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Stop Letting Wine Crash the Wedding: Craft Beer Consumers Are Sophisticated Buyers

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STOP LETTING WINE CRASH THE WEDDING: CRAFT BEER CONSUMERS ARE SOPHISTICATED PURCHASERS

BY JUSTIN P. WEINBERG & O. JOSEPH BALTHAZOR JR.¹

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I. INTRODUCTION

Now is the time to drink beer in the United States—craft beer, that is. Due to craft brewing’s recent explosion, craft beer lovers looking for a locally produced porter² are closer than ever to finding their favorite beer.³ What even is a craft brewery, though? A craft brewery produces a small amount of beer, is not owned by a larger brewery, and uses traditional ingredients and brewing practices; it is “small, independent, and traditional.”⁴ Even with the craft brewing industry’s growth and popularity, craft breweries have a rival who is relentlessly preventing them from obtaining federal trademarks for their creative beer names. Most have heard of this rival. Wine.

For the sake of argument, analogize wine to someone who shows up to every family wedding, but no one really knows exactly how he is related to the rest of the family. As if he showed up uninvited years ago, but he decided over time he could continue crashing every wedding because those attending kept assuming he was “one of Uncle Ned’s kids” or something.⁵ This assumed family member, however, is a nuisance. He objects during the ceremony of every wedding, and sometimes calls off a marriage entirely.

Under current trademark law, wine is craft beer’s assumed related wedding guest. A trademark application is the wedding. Long ago wine showed up uninvited to a wedding and continues crashing every wedding. And the United States Patent and Trademark Office (USPTO)⁶ keeps assuming wine is a craft beer family member. The USPTO cannot issue a trademark for craft beer without wine first objecting during the ceremony.⁷

² For a detailed overview of porter-style beers, see GARRETT OLIVER, *THE OXFORD COMPANION TO BEER* 660–61 (2012) (“Today, the best renditions of porter are well balanced and aromatic, with predominant notes of rich chocolate as well as hints of coffee, caramel, nuts, and sometimes a faint smokiness, combined with an often dry, even slightly acidic, finish.”).

³ See Jim Vorel, *The Expanding Demographics of Craft Beer*, PASTE MAGAZINE, Oct. 4, 2014, <http://www.pastemagazine.com/articles/2014/10/the-expanding-demographics-of-craft-beer.html> (“75% of all drinkers now live within 10 miles of a craft brewery.”).

⁴ BREWERS ASSOCIATION, *CRAFT BREWER DEFINED*, <https://www.brewersassociation.org/statistics/craft-brewer-defined/> (last visited Oct. 9, 2015). The Brewers Association is the leading voice for craft brewers in the United States. See BREWERS ASSOCIATION, *PURPOSE*, <https://www.brewersassociation.org/brewers-association/purpose/> (last visited Oct. 10, 2015) (“The Brewers Association is a 501(c)(6) not-for-profit trade association. The association is an organization of brewers, for brewers and by brewers.”).

⁵ See STEVE FABER & BOB FISHER, *THE WEDDING CRASHERS* 19 (2003), http://www.dailyscript.com/scripts/wedding_crashers.pdf.

⁶ The USPTO is the federal agency responsible for registering trademarks. UNITED STATES PATENT AND TRADEMARK OFFICE, *ABOUT US*, <http://www.uspto.gov/about-us> (last visited Oct. 10, 2015).

⁷ See Roger Zimmerman, *Craft Beer Trademarks: Likelihood of Confusion*, CRAFT BREWING BUSINESS (Nov. 18, 2014), <http://www.craftbrewingbusiness.com/business-marketing/trademarks-likelihood-confusion/> (“In the U.S. Trademark Office, beer and wine can be considered related products.”).

For that reason craft breweries, which already face a highly regulated industry,⁸ face an uphill battle in trademarking their creative brands because a trademark for wine prohibits the same or similar trademark for craft beer.⁹ High Water Brewing, for example, recently failed to trademark NO BOUNDARY IPA¹⁰ due to a likelihood of confusion with a wine called NO BOUNDARIES.¹¹

That result seems odd considering a craft beer consumer buying at a liquor store or supermarket would see that a brewery—not a winery—makes No Boundary IPA because that is what appears on the label.¹² In registering a craft beer trademark, the USPTO considers thirteen *DuPont*¹³ factors, which are used in a balancing test to determine whether there is a likelihood of confusion between a craft beer mark and a registered wine mark.¹⁴ This balancing test currently favors wine.¹⁵ One *DuPont* factor—the sophisticated purchaser factor—should tip the scale in favor of craft beer, allowing concurrent registration.

This article begins with the history and rise of beer and craft beer in the United States, as well as recent trademark disputes facing craft brewers.¹⁶ It then explains the development of trademark law, and more precisely, how the USPTO analyzes applications for federal registration, and how courts decide cases of trademark infringement.¹⁷ Finally, it offers a solution for craft breweries that are denied registration because of wine.¹⁸

⁸ See David R. Scott, *Brewing Up a Century of Beer: How North Carolina Laws Stifle Competition in the Beer Industry and How They Should be Changed*, 3 WAKE FOREST J. L. & POL'Y 417, 422–26 (2013).

⁹ See Alastair Bland, *Craft Brewers Are Running Out Of Names, And Into Legal Spats*, NPR (Jan. 5, 2015), <http://www.npr.org/sections/thesalt/2015/01/05/369445171/craft-brewers-are-running-out-of-names-and-into-legal-spats> (“American trademark law lumps breweries together with wineries and distilleries, making the naming game even chancier.”).

¹⁰ *In re High Water Brewing, Inc.* (T.T.A.B 2014), <http://ttabvue.uspto.gov/ttabvue/v?pno=85886282&pty=EXA&eno=8>; see U.S. Trademark Application Serial No. 85,886,282 (filed Mar. 26, 2013). India Pale Ale is ale brewed with added hops, resulting in a strong, bitter flavor. It derives its name from a practice used during the nineteenth century in England, when breweries needed a way to make pale ale last longer during shipment to its trade partners, namely India. By adding more hops, the beer remained fresh by arrival time. Brewers soon started drinking the hoppy ale before sending it abroad, finding it audaciously delicious; now the IPA is America’s favorite craft beer. See William Bostwick, *How the India Pale Ale Got Its Name: A look to the hoppy brew’s past brings us to the revolution in craft beer today*, SMITHSONIAN, Apr. 7, 2015, <http://www.smithsonianmag.com/history/how-india-pale-ale-got-its-name-180954891/?no-ist>.

¹¹ High Water Brewing is a craft brewery now distributing in nine states and over fifteen different countries. HIGH WATER BREWING, THE CREW, <http://www.highwaterbrewing.com/the-crew/> (last visited Feb. 20, 2017).

¹² Federal law requires brewers to put the source of the beer on the label of the bottle. 27 C.F.R. § 25.142 (2016) (“Each bottle of beer shall show by label or otherwise the name or trade name of the brewer”); *Parent v. MillerCoors*, No. 3:15-cv-1204-GPC-WVG, 2015 WL 6455752, at *6 (S.D. Cal. Oct. 26, 2015).

¹³ *In re E. I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973).

¹⁴ *Id.*

¹⁵ See *infra* Part IV.

¹⁶ See *infra* Part II.

¹⁷ See *infra* Part III.

¹⁸ See *infra* Part V.

For one thing, craft beer is not purchased on impulse.¹⁹ Available statistics suggest that craft beer drinkers are similar to wine drinkers, whom courts have stated make sophisticated purchases.²⁰ There are also several practical concerns to consider, one of which is trademark depletion.²¹ Because of trademark depletion, the USPTO should not deny federal registration to a craft brewery simply because a wine bears a similar name.²² Should the USPTO invite wine to the wedding, the applicant for craft beer should kindly remind the USPTO that wine is not related to craft beer, and that the factor of the conditions under which the products are purchased, or the “sophisticated purchaser” factor, should fall heavily against finding a likelihood of confusion.

II. HISTORY AND BACKGROUND

A. History of Beer

Beer has been around the block;²³ just as it is society’s alcoholic drink of choice today,²⁴ to the ancient Egyptians, “beer was king.”²⁵ Some believe the Greeks and Romans—two civilizations that traditionally associated wine with prosperity and beer with poverty²⁶—learned much from the Egyptians about the importance of beer in society.²⁷ By the Middle Ages, brewing beer had become a way to earn a living, and also attracted local governments that sought to raise revenue.²⁸

¹⁹ See *infra* Part V.

²⁰ See *infra* Part V.

²¹ See *infra* Part V.

²² See *infra* Part V.

²³ Egyptians were brewing beer as early as 5000 BC. See IAN S. HORNSEY, A HISTORY OF BEER AND BREWING 32–33 (2003).

²⁴ See Lydia Saad, BEER IS AMERICANS’ ADULT BEVERAGE CHOICE THIS YEAR, GALLUP.COM (July 23, 2014), <http://www.gallup.com/poll/174074/beer-americans-adult-beverage-choice-year.aspx>.

²⁵ HORNSEY, *supra* note 23, at 34.

²⁶ See *id.* at 35; MAX NELSON, THE BARBARIAN’S BEVERAGE: A HISTORY OF BEER IN ANCIENT EUROPE 4 (2005).

²⁷ See HORNSEY, *supra* note 23, at 33–38.

²⁸ See RICHARD W. UNGER, BEER IN THE MIDDLE AGES AND THE RENAISSANCE 8 (2004) (mentioning governments regulated brewing and viewed it as a source of taxable income).

Beer arrived in the United States with the pilgrims.²⁹ It played a pivotal role in cultural society leading up to the birth of our country.³⁰ Brewing was so popular that in 1873 there were over 4,100 breweries operating in America.³¹ But after successful lobbying by a myriad of social groups, the United States added the 18th Amendment in 1920,³² embarking on an era colloquially known as “Prohibition,” which crippled brewery operations for thirteen years.³³

The repeal of the 18th Amendment³⁴ in 1933—ending Prohibition—left the beer industry with little hope of recovery.³⁵ As a result of innovative alternatives to selling beer, only larger breweries stood to recover.³⁶ The brewing industry nonetheless experienced growth in the first few years after Prohibition.³⁷ Because of economies of scale and unprecedented demand for beer,³⁸ large-scale breweries like Anheuser–Busch and Miller dominated the industry.³⁹ But their prominence did not result from brewing a variety of unique, flavorful beers:

Ultimately, big players such as Anheuser–Busch chose to create barriers to competitors not through making a range of truly differentiated and truly superior beers that collectively appealed to all segments of the market but, rather, through massive marketing and advertising investments intended to create perceived differentiation for otherwise similar products. Smaller brewers were forced out of the industry as advertising became the single largest cost component in the production of beer in the American market, because small brewers simply did not have the resources needed to engage in national advertising campaigns.⁴⁰

²⁹ The pilgrims brought with them beer, which had a “prominent place in daily life.” GREGG SMITH, *BEER IN AMERICA: THE EARLY YEARS—1587–1840: BEER’S ROLE IN THE SETTLING OF AMERICA AND THE BIRTH OF A NATION* 9–11 (1998).

³⁰ See *id.* at 44 (“Throughout the colonial period there were so many people tied to brewing that it is hard to identify anyone who wasn’t.”).

³¹ Tammy Lam, *Brew Free or Die? A Comparative Analysis of U.S. and E.U. Craft Beer Regulations*, 23 *CARDOZO J. INT’L & COMP. L.* 197, 202 (2014); NUMBER OF BREWERIES, BREWER’S ASSOCIATION, <https://www.brewersassociation.org/statistics/number-of-breweries/> (last visited Oct. 5, 2015); see also Hannah Jeppsen, *Let My Brewer’s Go! A Look at Home Brewing in the U.S.*, 10 *J. FOOD L. & POL’Y* 137, 140 (2014) (“The nineteenth century saw a revitalization of brewing . . .”).

³² U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

³³ See DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* (2010), for a detailed account on the causal events leading up to Prohibition.

³⁴ U.S. CONST. amend. XXI.

³⁵ See Eric K. Clemons et al., *When Online Reviews Meet Hyperdifferentiation: A Study of the Craft Beer Industry*, 23 *J. MGMT. INFO. SYS.* 149, 156 (2014) (“Prohibition came close to destroying the beer brewing industry in the United States. By the time the 21st Amendment repealed Prohibition in 1933, the number of brewers had decreased to less than three dozen.”).

³⁶ See Jeppsen, *supra* note 31, at 142 (“Large beer producers were able to survive Prohibition by selling malt products . . . and were in a better position to regain their footing after the repeal of Prohibition . . .”).

³⁷ See Lam, *supra* note 31, at 203.

³⁸ See Clemons et al., *supra* note 35, at 156 (stating that “mass production of standardized procedures” solved the demand issue in the United States, and that the technology of refrigeration allowed large-scale breweries to ship beer across the country).

³⁹ *Id.*

⁴⁰ *Id.*

By the 1980s, there were less than one hundred breweries in the United States and only a few varieties of beer from which to choose.⁴¹ In the 1990s the “big three” continued to control the industry.⁴² Even though big beer accounts for the largest market share, America’s craft brewers are still continuing a revolution.

B. Rise of the Craft Beer Industry in the United States

Fritz Maytag started the craft beer renaissance in 1965.⁴³ Maytag’s old-school style using real ingredients and traditional brewing practices-influenced the definition of craft beer used today.⁴⁴ Though Maytag revived traditional brewing practices, the brewing industry consolidated in the early 1980s leaving less than fifty total breweries.⁴⁵

But the industry did not consolidate for long. By 1997 there were 1,273 breweries in the United States, overtaking Germany for the first time in over two hundred years.⁴⁶ Craft beer is now one of America’s hottest industries.⁴⁷

⁴¹ See Glenn R. Carroll et al., *Why the Microbrewery Movement? Organizational Dynamics of Resource Partitioning in the U.S. Brewing Industry*, 106 AM. J. SOC. 715, 716 (2000); see Clemons et al., *supra* note 35, at 156.

⁴² See Clemons et al., *supra* note 35, at 156 (“Anheuser–Busch, Miller, and Coors . . . produced approximately 82 percent of the 190 million barrels of beer sold in the United States in 1997.”).

⁴³ Maytag, in 1965, bought a fifty-one percent stake in the Anchor Brewing Company. See STEVE HINDY, *THE CRAFT BEER REVOLUTION: HOW A BAND OF MICROBREWERS IS TRANSFORMING THE WORLD’S FAVORITE DRINK* 5 (2014) (“In the beginning there was Fritz Maytag. And for more than a decade, he stood alone.”).

⁴⁴ See CRAFT BREWER DEFINED, *supra* note 4. Maytag saw the importance of producing beer according to its original recipe, inspiring brewers to return to traditional practices in brewing beer. See TOM ACITELLI, *THE AUDACITY OF HOPS: THE HISTORY OF AMERICA’S CRAFT BEER REVOLUTION* 10 (2013) (explaining that before Maytag purchased the brewery in 1965, it often purchased cheaper, alternative ingredients such as corn syrup, a practice Maytag found so distasteful that he used only barley malt to brew his beer, the original ingredient from the brewery’s “nineteenth century roots”); ACITELLI, *supra* note 44, at 11 (explaining that Maytag created a “lab” to test different recipes of beer; he sought sustainable shipping practices without the use of preservatives; and more generally, he felt demand was there for people who cared about what they drank); HINDY, *supra* note 43, at 5 (“[Maytag] laid down the enduring principles of smallness, independence, and all malt beers . . .”).

⁴⁵ Carroll et al., *supra* note 41, at 716.

⁴⁶ See Carroll et al., *supra* note 41, at 716.

⁴⁷ See Brian Solomon, *America’s Hottest Startups Are Craft Breweries*, FORBES, June 22, 2015, (“Forget apps, the real startup gold rush is to open a brewery.”).

An American craft brewery today is small, independent, and traditional.⁴⁸ A craft brewery is small, if it produces six million barrels or less annually.⁴⁹ It is independent, if less than twenty-five percent of the brewery is owned by a company who itself is not a craft brewer.⁵⁰ A traditional brewery is one “that has a majority of its total beverage alcohol volume in beers whose flavor derives from traditional or innovative brewing ingredients and their fermentation.”⁵¹ The craft brewing industry injected \$55.7 billion into the country’s economy in 2014 and added over 424,000 jobs.⁵² The craft beer industry also accounted for \$22.3 billion of the \$107.6 billion beer industry in 2015.⁵³ Beer drinkers contribute to this growth by returning to and supporting local small, independent, and traditional breweries.⁵⁴

Craft beer’s explosion onto the brewing scene, however, has caused it some growing pains. Antiquated post-Prohibition laws favoring wholesalers, bars, liquor stores, and restaurants, restrict craft breweries from growing.⁵⁵ Depending on the state and the brewery’s size, under these laws craft breweries are limited from selling beer at the retail level—like growlers—and are subject to harmful laws restricting distributing contracts.⁵⁶ Other issues have also arisen for craft breweries amidst all this growth, such as seeking a federal trademark.⁵⁷

⁴⁸ See CRAFT BREWER DEFINED, *supra* note 4; Parent v. MillerCoors, No. 3:15-cv-1204 (GPC/WVG), 2015 WL 6455752, at *1 (S.D. Cal. Oct. 26, 2015).

⁴⁹ See CRAFT BREWER DEFINED, *supra* note 4.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See BREWERS ASSOCIATION, ECONOMIC IMPACT STUDY (Aug. 8, 2015), <https://www.brewersassociation.org/statistics/economic-impact-data/>.

⁵³ See BREWERS ASSOCIATION, NATIONAL BEER SALES AND PRODUCTION DATA, <https://www.brewersassociation.org/statistics/national-beer-sales-production-data/> (last visited Feb. 20, 2017).

⁵⁴ See Carroll et al., *supra* note 41, at 716 (“Nearly every one of the breweries founded in the last 20 years is associated in some way with the self-labeled ‘microbrewery’ movement, a group of brewers and consumers concerned with craftsmanship and taste in brewing beer.”).

⁵⁵ Laws enacted at the state level after Prohibition created the “three-tier system of distribution.” See Lam, *supra* note 31, at 205–06 (advising that states created a system where “producers, distributors, and retailers exist as separate entities”).

⁵⁶ See *id.* (explaining that after Prohibition, states created a system wherein “producers, distributors, and retailers exist as separate entities”).

⁵⁷ In 2014 alone, there was a 14.9% increase in the number of craft breweries. See BREWERS ASSOCIATION, NUMBER OF BREWERIES, <https://www.brewersassociation.org/statistics/number-of-breweries/> (last visited Oct. 9, 2015).

C. Trademark Disputes for Craft Brewers

With upwards of 93,000 craft beer brands in circulation, choosing a name has become increasingly difficult for craft breweries.⁵⁸ This shortage of available trademarks results in disputes between players of all sizes.⁵⁹ Craft breweries not only have to avoid infringing other beer names, but also have to avoid infringing other drink types. For example, in 2015 Red Bull demanded the Old Ox Brewery change its name.⁶⁰ Thus, the “craft brewery industry has enough of a trademark problem as it is” without adding wine into the mix.⁶¹ The result of these disputes is an increase in the cost of trademark protection.⁶²

⁵⁸ See Andy Crouch, *The Great Beer Trademark Wars*, ALL ABOUT BEER MAGAZINE (Apr. 30, 2014), <http://allaboutbeer.com/article/beer-trademarks/> (“Managing issues involving brewery and brand names are now quickly becoming a frequent concern for brewers.”).

⁵⁹ Craft beer drinkers have a particular way of encouraging compromise. Long Trail Brewing of Vermont, for example in 2014, sued Bent Paddle Brewing of Minnesota alleging Bent Paddle’s hiker logo infringed Long Trail’s hiker logo mark. The two small breweries settled after facing public scrutiny. See Clare Kennedy, *Bent Paddle, Vermont Brewer End Trademark Dispute*, MINNEAPOLIS/ST. PAUL BUSINESS JOURNAL (Dec. 11, 2014), <http://www.bizjournals.com/twincities/news/2014/12/11/bent-paddle-vermont-brewer-end-trademark-dispute.html>. Lagunitas in 2015 sued Sierra Nevada alleging Sierra Nevada’s new IPA logo infringed Lagunitas’ IPA logo, however, Lagunitas dropped the lawsuit a few days later. Craft beer drinkers started protesting one large craft brewery attempting to enforce its trademark on another large craft brewery—especially over a term the industry should share. See Josh Noel, *Lagunitas Drops Lawsuit Against Sierra Nevada After Twitter Backlash*, CHICAGO TRIBUNE (Jan. 14, 2015), <http://www.chicagotribune.com/dining/recipes/ct-lagunitas-sierra-nevada-backlash-20150114-story.html>.

⁶⁰ Red Bull alleged consumers would likely be confused as to the source of Old Ox craft beer and Red Bull energy drinks because of Old Ox’s logo. See Firtz Hahn, *Red Bull Wants to Rename an Ashburn Brewery, Because an Ox Looks Like a Bull*, WASHINGTON POST (Feb. 9, 2015), <http://www.washingtonpost.com/news/going-out-guide/wp/2015/02/09/red-bull-wants-to-rename-an-ashburn-brewery-because-an-ox-looks-like-a-bull/>.

⁶¹ Timothy Geigner, *Trademark Dispute Between Brewery And Winery Over Northstar Brand*, TECHDIRT (May 6, 2015), <https://www.techdirt.com/articles/20150504/05340830882/trademark-dispute-between-brewery-winery-over-northstar-brand.shtml>.

⁶² Founder of Dogfish Head Brewery, Sam Calagione, stated that he spent more on trademark protection in 2013 than what he spent to open the brewery. See Keith Gibbons, *The Latest News in Craft Beer Lawsuits, Trademarks, and Name Changes*, CRAFT BREWING BUSINESS (Apr. 25, 2014), <http://www.craftbrewingbusiness.com/business-marketing/latest-news-craft-beer-lawsuits-trademarks-name-changes/>.

The disputes at issue here are those resulting from similarly branded beer and wine.⁶³ On June 20, 2012, for example, The Bruery⁶⁴ filed an application with the USPTO to federally register a craft beer called 5 GOLDEN RINGS.⁶⁵ The USPTO denied this trademark name because of a registered wine mark called GOLD RING.⁶⁶ Now this issue is extending from the filing process to infringement lawsuits, as wineries are suing craft breweries to enforce registered trademarks.⁶⁷ With a little over four thousand breweries currently operating in the United States,⁶⁸ and because there are over twice as many wineries as there are breweries,⁶⁹ it is not surprising they are running into issues trademarking their brewery and beer names.⁷⁰ And if wine continues to bully craft breweries out of trademark registration, craft breweries can only rely on common law protection of its trademarks, which provides only limited protections.⁷¹

⁶³ It is not surprising there are trademark issues with over 4,000 breweries and 8,000 wineries picking and choosing names. See BREWERS ASSOCIATION, NUMBER OF BREWERIES, <https://www.brewersassociation.org/statistics/number-of-breweries/> (last visited Nov. 7, 2015); WINE INDUSTRY METRICS, WINES VINES ANALYTICS, <http://www.winesandvines.com/template.cfm?section=widc&widcDomain=wineries> (updated as of July, 2015) (last visited Nov. 7, 2015).

⁶⁴ The Bruery is a craft brewery located in Orange County, California. See THE BRUERY, ABOUT US, <http://www.thebruery.com/about-us/> (last visited Oct. 11, 2015).

⁶⁵ U.S. Trademark Application Serial No. 85,656,671 (filed June 20, 2012).

⁶⁶ *In re The Bruery, LLC.*, (TTAB Sept. 24, 2014), <http://ttabvue.uspto.gov/ttabvue/ttabvue-85656671-EXA-12.pdf>; see also GOLD RING, Registration No. 3,855,037.

⁶⁷ See Vince Winkel, *Boulder's Twisted Pine Brewing Sued by Washington Winery Alleging Trademark Infringement*, DAILYCAMERA (May 1, 2015), http://www.dailycamera.com/boulder-business/ci_28031656/boulders-twisted-pine-brewing-sued-by-washington-winery (“A Washington state wine producer this week filed a lawsuit in U.S. District Court against Boulder’s Twisted Pine Brewing Company, alleging trademark infringement and other unfair practices.”).

⁶⁸ See BREWERS ASSOCIATION, NUMBER OF BREWERIES, <https://www.brewersassociation.org/statistics/number-of-breweries/> (last visited Nov. 7, 2015).

⁶⁹ There are over 8,000 wineries in the United States. See WINE INDUSTRY METRICS, *supra* note 63.

⁷⁰ See Bland, *supra* note 9 (“For newcomers to the increasingly crowded industry of more than 3,000 breweries, finding names for beers, or even themselves, is increasingly hard to do without risking a legal fight.”).

⁷¹ See *infra* Part III.

III. TRADEMARK LAW

A. History and Development of Trademark Law in the United States

Trademarks date back thousands of years.⁷² Medieval guilds in England relied on trademarks to distinguish their goods from other sources.⁷³ Good producers later sought protection in English common law courts from “improper diversion of its trade.”⁷⁴ The original purpose of trademark law therefore is to indicate the source or origin of goods.⁷⁵

American trademark law developed from English common law.⁷⁶ Trademark law therefore has “common law concepts” that function absent any statutory protections.⁷⁷ Unlike the rights afforded by federal registration, rights at common law begin as soon as a mark is used in commerce, and not when registration is filed.⁷⁸

⁷² See SHELDON W. HALPERN, SEAN B. SEYMORE & KENNETH L. PORT, FUNDAMENTALS OF UNITED STATES INTELLECTUAL PROPERTY LAW: COPYRIGHT, PATENT, AND TRADEMARK 240 (4th ed. 2012) (“The use of a mark to identify the source of a product actually began at least 3,500 years ago when potters made scratchings on the bottom of their creations to identify the source.”) [hereinafter PORT].

⁷³ See Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1850 (2007) (“Local guilds often developed reputations for the quality of their products[,] . . . requir[ing] their members to affix distinguishing marks to their products so they could police their ranks effectively.”).

⁷⁴ See *id.* at 1858.

⁷⁵ See PORT, *supra* note 72, at 240; see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION: DEFINITIONS OF TRADEMARK AND SERVICE MARK § 9 cmt. c (1995) (“The protection of trademarks also functions as an indirect form of consumer protection.”).

⁷⁶ See PORT, *supra* note 72, at 240.

⁷⁷ See *Pedi-Care, Inc. v. Pedi-A-Care Nursing, Inc.*, 656 F. Supp. 449, 454 (D.N.J. 1987) (citing *Caesar’s World, Inc. v. Caesar’s Palace*, 490 F. Supp. 818 (D.N.J. 1980)); PORT, *supra* note 72, at 239. Unlike copyrights and patents, trademark protection does not originate in the United States Constitution; it is instead derived from the Commerce Clause. See U.S. CONST. art. I, § 8, cl. 8; PORT, *supra* note 72, at 239 (“Whereas the United States Constitution provides the grounding foundation for both patents and copyrights, trademarks do not enjoy such recognition.”) (citation omitted); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 166 (2003) (“Trademarks are a distinct form of intellectual property from patents and copyrights.”).

⁷⁸ See *Pedi-Care*, 656 F. Supp. at 454 (citing *Wiener King, Inc. v. Weiner King Corp.*, 407 F. Supp. 1274 (D.N.J. 1976)); BRADLEE R. FRAZER, 22 AM. JUR. PROOF OF FACTS 3D 623, 636 (1993) (“[T]he one who first uses the mark in commerce in connection with a peculiar line of business is the first to obtain the common-law rights.”). *But see* PORT, *supra* note 72, at 276 (“[T]he [Intent-to-Use] registration is the singular exception to this rule.”).

B. The Lanham Act

Congress codified these common law concepts in 1946 by passing the Lanham Act.⁷⁹ A trademark under the Lanham Act is any “word, name, symbol, or device or any combination thereof . . . used . . . to indicate the source of goods”⁸⁰ An applicant who is using the mark or who has a *bona fide* intention to use the mark in commerce is eligible to earn federal trademark rights.⁸¹ A federal trademark gets nationwide protection, earning its owner the right to exclusively use that mark in commerce in connection with a product or service.⁸²

C. Common Law Rights v. Federal Registration Rights

The person to first use a mark in connection with a good or service earns the common law right to exclude others from using the same or similar mark within a certain geographic zone.⁸³ On that basis, someone who files and receives a valid federal trademark can nonetheless be barred from using that mark in a geographic area that is protected by a subsequent user who has already earned common law rights to that mark.⁸⁴

⁷⁹ See Lanham Act (Trademark Act of 1946), 15 U.S.C. §§ 1051–1141n (2012); e.g., *Pedi-Care, Inc.*, 656 F. Supp. at 454 (The Lanham Act does not create the right to a mark, it only recognizes the right acquired through use.”); PORT, *supra* note 72, at 240–41. What resulted from the Act were not only the recognition of nationwide protection for common law marks but also a creation of the rights of incontestability and dilution, both of which did not exist at common law. Interview with Kenneth L. Port, Professor of Law, Mitchell Hamline School of Law, in St. Paul, Minn. (Sept. 30, 2015); see also Kenneth L. Port, *The Illegitimacy of Trademark Incontestability*, 26 IND. L. REV. 519, 521 (1993) [hereinafter *Trademark Incontestability*]; Kenneth L. Port, *The “Unnatural” Expansion of Trademark Rights: Is A Federal Dilution Statute Necessary?*, 18 SETON HALL LEGIS. J. 433, 452 (1994) [hereinafter *Trademark Dilution*]. At common law a trademark did not vest in an absolute property right; under common law one could acquire a trademark only by affixing and using the mark in commerce. The absolute property right provided by incontestability therefore challenges common law trademark principles. Interview with Kenneth L. Port, Professor of Law, Mitchell Hamline School of Law, in St. Paul, Minn. (Sept. 30, 2015); see also PORT, *supra* note 72, at 294 (“[T]he scope of trademark protection is not absolute.”). *But see* Daniel M. McClure, *Trademarks and Competition: The Recent History*, L. & CONTEMP. PROBS., 13, 37 (Spring 1996).

⁸⁰ 15 U.S.C. § 1127.

⁸¹ *Id.*

⁸² See PORT, *supra* note 72, at 241 (“Once a trademark is registered, nationwide protection is conferred on the owner of the registration as of the date of the filing of the registration application, even if the use has not been nationwide.”).

⁸³ *Id.* at 289.

⁸⁴ A subsequent user is someone who was in good faith using a mark before someone else registered that mark or one similar at the federal level. Common law allows a subsequent user to continue using their mark within their geographic area because they were using it first. See *Thrifty Rent-A-Car System v. Thrift Cars, Inc.*, 831 F.2d 1177 (1st Cir. 1987); *Burger King of Florida, Inc. v. Hoots*, 403 F.2d 904 (7th Cir. 1968). See also PORT *supra* note 72, at 292.

1. Vertical & Horizontal Use—Scope of Common Law Protection

A senior common law trademark owner is provided protection subject to vertical and horizontal use.⁸⁵ Vertical use relates to how the mark is used respective to “market analysis.”⁸⁶ To the extent the senior user has shown vertical use, it may exclude others from using the same or similar mark in the same market, that is, a senior user of a common law mark that sells their product at the manufacturing level would be able to exclude others from using the same or similar mark for a manufactured product, but may not be able to exclude others from using the same or similar mark at the retail level.⁸⁷

Horizontal use refers to the geographic area in which the mark is used in commerce in connection with a good or service.⁸⁸ If a senior user has established use in Minnesota, it would not be able, under common law, to bar a subsequent user in Texas.⁸⁹ If the subsequent user intentionally chose the mark in order to cause harm to the senior user, however, the senior user may file a claim for trademark infringement. Absent an intentional action to adopt the same or similar mark, infringement is not established at common law.⁹⁰ As a result, the scope of a common law user’s protection of its mark is determined by the “degree to which the trademark owner has penetrated the market.”⁹¹

2. Federal Registration Rights

A federal trademark provides the strongest protection.⁹² This is because one of the distinguishing features of a federal registrant is constructive notice, which signals to the entire country as a matter of law that the registrant has a claim of right to use the mark.⁹³ Constructive notice renders a subsequent application invalid to the extent it attempts to register the same or similar mark in connection with the same or similar good or service as the registrant’s mark.⁹⁴ There are consequences for adopting a mark that is already federally registered.⁹⁵

⁸⁵ See PORT, *supra* note 72, at 289.

⁸⁶ Market analysis means selling at a manufacturing, distributing, or retailing level. See *id.*

⁸⁷ See *id.* (“[I]f a mark is used only in wholesale, such prior use may not be a bar to a subsequent user from adopting the same or similar mark for use on the same or similar goods or services in the retail market for those goods or services.”) (citation omitted).

⁸⁸ *Id.*

⁸⁹ *Id.* (relying on *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90 (U.S. 1918)).

⁹⁰ *Id.* (citation omitted).

⁹¹ PORT, *supra* note 72, at 290.

⁹² See *id.* at 241.

⁹³ 15 U.S.C. § 1072.

⁹⁴ PORT, *supra* note 72, at 292.

⁹⁵ Constructive notice, as an evidentiary device, affords the senior user the ability to establish bad faith for the purpose of infringement. See *id.* at 292–93.

D. Registration Procedure for Nationwide Protection

To register for a federal trademark, one must file an application with the USPTO and include a filing fee.⁹⁶ Any mark is registrable so long as the Lanham Act does not specifically prohibit it.⁹⁷ The applicant must also choose the international product and service classification in which it wants the mark registered.⁹⁸ Examining attorneys then determine registration according to the Lanham Act and the Trademark Manual of Examining Procedure (TMEP).⁹⁹

In determining whether or not to register the mark, the examining attorney determines whether the applicant's mark is likely to cause confusion with a previously registered mark.¹⁰⁰ The analysis does not require "actual" confusion when the marks are placed together; only that confusion is likely.¹⁰¹ If the examining attorney does not believe confusion is likely to result from registering the applicant's mark, then it will allow the marks to be registered concurrently.¹⁰²

But if the examining attorney believes the applicant's mark is likely to cause confusion according to Section 2(d) of the Lanham Act,¹⁰³ then a non-final office action will be issued to the applicant, detailing the reason for refusal.¹⁰⁴ The applicant may appeal this decision directly to the same examining attorney who initially refused registration, and cite to prior decisions by the USPTO.¹⁰⁵ Next, the examining attorney may issue registration, or refuse registration again in the form of a final office action.¹⁰⁶

If after the issuance of the final office action an applicant still feels it deserves registration, then an applicant may appeal the decision to the Trademark Trial and Appeal Board (TTAB).¹⁰⁷ At this level, both the examining attorney, who issued the non-final and final office actions, and the applicant submit briefs to the TTAB, detailing why or why not registration is required under the Lanham Act.¹⁰⁸ The appeal is reviewed by a group of judges, who either decide to register the mark, or deny the mark registration.¹⁰⁹ If after this appeal the mark is again refused registration, then the applicant may appeal to a federal district court.¹¹⁰

⁹⁶ For the list of statutory requirements for principal registration, see 15 U.S.C. § 1052(d) and FRAZER, *supra* note 78, at 638.

⁹⁷ Section 1052 prohibits several types of marks, including marks that are likely to cause confusion with a previously registered mark. See 15 U.S.C. § 1052.

⁹⁸ See generally 37 C.F.R. § 6.1 (2013) (detailing that beer is in class 032 and wine in class 033).

⁹⁹ The TMEP sets forth the guidelines for examining attorneys in the USPTO. 15 U.S.C. § 1062.

¹⁰⁰ 15 U.S.C. § 1052(d).

¹⁰¹ See *In re White Rock Distilleries Inc.*, 92 U.S.P.Q.2d 1282 (P.T.O. Oct. 5, 2009); PORT, *supra* note 72, at 317.

¹⁰² PORT, *supra* note 72, at 293.

¹⁰³ 15 U.S.C. § 1052(d).

¹⁰⁴ TMEP (8th ed. Jan. 2017) § 1207.01; see also TMEP § 1109.16(d).

¹⁰⁵ See TMEP § 705.05.

¹⁰⁶ TMEP § 715.

¹⁰⁷ 15 U.S.C. § 1070 (2016); 37 C.F.R. § 2.141 (2016).

¹⁰⁸ TMEP § 1501.

¹⁰⁹ *Id.*

¹¹⁰ TMEP § 1705.09.

E. Likelihood of Confusion

The likelihood of confusion analysis takes place at two distinct levels in trademark law: (1) when applying for federal registration with the USPTO;¹¹¹ and (2) under the test for trademark infringement under the Lanham Act.¹¹²

1. Application for federal registration

To decide whether the applicant's mark is likely to cause confusion with the registrant's mark, the examining attorney must determine if the mark so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.¹¹³

¹¹¹ The Bruery, LLC., (T.T.A.B. 2014).

¹¹² See generally PORT, *supra* note 72, at 317.

¹¹³ 15 U.S.C. § 1052(d) (2012).

The analysis uses the *DuPont* factors,¹¹⁴ which include:

- (1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.
- (2) The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use.
- (3) The similarity or dissimilarity of established, likely-to-continue trade channels.
- (4) *The conditions under which and buyers to whom sales are made, i.e. “impulse” vs. careful, sophisticated purchasing.*
- (5) The fame of the prior mark (sales, advertising, length of use).
- (6) The number and nature of similar marks in use on similar goods.
- (7) The nature and extent of any actual confusion.
- (8) The length of time during and conditions under which there has been concurrent use without evidence of actual confusion.
- (9) The variety of goods on which a mark is or is not used (house mark, “family” mark, product mark).
- (10) The market interface between applicant and the owner of a prior mark.
- (11) The extent to which applicant has a right to exclude others from use of its mark on its goods.
- (12) The extent of potential confusion, i.e., whether *de minimis* or substantial.
- (13) Any other established fact probative of the effect of use.¹¹⁵

The examining attorney determines likelihood of confusion on a case-by-case basis, determining which factors favor the registrant and which factors favor the applicant; that is, the factors are allocated according to which party they favor most.¹¹⁶ But in doing so, the examining attorney may give unequal weight to different factors.¹¹⁷ The *DuPont* factors are neither exhaustive nor dispositive.¹¹⁸ It is common for attorneys to omit some factors if they are not relevant and it may only take one factor to control the outcome of the analysis.¹¹⁹

¹¹⁴ *In re* Application of E. I. Du Pont de Nemours & Co., 476 F.2d 1357, 1360 (C.C.P.A. 1973).

¹¹⁵ *Id.* at 1361 (emphasis added).

¹¹⁶ *See, e.g.*, Citigroup Inc. v. Capital City Bank Grp., Inc., 637 F.3d 1344, 1349 (Fed. Cir. 2011).

¹¹⁷ *See, e.g.*, *In re* Majestic Distilling Co., 315 F.3d 1311, 1315 (Fed. Cir. 2003).

¹¹⁸ *See* PORT, *supra* note 72 at 317.

¹¹⁹ *Majestic Distilling*, 315 F.3d at 1315.

2. Infringement

A balancing test is also used in trademark infringement lawsuits.¹²⁰ Although different circuits employ varied versions using a combination of different factors,¹²¹ the Second Circuit in New York, which uses the following factors from *Polaroid*:¹²²

- (1) Strength of plaintiff's mark.
- (2) The degree of similarity of the marks.
- (3) The proximity of the products or services in the marketplace.
- (4) The likelihood that the plaintiff will bridge the gap (narrowing significant market differences).
- (5) Evidence of actual confusion.
- (6) Defendant's good faith in adopting the mark.
- (7) The quality of the defendant's product or service.
- (8) The sophistication of the buyers.¹²³

Like the *DuPont* factors, the *Polaroid* factors are neither exhaustive nor dispositive.¹²⁴ It is common for jurisdictions to borrow from other jurisdictions in support of their analyses of these factors.¹²⁵

Craft breweries are currently disadvantaged in the application process because the fourth *DuPont* factor is not argued well enough to tip the likelihood of confusion scale in favor of craft beer.¹²⁶ This factor favors alcoholic products in cases of wine or vodka; by extension, it should also favor craft beer. Because craft beer consumers are sophisticated, they would not be likely to confuse two similarly branded craft beer and wine marks.¹²⁷

¹²⁰ See generally PORT, *supra* note 72 at 316–17.

¹²¹ See *id.* at 317–321 (detailing the different tests used by different circuits).

¹²² See, *Polaroid Corp. v. Polarad Elec. Corp.*, 287 F.2d 492 (2d Cir. 1961).

¹²³ Port, *supra* note 72 at 317 (citing *Polaroid Corp.* at 495).

¹²⁴ See *Estee Lauder Inc. v. The Gap, Inc.*, 108 F.3d 1503, 1510 (2d Cir. 1997).

¹²⁵ See *Roederer v. J. Garcia Carrion, S.A.*, 732 F. Supp. 2d 836, 877 (D. Minn. 2010).

¹²⁶ See Resp. Office Action, PUZZLE BREWING COMPANY, (Feb. 19, 2015), <http://ttabvue.uspto.gov/ttabvue/v?pno=86263566&pty=EXA&eno=4> (omitting the sophisticated purchaser factor); Resp. Office Action, NO BOUNDARY IPA (T.T.A.B Apr. 29, 2014), <http://ttabvue.uspto.gov/ttabvue/v?pno=85886282&pty=EXA&eno=4> (mentioning that craft beer consumers are sophisticated without providing precedential support for the proposition).

¹²⁷ See *infra* Part V.

IV. THE SOPHISTICATED PURCHASER FACTOR

Examining attorneys should find that the sophisticated purchaser factor would preclude confusion between two same or similar marks for craft beer and wine.¹²⁸ If a product's purchaser is more sophisticated, they spend more time deciding whether to purchase a product, and in doing so, will not purchase the wrong product by mistake as a result of confusingly similar trademarks.¹²⁹ Showing that the prospective purchasers of a product are sophisticated weighs against finding confusion.¹³⁰ The issue is that this factor is either omitted from the analysis, focusing more on distinguishing the similarity of the marks and the similarity of goods, or is unsupported by evidence.¹³¹

A. Level One: Registration with the USPTO

Examining attorneys use the *DuPont* factors of analysis in determining a likelihood of confusion.¹³² The sophisticated purchaser factor is not argued well enough in response to denied federal trademark applications.¹³³ In turn, the analysis has become a broken record: the applicant attempts to argue that beer and wine are not related goods, or that beer and wine do not emanate from the same source, and that the marks are distinctively different.¹³⁴ Examining attorneys then rebut by arguing beer and wine may emanate from the same source and are thus sufficiently related to warrant a likelihood of confusion,¹³⁵ even though "there is no per se rule that holds that all alcoholic beverages are related."¹³⁶

¹²⁸ See *In re Puzzle Brewing Co.*, (T.T.A.B. 2015), <http://ttabvue.uspto.gov/ttabvue/v?pno=86263566&pty=EXA&eno=10>.

¹²⁹ See, e.g., *E. & J Gallo Winery v. Consorzio del Gallo Nero*, 782 F. Supp. 457, 465–66 (N.D. Cal. 1991).

¹³⁰ *Id.*

¹³¹ Resp. Office Action, PUZZLE BREWING COMPANY, *supra* note 127; Starbucks Corp. v. Wolfe's Borough Coffee, Inc., 588 F.3d 97, 119 (2d Cir. 2009).

¹³² See *Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 637 F.3d 1344, 1349 (Fed. Cir. 2011).

¹³³ See *Puzzle Brewing*, *supra* note 129; *In re The Bruery, LLC* (T.T.A.B. 2014) <http://ttabvue.uspto.gov/ttabvue/v?pno=85656671&pty=EXA&eno=6>.

¹³⁴ See Resp. Office Action, NO BOUNDARY IPA, *supra* note 127; Resp. Office Action, PUZZLE BREWING COMPANY, *supra* note 127.

¹³⁵ Examining attorneys rely on cases that have held alcoholic products, including beer and wine, to be related. See *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003) (stating tequila is related to malt liquor); *In re Sailerbrau Franz Sailer*, 23 U.S.P.Q.2d 1719 (T.T.A.B. 1992) (holding beer and wine are related goods); *Schieffelin & Co. v. Molson Cos.*, 9 U.S.P.Q.2d 2069 (T.T.A.B. 1989) (holding beer and brandy are related).

¹³⁶ *White Rock Distilleries*, 92 U.S.P.Q.2d at 1285 (T.T.A.B. 2009) (citing *G.H. Mumm & Cie v. Desnoes & Geddes, Ltd.*, 917 F.2d 1292, 1295 (Fed. Cir. 2003)).

The use of “third-party registrations” may determine whether two different goods are of a type that may emanate from a single source, and in turn serve as support to say the products are sufficiently related as to likely confuse a consumer as to the source of a good.¹³⁷ In determining that beer and wine may emanate from the same source, examining attorneys rely on a short list of third-party registrations that sell beer and wine under the same mark.¹³⁸ But overall, examining attorneys rely on the fact that a small percentage of entities produce beer and wine under the same mark to say that beer and wine are of a type of product that may emanate from the same source.¹³⁹

Sometimes the applicants mention that craft beer consumers have the sophistication, but offer little to no authority in support and do not distinguish this concept as a separate *DuPont* factor, instead combining it into the similarity of products factor.¹⁴⁰ Failing to differentiate this concept as a separate factor reduces its weight in the overall balancing of the factors.¹⁴¹ If examining attorneys believe the products are related, a separate analysis under the fourth *DuPont* factor should add to the determination that the marks, notwithstanding their similarity, would not result in a likelihood of confusion, because the purchasers of craft beer are sophisticated enough to discern between two similar marks for craft beer and wine.

¹³⁷ See *In re Mucky Ducky Mustard Co. Inc.*, 6 U.S.P.Q.2d 1467, 1470 n.6, 1988 WL 252484, at 3 n.6 (T.T.A.B. 1988) (Third-party registrations have probative value to determine goods may emanate from a single source); *In re Albert Trostel & Sons Co.*, 29 U.S.P.Q.2d 1783, 1993 WL 596274 (T.T.A.B. 1993) (Third-party registrations may show relatedness of goods).

¹³⁸ See *High Water Brewing*, *supra* note 10 (offering a short list of five entities that sell beer and wine under the same mark); *Puzzle Brewing*, *supra* note 129 at 5–6 (stating that because a short list of companies sell beer and wine under the same mark, consumers have been exposed to the idea that beer and wine can emanate from the same source). In one case, an examining attorney used evidence of an online article that discussed a “hybrid” product using beer and wine in order to satisfy that beer and wine may emanate from the same source. See *Puzzle Brewing*, *supra* note 129 at 7.

¹³⁹ Examining attorneys treat the amount of third-party registrations, some as little as five, as sufficient to determine that beer and wine may emanate from a single source, even though five third-party registrations reflect less than one-percent of the total number of wineries and breweries in the United States. Cf. *In re Coors Brewing*, 343 F.3d 1340, 1347 (Fed. Cir. 2003) (holding third-party registrations for entities that provide restaurant services and beer under the same mark that represent less than one percent of the respective population were not sufficient to say the restaurant services and beer are related).

¹⁴⁰ Resp. Office Action, NO BOUNDARY IPA, *supra* note 127.

¹⁴¹ See *Starbucks Corp.*, 588 F.3d at 119.

B. Level Two: Infringement

At the infringement level, some jurisdictions view the sophisticated purchaser factor in light of the “degree of care” taken by purchasers.¹⁴² One thing courts look at in determining whether customer will exercise a degree of care is the price of the products.¹⁴³ The places in which the products are purchased are also discussed.¹⁴⁴ Courts have provided that evidence suggesting purchasers are sophisticated can weigh against finding a likelihood of confusion.¹⁴⁵ But in the absence of such evidence, courts are left to give less weight to this factor, ignore it altogether, or rely simply on the “nature of the product or its price.”¹⁴⁶ The Eighth Circuit and the Second Circuit have come to different conclusions regarding whether or not consumers of alcoholic products are sophisticated enough to preclude a finding of a likelihood of confusion.¹⁴⁷

1. Eighth Circuit

The Eighth Circuit uses the *SquirtCo* factors, and likelihood of confusion is a finding of fact.¹⁴⁸ The sophisticated purchaser factor looks at “whether the kind of product, its cost, and the condition of purchase can eliminate the likelihood of confusion that would otherwise exist.”¹⁴⁹ To do so, the court “stand[s] in the shoes of the ordinary purchaser, buying under the normally prevalent conditions of the market and giving the attention such purchasers usually give in buying that class of good.”¹⁵⁰ Courts could reason that even a purchaser who exercises a degree of a care while purchasing may nonetheless wrongfully assume the product they are about to purchase is associated with another source.¹⁵¹

¹⁴² *Roederer*, 732 F. Supp. 2d at 877 (“[The degree of care] requires consideration of the type of product, its cost, and conditions of purchase.”).

¹⁴³ See, e.g., *Star Indus., Inc. v. Bacardi & Co. Ltd.*, 412 F.3d 373, 386–87 (2d Cir. 2005).

¹⁴⁴ See *id.* at 390 (discussing how consumers in liquor stores act differently than consumers in grocery stores).

¹⁴⁵ *Id.* (“Consumer sophistication may be proved by direct evidence such as expert opinions or surveys.”).

¹⁴⁶ *Starbucks Corp. v. Wolfe’s Borough Coffee, Inc.*, 588 F.3d 97, 119 (2d Cir. 2009) (“Given the lack of evidence provided to the District Court regarding consumer sophistication, we decline to give this factor ‘much, if any, weight’ in our *de novo* balancing of the *Polaroid* factors.”) (relying on *Hasbro, Inc., v. Lanard Toys, Ltd.*, 858 F.2d 70, 78–79 (2d Cir. 1998)); *Star Indus.*, 412 F.3d at 390.

¹⁴⁷ Compare *Roederer*, 732 F. Supp. 2d at 878 (determining purchasers of sweet wine are not sophisticated), with *Banfi Products Corp. v. Kendall-Jackson Winery, Ltd.*, 74 F. Supp. 2d 188, 199 (E.D.N.Y. 1999) (determining purchasers of wine are sophisticated).

¹⁴⁸ *SquirtCo v. Seven-Up Co.*, 628 F.2d 1086, 1090–91 (8th Cir. 1980).

¹⁴⁹ *Id.* at 1091.

¹⁵⁰ *General Mills, Inc. v. Kellogg Co.*, 824 F.2d 622 (8th Cir. 1987) (citing *Scott v. Mego Int’l, Inc.*, 519 F. Supp 1118, 1133 n.17 (D. Minn. 1981)).

¹⁵¹ See *Roederer*, 732 F. Supp. 2d at 877 (citing *Daddy’s Junky Music Stores, Inc. v. Big Daddy’s Fam. Music Ctr.*, 109 F.3d 275, 286 (6th Cir. 1997)).

The *Roederer* court determined that purchasers of less expensive wines were not sophisticated.¹⁵² In determining that purchasers were not sophisticated, the *Roederer* court did not discuss the conditions under which the products are purchased and instead relied on the price.¹⁵³ The court weighed this factor in favor of finding a likelihood of confusion without meaningfully discussing that these products are purchased in liquor stores, where purchasers are more sophisticated.¹⁵⁴

2. Second Circuit

The Second Circuit follows the *Polaroid* test in determining a likelihood of confusion, and the rationale behind Second Circuit decisions acts as persuasive authority to examining attorneys during the registration process and should be used over other circuits' rationales.¹⁵⁵ Under the *Polaroid* test, consumer sophistication may be proven by direct evidence such as expert opinions or surveys, or the court may rely simply on the "nature of the product or its price."¹⁵⁶ In general, if a product is relatively inexpensive, the degree of sophistication exercised by the purchaser is lower than that of a relatively expensive product.¹⁵⁷

¹⁵² *Id.* at 877 ("In general, purchasers of wine and sparkling wine are unsophisticated and rely on familiarity with brands and the information conveyed by the labels when purchasing a less-expensive product.").

¹⁵³ *Id.*

¹⁵⁴ See generally *id.*

¹⁵⁵ See, e.g., *Star Indus., Inc. v. Bacardi & Co. Ltd.*, 412 F.3d 373, 384 (2d Cir. 2005).

¹⁵⁶ *Id.* at 390 (relying on *Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*, 317 F.3d 209, 218–19 (2d Cir. 2003); *But see Sports Authority, Inc. v. Prime Hospitality Corp.*, 89 F.3d 955, 965 (2d Cir. 1996) ("[P]rice alone is not determinative of the care a consumer will take in making purchases . . .").

¹⁵⁷ See *Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*, 317 F.3d 209, 219 (2d Cir. 2003) (referencing *Harold F. Ritchie, Inc. v. Chesebrough-Pond's Inc.*, 281 F.2d 755 (2d Cir. 1960)); *Frank Brunckhorst Co. v. G. Heileman Brewing Co. Inc.*, 875 F. Supp 966, 983 (E.D.N.Y. 1994) (stating purchasers of more expensive products will be more careful).

The Second Circuit has held that food products purchased in a supermarket, such as bread and margarine, are purchased casually, without sophistication.¹⁵⁸ Conversely, the Second Circuit has held that products purchased in liquor stores are not purchased on impulse, and require more “careful” purchasing.¹⁵⁹ Specifically, they have held that purchasers of vodka are sophisticated enough to differentiate between two differently labeled vodkas with a similar mark, when one vodka is \$24 and the other \$12.¹⁶⁰ The Second Circuit has also accepted evidence suggesting that wine purchasers are wealthier and older, weighing the factor of sophistication in favor of not finding likelihood of confusion for two similarly branded wines.¹⁶¹ Interestingly, the Second Circuit also mentions that “premium” beer, or craft beer, would have more sophisticated purchasers than consumers of a beer made by Anheuser.¹⁶²

C. Commander Beer

The TTAB determined in *In re Sailerbrau Franz Sailer*¹⁶³ that CHRISTOPHER COLUMBUS for beer would be likely to confuse a consumer as to its source with CRISTOBAL COLON for wine.¹⁶⁴ The TTAB in *Sailerbrau* reasoned that beer and wine are products purchased by the general public at a wide range of prices on impulse.¹⁶⁵ There was no mention of the fact that these products are purchased in liquor stores.¹⁶⁶ However, this was decided in 1992, before the rise of the craft beer industry.¹⁶⁷

¹⁵⁸ See *Frank Brunckhorst Co. v. G. Heileman Brewing Co.*, 875 F. Supp. 966, 983 (E.D.N.Y. 1994); *Lever Brothers Co. v. American Bakeries Co.*, 693 F.2d 251, 259 (2d Cir. 1982); *Starbucks Corp. v. Wolfe’s Borough Coffee, Inc.*, 588 F.3d 97, 119 (2d Cir. 2009) (mentioning “low-cost goods” purchased in a “supermarket environment” require a low level of consumer sophistication).

¹⁵⁹ See *Star Indus., Inc. v. Bacardi & Co.*, 412 F.3d 373, 390 (2d Cir. 2005) (advising that consumers in a liquor store exercise the requisite level of sophistication to distinguish between two similar vodka marks); See also *G.H. Mumm & Cie v. Desnoes & Geddes, Ltd.*, 917 F.2d 1292, 1295 (Fed. Cir. 1990) (reasoning that because a champagne producer marketed its product as a “premium” good, the purchaser of its champagne will exercise a higher degree of focus while making a decision).

¹⁶⁰ *Star Indus., Inc. v. Bacardi & Co.*, 412 F.3d 373, 390 (2d Cir. 2005) (held that a \$24 bottle of vodka was “relatively expensive”).

¹⁶¹ See *Banfi Prod. Corp. v. Kendall-Jackson Winery, Ltd.*, 74 F. Supp. 2d 188 (E.D.N.Y. 1999) (finding no likelihood of confusion between two similar marks for wine, wherein one type of wine was more expensive than the other, relying on evidence suggesting wine purchasers are “likely to be older, wealthier, and better educated than the general population”). But see *Constellation Brands, Inc. v. Arbor Hill Associates, Inc.*, 535 F.Supp.2d 347, 371 (W.D.N.Y. 2008) (finding the sophisticated purchaser factor weighed against finding a likelihood of confusion, but the court did not believe purchasers of wine products exhibited a high level of sophistication when two wine products are both sold in liquor stores where one wine is more expensive than the other).

¹⁶² See *Frank Brunckhorst Co.* 875 F. Supp. at 983 (E.D.N.Y. 1994).

¹⁶³ *In re Sailerbrau Franz Sailer*, 23 U.S.P.Q.2d 1719 (T.T.A.B. 1992).

¹⁶⁴ *Id.* (If a final office-action refusing registration is appealed, the TTAB determines whether or not the examining attorney was correct to either refuse or grant registration); See also, *In re White Rock Distilleries*, 92 U.S.P.Q.2d 1282 (T.T.A.B. 2009).

¹⁶⁵ See *In re Kysela Pere et Fils, Ltd.*, 98 U.S.P.Q.2d 1261, *5 (T.T.A.B. 2011); *In re Sailerbrau Franz Sailer*, 23 U.S.P.Q.2d 1719 (T.T.A.B. 1992).

¹⁶⁶ *In re Sailerbrau Franz Sailer*, 23 U.S.P.Q.2d 1719 (T.T.A.B. 1992).

¹⁶⁷ See Carroll et al., *supra* note 41, at 716.

A craft brewery successfully registered a trademark for beer in 2013, even though the USPTO initially refused registration because of a similarly branded wine.¹⁶⁸ Lift Bridge from Stillwater, Minnesota¹⁶⁹ applied to register COMMANDER for beer,¹⁷⁰ and was initially denied, citing a likelihood of confusion with a wine called COMANDANTE.¹⁷¹ The examining attorney issued registration after a response brief filed by Lift Bridge, which did not mention the sophisticated purchaser factor.¹⁷² Instead the applicant scrutinized the use of third-party registrations to warrant a likelihood of confusion.¹⁷³

In 2014, however, the USPTO took a step back and denied High Water Brewing a trademark for NO BOUNDARY IPA because of a wine called NO BOUNDARIES.¹⁷⁴ If COMMANDER is registrable notwithstanding COMANDANTE, then registration should be allowed for NO BOUNDARY IPA notwithstanding NO BOUNDARIES. And were the TTAB ever to revisit CHRISTOPHER COLUMBUS for beer, they should allow registration notwithstanding CRISTOBAL COLON.

V. CHANGE IN THE ANALYSIS

A. Craft Beer Consumers are Sophisticated Purchasers

1. If wine and vodka, then why not craft beer?

The Second Circuit has held, for the purpose of a likelihood of confusion analysis, that consumers of vodka and wine have the requisite sophistication to discern between two similarly branded vodka marks and two similarly branded wine marks.¹⁷⁵ In support of these findings, the Second Circuit relied on evidence suggesting wine consumers are older and wealthier, thus determining they do not purchase wine products on impulse.¹⁷⁶ The Second Circuit also relied on the determination that products purchased in liquor stores are not purchased on impulse.¹⁷⁷ Overall, the Second Circuit realizes that purchasers of alcoholic products have a higher level of sophistication.¹⁷⁸

¹⁶⁸ See Resp. Office Action, COMMANDER, (T.T.A.B. 2013), https://tsdrsec.uspto.gov/ts/cd/pdfs?f=/ROA/2013/09/16/20130916154420085168-85790849-003_001/evi_6465174130-153716684_-_RESPONSE_TO_Office_Action_COMMANDER_85790849.pdf.

¹⁶⁹ See LIFT BRIDGE, <http://liftbridgebrewery.com/#brewery/tap-room> (last visited Nov. 13, 2015).

¹⁷⁰ COMMANDER, Registration No. 4,483,537.

¹⁷¹ COMMANDER, *supra* note 169.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *In re High Water Brewing, Inc.*, 2014 WL 5282254 (T.T.A.B. 2014).

¹⁷⁵ *Star Indus., Inc. v. Bacardi & Co.*, 412 F.3d 373, 390 (2d Cir. 2005); *Banfi Prod. Corp. v. Kendall-Jackson Winery, Ltd.*, 74 F. Supp. 2d 188 (E.D.N.Y. 1999).

¹⁷⁶ *Star Industries*, 412 F.3d 373 at 390.

¹⁷⁷ *Banfi Prod. Corp. v. Kendall-Jackson Winery, Ltd.*, 74 F. Supp. 2d 188 (E.D.N.Y. 1999).

¹⁷⁸ See generally *Star Indus., Inc. v. Bacardi & Co.*, 412 F.3d 373, 390 (2d Cir. 2005).

There is evidence available showing craft beer drinkers are more sophisticated than the typical beer drinker, enough to distinguish between a beer mark and a wine mark.¹⁷⁹ This evidence suggests that the “[craft beer] demographic group possesses high disposable income with the education and life position to be comfortable in expressing discrimination and to demand their preferences.”¹⁸⁰ The results of this study mirror the findings of surveys submitted to argue wine consumers are also sophisticated.¹⁸¹ Especially in light of the fact that liquor store purchases are made with a higher level of sophistication,¹⁸² and craft beer is purchased in liquor stores.¹⁸³ Therefore, the evidence that craft beer drinkers are wealthy, smart, and passionate, should weigh heavily against finding a likelihood of confusion with a previously registered mark for wine. If sophisticated wine consumers are able to distinguish between two similarly branded wines,¹⁸⁴ and if vodka consumers yield the ability to distinguish between two similarly branded vodkas,¹⁸⁵ then a craft brewery should not be denied registration. And above all, if a craft brewery was able to register a trademark notwithstanding a similarly branded wine, without mentioning the sophisticated purchaser factor, then any future refusal should be overturned if the applicant argues this factor.¹⁸⁶

2. Requiring Craft Breweries to Submit Survey Evidence is Wrong

Although examining attorneys and judges will entertain evidence of sophisticated purchasers, they are often looking for surveys conducted by the applicant indicating there will not be a likelihood of confusion with the registrant’s product.¹⁸⁷ These surveys, however, are expensive and in many situations are not feasible for a small craft brewery owner who simply wants to register his or her name.¹⁸⁸ Should a craft brewery be expected to cover the cost of a survey when the threshold for registration is generally lower than that of an infringement lawsuit where surveys are generally used?¹⁸⁹

¹⁷⁹ See Douglas W. Murray & Martin A. O’Neill, *Craft Beer: penetrating a niche market*, 114 BRITISH FOOD J. 899, 903 (2012) (“What is striking is the overall profile of the respondent sample: approximately 72 percent . . . earned a Bachelor’s or higher graduate degree; [and] 63 percent (approximate) enjoy household annual incomes over \$75,000 . . .”).

¹⁸⁰ *Id.* (“[R]espondents were asked to self-describe their commitment level with 93 percent describing themselves as passionate or enthusiasts.”).

¹⁸¹ See *Banfi*, 74 F.Supp.2d at 195 (stating surveys of wine consumers reflect that they “tend to be older, wealthier, and better educated than the average population” and that a typical wine consumer earns at least \$60,000 in income).

¹⁸² *Star Industries*, 412 F.3d 373 at 390.

¹⁸³ Telephone Interview with David Hautman, General Manager of Franklin-Nicollet Liquor Store, (Nov. 15, 2015, 6:26 PM) (David Hautman is the General Manager of three liquor stores in Minnesota, including the Franklin-Nicollet Liquor Store in Minneapolis, and has been in the liquor industry for 38 years).

¹⁸⁴ See *Banfi*, 74 F.Supp.2d at 188.

¹⁸⁵ *Star Industries*, 412 F.3d 373 at 390.

¹⁸⁶ See Resp. Office Action, COMMANDER, *supra* note 169.

¹⁸⁷ *Star Industries*, 412 F.3d at 390.

¹⁸⁸ Peter Weiss, *The Use of Survey Evidence in Trademark Litigation: Science, Art or Confidence Game?*, 80 TRADEMARK REP. 71, 85 n.30 (1990) (“The cost of a major survey tends to start at around \$30,000 and can run up to \$100,000 or more.”).

¹⁸⁹ See generally PORT, *supra* note 72, at 256.

B. Third-Party Registrations are Not Sufficient to Find Beer and Wine are Related

It should not be enough for an examining attorney to reason that because beer and wine may emanate from the same source that their respective purchasers are not sophisticated enough to differentiate between a craft beer and wine mark.¹⁹⁰ Less than fifty companies make both beer and wine.¹⁹¹ It is misguided to say this number is significant enough to preclude craft beer trademarks considering there are over 8,000 wineries in the United States and over 3,500 breweries.¹⁹² Coors argued that restaurant services and beer may emanate from the same source, but an appeals court ruled the two were unrelated.¹⁹³

C. Craft Beer and Wine are Consistently Distinguished

Beer is not wine, and under current law each are treated differently.¹⁹⁴ Beer is also not found next to wine on store shelves.¹⁹⁵ Different players in the alcohol industry dominate beer and wine.¹⁹⁶ Not to mention breweries are required by law to place the source of the beer on the label.¹⁹⁷ It therefore seems like any confusion as to the source of the product would be eliminated by this statutory requirement; under current trademark law, however, that label requirement has little meaning.¹⁹⁸

D. Stop Giving Wine Absolute Property Rights

As a result of these decisions, examining attorneys are effectively creating a barrier for craft breweries to enjoy nationwide protection intended under the Lanham Act.¹⁹⁹ By allowing wine marks priority in trademark law, the examining attorneys are effectively giving wine marks absolute property rights in words that should otherwise be available for use by craft breweries.²⁰⁰ Trademark rights are not absolute, but they instead ensure the right to exclude others from using the same or similar mark through use.²⁰¹

¹⁹⁰ See generally Puzzle Brewing, *supra* note 129.

¹⁹¹ See Resp. Office Action, COMMANDER, *supra* note 169.

¹⁹² See *id.* (arguing successfully third-party registrations are insufficient to say beer and wine may emanate from the same source).

¹⁹³ *Coors*, 343 F.3d at 1347.

¹⁹⁴ See, e.g., MINN. STAT. § 340A.404 (affording different licenses to wineries than breweries).

¹⁹⁵ Hautman, *supra* note 184.

¹⁹⁶ Compare BREWERS ASSOCIATION, TOP 50 BREWERIES OF 2014, <https://www.brewersassociation.org/press-releases/brewers-association-lists-top-50-breweries-of-2014/> (last visited Nov. 9, 2015), with Colman Andrews, *101 Best Wineries in America for 2015*, THE DAILY MEAL (July 23, 2015), <http://www.thedailymeal.com/america-s-101-best-wineries>.

¹⁹⁷ 27 C.F.R § 25.142(a).

¹⁹⁸ Even if a craft beer drinker understood that some wineries make beer and vice versa, the requirement that the source must be placed on the bottle should eliminate any confusion as to whether that specific beer is made by a winery or a brewery, because a consumer would see that the craft beer they are about to purchase is made either by a brewery or winery.

¹⁹⁹ 15 U.S.C. § 1052 (2006).

²⁰⁰ Interview with Kenneth L. Port, Professor of Law, Mitchell Hamline School of Law, in St. Paul, Minn. (Sept. 30, 2015).

²⁰¹ *Id.*

Without a federal trademark, craft breweries can rely only on common-law protection for their marks, which does not afford the greatest number of the protections.²⁰² Under common law, a craft brewery can only preclude another entity from using its mark to the extent that it has used the mark in commerce within a particular geographic area.²⁰³ A craft brewery in Minnesota, for example, seeking expansion into Wisconsin or Iowa might be precluded from doing so by senior users or federal trademark owners selling similar named beers in those states.²⁰⁴ Expansion into new markets may lead to infringement suits from other trademark owners without federal protection.²⁰⁵

E. Practical Considerations

1. Wine is already advantaged

There are over twice as many wineries in the United States than there are breweries.²⁰⁶ Wineries are afforded special treatment in light of the post-Prohibition three-tier system.²⁰⁷ Craft breweries generally do not have the ability to sell bottles of beer directly to consumers.²⁰⁸ They rely on their ability to sell their beer in their taprooms, or to sell to distributors who in turn sell to bars, restaurants, and liquor stores.²⁰⁹ Moreover, craft beer drinkers find it distasteful to see a craft-brewery fight over trademarks, so why add wine to the mix?²¹⁰ Especially in light of the economic impact craft breweries have on the United States today, this is an industry worth protecting.²¹¹

2. Trademark Depletion

It is likely beer and wine names may contain similar wording.²¹² But denying craft breweries registration because of wine could lead to brewers choosing mundane, registration-proof names for their beers,²¹³ taking away from the innovation that leads to names such as, “Day Tripper.”²¹⁴ It could potentially prevent brewers from trying new recipes, new techniques, and new marketing strategies to create new beers, which would harm consumers and brewers alike.²¹⁵

²⁰² *Id.* at 241.

²⁰³ *Id.* at 289.

²⁰⁴ *Id.*

²⁰⁵ *See generally id.* at 292.

²⁰⁶ NUMBER OF BREWERIES, *supra* note 63; WINE INDUSTRY METRICS, *supra* note 63.

²⁰⁷ *See Scott, supra* note 8, at 424–25.

²⁰⁸ *See generally id.* at 423 (“Under the statute, brewers and wholesalers are prohibited from having any direct or indirect interest in a retailer.”) (citation omitted).

²⁰⁹ *Id.* at 418, 422.

²¹⁰ *See Noel, supra* note 59 and accompanying text.

²¹¹ *See ECONOMIC IMPACT STUDY, supra* note 52.

²¹² *See Bland, supra* note 9.

²¹³ Soon enough, breweries are going to start naming their beers sdkj, rsdkn, ouetnv, or some other arbitrary name in hopes that it does not result in a wedding invitation to a similarly named wine.

²¹⁴ Day Tripper is a registered trademark owned by Indeed Brewing Company in Minneapolis, MN, <http://www.beatlesbible.com/songs/day-tripper/> (last visited Nov. 9, 2015).

²¹⁵ *See generally* Carroll et al., *supra* note 41, at 725 (discussing how craft beer drinkers prefer different products with better taste).

F. If Wine Crashes the Wedding, Kindly Ask It to Leave

In the future, should a craft brewery apply for principal registration under class 032 and subsequently receive a Section 2(d) refusal based on a likelihood of confusion with a brand of wine in class 033? The attorney should argue the “sophisticated purchaser *DuPont* factor in their response brief, relying on *Star Industries*, which determined that purchasers of two similar vodkas were sophisticated.²¹⁶ They should argue that craft beer drinkers are not only smart, but also passionate, and that if wine and vodka drinkers are sophisticated, then craft beer drinkers are too.²¹⁷

In order to weaken the other factors, the applicant should argue that third-party registrations are insufficient to warrant a likelihood of confusion, because a percentage of less than one suggests that craft beer and wine may emanate from the same source which is not enough to determine the products are related.²¹⁸ The examining attorney should see the arguments made on the basis of the sophisticated purchaser and find that this factor weighs heavily against finding a likelihood of confusion. In their balancing of the *DuPont* factors, the examining attorney should duly note the strength of the fourth factor, and allow concurrent registration.²¹⁹

VI. CONCLUSION

Therefore, the focus in the analysis subsequent to a Section 2(d) refusal for a craft beer based on a likelihood of confusion with a wine should be on the sophisticated purchaser factor. Third-party registrations should not be enough to warrant a finding that craft beer and wine are related. The Lanham Act is intended to protect users nationwide; refusing registration for craft breweries because of wine creates a barrier preventing craft breweries to enjoy the Lanham Act’s intended protections. Common law protection is not strong enough for craft breweries to expand into new markets. Because of the craft beer industry’s impact on the economy,²²⁰ it is an industry we must protect.

After all, the applicant needs to remind the examining attorney wine never received an invitation to the wedding. As of now when wine is asked at the wedding, “So, how do you know the groom?” the usual response is, “Oh, we’re . . . Uncle Ned’s kids.”²²¹ Which, like allowing wine to crash a craft beer’s trademark application, is just plain wrong. Craft beer consumers are sophisticated purchasers. They are unlikely to be confused as to whether a craft brewery or a winery makes a craft beer.

²¹⁶ *Star Industries*, 412 F.3d 373 at 390.

²¹⁷ *Id.* Banfi Products Corp., 74 F. Supp. 2d 188 at 199.

²¹⁸ *See generally In re Coors Brewing*, 343 F.3d 1340, 1347 (Fed. Cir. 2003).

²¹⁹ *See generally* PORT, *supra* note 72, at 293.

²²⁰ *See* ECONOMIC IMPACT STUDY, *supra* note 52.

²²¹ STEVE FABER & BOB FISHER, THE WEDDING CRASHERS 19 (2003) (script for the movie entitled, “The Wedding Crashers”), http://www.dailyscript.com/scripts/wedding_crashers.pdf.

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