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**The TTAB Should Drink a Beer and Relax: Implications for Trademark Consent Agreements in the Craft Brewing Industry After *In re Bay State Brewing Company, Inc.***

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# The TTAB Should Drink a Beer and Relax: Implications for Trademark Consent Agreements in the Craft Brewing Industry After *In re Bay State Brewing Company, Inc.*

Spencer T. Wiles\*

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### *I. Introduction*

Have you ever found yourself at a restaurant or a bar, looking to quench your thirst with a nice craft beer? If you have, you may have had the wait staff recite a lengthy selection of beers, or have been confronted with a long list of craft brews, from different locations and breweries, each likely represented by a distinct

name—a name that is most likely trademarked.<sup>1</sup> Often, the distinct names of beers and breweries significantly influence the consumer about which “cold one” to order.<sup>2</sup> Due to the significance of branding and marks within the craft beer industry, the survival of a brewery relies heavily on its ability to properly protect its trademarks.<sup>3</sup> This Note will focus on one method of protection—trademark coexistence agreements that are negotiated between two breweries.

Smaller companies such as craft breweries often decide to enter into contractual agreements (referred to as “consent agreements” or “coexistence agreements”) with one another in an effort to avoid costly litigation over trademarking.<sup>4</sup> Generally, trademark coexistence agreements are contractual agreements allowing “potentially confusing trademarks to coexist in the market without trademark infringement lawsuits.”<sup>5</sup>

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1. See Alastair Bland, *Craft Brewers are Running Out of Names, and Into Legal Spats*, NAT'L PUB. RADIO, (Jan. 15, 2015, 9:08 AM), <http://www.npr.org/sections/thesalt/2015/01/05/369445171/craft-brewers-are-running-out-of-names-and-into-legal-spats> (last visited Nov. 15, 2016) (explaining that “[v]irtually every large city, notable landscape feature, creature and weather pattern of North America—as well as myriad other words, concepts and images—has been snapped up and trademarked as the name of either a brewery or a beer”) (on file with the Washington and Lee Law Review).

2. See Ulrich R. Orth et al., *Promoting Brand Benefits: The Role of Consumer Psychographics and Lifestyle*, 21 J. CONSUMER MARKETING 97, 98 (2004) (“Craft beers are such an object with relatively few attributes that physically differentiate products, and brand names have been shown to have considerable importance in the purchase decision.”).

3. See *Why It's Important for Craft Brewers to Register*, GERBEN L. FIRM PLLC (Oct. 31, 2014), <https://www.gerbenlaw.com/blog/why-its-important-for-craft-brewers-to-register-trademarks/> (last visited Jan. 5, 2017) (“That increasing popularity, however, means an increasingly crowded marketplace, and with it, more competition for trademarks and naming rights, and an increased need for protection of brewery names and beer brands, both established and new.”) (on file with the Washington and Lee Law Review).

4. See *Martin City Brewing May Finally Get its Hard Way IPA trademark Registered*, KAIDER L. (Feb. 15, 2016) [hereinafter *Martin City Brewing*], <http://www.kaiderlaw.com/blog/category/all> (last visited Sept. 20, 2016) (“A ‘consent agreement,’ for example, is a common device to resolve a trademark dispute . . . These agreements are more common between two parties of more or less equal size (two craft breweries, for example.)” (on file with the Washington and Lee Law Review).

5. Marianna Moss, *Trademark “Coexistence” Agreements: Legitimate Contracts or Tools of Consumer Deception?*, 18 LOY. CONSUMER L. REV. 197, 197 (2005).

Trademark infringement lawsuits generally arise when there is a question as to whether the use of a certain trademark creates a likelihood of confusion with another mark.<sup>6</sup> In other words, the inquiry is whether “one mark [is] so close to another that an ordinary purchaser is likely to be confused, mistaken, or deceived regarding the source of the goods or service.”<sup>7</sup> Due to the fact that trademark coexistence agreements are contracts made and contemplated by the two potentially affected parties,<sup>8</sup> the Federal Circuit—the court that reviews decisions from the Trademark Trial and Appeal Board (TTAB)<sup>9</sup>—has maintained a longstanding opinion that trademark coexistence agreements should carry “great weight” when the TTAB performs a “likelihood of confusion” analysis to determine the legitimacy of a mark.<sup>10</sup> In fact, in *Bongrain International Corp. v. Delice De France, Inc.*, the Federal Circuit states:

We have often said, in trademark cases involving agreements reflecting parties’ views on the likelihood of confusion in the marketplace, that they are in a much better position to know the real life situation than bureaucrats or judges and therefore such agreements may, depending on the circumstances, carry great weight, as was held in *DuPont*. Here, the board appears effectively to have ignored the views and conduct of the parties

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6. See 15 U.S.C. § 1125(a)(1) (2012) (providing that any person who uses any term, name, symbol, device, or combination in commerce, shall be civilly liable if he or she is likely to cause confusion of another’s mark).

7. George Miaoulis & Nancy D’Amato, *Consumer Confusion & Trademark Infringement*, 42 J. OF MARKETING 48, 49 (1978) (“To make a judgment with regard to infringement, the court would like to know what is in the customer’s mind, how he is reacting to the two marks, and thus whether he is likely to be deceived.”).

8. See David Allen Bernstein, Note, *A Case for Mediating Trademark Disputes in the Age of Expanding Brands*, 7 CARDOZO J. CONFLICT RESOL. 139, 144–45 (2005) (“In some cases, companies are willing to compromise, which allows both parties to continue to use the brand in separate product or service areas. This compromise, also known as consent to use agreement, is the optimal solution . . .”).

9. See *CAE, Inc. v. Clean Air Eng’g*, 267 F.3d 660, 674 (7th Cir. 2001) (“[T]he Lanham Act provides two avenues for review of TTAB decisions: review by the Federal Circuit on the closed record of the TTAB proceedings; or review by the district court with the option of presenting additional evidence and claims.”).

10. See *Bongrain Int’l Corp. v. Delice De France, Inc.*, 811 F.2d 1479, 1484–85 (Fed. Cir. 1987) (explaining that in trademark cases involving coexistence agreements, “great weight” should be given to the agreement when performing a confusion analysis because the parties have a more practical understanding of the marketplace than “bureaucrats or judges”).

merely because it harbored a different view from the parties on likelihood of confusion.<sup>11</sup>

Therefore, the Federal Circuit finds that if the parties do not believe that coexisting use will cause a confusion in the marketplace, then it likely will not occur, and the TTAB need not substitute its judgment for that of the parties.<sup>12</sup>

On February 25, 2016, the TTAB rendered a decision of great importance to the craft brewing industry when it affirmed a ruling from the United States Patent and Trademarks Office (USPTO). The USPTO refused to register the trademark TIME TRAVELER BLONDE on the grounds of confusion with the previously registered mark TIME TRAVELER despite an extensive trademark coexistence agreement between the two breweries.<sup>13</sup> Bay State Brewing Company (Bay State), a small Massachusetts brewery, sought registration on the principal register for the mark of TIME TRAVELER BLONDE,<sup>14</sup> in standard characters, for “beer” within International Class 32, a trademark class that includes beers, mineral and aerated waters, and other non-alcoholic beverages.<sup>15</sup> A&S Brewing, a Vermont-based brewing

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11. *Id.*

12. *See, e.g., id.* at 1485

Likelihood of confusion under § 2(d) is, as the board said, a question of law and as such it is freely reviewable by us. Our review of this case, particularly considering the views of the parties on what actually happens and is likely to happen in the marketplace as it affects their respective businesses, constrains us to disagree with the board.

13. *See In re Bay State Brewing Company, Inc.*, 2016 WL 1045677, \*4 (T.T.A.B. 2016) (citing to the Appellant’s brief).

In this case, Applicant and [Registrant] made ‘reasoned assessments of the marketplace’ in a detailed agreement that is the Long Form Agreement submitted on December 30, 2013. This Agreement . . . is a non-naked, well-reasoned, and detailed agreement drafted by knowledgeable parties intimately familiar with the market and eager to avoid confusion. As is shown below the parties crafted an agreement designed to avoid confusion in the marketplace and underscored the agreement with a mutual commitment to collaborate in avoiding confusion in the marketplace. This agreement should be given the substantial and great weight as required by the Federal Circuit.

14. *See id.* at \*1 (describing the procedural history of the case).

15. *See International Classification of Goods and Services for the Purposes of the Registration of Marks*, World Intellectual Property Organization (10th ed. 2011) (explaining that Class 32 includes mainly non-alcoholic beverages, as well as beer).

collaborative, successfully registered the mark TIME TRAVELER, also in standard characters, for “beer, ale and lager’ in International Class 32.”<sup>16</sup> The USPTO trademark examining attorney denied Bay State’s application on the grounds that, when used for beer, it “so resembles the previously registered mark” of A&S, it is “likely to cause confusion.”<sup>17</sup> Following denial by the USPTO, Bay State appealed for review by the TTAB.<sup>18</sup> In its appeal, Bay State emphasized that it had previously entered into a consent agreement with A&S brewing that, if followed, would eliminate confusion.<sup>19</sup> After an in-depth analysis, the TTAB upheld the USPTO decision to refuse registration of Bay State’s mark notwithstanding the consent agreement, stating that “consumers are likely to be confused upon encountering the marks TIME TRAVELER BLONDE and TIME TRAVELER, both for ‘beer,’ even when used in accordance with the consent agreement.”<sup>20</sup>

This Note focuses on the issue of what protections a trademark coexistence agreement provides to companies within the craft brewing industry in light of the recent TTAB ruling in *In re Bay State Brewing Company, Inc.* In Part II, this Note provides an overview of the craft brewing industry and its importance to the United States economy.<sup>21</sup> Part III offers an overview of coexistence agreements as a function of contract law, while also giving a primer on trademark law and discussing use within the craft brewing industry.<sup>22</sup> Part IV analyzes the decision in *In re Bay State Brewing Company, Inc.* and its serious consequences for the craft brewing industry, while also focusing on the likelihood of confusion analysis for the craft brewing industry as a whole.<sup>23</sup> Finally, Part V examines the specific Trademark Coexistence Agreement with

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16. *In re Bay State Brewing Company, Inc.*, 2016 WL 1045677, \*1 (T.T.A.B. 2016)

17. *Id.*

18. *See id.* (explaining that when the examining attorney made refusal final, Bay State appealed to the TTAB).

19. *See id.* (“Applicant asserts that it has a consent agreement with Registrant, and asserts that ‘the parties acknowledge that confusion is likely unless they both adhere to the terms of the [agreement].’”).

20. *Id.* at \*10.

21. *See infra* Part II.

22. *See infra* Part III.

23. *See* discussion *infra* Part IV.

*In re Bay State Brewing Company, Inc.* and uses it as an example to discuss the future implications for trademark coexistence agreements in the craft brewing industry in light of the new level of scrutiny provided by the TTAB's decision.<sup>24</sup>

## II. Overview of the Craft Brewing Industry Recent Growth of the Craft Brewing Industry

The beer market in America is as healthy as it has ever been. In 2015, “the number of operating breweries in the U.S. grew fifteen percent, totaling 4,269 breweries — the most at any time in American history.”<sup>25</sup> Many individuals likely associate the term “craft beer” with any beer that is not “‘Big beer’ (or ‘MillCoorWeiser’<sup>26</sup>), the beer produced by Anheuser-Busch InBev (ABI) and MillerCoors, which are the two major producers of malt beverages in the United States.”<sup>27</sup> That being said, the Brewer's Associations—a trade organization that represents “small and independent American craft brewers”<sup>28</sup>—defines a craft brewer as:

An American craft brewer is small, independent and traditional. Small: Annual production of 6 million barrels of beer or less (approximately 3 percent of U.S. annual beer sales).

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24. See discussion *infra* Part V.

25. *Small and Independent Brewers Continue to Grow Double Digits*, BREWERS ASS'N (March 22, 2016) [hereinafter *Small and Independent Brewers Continue to Grow*], <https://www.brewersassociation.org/press-releases/small-independent-brewers-continue-grow-double-digits/> (last visited Sept. 7, 2016) (on file with the Washington and Lee Law Review).

26. See Adam Millsap, *Craft Brewing Has Brought Variety to Oktoberfest*, FORBES (Sept. 20, 2016, 10:04 A.M.), <http://www.forbes.com/sites/adammillsap/2016/09/15/craft-brewing-has-brought-variety-to-oktoberfest/#763a6c1f468f> (last visited Jan. 5, 2017) (“But it wasn’t too long ago that American beer drinkers were largely limited to what beer buffs call MillCoorWeiser beer—the mass produced American lager prominently sold under the Budweiser, Miller, and Coors brand names.”) (on file with the Washington and Lee Law Review).

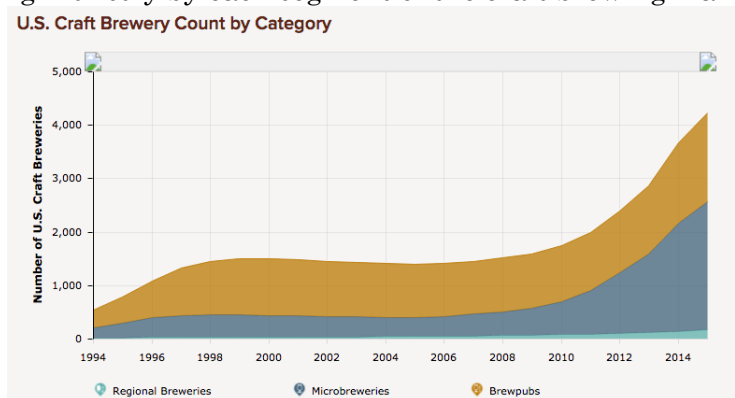
27. Kenneth G. Elzinga et al., *Craft Beer in the United States: History, Numbers, and Geography*, 10 J. WINE ECON. 242, 244 (2015) (explaining further that ABI and MillerCoors combined maintained a share of the market of beer sales in the United States of 73% and craft beer maintains less than 10% of the domestic market).

28. See BREWER'S ASS'N, *Small and Independent Brewers Continue to Grow*, *supra* note 25.



Beer production is attributed to the rules of alternating proprietorships. Independent: Less than 25 percent of the craft brewery is owned or controlled (or equivalent economic interest) by an alcoholic beverage industry member that is not itself a craft brewer. Traditional: A brewer that has a majority of its total beverage alcohol volume in beers whose flavor derives from traditional or innovative brewing ingredients and their fermentation. Flavored malt beverages (FMBs) are not considered beers.<sup>29</sup>

Within the definition of “craft brewer,” there are several sub-categories of breweries: microbreweries,<sup>30</sup> brewpubs,<sup>31</sup> nanobreweries,<sup>32</sup> and regional craft breweries.<sup>33</sup> The graphic below, Figure II.A.1,<sup>34</sup> demonstrates the growth of the craft brewing industry by each segment of the craft brewing market.



29. *Id.* at n. 1.

30. See Elzinga et al., *supra* note 27, at 244 n. 2 (“Microbreweries sell their output to a downstream vendor (i.e., a distributor or retailer).”).

31. See *id.* (“[B]rewpubs are vertically integrated and sell direct to the consumer at the production point (i.e., its restaurant or bar).”).

32. See *id.* at 244 (“In the taxonomy of craft beer production, there also is the nanobrewery, which, unlike home brewers, brews beer for resale but on a very small scale (a capacity of three barrels or less).”).

33. See *Craft Beer Industry Market Segments*, BREWERS ASS’N, <https://www.brewersassociation.org/statistics/market-segments/>, (last visited Nov. 17, 2016) (explaining that a regional craft brewery is a brewery, with an annual beer production of between 15,000 and 6,000,000 barrels, with a majority of volume in “traditional” or “innovative” beer) (on file with the Washington and Lee Law Review).

34. See *Number of Breweries: U.S. Craft Brewery Count by Category*, BREWERS ASS’N, <https://www.brewersassociation.org/statistics/number-of-breweries/>, (last visited Nov. 17, 2016) (providing various graphics representing

With the rapid growth in the craft brewing industry, the economic impact of the craft brewing industry is undoubted. In fact, as of 2015, ninety-nine percent of American breweries (4,225) are considered craft breweries and account for a retail value estimated at \$22.3 billion.<sup>35</sup> Additionally, craft breweries do not only produce great beer—they also produce great jobs.<sup>36</sup> In 2015, craft brewers provided nearly 122,000 jobs, which was a 6,000 job increase from 2014.<sup>37</sup>

### A. Local Impacts of Craft Beer

Craft breweries have a strong economic impact at the local, state, and national levels.<sup>38</sup> In fact, craft brewers contributed \$55.7 billion to the United States economy in 2014.<sup>39</sup> This contribution is tremendous when compared to the contribution of \$33.9 billion to the economy in 2012<sup>40</sup>—a testament to how much the industry has recently grown. Figure II.A.2<sup>41</sup> represents the economic impact that craft breweries have on each state.

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the number of breweries in the United States) (on file with the Washington and Lee Law Review).

35. See BREWERS ASS'N, *Small and Independent Brewers Continue to Grow*, *supra* note 25 (providing statistical figures that demonstrate the growth of the craft brewing industry in 2015).

36. See *id.* (“Small and independent brewers are a beacon for beer and our economy . . . . As breweries continue to open and volume increases, there is a strong need for workers to fill a whole host of positions at these small and growing businesses.”).

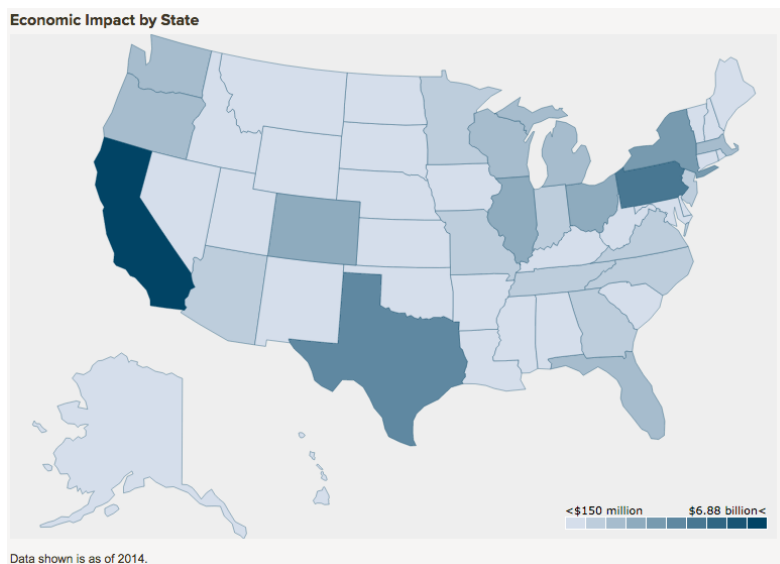
37. See *id.* (describing the economic impacts as a result of the craft brewing business).

38. See *Economic Impact*, BREWERS ASS'N, <https://www.brewersassociation.org/statistics/economic-impact-data/> (last visited Jan. 8, 2016) (“With a strong presence across the 50 states and the District of Columbia, craft breweries are a vibrant and flourishing economic force at the local, state, and national level.”).

39. See *id.* (explaining that his figure is “derived from the total impact of beer brewed by craft brewers as it moves through the three-tier system (breweries, wholesalers, and retailers), as well as all non-beer products like food and merchandise that brewpub restaurants and brewery taprooms sell”).

40. See Neil Reid & Jay D. Gatrell, *Brewing Growth*, 14 ECON. DEV. J. 5, 7 (2015) [hereinafter *Brewing Growth*] (“In 2012, the industry contributed \$33.9 billion to the U.S. economy and was responsible for more than 360,000 jobs . . . .”).

41. *Economic Impact*, BREWERS ASS'N, <https://www.brewersassociation.org/statistics/economic-impact-data/> (last visited Jan. 8, 2016) (on file with the



As seen in Figure II.A.2, the craft brewing industry generates the most economic output from larger states: California, Pennsylvania, Texas, New York, and Colorado, form the top five producing states in 2014.<sup>42</sup> However, the craft brewing industry also has economic impacts on smaller states, with Colorado, Oregon, Vermont, Pennsylvania, and Alaska making up the top five states based off of economic output per capita.<sup>43</sup>

Expansion of the craft brewing industry has also created a tourism niche as people travel to visit craft breweries.<sup>44</sup> As a result of growing beer tourism, many communities have developed “craft beer trails” that provide suggested itineraries for visiting breweries in the area.<sup>45</sup> These craft beer trails not only improve

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Washington and Lee Law Review).

42. *See id.* (providing the following economic outputs: California (\$6.9 billion), Pennsylvania (\$4.5 billion), Texas (\$3.8 billion), New York (\$2.9 billion), Colorado (\$2.7 billion)).

43. *See id.* (explaining that this figure is calculated per capita for adults over the age of 21).

44. *See* Jennifer Francioni Kraftchick et al., *Understanding Beer Tourist Motivation*, 12 *TOURISM MGMT. PERSPECTIVES* 41, 41 (2014) (“A beer tourist’s primary motivation for travel is to visit a brewery, beer festival, or beer show in order to experience the beer-making process and/or tasting of beer.”).

45. *See* Reid & Gatrell, *supra* note 40, at 8 (2015) (providing examples of

local economies and promote travel, but also promote collaboration in between breweries—a trend that causes brands to overlap and contributes to the collegial atmosphere of the craft brewing industry.<sup>46</sup>

In an effort to attract new breweries, some states have changed local laws.<sup>47</sup> Such local changes are helpful for attracting breweries because “[l]aws governing the production, sale, and consumption of beer vary significantly from state to state with more restrictive laws placing some [less restrictive] states at a competitive advantage.”<sup>48</sup> The willingness of states to alter laws in an effort to attract craft breweries demonstrates the importance of craft breweries to states and their economies.

### *B. Legislative Incentives for Craft Beer*

Because of the impact that craft breweries have on national and state economies, governments at every level have taken actions that effect the craft brewing industry. In 1978, Congress reduced the federal excise tax on beer from \$9.00/barrel to \$7.00/barrel for the first 60,000 barrels that were produced by breweries with less than two million barrels in total annual sales.<sup>49</sup> Additionally, at the time of this Note, legislation has been introduced into both the United States Senate and House of Representatives, under the title of the Craft Beverage Modernization and Tax Reform Act of 2015.<sup>50</sup> The proposed legislation has strong support from the industry because the act is tailored to promote job creation in craft brewing.<sup>51</sup> Among other

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craft beer trails in Columbus, Ohio; Kalamazoo, Michigan; and Louisville, Kentucky).

46. *See id.* (providing the example that “[i]n Mills River, NC, Sierra Nevada’s popular ‘Beer Camp’ model, which builds on a collaborative co-branding initiative with smaller craft houses . . .” has had a positive impact on the local economy).

47. *See id.* at 10 (describing that in an effort to attract Stone Brewing Company, South Carolina governor signed a bill that removed many restrictions on craft breweries and discussing current legislation in Ohio that would raise the state’s maximum ABV to 21 percent).

48. *Id.*

49. *See* Elzinga et al., *supra* note 27 at 244, n.2 (describing the reduction in the federal excise tax as a “windfall for craft brewers”).

50. S.1562, 114th Cong. (2015); H.R. 2903, 114th Cong. (2015).

51. *See Federal Excise Tax Overview: Craft Beer Modernization and Tax*

aims, the legislation will reduce excise tax and regulatory burdens for brewers, reducing the federal excise tax to \$3.50/barrel on the first 60,000 barrels for domestic brewers producing less than two million barrels annually.<sup>52</sup> This reduction in the excise tax will create more cash flow for brewers, allowing for reinvestment in their businesses and expansion of their breweries and expand distribution.<sup>53</sup> Additionally, the legislation would increase collaboration between brewers by removing restrictions on tax-free transfers of beer, repealing unnecessary inventory restrictions, and allowing expansions of breweries for packaging and storage facilities.<sup>54</sup> These legislative effects are designed to help craft breweries grow and expand by allowing small brewers to collaborate on new beers by giving them the flexibility to transfer beer between breweries without tax liability.<sup>55</sup> With such legislation being implemented to help the craft brewery industry expand, the TTAB's ruling in *In re Bay State Brewing Company*<sup>56</sup> may restrict these aims and reduce the collaboration between these breweries.

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*Reform Act of 2015*, BREWERS ASS'N, <https://www.brewersassociation.org/government-affairs/craft-beverage-modernization-and-tax-reform-act/federal-excise-tax-overview/> (last visited Nov. 17, 2016) (“The intent of the bill is to update and modernize the excise tax and regulatory requirements for craft brewers as well as vintners and distillers, and thereby help to ensure the continued growth of America’s craft beverage industries.”) (on file with the Washington and Lee Law Review).

52. *See id.* (describing Section 201 of the bill introduced into the House of Representatives and Section 201 of the bill introduced into the Senate).

53. *See id.* (explaining that Section 201 of the bill is designed to “[r]ecalibrate excise taxes for brewers to provide more cash flow to allow them to reinvest in their businesses”).

54. *See id.* (describing Section 204 of the bill introduced into the House of Representatives and Section 204 of the bill introduced into the Senate).

55. *See Majority of U.S. Senators Support Beer Tax Reform*, BREWERS ASS'N, <https://www.brewersassociation.org/press-releases/majority-u-s-senators-support-beer-tax-reform/> (last updated Sept. 26, 2016) (last visited Jan. 6, 2016) (discussing specific provisions within the introduced legislation) (on file with the Washington and Lee Law Review).

56. *See supra* notes 13–20 and accompanying text (discussing the facts of *In re Bay State Brewing Company*).

*C. Geographical Distribution of Craft Beer*

While all Americans love beer, the distribution of craft breweries is not even throughout the United States.<sup>57</sup> Several theories attempt to explain the uneven distribution of breweries during the growth of the industry.<sup>58</sup> One theory that may explain this growth and distribution is the resource partitioning theory, which explains that as a market expands, it divides into special segments.<sup>59</sup> Craft brewers have emerged to address the needs of a certain segment.<sup>60</sup> Neil Reid, a craft brewing expert who has published multiple works on the topic, has stated that he is partial to the resource partitioning theory because it “explains the emergence of the craft beer industry as a response to consumer dissatisfaction with American pale lager that has, up until recently, dominated American palates.”<sup>61</sup> Specifically, “craft beer appears to resonate particularly strongly with the millennial demographic cohort who seems attracted to its diversity of styles and flavors.”<sup>62</sup> Therefore, one explanation for the distribution of the industry is that craft breweries have emerged in areas where

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57. See Neil Reid et al., *From Yellow Fizz to Big Biz: American Craft Beer Comes to Age*, 57 FOCUS ON GEOGRAPHY 114, 114 (Sept. 2014) [hereinafter *From Yellow Fizz to Big Biz*] (“Growth of the craft brewing industry has been unevenly distributed across both space and time. There are states where the industry has a strong presence and those where it is weakly represented.”).

58. See *id.* (explaining that the emergence and growth of the craft brewing industry is a result of resource partitioning and is part of a broader neo-localism movement).

59. See *id.* (explaining the resource partitioning theory and how this theory applies to the craft brewing industry).

60. See Neil Reid et al., Conference Paper, *The Ubiquity of Good Taste: A Spatial Analysis of the Craft Brewing Industry in the United States*, 53rd Congress of the European Regional Science Association: Regional Integration: Europe, the Mediterranean and the World Economy, 4 (Aug. 2013) [hereinafter Conference Paper] (“Over time, however, some consumers express dissatisfaction with the homogeneous product and a market evolves for higher quality and differentiated styles of beer.”).

61. See Neil Reid et al., *From Yellow Fizz to Big Biz*, *supra* note 57, at 114.

62. *Id.*; see also Reid et al., Conference Paper, *supra* note 60, at 4 (“Craft beer is attractive to a discernable demographic. The typical consumer of craft beer is male, white, earns at least \$75,000 per year, works in the service sector, and is college educated.”); Reid & Gatrell, *supra* note 40 (“[C]raft breweries tend to be more numerous in metropolitan areas whose populations exhibit higher levels of social tolerance, and where a greater share of those who live there are young (aged 25-44), educated, and non-Hispanic whites.”).

it can best serve these distinct populations and satisfy the desires for beers other than the typical MillCoorWeiser.<sup>63</sup>

Second, it appears that the craft brewing industry is a part of a larger neo-localism movement that is defined as “the deliberate seeking out of regional lore and local attachment by residents (new and old) as a delayed reaction to the destruction in modern America of traditional bonds to the community and family.”<sup>64</sup> Craft breweries are part of “the larger ‘buy-local’ movement that has grown in popularity in recent years, particularly with respect to the purchase of locally-grown food by ‘localvores.’”<sup>65</sup> As a response to this movement, many craft breweries attempt to capitalize on local connections in advertising and marketing strategies.<sup>66</sup> Such advertising and marketing strategies “[c]reat[e] an attachment to the local area, especially its history and landscape, [that] is often reflected in the names that craft brewers chose for the portfolio of beers that they brew.”<sup>67</sup> The desire to use local names for their beers limits brewery name choices and has created a trend for creating trademark coexistence agreements with other breweries. Unfortunately, this trend may be undermined by *In re Bay State Brewing Company*, as will be discussed in detail in Part V of this Note.<sup>68</sup>

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63. See Reid et al., *From Yellow Fizz to Big Biz*, *supra* note 57, at 116 (“In the case of the beer industry the craft brewers have emerged to meet this demand for variety; a variety that is manifest in terms of greater choice with respect to style, flavor, and strength of beer.”).

64. *Id.*

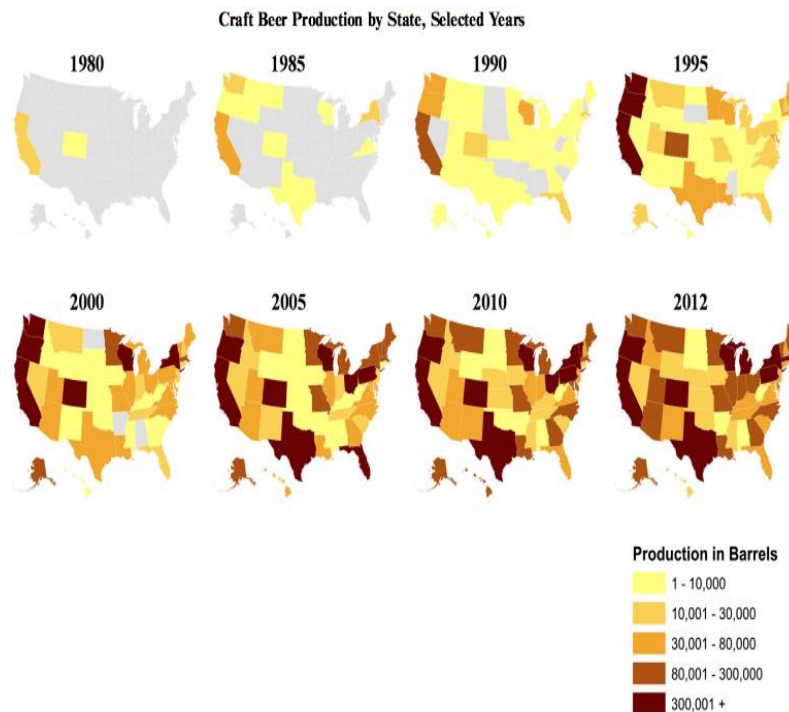
65. Reid et al., Conference Paper, *supra* note 60, at 6.

66. See Reid et al., *From Yellow Fizz to Big Biz*, *supra* note 57, at 117 (“[M]any craft breweries consciously foster the concept of neo-localism and have purposefully catered to these cravings for connection through targeted marketing strategies that emphasize local identity and distinctiveness.”).

67. *Id.* (providing an example that Great Lakes brewing Company in Cleveland brews the Edmund Fitzgerald Porter, named after a Great Lakes freighter (the SS Edmund Fitzgerald) that sank on Lake Superior during a storm in 1975).

68. See *infra* Part V. Examination of Specific Trademark Coexistence Agreement in *In re Bay State Brewing Company, Inc.* and the Implications for Future Coexistence Agreements in the Craft Brewing Industry (examining the TTAB’s decision and the implications that the decision will have on the craft brewing industry).

The above mentioned theories may help explain the uneven distribution of craft breweries throughout the United States.<sup>69</sup> The



largest geographic concentrations of craft breweries are found in the Pacific Northwest, California, the Northeast, the Great Lakes, and the Mountain West.<sup>70</sup> Figure II.A.3<sup>71</sup> below demonstrates the Craft Beer Production by State since 1980.

69. See Reid et al., Conference Paper, *supra* note 60, at 5 (“The demographics of the market may impact the geography of the industry as regions and locales whose demographic and economic characteristics are attractive to craft brewers are more likely to possess a higher number of microbreweries and brewpubs.”).

70. See Reid & Gatrell, *Brewing Growth*, *supra* note 40, at 6 (explaining that the following cities are responsible for such geographic distribution: Seattle, Portland, San Diego, Los Angeles, San Francisco, Sacramento, Riverside, New York, Washington, D.C., Philadelphia, Boston, Chicago, Minneapolis, Detroit, and Denver).

71. Elzinga et al., *supra* note 27, at 261.



Figure II.A.3 shows that the craft brewing industry has grown exponentially since 1980, when there was only one craft brewer outside of the state of California.<sup>72</sup> Further, the above chart demonstrates that “craft beer production moved sequentially into the Pacific Northwest, the Northeast, and then the upper Midwest.”<sup>73</sup> Based on the time-lapsed geographic map, it is apparent that craft brewing was slow to move into lower Midwestern and Southern states and was not brewed in every state until 2001.<sup>74</sup> Additionally as Figure II.A.3 demonstrates, it is evident that expansion of craft brewing is not random,<sup>75</sup> and these evolving clusters contribute to more overlapping distribution markets within the craft brewing industry—an issue that the TTAB acknowledges in *In re Bay State Brewing Co. Inc.*<sup>76</sup>

#### D. Continued Expansion of Craft Beer

As there are no indications that the expansion of craft brewing will stop anytime soon, the geographical overlap and distribution described above will likely become more crowded.<sup>77</sup> The continuous expansion of craft beer also includes successful and established breweries that search for new production locations to expand their markets.<sup>78</sup> The expansion of such breweries hinges on some factors

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72. See *id.* at 258 (explaining that craft beer originated in California, where 97% of craft beer was produced in 1980, as there was only one brewer outside of the state who was located in Boulder, Colorado).

73. *Id.*

74. See *id.* at 260 (describing production of craft beer while also explaining that a similar geographic pattern emerges when examining the number of craft brewers per state as compared to the total production by state).

75. See *id.* (“The geographic distribution of craft beer appears to be anything but random, raising the question: What caused the geographic clustering of economic activity in craft brewing . . . ?”).

76. See *In re Bay State Brewing Company, Inc.*, 2016 WL 1045677, \*8 (T.T.A.B. 2016) (“[A]lthough Applicant’s use, by the terms of the agreement, is limited to New York, a nationwide registration issued to the Applicant would give Applicant presumptive nationwide exclusive rights.”); See also *infra* Part V.B.2 (examining the TTAB’s discussion of the geographic restrictions in Bay State Brewing’s agreement).

77. See Reid et al., *From Yellow Fizz to Big Biz*, *supra* note 57, at 123–24 (“At the time of writing, the growth in the number of craft breweries shows no sign of abating.”).

78. See Reid & Gatrell, *Brewing Growth*, *supra* note 40, at 6 (“[T]he need for

that are directly related to a geographical area.<sup>79</sup> For example, the water content of a particular area is important in determining location of a brewery because of the amount of water used in beer production.<sup>80</sup> Additionally, access to highways for transport and distribution are important for breweries in deciding where to expand their operation.<sup>81</sup> Furthermore, factors that relate to the demographics of the area, particularly to the neo-localism movement, are important in determining future sites for breweries and production facilities.<sup>82</sup> As breweries expand their geographic footprint, successful craft breweries become national brands, which further crowds the market and provides more pressure on branding and trademarking options for new and emerging breweries.<sup>83</sup>

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a second production location arises as the brewery is successful, demand for its beer increases, and the geographic footprint of its market expands. As growing breweries ship their product to more geographically distinct markets, their transportation costs increase.”).

79. *See id.* at 10 (“[T]he historical factors that determine the geography of site selection are changing.”).

80. *See id.* at 9

With water being a key ingredient of beer, Stone was particularly interested in the type, availability, and quality of the water. The brewery will use approximately 215,000 gallons of water per day. While water treatment is now standard practice in the industry, water quality and its specific characteristics—hardness, alkalinity, and chlorinity—influence location.

81. *See id.* (“Access to interstate highways and concerns about water were also important to Sierra Nevada Brewing Company when there were looking for a second production location in the eastern United States.”).

82. *See id.* (“Indeed the traditional concept of a community’s ‘business climate’ has now been expanded to include softer cultural factors (i.e., perceived ‘progressiveness’, availability of brownfield sites, sustainability, and so on) and the political will to rapidly respond and revise arcane regulations.”).

83. *See id.* (“The expanding geographic footprint of these highly successful craft breweries means that they are increasingly becoming national brands. For example, New Belgium Brewing Company’s beer is available in 36 states plus D.C., while Green Flash Brewing Company’s beer is sold in 40 states.”).

*1. Growth of the Craft Brewing Industry Has Led to  
Trademarking and Naming Issues*

As explained above, the craft brewing industry is growing at a rapid pace.<sup>84</sup> With a growing industry and a limited possible number of names, brands, and labeling designs, many of which have trademark protection, there will naturally be overlap in some of the brands and names for certain beers.<sup>85</sup> Arguably, the most important aspect in having a successful beer (aside from taste) is maintaining a successful brand name and image.<sup>86</sup> The importance of maintaining a successful brand combined with the large boom in the craft brewing industry and the limited number of names, brands, and designs, has led to an increase in trademark litigation within the craft brewing industry.<sup>87</sup> For brewery owners the

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84. See *supra* Part I.A (explaining the recent growth of the craft brewing industry and the economic impact that it has had).

85. See Sara Randazo, *Hoppportunity Cost: Craft Brewers Brawl Over Catchy Names as Puns Run Dry*, WALL STREET J. (July 10, 2016, 1:10 PM), <http://www.wsj.com/articles/hoppportunity-cost-craft-brewers-brawl-over-catchy-names-as-puns-run-dry-1468170639> (last visited Sept. 20, 2016) (detailing the issues associated with numerous attempting to name beers with relevant puns) (on file with the Washington and Lee Law Review). See generally *The Great Beer Trademark Wars: Brewers Head to the Courts to Protect Their Brands*, ALL ABOUT BEER MAG., <http://allaboutbeer.com/article/beer-trademarks/>, (April 30, 2014) (last visited September 7, 2016) (on file with the Washington and Lee Law Review).

86. See Ulrich R. Orth et al., *Promoting Brand Benefits: The Role of Consumer Psychographics and Lifestyle*, 21 J. CONSUMER MARKETING 97, 98 (2004) (“Craft beers are such an object with relatively few attributes that physically differentiate products, and brand names have been shown to have considerable importance in the purchase decision.”).

87. See Rebecca S. Winder, Note, *Trademark Protection in the Craft Brewing Industry: A Beer by Any Other Name May Be an Infringement*, 15 WAKE FOREST J. BUS. & INTELL. PROP. L. 148, 149 (2014)

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.

See also Carolyn Heneghan, *Why Beverage Industry Lawsuits Are Increasing*, FOOD DIVE, <http://www.fooddive.com/news/why-beverage-industry-lawsuits-are-increasing/411817/> (last visited Sept. 20, 2016) (discussing how the rapid expansion of the beverage industry has led to an increase in trademark disputes,

thought of trademark litigation can be daunting and many owners likely share the viewpoint of Matt Nadeau, the owner of Rock Art Brewery based in Morrisville, Vermont, who expressed the difficulties that breweries face when threatened with trademark litigation:

The way the system is set up, I'm being explained by these trademark lawyers, is that this will enter the court system and this \$1 billion corporation will be allowed to fight this in the courts with dollars. If I win the first round, they can appeal. And if I win the second round, they can appeal. And all the time, this starts at \$65,000 for each court case and goes and goes. And at some point obviously, a small little Vermont brewery is not going to be able to afford this anymore. And what happens at that point when you're involved in this legal battle and can no longer afford to represent yourself, you lose by default. The court system says you default lose. What happens then? I have to change the name of the beer and move on if there's any brewery left.<sup>88</sup>

Matt Nadeau's description encompasses the fear that many craft brewery owners face and, even when there may not be any trademark infringement, craft brewery owners are often overwhelmed by the threat of litigation and are advised by counsel to take alternate courses of action.<sup>89</sup> One such alternative is to

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misleading claims, and distribution rights violations); Michael Kanach et. al, *The Brewhaha: Working with Craft Breweries for Trademark, Brand Protection, and Other Issues*, A.B. A. SECT. INTELL. PROP. L., (Mar. 27, 2015, 3:30 PM), [http://www.americanbar.org/content/dam/aba/administrative/intellectual\\_property\\_law/2015/spring/materials/aba-ipl-brewhahacraftbeertrademarks-kanach-pdf-combined.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/intellectual_property_law/2015/spring/materials/aba-ipl-brewhahacraftbeertrademarks-kanach-pdf-combined.authcheckdam.pdf) (last visited September 20, 2016) (discussing recent disputes and indicating that the national median cost of trademark litigation up through discovery is \$151,000 and through trial is \$300,000, which demonstrates the incentive to enter into trademark coexistence agreements) (on file with the Washington and Lee Law Review); Robyn Ross, *Trouble Brewing*, TEXAS MONTHLY (Jan. 2016), <http://www.texasmonthly.com/the-culture/trouble-brewing/> (last visited Sept. 20, 2016) (analyzing a dispute between two Texas Breweries and describing the steps and the consequences with regard to the USPTO) (on file with the Washington and Lee Law Review).

88. Ross Appel, *Worry Wort: A Path to Acquiring Trademark Rights in the Craft Brewing Industry*, 24 FORDHAM INTELL. PROP., MEDIA, & ENT. L. J. 1030, 1045–46 (2015) (citing Leah Chan Grinvald, *Shaming Trademark Bullies*, 2011 WIS. L. REV. 625, 627–628 (2011)).

89. See *id.* at 1046 (“A Vermont attorney advised Nadeau that there was no infringement but that he should consider his family, his employees, and the future of the business and simply change the name.”); see also Winder, *supra* note 87, at 148 (“Having just started your own business, you do not have the excess funds

enter into a trademark coexistence agreement with another party<sup>90</sup>—the method that Bay State Brewing chose, which was ultimately invalidated by *In re Bay State Brewing Company*.<sup>91</sup>

### III. Overview of Trademark Coexistence Agreements

#### A. Trademark Law Primer

The Lanham Act of 1946 defines a trademark as “any word, name, symbol, or device, or any combination” used or intended to be used in commerce that can “identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.”<sup>92</sup> Trademark law serves dual goals—“to protect consumers from deception and confusion over trade symbols *and* to protect the plaintiff’s infringed trademark as property.”<sup>93</sup> Trademarks play an important economic role as they encourage the production of quality products and reduce the

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necessary to hire an attorney and take the dispute to court. Instead, you can either work with the other brewer. . . or you can appeal to your. . . supporters. . . attempt[ing] to get the other brewer to back down.”).

90. See Christina Sauerborn, *Trademark Troubles Overflow for the Craft Beer Industry*, FORDHAM INTELL. PROP., MEDIA, & ENT. L. J. (Nov. 8, 2016), <http://www.fordhamiplj.org/2016/11/08/trademark-craft-beer-industry/> (last visited Feb. 21, 2017) (explaining that “another workaround that can be used to navigate trademark disputes is a ‘coexistence agreement,’ where two or more parties consent to one another’s registrations and mutually plan how to distinguish themselves in the marketplace”).

91. See *supra* Part IV. (discussing the TTAB’s analysis of *In re Bay State Brewing Company*).

92. 15 U.S.C.A. § 1127 (2006).

93. J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:2 (4th ed. 2016); see also S. Rep. No. 1333, 79th Cong., 2d Sess., 3 (1946)

The purpose underlying any trademark statute is twofold. One is to protect the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get. Secondly, where the owner of a trade-mark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats. This is the well-established rule of law protecting both the public and the trade-mark owner.

customer's costs of making purchasing decisions.<sup>94</sup> Generally, trademarks perform four functions that merit protection in the courts.<sup>95</sup> First, trademarks "identify one seller's goods and distinguish them from goods sold by others," and second, they "signify that all goods bearing the trademark come from or are controlled by a single, albeit anonymous source."<sup>96</sup> Third, trademarks "signify that all goods bearing the trademark are of an equal level of quality" and fourth, they are used "as a prime instrument in advertising and selling the goods."<sup>97</sup> It is also important to note that a trademark represents the good will that a business has built up.<sup>98</sup> Therefore, trademarks are used to reduce consumer confusion by clearly identifying the source of a good, while also encouraging competition by granting producers exclusive rights to use their trademarks and the good will associated with them.<sup>99</sup>

Trademark law differs from other forms of intellectual property law (such as patents, copyrights, or trade secrets) as trademark law "does not depend upon novelty, invention, discovery, or any work of the brain. It requires no fancy or imagination, no genius, no laborious thought."<sup>100</sup> Instead, trademark protection is awarded to an individual who is first to use a distinctive mark in commerce.<sup>101</sup> Thus, it is the use of a mark in commerce that gives the originator of a mark trademark protection.<sup>102</sup>

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94. *Id.* at § 2:3 (4th ed. 2016).

95. *Id.* at § 3:2.

96. *Id.*

97. *Id.*

98. *See id.* ("If this consumer satisfaction and preference is labeled 'good will,' then a trademark is the symbol by which the world can identify that good will.").

99. *Id.* at § 2:1; *see also* MARK A. LEMLEY ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2016, VOLUME II: COPYRIGHTS, TRADEMARKS, AND STATE IP PROTECTIONS, V-3 (2016) (describing that consumers largely rely on trademarks in situations when it is difficult to inspect a product quickly and cheaply to determine its quality).

100. LEMLEY ET AL., *supra* note 99, at V-4 (quoting Trade-Mark Cases, 100 U.S. 82, 94 (1879)).

101. *Id.* at V-5.

102. *Id.* at V-6.

Trademark registration is not required for trademark protection, but registration on the USPTO Principal Register provides presumptive evidence of trademark protection.<sup>103</sup> Federal trademark registration can be accomplished either through the filing a use-based application,<sup>104</sup> under 15 U.S.C. § 1051(a), or an intent-to-use application under § 1051(b).<sup>105</sup> If the application is approved by the USPTO, the mark is placed on the USPTO Principal Register, and the mark holder possesses an exclusive right to use the trademark in connection with the particular good or service for which it is registered.<sup>106</sup> Essentially, this means that a senior user of a registered mark may prevent subsequent users from using the registered mark or one that is similar where there is a likelihood of confusion between the two marks.<sup>107</sup>

Registration may also be acquired under the concurrent use doctrine, which was codified into the Lanham Act in 1946 as 15 U.S.C. § 1052(d). The concurrent use doctrine “allows different owners to use the same or similar marks in commerce under certain circumstances.”<sup>108</sup> The concurrent use doctrine arose out of common law and made it possible for different users to create similar marks independently of each other, providing a system which did not punish a subsequent user who used the similar mark in a geographically remote area and adopted the similar mark in

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103. *See id.* at V-103 (explaining that the primary advantages to registration are “nationwide constructive use and constructive notice, which cut off rights of other users of the same or similar marks” and “the possibility of achieving incontestable status after five years, which greatly enhances rights by eliminating a number of defenses”).

104. *See* 15 U.S.C. § 1051(a) (2002) (describing the procedure for the owner of a trademark that is currently used in commerce to request registration of its trademark on the principal register).

105. *See* 15 U.S.C. § 1051(b) (2002) (describing the procedure for a person who has a good-faith bona fide intention to use a mark in commerce to request registration of its trademark on the principal register).

106. *See* Winder, *supra* note 87, at 153 (explaining the process for acquiring federal trademark registration on the principal register under the Lanham Act).

107. *See* LEMLEY ET AL., *supra* note 99, at V-5 (2016) (explaining the importance of trademark protection for the senior user); *see also id.* at 153–54 (“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.”).

108. David S. Barrett, *The Future of the Concurrent Use of Trademarks Doctrine in the Information Age*, 23 HASTINGS COMM. & ENT. L. J. 687, 688 (2001).

an innocent manner using good faith.<sup>109</sup> Indeed, this common law doctrine has been defined as “the result of a court’s desire to find an equitable balance between trademark users and the buyers of the goods or services.”<sup>110</sup>

*B. General Overview of Trademark Coexistence Agreements as a Part of Contract Law*

*1. Trademark Coexistence Agreements Defined*

Trademark coexistence agreements are creatures of contract law which allow potentially confusing trademarks to coexist without trademark infringement lawsuits.<sup>111</sup> The International Trademark Association (INTA) defines trademark coexistence agreements as an “[a]greement by two or more persons that similar marks can coexist without any likelihood of confusion; allows the parties to set rules by which the marks can peacefully coexist.”<sup>112</sup> A consent agreement is a form of coexistence agreement, which is often abbreviated, however the two terms often are used interchangeably.<sup>113</sup> Trademark consent or coexistence agreements

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109. *See id.* at 689–90 (providing a brief history of the concurrent use doctrine).

110. *Id.* at 690.

111. *See Moss, supra* note 5, at 197 (describing the purpose of trademark coexistence agreements which are often agreed upon between manufacturers of similar products); *see also* Lawrence W. Greene, *The Ties that Bind? Considerations in Drafting and Maintaining U.S. Trademark Consent and Coexistence Agreements*, INT’L TRADEMARK ASS’N (Mar. 15, 2012), <http://www.inta.org/INTABulletin/Pages/TheTiesThatBindConsiderationsinDraftingandMaintainingUSTrademarkConsentandCoexistenceAgreements.aspx> (last visited Feb. 1, 2017) (“Consent agreements and coexistence agreements are indispensable tools for resolving present or possible future disputes between two parties about the use and/or registration of arguably similar marks for related goods or services.”) (on file with the Washington and Lee Law Review).

112. *INTA Glossary*, INT’L TRADEMARK ASS’N, <http://www.inta.org/TrademarkBasics/Pages/glossary.aspx> (last visited Feb. 1, 2017) (also explaining that “concurrent use agreement” is defined as an “[a]greement by two or more persons to use the same mark in connection with the same or similar goods or services; usually limited by geographic boundaries”) (on file with the Washington and Lee Law Review).

113. *See Consent or Coexistence? Deciding Which Trademark Agreement to Use*, Practical Law: Thomson Reuters (Jun. 3, 2014), <http://us.practicallaw.com/7->



may be introduced by parties attempting to obtain trademark registration.<sup>114</sup> While these agreements vary in form and substance from case to case, “often, a consent agreement is the trademark applicant’s best option for convincing the Examiner that their proposed mark will not cause a likelihood of confusion with the mark cited against their application.”<sup>115</sup> A consent agreement will often be considered by the examining attorney as evidence that there is no likelihood of confusion.<sup>116</sup>

## 2. *Judicial Interpretation of Trademark Coexistence Agreements*

Trademark coexistence agreements carry more weight and legal consequences in the United States than internationally.<sup>117</sup> In most international jurisdictions, coexistence agreements are used as evidence in acquiring trademark registration, however, once a mark is registered, the “useful life of the consent agreement can come to an abrupt end.”<sup>118</sup> On the contrary, in the United States,

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569-3945 (last visited Feb. 1, 2017) (explaining that a trademark consent agreement is a relatively simple agreement where one party grants the other consent to use and register a trademark whereas coexistence agreements are more comprehensive, generally including use and registration limitations for both marks involved in the agreement) (on file with the Washington and Lee Law Review).

114. *See Is a Co-Existence Agreement the Right Choice For Your Brand?*, L. OFF. JOSEPH C. MESSINA, <http://www.ny-trademark-lawyer.com/is-a-co-existence-agreement-the-right-choice-for-your-brand.html> (last visited Feb. 1, 2017) (explaining the factors that a company or individual should weigh in determining whether to enter into a trademark co-existence agreement) (on file with the Washington and Lee Law Review).

115. *Id.*

116. *See id.* (suggesting that the reasoning behind considering co-existence agreements as evidence of no likelihood of confusion “is that the parties most affected by potential consumer confusion are declaring that confusion will not result”).

117. *See Consent or Coexistence? Deciding Which Trademark Agreement to Use*, Practical Law: Thomson Reuters (Jun. 3, 2014), <http://us.practicallaw.com/7-569-3945> (last visited Feb. 1, 2017) (explaining the more significant legal life of a consent agreement in the United States as compared to many international jurisdictions) (on file with the Washington and Lee Law Review).

118. *See id.* (describing that many international trademark offices focus on acting in the public interest and are extremely discretionary in their acceptance of consent agreements to allow a party to overcome a citation to the other party’s mark, and once accepted the agreement essentially ends).

because trademark coexistence agreements “play a more fundamental role in defining or redefining the scope of each party’s trademark rights, they are given great weight by the USPTO.”<sup>119</sup> As discussed above, the deference given to coexistence agreements has been noted by the Federal Circuit, as it has stated that “in trademark cases involving agreements reflecting parties’ views on the likelihood of confusion in the marketplace, that they are in a much better position to know the real life situation than bureaucrats or judges and therefore such agreements may, depending on the circumstances, carry great weight.”<sup>120</sup>

The Federal Circuit—the court that has jurisdiction to review many TTAB decisions—is not the only court to give great deference to trademark coexistence agreements, respecting the freedom of parties to contract. For example, in *Times Mirror Magazines v. Field & Stream Licenses Co.*,<sup>121</sup> the Second Circuit refused to set aside a trademark coexistence agreement.<sup>122</sup> In the case, the plaintiff sued for (among other things) breach of contract and trademark infringement and sought cancellation of all contracts, specifically the trademark coexistence agreement with the defendant regarding the “FIELD & STREAM” mark.<sup>123</sup> The plaintiff contended that the trademark coexistence agreement should have been voided because “they [would] inevitably cause substantial confusion and thus injure the public interest.”<sup>124</sup> The plaintiff further argued that the district court erred by “requiring injury to the public rather than simply a heightened showing of confusion”—an argument that the Second Circuit found unpersuasive.<sup>125</sup> The Second Circuit held that “in order to obtain

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119. *See id.* (discussing the fact that because trademark coexistence agreements play a more prominent role in the United States than abroad, there are more factors to consider when deciding whether to enter into an agreement and how to draft such an agreement).

120. *Supra* notes 10–12 and accompanying text.

121. 294 F.3d 383 (2d Cir. 2002).

122. *See id.* at 384 (“Because defendants acted within their rights under the agreements and [plaintiff] has not shown that the public interest requires rescission of the contracts, we affirm.”).

123. *See id.* at 388 (explaining the lawsuit and the district court decision that upheld the trademark coexistence agreement as a valid and well-reasoned agreement).

124. *Id.* at 395.

125. *See id.* (explaining the reasoning of the court and discussing that

rescission of a freely bargained trademark contract, a party must show that the public interest will be significantly injured if the contract is allowed to stand.”<sup>126</sup> The court reasoned that “simple fairness” requires an adherence to contracts unless that “will damage the public and not just a contracting party.”<sup>127</sup> Additionally, the Second Circuit explicitly states that the public interest will not be significantly injured if confusion causes members of the public “to buy products of equal quality that do not threaten their health or safety” and as a result, the trademark coexistence agreement shall be upheld.<sup>128</sup> Using the rationale of the Second Circuit, it would seem that a trademark coexistence agreement between two breweries (such as the agreement in *In re Bay State Brewing Co., Inc.*) for the names of beer, would never rise to the level of causing significant injury to the public interest, as confusion would only cause a consumer to purchase the wrong beer (a product of equal quality) and would not threaten the consumer’s health or safety.<sup>129</sup>

Similar to the Second Circuit, the TTAB—the administrative body that decided *In re Bay State Brewing Co., Inc.*—has also given great deference in the past to trademark coexistence agreements. In *Ron Cauldwell Jewelry, Inc. v. Clothestime Clothes, Inc.*,<sup>130</sup> the TTAB granted summary judgment on behalf of an applicant who filed to register the mark EYE CANDY for use on fashion accessories.<sup>131</sup> The opposer, who had a previously used mark EYE CANDY for the use on similar fashion products,<sup>132</sup> contended that

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trademark agreements are favored under the law and “courts considering negotiated agreements governing mark use accord them greater deference than they give to equitable defenses . . .”).

126. *Id.* at 396.

127. *Id.*

128. *See id.* (explaining further that in the absence of significant harm to the public, a plaintiff should not be permitted to void the contractual terms of a trademark coexistence agreement).

129. *See id.* (discussing that the district court correctly upheld the contract because a purchase of a similar product would not threaten the health or safety of the public).

130. 2002 WL 745591 (T.T.A.B.2002).

131. *See id.* at \*1 (explaining that the applicant is being opposed for registration of mark by an opposer who has a similar mark pending application, but the two parties have previously entered into a trademark coexistence agreement).

132. *See id.* (explaining that the opposer’s mark was for “retail stores

the applicant's mark should not be registered because it was "likely to cause confusion, mistake or deception."<sup>133</sup> Prior to application, the applicant and the opposer entered into a trademark coexistence agreement, which among other things, stipulated that the opposer would not object to the application for the EYE CANDY mark and in return the applicant would not object to the opposer using EYE CANDY as a store name in New York City.<sup>134</sup> Applicant argued that registration should be permitted due to the terms of the trademark coexistence agreement—an agreement that opposer contended was ambiguous and without consideration.<sup>135</sup> The TTAB reached its conclusion that registration should be permitted solely on the basis of the trademark coexistence agreement.<sup>136</sup> Consequently, in basing its decision solely on a contractual agreement, the TTAB did not consider "any outside policy questions, such as consumer confusion, injury to public interest, etc."<sup>137</sup> After acknowledging the existence of a coexistence agreement, the TTAB only concerned itself with contractual issues—once it found that the coexistence agreement was clear and unambiguous on its face, it had no problem in granting summary judgment for the applicant.<sup>138</sup> Additionally, the TTAB addressed the contention that no consideration was given for the agreement, and found that there is no genuine issue of material fact with respect to the consideration for the trademark coexistence agreement.<sup>139</sup> In responding to the consideration argument, the TTAB noted that "the coexistence

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featuring jewelry, watches, money clips, cuff links, key chains, clocks, handbags, purses, shawls, scarves, gloves, and decorative hair clips and pins . . .").

133. *Id.*

134. *Id.* at \*3.

135. *Id.* at \*3–4.

136. *See id.* at \*5 ("After careful consideration of the short, two-page coexistence agreement, the arguments and evidentiary submission presented by each party, we find that applicant has met its burden on summary judgment . . . and that it is entitled to registration as a matter of law.>").

137. Moss, *supra* note 5, at 210.

138. *See* Ron Cauldwell Jewelry, Inc. v. Clothetime Clothes, Inc., 2002 WL 745591, \*5 (T.T.A.B. 2002) (explaining that the appropriate way to interpret an agreement is not on the subjective intention of the parties, but rather on the objective words of the parties and if the agreement is clear and unambiguous on its face, it should be upheld).

139. *Id.* at \*5.

agreement itself evidences consideration” as both parties give up rights when entering into such an agreement and thus form a valid contract.<sup>140</sup>

The previously described opinions demonstrate the willingness of courts to accept and give deference to trademark coexistence agreements on the grounds of contract law.<sup>141</sup> Following the logic of the *Time Mirror Magazine* and *Ron Cauldwell Jewelry*, courts should balance the public interest while giving weight to the “freedom and sanctity of contracts.”<sup>142</sup> Ultimately, while marks may be similar and potentially lead to consumer confusion, trademark coexistence agreements provide protection (at least in some jurisdictions) based off of the agreement, as long as the confusion would not significantly injure the public and the agreement appears to meet all requirements for a proper contract.

### *C. Trademark Coexistence Agreement Use Within the Craft Brewing Industry*

Trademark coexistence or consent agreements are often used in the craft brewing industry to attempt to avoid trademark disputes.<sup>143</sup> Consent agreements allow parties to negotiate a deal that allows for their trademarks to peacefully coexist in a manner that avoids a likelihood of confusion.<sup>144</sup> With the expansion of the craft brewing industry and the natural overlap of names and brands, it is beneficial for smaller breweries to enter into mutually beneficial consent agreements.<sup>145</sup> As a result, many breweries

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140. *See id.* at \*5 (explaining that in “exchange for opposer not objecting to applicant’s use and registration, applicant indicated that opposer’s use for its store was acceptable” constituted consideration for the agreement).

141. *See, e.g., id.* at \*5 (describing the review of the coexistence agreement as a contract).

142. *See Moss, supra* note 5, at 221 (discussing that coexistence agreements should be evaluated on a “sliding scale,” largely depending on whether confusion would cause serious injury to the public interest, such as health issues caused by purchasing the wrong medication).

143. *See Martin City Brewing, supra* note 4 (describing the usefulness of a trademark coexistence agreement in the craft brewing industry).

144. *See supra* Part III.B (providing background information on trademark coexistence agreements).

145. *See Benefits and Risks of Trademark Coexistence Agreements,*

enter into coexistence agreements as a “surefire strategy for getting a trademark registration in the face of a likelihood of confusion refusal.”<sup>146</sup>

One explanation for why trademark consent agreements are appealing to the craft brewing industry is the unique culture that the industry embodies.<sup>147</sup> Because most craft breweries are small, they often “do not have the resources to mass market their products, so instead, they focus their energy to the local community, tailoring their distribution to local bars, restaurants, and beer festivals” and cultivate local community support.<sup>148</sup> Additionally, the craft brewing industry is one based on collaboration, as many breweries work together to brew beer and launch new products.<sup>149</sup> Collaboration brews are usually beneficial for both brewers involved as it gives the parties an opportunity to share brewing expertise and creativity “while simultaneously supporting each other by providing access to markets that each brewer would normally be unable to reach.”<sup>150</sup> The combination of local support and collaboration are key aspects that make the craft brewing industry one that is close-knit and collegial.<sup>151</sup>

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PRACTICAL LAW: THOMSON REUTERS (Sep. 16, 2013), <http://us.practicallaw.com/4-540-5507?q=&qp=&qo=&qe=> (last visited Feb. 22, 2017) (explaining that trademark coexistence agreements can be a “cost-effective and efficient way to resolve an actual or potential conflict”) (on file with the Washington and Lee Law Review).

146. Cynthia A. Moyer, *99 Bottles of Beer on the Wall—2 With the Same Name*, LAW 360 (Mar. 17, 2016, 11:24 AM), [http://www.law360.com/articles/770574/99-bottles-of-beer-on-the-wall-2-with-the-same-name?article\\_related\\_content=1](http://www.law360.com/articles/770574/99-bottles-of-beer-on-the-wall-2-with-the-same-name?article_related_content=1) (last visited Sept. 20, 2016) (on file with Washington and Lee Law Review).

147. See Winder, *supra* note 87, at 152 (explaining that the history and size of the craft brewing industry has led to a “unique culture where members collaborate with one another”).

148. *Id.*

149. See Martin Johnson, *Collaborative Brewing is Heating Up in the Beer World*, EATER (Jun. 5, 2015, 3:00 PM), <http://www.eater.com/drinks/2015/6/5/8734935/collaborative-brewing-is-heating-up-in-the-beer-world> (last visited Feb. 22, 2017) (“Retail buyers, bar managers, industry consultants and brewers all agree that cooperative brewing is a fast growing trend. Breweries working together to create a unique product ‘doesn’t happen on this level in any other alcoholic beverage’ category.”).

150. Winder, *supra* note 87, at 152.

151. See *id.* (“This culture of collaboration and the cultivation of local community support are key characteristics that have combined to create a close-

The sense of camaraderie that the industry demonstrates in its brewing translates over to how breweries often approach potential trademark issues with other breweries.<sup>152</sup> For example, when Molly Izo, Associate Marketing Manager for Deschutes Brewery, was asked how the brewery approaches potentially infringing trademark uses by other breweries, she responded:

Typically we would contact counsel on such issues, but it's not our policy to send out cease and desist letters. Because craft is what it is and represents the community it does, we typically try to reach out first to create common ground . . . We try to use the friendly approach because we never want to be the big bad guys saying 'you need to stop using this right away.'<sup>153</sup>

Molly Izo further explained that when Deschutes is contacted by other breweries about their own trademark use, though Deschutes has performed extensive searches of all their names, “there’s always the off-chance that there’s another brewery that’s been using the mark.”<sup>154</sup> In these instances, Deschutes does its “best to try to work out some sort of coexistence agreement. It doesn’t always work that way, but it definitely does nine times out of ten.”<sup>155</sup> The example of Deschute’s policies sheds light on the camaraderie of the craft brewing industry even when dealing with legal matters and demonstrates why entering into a trademark coexistence agreement is an attractive option for many craft brewers—an option that is threatened by the ruling in *In re Bay State Brewing Company*. The remainder of this Note addresses the issue of what protections, if any, a trademark coexistence agreement provides to craft breweries in light of the recent (TTAB) ruling in *In re Bay State Brewing Company, Inc.*

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knit industry with a strong sense of camaraderie.”).

152. See Molly Izo, *Deschutes Brewery: How the Craft Brew Boom is Changing the Industry’s Trademark Game*, INT’L TRADEMARK ASS’N (Sep. 15, 2016), [http://www.inta.org/INTABulletin/Pages/Deschutes\\_Brewery\\_Interview\\_7116.aspx](http://www.inta.org/INTABulletin/Pages/Deschutes_Brewery_Interview_7116.aspx) (last visited Feb. 22, 2017) (explaining how Deschutes Brewery, which is located in Oregon, deals with trademark issues while “tak[ing] pride in the fact that the craft beer industry has typically been characterized by camaraderie and collaboration”) (on file with the Washington and Lee Law Review).

153. *Id.*

154. *Id.*

155. *Id.*

*IV. Analysis of In re Bay State Brewing Company, Inc.*

As discussed earlier, the TTAB issued a precedential decision on February 25, 2016 that denied applicant Bay State Brewing Company registration for the mark TIME TRAVELER BLONDE.<sup>156</sup> The registration was refused “on the ground that Applicant’s mark, when used for Applicant’s goods, so resembles the previously registered mark TIME TRAVELER . . . for ‘beer, ale, and lager’ . . . as to be likely to cause confusion.”<sup>157</sup> The refusal to register was made despite the fact that a consent agreement existed between the Bay State Brewing and the registrant of the existing TIME TRAVELER mark.<sup>158</sup> In its decision, the TTAB states that it must consider the impact of the consent agreement in a likelihood of confusion analysis and summarizes that its determination for rejecting analysis “is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion.”<sup>159</sup>

*A. Description of du Pont Factors for Likelihood of Confusion Analysis*

The likelihood of consumer confusion is a question of fact.<sup>160</sup> When a court performs a likelihood of confusion analysis, it must consider each of the following factors if evidence has been introduced into the record (“*du Pont* factors”): (1) the similarity or dissimilarity of the marks in their entireties, (2) the similarity or dissimilarity and nature of the goods or services as described in the application or registration or in connection with which a prior mark is in use, (3) the similarity or dissimilarity of established,

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156. *See supra* Part I. (explaining the background of *In re Bay State Brewing*).

157. *In re Bay State Brewing Co., Inc.*, 2016 WL 1045677, \*1 (T.T.A.B. 2016).

158. *See id.* (“Applicant asserts that it has a consent agreement with Registrant, and asserts that ‘the parties acknowledge that confusion is likely unless they both adhere to the terms of the [agreement].’”).

159. *Id.* (citing *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357 (C.C.P.A. 1973)).

160. *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973) (explaining that there is “no litmus rule” in determining the likelihood of consumer confusion, instead, each case must be decided on its own facts).



likely-to-continue trade channels, (4) the conditions under which and buyers to whom sales are made, (5) the fame of the prior mark, (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, (10) the market interface between applicant and owner of a prior mark, (11) the extent to which applicant has a right to exclude others from use of its mark, (12) the extent of potential confusion, (13) any other established fact probative of the effect of use.<sup>161</sup> The factors are not listed in an order of importance or merit and each may be used to play a dominant role in the likelihood of confusion analysis.<sup>162</sup>

*B. Likelihood of Confusion Analysis Applies to the Craft Brewing Industry as a Whole*

*1. Similarity/Dissimilarity Between Applicant's Goods and Registrant's Goods (Second du Pont Factor)*

In *In re Bay State Brewing Company, Inc.*, the court first considered the second *du Pont* factor which is focused on the similarity between the Applicant's and Registrant's goods.<sup>163</sup> In the TTAB's brief analysis of the second *du Pont* factor, it concludes that the goods are identical because they are used for beer.<sup>164</sup> The TTAB took notice that the registrations were for use on two different types of beer, with applicant's mark to be used in connection with an "ale" style beer and the registrant's mark used on "lager" style beers, however the TTAB concluded that because these are merely types of beer, the goods are still identical.<sup>165</sup> With

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161. *Id.*

162. *See id.* at 1361–62 (providing examples of past cases where various factors were used as the main determination in the likelihood of confusion analysis).

163. *See In re Bay State Brewing Co., Inc.*, 2016 WL 1045677, \*1 (T.T.A.B. 2016) (explaining that the first factor that the TTAB considered was the second *du Pont* factor and an examination of the type of goods).

164. *See id.* ("The goods are identical insofar as the identification in the application and in the cited registration both include 'beer.'").

165. *See id.* ("The remaining goods in the cited registration, 'ale' and 'lager'

the TTAB's approach that a beer is a beer, it is likely that in any analysis between two craft brewers, this factor will always weigh in favor of a likelihood of consumer confusion.<sup>166</sup>

## 2. Trade Channels and Purchasers (*Third du Pont Factor*)

After the TTAB concluded that the type of goods that the marks were to be used for were identical, the TTAB proceeded to analyze the third *du Pont* factor—concerning the similarity of established, likely-to-continue trade channels.<sup>167</sup> The TTAB notes that there is an initial presumption that the trade channels and purchasers are the same if the goods identified in the application and the registration are at least in-part identical.<sup>168</sup> It is important to note that if the TTAB continues to find that all beers are identical, it will likely be able to rely on such a presumption in any dispute regarding two beers.<sup>169</sup> In *In re Bay State Brewing Company*, the TTAB defines the relevant trade channels as “liquor stores, beer sections of grocery and convenience stores, and the like, as well as bars and restaurants, and the customers would include ordinary consumers.”<sup>170</sup> The TTAB also proclaims to “take judicial notice that beer is often relatively inexpensive, subject to impulse purchase, and often ordered orally in a bar or restaurant.”<sup>171</sup> As a result, the TTAB finds that beer is held to a lesser standard of purchasing and thus, the third *du Pont* factor

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are otherwise closely related to, and in fact are types of beer.”).

166. See, e.g., *In re Crow Hop Brewing Co., Ltd.*, 2016 WL 4775485 (T.T.A.B. 2016) (providing an example of the TTAB using the Bay State Brewing likelihood for confusion analysis in another dispute between two breweries); *In re Clipper City Brewing Co.*, 2017 WL 412405 (T.T.A.B. 2017) (same).

167. See *id.* at \*2 (explaining that the TTAB's analysis concerned the similarity of dissimilarity of trade channels for the applicant's and registrant's goods).

168. See *In re Viterro Inc.*, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (providing that even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on such a presumption in determining the likelihood of confusion).

169. See, e.g., *In re Yawata Iron & Steel Co.*, 159 USPQ 721, 723 (C.C.P.A. 1968) (demonstrating that where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same).

170. *In re Bay State Brewing Co., Inc.*, 2016 WL 1045677, \*2 (T.T.A.B. 2016).

171. *Id.*

weighs in favor of the TTAB finding a likelihood of consumer confusion.<sup>172</sup> However, what the TTAB has failed to consider is that is that the average craft beer drinker is not simply the average beer drinker.<sup>173</sup> Therefore, there is a potential argument that decisions regarding the purchase of craft beer are made by informed individuals, seeking a specific product, and as a result, these individuals would not be as likely to be confused.<sup>174</sup>

### 3. *Similarity Between the Marks (First du Pont Factor)*

The third aspect that the TTAB considered in its analysis was the *first du Pont* factor—“the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation, and impression.”<sup>175</sup> The standard for comparing the similarity between two marks involves comparing “them in their entirety as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them.”<sup>176</sup> The purpose of the inquiry is to determine “whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.”<sup>177</sup> The TTAB builds on its analysis that because the goods are identical (essentially meaning that both products are beer), there is a lower standard needed to determine that the similarity of the marks points in favor of finding a likelihood of confusion.<sup>178</sup>

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172. *See id.* at \*2 (“When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.” (citing *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 1329 (Fed. Cir. 2000))).

173. *See supra* note 62 and accompanying text (explaining that craft beer resonates with a particular demographic, generally this demographic includes individuals who are college educated with well-paying jobs).

174. *See Reid et al.*, Conference Paper, *supra* note 60, at 5 (characterizing craft beer as a “high order prestige good” that is “often viewed as highbrow” and describing the craft beer consumer as “sophisticated” and “discerning”).

175. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973).

176. *In re Bay State Brewing Co., Inc.*, 2016 WL 1045677, \*2 (T.T.A.B. 2016).

177. *Id.*

178. *Id.* at \* 3 (“In comparing the marks, we are mindful that where, as here, the goods are identical, the degree of similarity between the marks necessary to

In its analysis, the TTAB notes that although marks are to be compared in their entirety, one portion of the mark may be given more or less weight in determining whether consumer confusion will occur.<sup>179</sup> In particular, when comparing TIME TRAVELER BLONDE (applicant's mark) and TIME TRAVELER (registrant's mark), the TTAB finds that the term BLONDE in the applicant's application is of a "highly descriptive or generic nature" as it simply describes the type of beer.<sup>180</sup> Because of its descriptive nature, the TTAB concludes that BLONDE has no source-indicating function and does "very little or nothing to distinguish" the applicant's mark from the registrant's.<sup>181</sup> To further support its conclusion that the term BLONDE does not distinguish the two marks, the TTAB notes that it is common for consumers to shorten marks.<sup>182</sup> This propensity to shorten marks is particularly relevant for goods such as beer because "[b]eer is often ordered by name, in a bar or restaurant, or from a menu, where only the name of the beer will be used (in this case, TIME TRAVELER)."<sup>183</sup> Further, the TTAB does not consider how the term may affect the appearance of the mark on its label because many consumers who purchase these beers are "ordering these goods from a bartender or waiter/waitress will not have the opportunity to see a label when they order the product. Further, if the beer is served in a glass

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find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods.").

179. *See id.* at \*3 ("Although marks must be considered in their entirety, it is settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark."); *see also In re Nat'l Data Corp.*, 753 F.2d, 1056, 1058 (Fed. Cir. 1985) ("[T]here is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety. Indeed, this type of analysis appears to be unavoidable.").

180. *See id.* at n.5 (acknowledging that beers that are very pale in color are described as "blonde" and these beers "tend to be clear, crisp, and dry, with low-to-medium bitterness and aroma from hops, and some sweetness from malt").

181. *See id.* at \*3 (comparing BLONDE to the descriptive term CAFE in *In re Dixie Rests, Inc.*, 105 F.3d 1405 (Fed. Cir. 1997) where the court found that DELTA was the dominant portion of the mark THE DELTA CAFE).

182. *See id.* ("That is to say, when Applicant's and Registrant's marks are considered in their entirety, the term BLONDE does very little or nothing to distinguish them. In saying this, we also keep in mind the penchant of consumers to shorten marks.").

183. *Id.* at \*4.

because it is a draft beer . . . the consumer may never be able to see the label” and as a result will not be able to recognize the difference that the marks portray when used on their respective products.<sup>184</sup>



The two labels, which appear above in Figure IV.B.4<sup>185</sup> appear markedly different, however, the TTAB presumes they are virtually identical in appearance “insofar as they both are standard character marks.”<sup>186</sup> Furthermore, even when considering the full mark TIME TRAVELER BLONDE, the TTAB concluded that the mark was “virtually identical in sound” to the registrant’s TIME TRAVELER mark.<sup>187</sup> Additionally, the TTAB found that both marks are arbitrary in relation to their respective goods, meaning that neither mark appears to be related to beer.<sup>188</sup> As a result of this arbitrariness, the TTAB concluded that there is nothing in the applicant’s mark that would suggest “or create a different commercial impression, when used on Applicant’s goods, as compared to Registrant’s goods.”<sup>189</sup> Thus, the TTAB found that the similarity of the marks—the first *du Pont* factor—“weighs heavily in favor of a finding of a likelihood of confusion.”<sup>190</sup>

#### 4. *Weighing du Pont Factors Against the Consent Agreement between Applicant and Registrant*

Overall, the TTAB’s likelihood of confusion analysis would apply to the craft brewing industry as a whole.<sup>191</sup> The TTAB built its analysis on the cornerstone that the applicant’s and registrant’s goods were virtually identical—meaning that because both marks were to be used for beer, there was a lower threshold necessary in the likelihood of confusion analysis.<sup>192</sup> In fact, TTAB concludes,

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184. *Id.*

185. *In re* Bay State Brewing Co., Inc., 2016 WL 1045677, \*6 (T.T.A.B. 2016).

186. *Id.* at \*4.

187. *Id.*

188. *See id.* (explaining that the two marks “would be even closer in meaning and overall commercial impression” given the arbitrary nature of TIME TRAVELER, as the two marks would be “used for the identical goods”).

189. *Id.*

190. *Id.*

191. *See e.g., In re* Crow Hop Brewing Co., Ltd., 2016 WL 4775485 (T.T.A.B. 2016) (providing an example of the TTAB using the Bay State Brewing likelihood for confusion analysis in another dispute between two breweries); *In re* Clipper City Brewing Co., 2017 WL 412405 (T.T.A.B. 2017) (same).

192. *See, e.g., id.* at \*2 (“Because the goods identified in the application and the cited registration are at least in-part identical, we must presume that the channels of the trade and classes of purchasers are the same.”).

“[a]bsent other *du Pont* factors, the virtual identity in the marks, and the identity in the goods, trade channels, and purchasers, along with the impulse nature of purchases of beer, presents a compelling case for finding a likelihood of confusion.”<sup>193</sup> The TTAB then proceeds to consider the impact that the trademark coexistence agreement in this case will have on the likelihood of confusion factors.<sup>194</sup>

*V. Examination of Specific Trademark Coexistence Agreement in In re Bay State Brewing Company, Inc. and the Implications for Future Coexistence Agreements in the Craft Brewing Industry*

This section discusses the TTAB review of the specific trademark coexistence agreement that was submitted with the application to register TIME TRAVELER BLONDE.<sup>195</sup> As examined earlier in this Note, many judicial bodies, including the TTAB have reviewed coexistence agreements with great deference.<sup>196</sup> In fact, the TTAB itself has viewed coexistence agreements as contracts has concerned itself with contractual issues, such an ambiguity and consideration.<sup>197</sup> The analysis of *In re Bay State Brewing Company* appears to stray from the approach of the past as the Examiner and the TTAB view the agreement with a higher level of scrutiny—ultimately making the agreement useless in the current registration process.<sup>198</sup>

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193. *Id.* at \*4.

194. *See id.* at \*4 (explaining that when there is a consent agreement between the applicant and the registrant in a case, the TTAB is to consider the agreement in light of balancing the likelihood of confusion factors).

195. *See id.* at \*1 (discussing that the “existence of a coexistence agreement relates to one of the *du Pont* factors, namely the market interface between Applicant and Registrant” and that the TTAB must consider the impact of the agreement after considering the other factors).

196. *See, e.g.,* *Bongrain Int’l Corp. v. Delice De France, Inc.*, 811 F.2d 1479, 1484–85 (Fed. Cir. 1987) (providing an example of the Federal Circuit setting a very deferential standard to the parties involved in a trademark coexistence agreement when the court reviews such an agreement).

197. *See, e.g.,* *Ron Caldwell Jewelry, Inc. v. Clothestime Clothes, Inc.*, 2002 WL 745591, \*5 (T.T.A.B. 2002) (providing an example of the TTAB reviewing a trademark coexistence agreement under contractual standards).

198. *See In re Bay State Brewing Co., Inc.*, 2016 WL 1045677, \*10 (T.T.A.B. 2016) (“Notwithstanding the consent agreement, we are persuaded that patrons . . . are likely to be confused as to source upon encountering the

In its opinion, the TTAB does, in fact, acknowledge the importance of consent agreements in the likelihood of confusion analysis.<sup>199</sup> The TTAB further emphasizes that only “few [consent agreements] may be found lacking”—meaning that are few consent agreements that do not satisfy the standard to prevail in a likelihood of confusion analysis—but insists that there is no firm rule that consent agreements will always contravene refusal on grounds of confusion.<sup>200</sup> The TTAB based its rationale largely on the fact that it reads *In re Mastic Inc.*<sup>201</sup> to teach that there is “no per se rule that a consent, whatever its terms, will always tip the balance to finding no likelihood of confusion, and it therefore follows that the content of each agreement must be examined.”<sup>202</sup> It is important to note that this differs from the approach that the TTAB took in *Ron Cauldwell Jewelry*, a case decided 15 years after *In re Mastic Inc.*, when it simply reviewed whether the agreement was unambiguous and contained consideration.<sup>203</sup> Furthermore, while *In re Mastic Inc.* does provide an example where the Federal Circuit affirmed a TTAB order that denied applicant registration in light of a consent agreement—the case and consent agreement, are much different from *In re Bay State Brewing*. In *In re Mastic Inc.*, the “consent [agreement] was a ‘naked’ consent without any restrictions or limitations on either the applicant or registrant with respect to marketing channels, purchasers, or users.”<sup>204</sup> To support its conclusion, the Federal Circuit noted that the agreement submitted in *In re Mastic Inc.* “does not evidence a bilateral ‘agreement’” because the agreement is “simply a

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marks . . . even when these marks are used within the constraints set forth in the consent agreement.”).

199. *See id.* at \*6 (citing to *In re Wacker Neuson SE*, 97 U.S.P.Q.2d 1048, 1411–12 (T.T.A.B. 2010) to acknowledge that the TTAB is aware of precedence demonstrating the importance of consent agreements in the likelihood of confusion analysis).

200. *See id.* at \*6 (explaining that it is “not a foregone conclusion” that all consent agreements will be “determinative” in establishing that there will not be a likelihood of confusion).

201. 829 F.2d 1114 (Fed. Cir. 1987) (affirming TTAB refusal to register trademark “SHURLOCK” on the basis of likelihood of confusion).

202. *In re Bay State Brewing Co., Inc.*, 2016 WL 1045677, \*6 (T.T.A.B. 2016).

203. *See supra* notes 130–140 and accompanying text.

204. *In re Mastic Inc.*, 829 F.2d 1114, 1116 (Fed. Cir. 1987).



statement signed on behalf of [registrant].”<sup>205</sup> Therefore, because the agreement did not demonstrate that the parties entered into a likelihood of confusion determination, the court did not grant it significant weight in its likelihood of confusion analysis.<sup>206</sup> An analysis of the consent agreement submitted in *In re Bay State Brewing Company* will demonstrate that the consent agreement is much more thorough and contemplated than the one submitted in *In re Mastic*.

*A. The Consent Agreement Submitted in In re Bay State Brewing Company was a Long Form Agreement*

Initially, the applicant submitted a Short Form Agreement for review in the application of the mark TIME TRAVELER BLONDE.<sup>207</sup> This short agreement was “intended to be made of public record with the Patent and Trademark Office” and due to the consequences of publishing documents in public record, did not contain all of the bargained upon terms.<sup>208</sup> Upon denial of the short agreement, a Long Form Agreement, which was claimed to have been intended solely for the internal use of the parties, was submitted for examination.<sup>209</sup> If a consent agreement is used to overcome a likelihood of confusion analysis, then it is necessary to become public record to provide public notice as to why the USPTO allowed registration.<sup>210</sup> Therefore, from a practical standpoint, it is important to have an adequate agreement while not disclosing information intended to be confidential.

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205. *Id.* at 1117.

206. *See id.* (“There are no undertakings of record between the parties which enter into the likelihood of confusion determination, and the board did not err in giving that [‘naked’] characterization to the consent.”).

207. *See In re Bay State Brewing Co., Inc.*, 2016 WL 1045677, \*6 (T.T.A.B. 2016) (explaining how the record developed to include both a short form and a long form consent agreement).

208. *See id.* (discussing why two different forms of the consent agreement were drafted and provided to the USPTO).

209. *See id.* (“[T]he Long Form Agreement is a lengthier, more detailed agreement and it is appropriate that Applicant and the Examining Attorney have focused their attention on this agreement.”).

210. *See id.* at \*4, n. 6 (describing that coexistence agreements take on extra significance if used to overcome a likelihood of confusion analysis).

Applicants, Bay State Brewing, argue that it and the registrant made “reasoned assessments of the marketplace” in the detailed, long form agreement.<sup>211</sup> As a result of these assessments, the applicants believe that the agreement “is a non-naked, well-reasoned and detailed agreement crafted by knowledgeable parties intimately familiar with the market and eager to avoid confusion.”<sup>212</sup> The applicant’s argument followed that because the agreement was well reasoned by the two parties in the marketplace, that it should be “given the substantial and great weight as required by the Federal Circuit.”<sup>213</sup> Despite the applicant’s arguments, the Examining Attorney reviewed the agreement in detail and found its pertinent terms “inaccurate . . . irrelevant . . . or legally insignificant.”<sup>214</sup> In making his or her determination that the consent agreement was lacking, the examining attorney relied on *In re Mastic Inc.*<sup>215</sup> The examining attorney also described and reviewed the relevant sections to the consent agreement—these sections will be discussed below.

*B. Specific Sections of Bay State Brewing’s Trademark Consent Agreement*

It is important to note that when considering the specific provisions of Bay State Brewing’s consent agreement, there are two overriding purposes for the parties entering into the agreement.<sup>216</sup> First, the applicant and the registrant “wish to avoid any conflict with one another and consent to co-exist’ under

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211. *See id.* (describing why applicants believe that the USPTO has not shown “good reason” to substitute its own determination for the likelihood of confusion with that of the parties involved).

212. *Id.* (explaining further that “the parties crafted an agreement designed to avoid confusion in the marketplace and underscored the agreement with a mutual commitment to collaborate in avoiding confusion in the marketplace”).

213. *Id.*

214. *Id.* at \*5.

215. *See id.* (focusing on language in the case that indicates that there are instances where a consent agreement may not lead to overcoming the likelihood of confusion analysis). For a discussion of the case that the examining attorney relied upon, see *supra* notes 204–206 and accompanying text.

216. *See id.* at \*6 (explaining the specifics of the consent agreement).

certain terms and conditions.”<sup>217</sup> Second, the parties provide that they “agree to cooperate in good faith to resolve such actual confusion and to develop measures sufficient to avoid a likelihood of confusion.”<sup>218</sup> The following sections are those that were deemed important by the TTAB.

### *1.Restrictions on Use*

The Restrictions on Use section of the agreement provides that neither party will use its respective mark other than in connection with the respective house mark.<sup>219</sup> Additionally, the applicant agreed that it will only use the entire mark, TIME TRAVELER BLONDE, or simply BLONDE—it will not use the words TIME TRAVELER (which is the registrant’s mark) in stand-alone fashion.<sup>220</sup> Further, the applicant states that it will use the term BLONDE “in a manner that is equally as or more prominent than the terms TIME and TRAVELER.”<sup>221</sup> The parties also agree that the applicant reserved the right to change the beer name to TIME TRAVELER MAIBOCK, but it would still comply with the stipulations agreed upon, simply substituting MAIBOCK for BLONDE.<sup>222</sup>

In its analysis of this section of the agreement, the TTAB does not find it persuasive that the two parties agreed only to use their respective marks in connection with each house mark, as “the use of a house mark does not obviate confusion.”<sup>223</sup> Additionally, the TTAB reads very deeply in the applicant reserving the right to change its name and concludes that this provision demonstrates

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217. *Id.*

218. *Id.*

219. *See id.* (discussing that the registrant agreed that it would not use the mark other than in connection with its house mark (THE TRAVELER BEER CO.) and the applicant agreed not to use its mark other than in connection with its house mark (BAY STATE BREWING)).

220. *See id.* (addressing the applicant’s agreement on how it would use its mark in production, sales, distribution, marketing, and licensing).

221. *Id.*

222. *Id.* (explaining the rights reserved by the applicant).

223. *See id.* (“We find, however, that the addition of house marks to these virtually identical marks used on identical goods does not necessarily mean that purchasers are not likely to be confused.”).

that BLONDE (which differentiates the applicant's and registrant's mark) is not an important aspect of the mark.<sup>224</sup> Therefore, even though the applicant is seeking to register its mark as a whole, and even though the two breweries agreed to use their marks in specific manners, the TTAB is assuming that the applicant "is relying on TIME TRAVELER as its source identifier."<sup>225</sup> Based on the precedential decisions explaining the significant weight to be owed to such agreements, it seems a stretch for the TTAB to read such assumptions into a private contract between the two involved parties.

## 2. Geographical Limitations

The Geographical Limitation provision of the agreement reads "Bay State [applicant] will not use TIME TRAVELER BLONDE outside of New England and the State of New York."<sup>226</sup> In the current case, the applicant is located in Massachusetts while the registrant is located in Vermont.<sup>227</sup> The TTAB was troubled with the fact that the provision limited the applicant's use to only New England and the State of New York, while the registrant's use was not limited at all.<sup>228</sup> The TTAB found this portion of the agreement caused two problems.<sup>229</sup>

First, TTAB finds that even though the parties have provided some sort of geographical limitations, they have essentially agreed that "both marks will be used in overlapping areas," namely New England and New York.<sup>230</sup> The TTAB notes that the applicant is seeking nationwide registration, not a limited geographic

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224. *See id.* at \*8, n. 12 (questioning the fact that the applicant is willing to substitute one "highly descriptive or generic term" for another).

225. *Id.*

226. *Id.* at \*7.

227. *See id.* at \*7 (explaining the TTAB's trouble with the geographic limitations that are provided within the consent agreement).

228. *See id.* at \*7 (analyzing the geographic limitations imposed on both parties via the agreed upon contract).

229. *See id.* (discussing the issues with this provision in the consent agreement).

230. *See id.* (explaining that the agreement allows the registrant to use its mark "within the entirety of the Applicant's territory").

concurrent registration.<sup>231</sup> If Bay State had been applying for a concurrent registration, its registration would reflect a right to use the mark in a limited geographic area.<sup>232</sup> In *Holmes Oil Company, Inc. v. Myers Cruizers of Mena, Inc.*,<sup>233</sup> the TTAB articulated the difference between a consent agreement and concurrent registration:

In contrast, if the parties enter into a consent agreement, rather than a concurrent use agreement, in order to overcome a refusal of registration on the ground of likelihood of confusion, such an agreement generally allows for each party's use in overlapping territories and does not result in geographic restrictions being placed on any party's registration, with the result being that each party obtains an unrestricted registration, subject to the parties' consent agreement or contractual arrangement concerning use and registration.<sup>234</sup>

The TTAB's articulation of such a scenario gives deference to use restrictions as part of the contract negotiation process of a consent agreement and its willingness to register marks in overlapping areas with a consent agreement in place.<sup>235</sup> Nonetheless, in *In re Bay State Brewing*, the TTAB found it problematic that the consent agreement allowed for overlapping use.<sup>236</sup>

Second, the TTAB is concerned that if the applicant was granted the nationwide registration that it sought, the registration would not reflect the geographic limitations that the parties voluntarily contracted for.<sup>237</sup> Consequently, "although Applicant's

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231. *See id.* ("Here, Applicant is not seeking a concurrent use registration (with a corresponding geographical restriction in Registrant's registration), but rather a nationwide registration.")

232. *See id.* (discussing the ramifications of a concurrent use registration application and proceeding).

233. 2011 WL 6780741 (T.T.A.B. 2011).

234. *Id.* at \*2.

235. *See id.* (explaining that "although this case is captioned as a concurrent use proceeding, it is only nominally one" as the parties have essentially entered into a "traditional consent agreement" with overlapping registration in the United States, minus Arkansas).

236. *See In re Bay State Brewing Co., Inc.*, 2016 WL 1045677, \*7 (T.T.A.B. 2016) ("Here, the reality is that even as Applicant is bound by its agreement with Registrant, both marks will be used in overlapping geographical areas, namely New England and New York.")

237. *See id.* at \*8 (explaining that "the geographical restrictions set forth in

use, by the terms of the agreement, is limited to New England and New York, a nationwide registration issued to Applicant would give Applicant presumptive nationwide exclusive rights.”<sup>238</sup> This would cause the issue that the national register would not accurately reflect the rights of the mark and thus would create problems with notice to the public and attorneys searching the register.<sup>239</sup> Therefore, the TTAB determines that granting nationwide registration while the agreement limits the geographic scope of use, will be misleading and would undermine the important public notice function of the national register.<sup>240</sup>

Although geographic restrictions were included in the consent agreement, the TTAB is so strongly displeased by the geographic restriction provision of the consent agreement that it states “in the absence of geographical restrictions, the effectiveness of the other provisions in this agreement is further diminished.”<sup>241</sup> The TTAB is implying its own judgment to the consent agreement that the restrictions the parties have agreed upon are essentially meaningless. Such a view by the TTAB threatens the use of consent agreements within the craft brewing industry, especially considering how the industry is in large part geographically clustered.<sup>242</sup>

### 3. Trade Dress

The trade dress provision of the consent agreement between the two parties provides that neither party will use “trade dress in its packaging, labeling, and/or marketing” of their respective beer in a manner “that is confusingly similar to the labeling, packaging, marketing materials, or other images” used by the other party.<sup>243</sup>

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the consent agreement are not reflected in the application”).

238. *Id.* at \*8.

239. *See id.* at \*8 (“[W]hen marks are being searched and cleared, there is a presumption by searchers and attorneys afforded to an unrestricted registration that Applicant’s registration would not and should not be entitled to.”).

240. *See id.* at \*8, n.11 (discussing the harm that would be caused to the registration system if both marks were on the register at the same time).

241. *Id.* at \*8.

242. *See* discussion *supra* Part I.A.3. (explaining the geographical distribution of craft breweries).

243. *Id.* at \*6.

The TTAB does not find this provision satisfactory as it believes the language only requires “each party not to use the trade dress of the other but do[es] not require the use of particular trade dress by either party.”<sup>244</sup> The TTAB criticizes this section of the agreement because both marks are requesting registration for standard character marks. Standard character marks are not limited in presentation as they may be displayed in “any font, style, size, or color.”<sup>245</sup> The TTAB therefore concludes that the parties could satisfy the trade dress agreement by displaying their marks in numerous fashions—however this would not aid in avoiding consumer confusion.<sup>246</sup> Further, the TTAB places more weight on trademark law than contract law principles and considers the coexistence agreement as a representation of the applicant’s “desire [for] a decision based on the mark, not as applied for, but rather as promised” which would lead to further public notice issues.<sup>247</sup> The TTAB explains that this agreement simply represents a promise to use the mark in a certain manner (as the mark is not currently in use)—a promise that would deviate from the parameters of trademark application and registration and would ultimately undermine the public notice functions of the national trademark register.<sup>248</sup> Ultimately, the TTAB decided that the trade dress provision of the agreement would not help prevent the likelihood of consumer confusion.<sup>249</sup>

While acknowledging the TTAB’s argument in regards to public notice, one may consider that reviewing this consent agreement from a strictly contractual standpoint could potentially

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244. *Id.* at \*8.

245. *Id.* (citing *In re Viterra, Inc.*, 101 U.S.P.Q.2d 1905, 1910 (Fed. Cir. 2012)).

246. *See id.* at \*8 (providing the example that the parties could use “minimal trade dress and smaller font displays of the house marks” and the “essence of the agreement would be met, but would not aid in the avoidance of confusion”).

247. *Id.*

248. *See id.* (“These promises as to trade dress and house mark usage represent another deviation from the parameters of the application and registration, and thus would result in a failure of the public notice function of the registration.”).

249. *See id.* (explaining that even after reviewing the trade dress provisions, the board is convinced a likelihood of confusion exists because of the use of “virtually identical marks on identical goods that are subject to impulse purchase by ordinary consumers in the same geographical area”).

help alleviate confusion in regards to the trade dress use. Doing so would place the burden on the parties involved in the action—parties that are closer to consumers and have more incentive not to have their marks confused—to initiate a suit for breach of contract.<sup>250</sup> The parties involved ultimately have more at stake than the TTAB in insuring that their respective marks are not used in a manner that is to be confused with the other.<sup>251</sup> As a result, the parties would self-regulate to ensure that the trade dress used for each product did not cause public confusion.

#### 4. Trademark Applications

The Trademark Application provision of the agreement provides that neither the applicant nor the registrant will take action to interfere with the other parties respective trademark applications given that each party complies with the terms of the contract.<sup>252</sup> Furthermore, the parties agree to cooperate in executing any further documentation that the USPTO requires to validate the intent and the terms of the agreement in question.<sup>253</sup> In its opinion, the TTAB did not shed light on this specific provision, however, it should be noted that in the past, the TTAB has considered a similar provision as adequate consideration for a contract, and thus one of the factors making a consent agreement a valid contract.<sup>254</sup>

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250. *Cf.* Ron Cauldwell Jewelry, Inc. v. Clothestime Clothes, Inc., 2002 WL 745591, \*5 (T.T.A.B. 2002) (explaining the parties' unsuccessful complaint for a breach of contract).

251. *See* Amalgamated Bank of N.Y. v. Amalgamated Tr. & Sav. Bank, 842 F.2d 1270, 1275 (Fed. Cir. 1988) (explaining that businessmen stand a lot to lose if their marks cause public confusion).

252. *See id.* at \*7 (providing that aside from the registrant not taking any action against the applicant for the current trademark, the applicant agrees not to take action against the registrant for TIME TRAVELER or any current or future application that uses the word TRAVELER).

253. *See id.* (replicating the terms of the trademark consent agreement between the applicant and the registrant).

254. *See, e.g., supra* notes 138–140 (providing an example of a consent agreement being analyzed for consideration).



### 5. Likelihood of Confusion

The Likelihood of Confusion provision of the consent agreement reads:

The parties hereby acknowledge that they believe that there would not be a likelihood of confusion between the TIME TRAVELER mark and the TIME TRAVELER BLONDE mark if the parties comply with the terms of this Agreement. Should actual consumer confusion between the parties' products occur in the future, however, the parties agree to cooperate in good faith to resolve such actual confusion and to develop measures sufficient to avoid a likelihood of confusion.<sup>255</sup>

In light of the above provision, the TTAB found that the agreement is “sorely lacking in business information” that demonstrates why the parties believe that the trademarks will not cause consumer confusion if the terms of the agreement are followed.<sup>256</sup> The TTAB provides examples of what it means by “business information” as it states “consent agreements often refer to differences between the goods, trade channels and classes of purchasers; the sophistication of purchasers; and dissimilar methods of advertising and promotion.”<sup>257</sup> The TTAB criticizes the fact that the agreement is silent to such information, and takes the stance that similar information must be explicitly stated in the consent agreement and the TTAB is not in a position to infer the business information.<sup>258</sup> In making this assertion, the TTAB cites *Amalgamated Bank of New York v. Amalgamated Trust & Savings Bank*<sup>259</sup>—a case where the Federal Circuit reversed a TTAB’s refusal to register a mark, even when there was a consent agreement between the two parties.<sup>260</sup> In *Amalgamated*, the

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255. *In re Bay State Brewing Co., Inc.*, 2016 WL 1045677, \*7 (T.T.A.B. 2016).

256. *See id.* at \*8, n.13 (criticizing the agreement for its lack of business information based on the “particular circumstances of their contemporaneous use”).

257. *Id.*

258. *See id.* (“The agreement is silent on all of these points. Lest we be accused of knowing more about the beer business than Applicant and Registrant do, we are not in a position to infer business that is not specifically expressed in the agreement.”).

259. 842 F.2d 1270 (Fed. Cir. 1988).

260. *See id.* at 1271 (explaining the reversal of the TTAB’s decision to deny registration of the applicant’s service marks).

Federal Circuit scolded the TTAB for relying on its own views instead of the views expressed in the consent agreement by the affected parties.<sup>261</sup> This case does not appear to be authority to support the TTAB's position that all business information must be clearly in the consent agreement. Instead, *Amalgamated* reiterates the fact that substantial deference should be given to the parties coexistence agreements that are entered into two business parties.<sup>262</sup> In fact, the Federal Circuit specifically recommended that the board should "heed[] the admonition of the CCPA in *DuPont*" that provides: "[d]ecisions of men who stand to lose if wrong are normally more reliable than those of examiners and judges. It can be safely taken as fundamental that reputable businessmen-users of valuable trademarks have no interest in *causing* public confusion."<sup>263</sup> Therefore, even the authority that the TTAB cited in its own decision, indicates that the TTAB seems to overstep its bounds in substituting its views for those of Bay State Brewing and the registrant. Instead, the TTAB should have followed *Amalgamated*, not substituted its own views, and "suppose[d] that [the parties] have to know the habits of their customers, and the application of such knowledge is implicit in the agreement here involved."<sup>264</sup>

## VI. Conclusion

The craft brewing industry is a growing and healthy industry in the United States. It is also a unique industry—one that has capitalized on the development of community support and established a collaborative, collegial atmosphere among fellow and competing brewers. The atmosphere amongst brewers often translates to how breweries interact with each other as they

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261. *See id.* at 1275 ("The TTAB's reliance on its own views regarding the banking industry, rather than the views of the parties in question, contravenes the scope and intent of this court's precedent in *DuPont* and *Bongrain*. In fact, the motions and agreement filed indicated the contrary to the board's opinion.").

262. *See id.* at 1273 (explaining that it is "difficult to maintain a subjective view that confusion will occur when those directly concerned say it won't." (citing *In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1362–63 (C.C.P.A. 1973))).

263. *Id.* at 1275 (citing *In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1363 (C.C.P.A. 1973)).

264. *Id.* at 1274.

approach potential legal conflicts. Combining the collegiality of the craft brewing industry with the fact that many breweries are startup businesses that are not able to fund litigation demonstrates the desire for many breweries to find means to avoid litigation. One way that craft brewers attempt to avoid litigation is to enter into trademark consent agreements—contracts that are contemplated by the parties to prevent a likelihood of confusion amongst consumers.

It has been longstanding precedent in nearly every jurisdiction, including the Federal Circuit, and the TTAB, to give great deference to consent agreements and to not substitute the views of the judiciary for those of the parties whom enter into the agreement. Therefore, it has been well-established that if a consent agreement is well-reasoned and provides adequate restrictions on the mark or marks considered, then it will be given deference and both marks will likely be registered by the USPTO. However, in the case of *In re Bay State Brewing Company*, the TTAB steps away from the established and highly-deferential standard of review for consent agreements and prevents the registration of a mark in light of a detailed consent agreement. While the TTAB does make a respectable argument regarding the likelihood of confusion in the case, the divergence from the highly deferential review threatens the future use of trademark coexistence agreements in the craft brewing industry. Because the TTAB's analysis largely depends on the fact that both of the marks are to be used for beer, it seems that the TTAB would reach the result that it did in *In re Bay State Brewing Company* in any dispute between two breweries. It appears that the only way a consent agreement between two craft breweries would appease the TTAB to allow registration would be in a case where the breweries were in markedly different geographic areas. With craft beer expanding at such a rapid pace and being distributed in a numerous markets, it brings into question if the TTAB's desire for such "geographical distinctions" will ever be met by a consent agreement between two breweries.

By any means, the TTAB's decision in *In re Bay State Brewing Company* will significantly reduce the use of trademark consent agreements within the craft brewing industry. In an industry that is so reliant on maintaining a reputable brand and associated marks, the inability to enter into peaceful trademark consent

agreements will naturally lead to an increase in litigation. The increase in litigation will threaten the unique and collegial culture that the expansion of the craft brewing has fostered. Furthermore, the increase in litigation may hamper the development of many smaller breweries and prevent the craft brewing industry from expanding as it has recently. For the sake of the craft brewing industry, the TTAB should return to reviewing coexistence agreements as freely bargained for contracts and give them great deference. In doing so, the TTAB should heed the advice of the Federal Circuit and give “great weight” to consent agreements in a likelihood of confusion analysis because the parties involved “are in a much better position to know the real life situation than bureaucrats or judges.”<sup>265</sup>

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265. *Bongrain Int'l Corp. v. Delice De France, Inc.*, 811 F.2d 1479, 1484–85 (Fed. Cir. 1987).