brewing industry because most breweries' success is based on building a grassroots fan base and support in the local community.⁵⁸ By using social media, the alleged infringer attempts to portray the mark holder as a bully who is focused solely on profits. As a result, many consumers see only that one brewery is trying to take away a mark from another and, therefore, often side with the infringer because of its "victim" status. Thus, the federal system discourages craft brewers from registering marks because enforcing their trademark rights invites substantial backlash from both other industry members and consumers.⁵⁹

This problem is compounded by the industry's rapid growth. With more and more brewers entering the market every day, it has become increasingly difficult for brewers to come up with novel, yet unique brands and beer names.⁶⁰ Having already experienced many conflicts between industry members, the craft brewing industry would do well to collectively adopt, through the Brewers Association, an education and dispute resolution initiative in order to reduce the tension inherent between trademark law and the industry's culture.

D. Examples

This tension between trademark law and the craft brewing industry is clearly visible in disputes arising daily throughout the country. Below are two such disputes that illustrate the trademark issues that frequently arise between craft brewers. These examples and the countless others that have and continue to occur demonstrate the need for corrective action, which should come in the form of an education initiative and mandatory non-binding mediation as a condition to Brewers Association membership.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ James McWilliams, *Microbrewers Go From Mellow to Bitter Over Branding*, FORBES (Nov. 29, 2013, 9:08 AM), <http://www.forbes.com/sites/jamesmcwilliams/2013/11/29/microbrewers-go-from-mellow-to-bitter-over-branding/>.

1. Magic Hat and West Sixth—The tale of the eight-pointed star

The first example involves a dispute between Magic Hat Brewing Company, a Vermont brewery established in 1994, and West Sixth Brewing Company, a Lexington, Kentucky brewery founded in 2012.⁶¹ Magic Hat began selling its #9 beer in 1995 and received federal registration for its #9 mark in 1996.⁶² The Magic Hat #9 logo, shown in Figure 1 of the Appendix, is red and orange and features a circle around a number 9, which has an eight-pointed star in its center.⁶³ Upon opening in 2012, West Sixth introduced its “6” logo.⁶⁴ As seen in Figure 2, the logo is green and blue and consists of the number 6 enclosed in a circle with the words “West Sixth Brewing Lexington, Kentucky” along the outside, with an eight-pointed star to the right of the six.⁶⁵ In addition to its green and blue logo, West Sixth used its 6 logo on its Amber Ale products in orange.⁶⁶ As can be seen in Figure 3, when viewed upside down, West Sixth’s logo bears a striking resemblance to the Magic Hat #9 mark.⁶⁷

After becoming aware of the similarity between the breweries’ marks and the potential for consumer confusion, Magic Hat wrote a letter to West Sixth’s owner on September 26, 2012 explaining its concerns about and rights in the #9 mark and asking West Sixth to stop using the 6 logo.⁶⁸ Magic Hat pointed out that both marks were circular, used similar numbers, and contained an eight-pointed star.⁶⁹ The letter, sent from Magic Hat’s attorney, assured West Sixth that Magic Hat was serious about protecting its rights, but that it was willing to resolve the matter without resorting to litigation.⁷⁰ In response, West Sixth sent a letter from its attorney in October 2012 stating it did not believe that the 6 logo infringed on Magic Hat’s #9 mark and that there was no likelihood of consumer confusion.⁷¹ West Sixth asserted that its logo created an entirely different impression

⁶¹ Tom Law, *West Sixth Brewing Company*, CRAFT BEER (Sept. 6, 2013), <http://www.craftbeer.com/featured-brewery/west-sixth-brewing-company>; *Visit the Artifactory*, MAGIC HAT BREWING COMPANY, <http://www.magichat.net/visit/>.

⁶² First Amended Verified Complaint at 3, 5, *Magic Hat IP v. West Sixth Brewing Co.*, No. 5:13-cv-00136-DCR (E.D. Ky. May 25, 2013).

⁶³ See *infra* Appendix, Figure 1.

⁶⁴ See Law, *supra* note 61.

⁶⁵ See *infra* Appendix, Figure 2.

⁶⁶ First Amended Verified Complaint, *supra* note 62, at 9.

⁶⁷ See *infra* Figure 3.

⁶⁸ First Amended Verified Complaint, *supra* note 62, at 12.

⁶⁹ *Id.* Exhibit E, at 1.

⁷⁰ *Id.* Exhibit E, at 2.

⁷¹ *Id.* Exhibit F, at 1.

from the Magic Hat #9 mark and that consumers could not be confused because the mark included the words “West Sixth Brewing.”⁷² Despite maintaining that its mark did not violate Magic Hat’s rights, West Sixth agreed to remove the “stylized compass design,” or eight-pointed star to the right of the number six, after expending its existing inventory of products with the original 6 logo.⁷³

The breweries then exchanged letters in which they seemingly agreed to resolve the matter.⁷⁴ Magic Hat requested and West Sixth agreed to remove its eight-pointed star (also referred to as a dingbat or compass) and use its 6 logo only in conjunction with the words “West Sixth Brewing.”⁷⁵ However, in February of 2013, West Sixth clarified that it intended to continue use of the eight-pointed star in its logo, but only when accompanied by the words “West Sixth Brewing.”⁷⁶ Shortly thereafter, Magic Hat discovered that West Sixth had released an Amber Ale using its 6 logo in orange, complete with the eight-pointed star.⁷⁷ Concluding that West Sixth was no longer interested in resolving the issue and that litigation was necessary to protect its intellectual property rights, Magic Hat filed its original complaint against West Sixth on May 16, 2013.⁷⁸

In its amended complaint filed May 25, 2013, Magic Hat alleged that West Sixth’s 6 logo was confusingly similar to Magic Hat’s #9 mark such that it had caused actual confusion among consumers.⁷⁹ Magic Hat alleged that this confusion constituted trademark infringement and had caused the Vermont brewery irreparable harm.⁸⁰ In response, West Sixth took to its website claiming it was the victim of corporate bullying and used social media in an attempt to create pressure from consumers and other industry members to induce Magic Hat to drop the suit.⁸¹ West Sixth pointed to Magic Hat’s purchase by a conglomerate prior to the dispute as evidence that the suit was corporate bullying.⁸²

⁷² *Id.* Exhibit F, at 2–3.

⁷³ *Id.* Exhibit F, at 3.

⁷⁴ *See id.* Exhibits G–I.

⁷⁵ *Id.* Exhibits G–I, at 1–2.

⁷⁶ *Id.* Exhibit J, at 1–2.

⁷⁷ *Id.* at 9.

⁷⁸ *Id.* at 15.

⁷⁹ *Id.* at 10.

⁸⁰ *Id.* at 3, 9–10, 36.

⁸¹ Erik A. Carlson, *Update: West Sixth Alters Logo as Lawsuit with Magic Hat is Settled*, BUSINESS LEXINGTON (June 6, 2013), <http://bizlex.com/2013/06/west-sixth-and-magic-hat-settle-lawsuit/>.

⁸² *Id.*

Shortly thereafter, the parties resolved the matter, and, as can be seen in Figure 4, West Sixth changed its logo by removing the eight-pointed star.⁸³ The breweries released a joint statement in June 2013 saying that they had compromised to resolve the dispute and prevent consumer confusion, and that neither would comment further on the matter.⁸⁴ In the joint statement, the parties acknowledged that both breweries had an incentive to ensure their brands and products were distinct and not subject to potential consumer confusion, and West Sixth retracted the comments it made on its website and social media in response to Magic Hat's complaint.⁸⁵

Magic Hat's dispute with West Sixth is a prime example of the rising tension in the craft brewing industry regarding trademark protection. Magic Hat took legal action to protect its federally registered mark, and West Sixth attempted to use social media to discredit Magic Hat's actions and paint itself as the victim. The tension is heightened by the fact that there are so many breweries trying to be creative and original, but the universe of names and styles of marks for beer varieties is limited. This limited universe of names and styles further encourages breweries to seek trademark protection if they can, but it also means there are more instances of trademark infringement. As showcased in this dispute, breweries must choose whether to seek such protection and face a reputational hit, or forgo trademark protection and risk that other industry members may use the same or confusingly similar marks.

The dispute between Magic Hat and West Sixth also demonstrates the tension between newer breweries and those that have established themselves in the industry. At the time of the dispute, Magic Hat had been in the craft brewing industry for nineteen years and West Sixth had been in existence for only a year. This is an instance where education about trademark rights and enforcement of those rights might have been effective in preventing the dispute. Had West Sixth understood the nature of trademark law, the protections it provides, and the steps that can be followed to reduce the likelihood of infringement, it likely would have either avoided a dispute altogether or reacted more cooperatively when Magic Hat brought the issue to West Sixth's attention.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

2. *Dogfish Head and Whip In—A very un-namaste dispute*

Much like the first example, the second dispute involved a well-established brewery and a recently opened brewery new to the industry. The conflict arose between Dogfish Head Craft Brewery, a Delaware brewery founded in 1995, and Whip In, an Austin, Texas store that opened a brewery on-site in 2013.⁸⁶ The dispute centered around the use of the word Namaste as a mark.⁸⁷ Dogfish began brewing its Namaste beer in 2009 as a fundraiser to support a fellow brewer after a broken thermostat caused excessive heat and ruined about 100,000 bottles, which was a third of his annual revenue.⁸⁸ After filing for federal trademark protection with the United States Patent and Trademark Office in July 2011, the mark was registered to Dogfish in February 2012.⁸⁹

In the summer of 2013, Whip In opened a brewery in its store and decided to name it Namaste Brewing.⁹⁰ In September of 2013, after discovering the new brewery, Dogfish emailed Whip In owner Dipak Topiwala requesting that he either change the name of his brewery, pay a licensing fee to use the Namaste mark, or restrict sales of his beer to the Whip In premises.⁹¹ Though Dogfish denies it, Whip In claims Dogfish also sent a cease and desist letter.⁹² As a result of this alleged action, Whip In took to social media, calling Dogfish cultural imperialists.⁹³ In a statement on the Delaware brewery's website, Dogfish expressed an interest in working out the problem with Whip In without having to resort to litigation, stating that the brewery had

⁸⁶ *Company*, DOGFISH HEAD CRAFT BREWERY, <http://www.dogfish.com/company/index.htm> (last visited Sept. 26, 2014); Mark Eichmann, *Delaware's Dogfish Head in Beer Battle with Texas Brewer*, NEWSWORKS (Sept. 30, 2013), <http://www.newsworks.org/index.php/homepage-feature/item/60372-delawares-dogfish-head-in-beer-battle-with-texas-brewer>.

⁸⁷ *Id.*

⁸⁸ Stephen Beaumont, *The "Brotherhood" Steps Up*, WORLD OF BEER (June 10, 2009, 10:25 AM), <http://worldofbeer.wordpress.com/2009/06/10/the-%E2%80%9Cbrotherhood%E2%80%9D-steps-up/>; Joe Stange, *Serious Blow to Drie Fonteinen*, THIRSTY PILGRIM (May 23, 2009), <http://www.thirstypilgrim.com/2009/05/serious-blow-to-drie-fonteinen.html>.

⁸⁹ NAMASTE, Registration No. 4102198, available at <http://tmsearch.uspto.gov/bin/gate.exe?f=searchss&state=4804:76gtoz.1.1> (Search Term: 4102198, select "Serial or Registration Number," then submit query).

⁹⁰ Eichmann, *supra* note 86.

⁹¹ McWilliams, *supra* note 60.

⁹² Dipak Topiwala, FACEBOOK (Sept. 24, 2013), <https://www.facebook.com/dipak.amrit/posts/10153325326640145> (addressing dispute with Dogfish).

⁹³ *Id.*

called and emailed Whip In in an attempt to resolve the problem.⁹⁴ In addition, Dogfish pointed out in its statement that the brewery had an existing trademark for Namaste, which is of no value if it is not protected, and that it had offered Whip In a variety of solutions to the problem.⁹⁵ In the end, Topiwala changed the brewery's name to Kamala Brewing, but his later comments indicate that he remains bitter about the dispute.⁹⁶

This dispute again illustrates the choices brewers face when deciding whether to seek protection for their trademark rights as a member of the growing craft brewing industry. Dogfish had taken steps to protect its marks and showed a commitment to enforcing its trademark rights, which it is able to do because of its size and success in the market. Whip In, a new brewery, took exception to such action and resorted to using social media to gain public and industry support. Even though Dogfish recognized it had rights worth protecting, the Delaware brewery did not file suit, likely because it recognized the public relations backlash that would flow from such action. As more breweries continue to grow and expand, they will be faced with the choice of seeking legal rights for their intellectual property at the risk of seeming "corporate" and suffering the wrath of consumers and other industry members who frown upon enforcement of such rights through litigation.

As exhibited by the examples above, there exists an inherent tension between the culture and expectations of the craft brewing industry and the requirements for federal trademark protection. This tension has put craft brewers in a difficult position, forcing them to choose between protecting their valuable trademarks and being subjected to industry ridicule or forgoing trademark protection and allowing their marks to be infringed, diluted, or tarnished. Because trademark protection is essential to maintaining good will with consumers and building a brand, this tension must be resolved in order for craft brewers to continue to grow and succeed in their industry.

⁹⁴ *Searching for a Friendly Solution*, DOGFISH HEAD CRAFT BREWERY (Sept. 24, 2013), <http://www.dogfish.com/community/blogfish/members/anonymous/searching-for-a-friendly-solution.htm>.

⁹⁵ *Id.*

⁹⁶ McWilliams, *supra* note 60.

III. INDUSTRY SELF-POLICING: A POSSIBLE SOLUTION

Due to the unique nature of the craft brewing industry, the best way to facilitate settlements and promote proper trademark protection among craft brewers would be to task the Brewers Association, the industry's trade organization, with responsibility for dispute resolution. The Brewers Association should adopt as a condition of membership the use of mandatory non-binding mediation for the resolution of conflicts between industry members and should also work to educate brewers entering the industry on the basics of trademark law.

As a collection of craft brewers that represent the industry members' interests, the Brewers Association understands the basic functioning of the craft brewing industry. Therefore, the Brewers Association is likely to have the most accurate information about and awareness of the industry's culture, meaning it will be best able to consider craft brewers' attitudes, address brewers' concerns, and develop appropriate policies that have a higher likelihood of success than possible legislation or standards from non-industry sources. The Brewers Association's ability to respond quickly to changes in the industry and to make policy with full knowledge of the industry culture makes it best suited to attempt to combat the current tension among craft brewers regarding trademark protection.

In addition to having an appropriate understanding of the industry, the Brewers Association can better adjust to the ebbs and flows of the industry, modifying its standards as the industry's attitude, market, or composition changes. Like many industries, the craft brewing industry's growth will slow and possibly decline at some point. The Brewers Association is best equipped to respond to such changes because it does not require a lengthy legislative process—only two thirds approval of the full Board of Directors and a 20-day notice period—to initiate changes.⁹⁷

Although some industry members may call for state or federal legislation to address the issue, having the industry's trade organization develop industry-wide education and dispute resolution procedures is more appropriate. First, the issue would be difficult to successfully resolve federally, and even if Congress agreed to address the issue, it generally takes a long time for Congress to enact or amend legislation.⁹⁸ Additionally, the idea of federal legislation might face resistance from those who do not think that the Lanham Act should be

⁹⁷ BREWERS ASSOCIATION, BYLAWS OF THE BREWERS ASSOCIATION 7 (2014).

⁹⁸ See, e.g., *How a Bill Becomes a Law*, USHISTORY.ORG, <http://www.ushistory.org/gov/6e.asp> (last visited Oct. 1, 2014).

altered for the benefit of a single industry. Congress itself would likely justify its decision not to legislate on the issue by stating that the legislature cannot cater to the craft brewing industry without doing the same for a myriad of other industries and that legislation is not absolutely necessary because the problem is not yet debilitating. Even with the lobbying of the Brewers Association and other craft brewing supporters, the industry would likely be unable to successfully encourage Congressional action.

Second, state legislation would likely cause confusion among industry members if different states adopt varying standards and requirements. As such, the Brewers Association is best equipped to deal with the intellectual property crisis facing the craft brewing industry and should implement an education initiative and a mandatory non-binding mediation program in order to promote harmony within the industry.

To try to avoid problems from the outset, the Brewers Association should educate brewers new to the industry about how trademark law works and brewers' options for obtaining trademark protection. Providing new brewers with information about the basics of trademark law would likely promote understanding and respect for other brewers' trademark rights throughout the industry. As a result of this education, brewers would likely be more aware of their actions and be careful to avoid possible trademark disputes. Such preventative measures would cut down on the number of disputes that arise, thus reducing the costs and ill will that go along with such disputes. By taking preventative measures to educate all brewers about trademark rights, the Brewers Association would likely be able to significantly decrease the stigma associated with seeking trademark protection, while also reducing the amount of discord arising from trademark disputes throughout the industry.

In order to limit the number of conflicts and decrease the fallout from disputes, the Brewers Association should implement mandatory non-binding mediation as its required dispute resolution procedure. This mandatory mediation would be a condition of membership that each brewer would agree to use to resolve potential disputes with other industry members upon joining the Brewers Association. By requiring mediation before any brewer could institute litigation, the Brewers Association would encourage brewers to work within the industry to resolve the dispute quietly. The existence of such a procedure would hopefully encourage brewers to go straight to mediation to resolve the problem, instead of using social media to cause reputational harm. Mediation would likely reduce such bullying and thus would preserve both parties' reputations in the industry. As a result, brewers would no longer have to choose between protecting marks at the expense of their

public image and preserving their image by forgoing trademark protection. By reducing the likelihood of public disparagement, this dispute resolution scheme would encourage brewers to seek trademark registration and enforce their rights in registered marks. Overall, mediation would provide brewers with the opportunity to settle disputes in a cordial manner and as quickly as possible so that both parties could return their focus to maintaining the success of their breweries.

By promoting trademark education and instituting mandatory non-binding mediation, the Brewers Association could likely significantly decrease the amount of disputes between industry members. This decrease in conflict would foster the industry's collaborative culture and allow brewers to return their main focus to brewing unique, innovative beers. Eliminating minor conflicts from the industry would not only help the industry's image, but would also cut down on costs associated with disputes, thus contributing to the industry's growth. By addressing the problem from within the industry, the Brewers Association would be able to cater to the particular needs of the craft brewing industry by using its specialized knowledge of the industry to develop an appropriate, reasonable, and effective dispute resolution mechanism and proper education to prevent disputes.

IV. CONCLUSION

Now, remember when you took your home brewing hobby and used your unrivaled talent and creativity to transform it into a successful business? As a member of the Brewers Association, you would have access to information about how trademark protection works and how to avoid infringing on other brewers' trademark rights. If for some reason you ended up in a dispute with another brewer that could not be amicably resolved through a phone call or email, you would turn to the mandatory non-binding mediation, where both parties would work with a mediator to resolve the dispute.

As seen from the examples above and countless others that spring up every week, the current state of federal trademark law continues to cause a great deal of conflict within the craft brewing industry. Due to the industry's steady and continued growth, it is unlikely that this tension between the industry and trademark law will resolve itself in the near future. As a result, the industry should police itself by allowing the Brewers Association to implement a trademark education initiative and institute mandatory non-binding mediation with which to prevent and settle trademark disputes. By creating such a system, the industry will be able to promote harmony amongst its members, which

will allow brewers to return their focus to providing craft beer lovers with high quality, innovative beers.

V. APPENDIX



Figure 1. Magic Hat's #9 trademark with the eight-pointed star in the center of the nine (registration applied for in Mar. 2013 and granted in Nov. 2013).⁹⁹



Figure 2. West Sixth's 6 mark with the eight-pointed star or compass to the right of the six as of the date Magic Hat's complaint was filed.¹⁰⁰

⁹⁹ Image of Magic Hat #9 Mark, UNITED STATES PATENT & TRADEMARK OFFICE (Mar. 22, 2013), <http://tsdr.uspto.gov/documentviewer?caseId=sn85883897&docId=DRW20130326073744#docIndex=11&page=1>.

¹⁰⁰ Chris Crowell, *West Sixth Brewing Allegedly Sued by Magic Hat Over Logo*, *continued . . .*



Figure 3. West Sixth's 6 logo viewed upside down, left, as compared to Magic Hat's 9 logo, right.¹⁰¹



Figure 4. West Sixth's updated 6 mark with eight-pointed star removed (applied for Oct. 30, 2013, with approval pending).¹⁰²

CRAFT BREWING BUSINESS (May 21, 2013), <http://www.craftbrewingbusiness.com/news/west-sixth-brewing-says-its-been-sued-by-magic-hat-over-logo/>.

¹⁰¹ Crowell, *supra* note 101; Image of Magic Hat #9 Mark, *supra* note 100.

¹⁰² Image of West Sixth Brewing 6 Mark, UNITED STATES PATENT & TRADEMARK OFFICE (Apr. 8, 2014), <http://tsdr.uspto.gov/documentviewer?caseId=sn86106128&docId=DRW20131102074129#docIndex=4&page=1>.