The Privilege of Obscenity: The Slant On Bad Frogs and Flying Dogs

Stacy Hostetter

Law Offices of Omar Figueroa

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THE PRIVILEGE OF OBSCENITY: THE SLANT ON BAD FROGS AND FLYING DOGS

Stacy Hostetter

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I. INTRODUCTION

Beer trademarks have become perhaps the most contentious of battlegrounds in an industry that built itself on a community of collaboration and camaraderie. The growing pains are understandable, however. The United States has witnessed a record number of craft breweries in recent years and the numbers only continue to rise. According to the Brewers Association, a not-for-profit trade association dedicated to small and independent American beer, as of November 2015, the country boasted a historic high of 4,144 breweries.\textsuperscript{2} In terms of trademark competition, that is not merely 4,144

\textsuperscript{1} Stacy Allura Hostetter started her legal career in the craft beer industry with all their transactional needs including intellectual property, contracts, licensing, business law, and regulatory compliance. Stacy co-authored Brew Law 101: A Guide to Opening a Brewery in 2015 and has presented at local, state, and national conferences with regards to the legal challenges faced by small businesses in highly regulated industries on topics ranging from trademark disputes to distribution relationships. Stacy now proudly serves the California cannabis industry at the Law Offices of Omar Figueroa with similar matters.

\textsuperscript{2} Press Release, Brewers Association, The Year in Beer: U.S. Brewery Count Reaches All-Time High of 4,144 (Dec. 2, 2015),
brewery names that need to be avoided if you are thinking of joining the sudsy ranks, but another ten individual beer names per brewery at least — and many breweries have much deeper portfolios than that. Puns seemed to be the first casualties in the war of words as breweries swept up every conceivable beer and hop pun imaginable. But even as the beer-themed linguistic well ran dry for puns, brewers discovered that less beer-specific names had issues as well. The crux of the issue is that beer and other alcoholic beverages are all treated as “related goods” for trademark purposes. This is so despite beer existing in a different international class than other alcoholic beverages in the trademark classification system used around the globe (beer belongs to International Class 32, while wine, spirits, and every other form of alcoholic beverage belongs to International Class 33). Thus, when analyzing a potential mark, brewers must take into account not only the ever-increasing number of craft breweries and their ever-lengthening beer lists, but also wineries, distilleries, kombucha manufacturers, sake manufacturers, and so forth.

By way of reference, the United States Patent and Trademark Office currently shows 27,303 live applications and registrations for trademarks in International Class 32 in connection with beer products and no less than 62,746 live applications and registrations in International Class 33 for other alcoholic beverages. But even those


United States Patent and Trademark Office, TESS (Aug. 1, 2016). First search: (032)[IC], (beer)[GS], and (live)[LD]. Second search: (033)[IC] and (live)[LD].
numbers barely paint the picture. Consumer-driven beer tracking website Beeradvocate currently has over 300,000 beer brands in its database alone. While the industry may have started with a team effort attitude rooted in opposition to the handful of mega-breweries that consolidated market share, the trademark drought has led even craft breweries to legal spats and litigation in recent years. So with ever-increasing competition and so many monikers already claimed, it is no wonder that a distinct trademark is worth a premium. But where to turn?

One category of marks that is relatively untapped is the immoral, indecent, and obscene. The landscape of the moral low-brow has seen little action to date, though likely not for lack of desire. Rather, legal barriers have prevented brewers and other alcohol manufacturers from such marks. Until recently, just like any business, trademark law prevented the registration of marks that are "immoral ... scandalous ... or matter which may disparage ... persons, ... institutions, beliefs, or national symbols" on the federal database of the United States Patent & Trademark Office. While that particular prohibition may now be at an end, given the recent decision in In re Tam, brewers must still contend with alcohol labeling laws at both the state and federal level that incorporate similar prohibitions to those imposed by trademark law.

Though the prohibitions were rooted in different areas of law — alcohol and trademark — the principal and the effect are the same. Now that free speech concerns have been implicated in the one, it bears examination whether the same analysis can and should be applied to

6 Todd, Comment to, The Great Beer Trademark Wars: Brewers Head to the Courts to Protect Their Brands, ALL ABOUT BEER MAG. (July 11, 2017). https://www.beeradvocate.com/community/threads/how-many-different-beers-are-there.525578/http://allaboutbeer.com/article/beer-trademarks/. Though, admittedly, many foreign beers that may not be distributed in the United States are listed as well.


9 808 F.3d 1321 (Fed. Cir. 2015) (en banc).

10 See generally id.
the other. Accordingly, this piece will briefly examine the structure of the trademark law prohibiting registration of obscene marks, the recent case law that has struck down that prohibition, and the structure of the alcohol labeling laws. The article will conclude with an analysis of whether the Tam decision can be applied to the alcohol labeling laws and thus open new avenues to the beer branding pundits of the nation.

II. PROHIBITION OF OBSCENE TRADEMARKS AND In re Tam

In 2011, Simon Shiao Tam, a member of the Asian-American dance-rock band “The Slants,” sought federal registration for the band’s name. However, the examining attorney refused the application based on a finding that the band name disparaged people of Asian descent and was therefore not registrable. The test is two-pronged: the mark’s meaning is (1) likely referring to identifiable persons and (2) disparages a substantial composite of the referenced group. The band, itself peopled by individuals of such descent, maintained that they were re-appropriating the term for the benefit of the Asian community and thus appealed the examining attorney’s decision. The Trademark Trial and Appeal Board affirmed the original refusal however, based on the aforementioned test and a throwaway reference to In re McGinley for the proposition that because the band could still call itself “The Slants,” the refusal of a registered trademark did not implicate speech rights. Unperturbed, the band appealed again, this time with a First Amendment challenge.

Sitting judiciary Judge Moore initially confirmed the Trademark Trial and Appeal Board’s decision but relied on an en banc hearing for a final decision which ultimately held the disparagement provision unconstitutional. The court found the provision to be both content and viewpoint discriminatory, and therefore subject to strict scrutiny. Once under the spotlight of strict scrutiny, the provision was found wanting constitutionally since it singled out disparaging speech as a

11 Id. at 1331.
12 See id.
13 See id. at 1358.
14 See In re Tam, 108 U.S.P.Q.2d (BNA) at 1313 (citing In re McGinley, 660 F.2d 481, 484 (C.C.P.A. 1981)).
15 See In re Tam, 785 F.3d 567, 568–69, 571 (Fed. Cir. 2015).
16 See Tam, 808 F.3d at 1328.
17 See id. at 1334–37.
subject matter and continued to discriminate based among the viewpoints contained therein.\textsuperscript{18}

The court then proceeded to reject the government’s various defenses including their reliance on \textit{In re McGinley}, their characterization of the provision as a regulation of commercial speech subject to lower scrutiny, and their characterization of registration as a “subsidy” or “government speech” outside the bounds of the First Amendment.\textsuperscript{19} In doing so, the court found federal registration to bestow widely recognized, “truly significant and financially valuable benefits upon markholders.”\textsuperscript{20} The government’s denial of those benefits, in turn, chilled free speech by “create[ing] a serious disincentive to adopt a mark which the government may deem offensive or disparaging.”\textsuperscript{21}

While the \textit{Tam} opinion expressly did not touch section 2(a)’s prohibitions on immoral or scandalous marks, the holding was extended to such soon thereafter in \textit{In re Brunetti}.\textsuperscript{22} Thus, \textit{Tam}’s rationale is currently applicable to all marks submitted to the USPTO that would have otherwise been denied based on obscenity grounds. This moral breathing room benefits alcohol manufacturers little however in the current legal regime. This is because both federal and state labeling laws currently prohibit the use of scandalous representations, whether through language or pictorial representations, on alcohol labels independent of the recently overturned trademark law.

\section*{III. Prohibition of Obscene Alcohol Labels}

While the trademark laws applicable to alcohol are the same as those applied to any other goods or services, federal and state governments have both placed labeling regulations upon alcohol that control how an alcohol manufacturer may brand and market its product. Since the trademark laws are universally applied, the ban on registration of scandalous and obscene marks has perhaps been less noticeable to alcohol manufacturers since it was a universal

\textsuperscript{18} \textit{See id. at} 1335-37.
\textsuperscript{19} \textit{Id. at} 1333-34, 1337-38, 1345-48.
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{In re Brunetti}, 877 F.3d 1330 (Fed. Cir. 2017).
requirement anyhow. If such prohibitions will not be enforced universally anymore, the independent labeling laws requiring the same become a unique burden to the alcohol industry. It seems fitting then, that as the country reevaluates the propriety of such trademark laws on a general sense, the same logic might apply to invalidate labeling laws prohibiting scandalous marks.

A. Federal Labeling Laws

The federal government regulates alcohol labeling through the Alcohol & Tobacco Tax and Trade Bureau ("TTB"). The TTB requires any sealed container of alcoholic beverages that crosses state lines to bear an approved label. This rule applies to bottles, cans, and kegs. Without an approved label, the alcohol is not allowed to travel in interstate commerce – a practice that is not only commonplace, but invaluable to an expanding business that hopes to be more than a purely regional commodity.

The labeling laws mandate a variety of information, most of which is aimed at keeping potential consumers apprised of factual, nutritionally relevant information such as the percentage of alcohol by volume, the type of beer, and so on. Specifically, the primary label on an alcohol container, which would include a keg collar if applicable, is required to indicate, among other things, the brand name of the beer. Though it need not be placed on the primary label, the familiar government warning pictured below on the top right of a Modern Times Lost Horizon label, must also be displayed on the container and in an exceptionally specific format.

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24 Id.
25 Id.
26 Id. at § 7.22.
27 Id. § 16.20-22 (mandating the inclusion of “GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems.” on all beer containers).
This warning must be so designed as to be readily legible "under ordinary conditions" and has requirements about background colors and the method of affixation. 28

All of this mandated information is akin to that used with other foodstuffs however and, again, is aimed at informing consumers about the nutritional impact the consumable is likely to have upon them. The rules are not aimed at viewpoints however. 29 Where the TTB laws begin to tread interesting water is with prohibitions against labels that create certain impressions upon potential consumers. These prohibitions preclude labels that create a false or misleading impression, disparage a competitor's products, simulate government approval or involvement, feature unsubstantiated health claims, and statements that indicate the beverage is intoxicating. 30 Many of these make intuitive sense to laymen and legal scholars alike. But the TTB also prohibits labels that feature obscene or indecent representations. 31 These issues also arise more frequently than one might think. No matter how comical or artistic, in order to gain label approval for alcoholic beverages, their manufacturers are evidently required to avoid sexual innuendos, nudity, expletives, and drug and addiction

28 Id.
30 27 C.F.R. § 7.29.
31 Id. § 7.29(a)(3).
references.

But the line between obscenity and art has long been a subjective nightmare. Objective criteria has never truly been proffered by the federal government for what does and does not constitute obscenity – the most reliable advice may well come from Former Supreme Court Justice Potter Stewart in a 1964 case when he said simply, “I know it when I see it.” 32 The TTB’s rationale for the obscene remains similarly far from well-articulated and many have argued its consistency suffers for it. 33 This creates a situation in which not only is a government actor deciding what is and is not proper decorum, but that decision is also mere luck of the draw in terms of which examiner receives the application. By no means is this a theoretical concern either, when obscenity is in the eye of the beholder, inconsistency is inevitable as evidenced by the below approvals and rejections.

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32 See generally Jacobellis v. Ohio, 378 U.S. 184 (1964) (holding the Louis Malle film The Lovers was not obscene and thus was constitutionally protected by the First Amendment. Notably, the majority was unable to agree upon a rationale for obscenity and yielded four different opinions from the majority and two dissenting opinions, none of which had the support of more than two justices).

33 For breweries, the see making the call on behalf of the federal government was a single man for well over a decade. Mr. Kent “Battle” Martin, was hired by the TTB in 2004 and until his retirement in 2015, Mr. Martin reviewed every single malt beverage label application submitted to the TTB for label approval.
More importantly, at first blush, the TTB’s prohibition on the obscene is similar in both source (federal government) and effect (denied benefits based on use of a mark that is deemed obscene) as those recently held unconstitutional by Tam and Brunetti. The court in Tam expressly limited its holding to the disparagement provision of the Lanham Act but anticipated the applicability elsewhere when it “[r]ecogniz[ed] . . . that other portions of §2 may likewise constitute government regulation of expression based on message, such as the exclusions of the immoral and scandalous marks[.]”\(^\text{34}\) Taking their argument on its merit, the TTB ban on indecent and obscene labels also constitutes “government regulation of expression based on message[.]”\(^\text{35}\) Additionally, it is the same message being regulated—that of the obscene, scandalous, and immoral.

While the USPTO has made clear that it believes In re Tam wrongly decided, even it was forced to concede that “Tam precludes the U.S. Trademark Office from refusing registration to any mark that falls under the interdicts of 2(a), and is all the more likely to cause a reversal of . . . refusals of registration to marks deemed ‘scandalous or immoral.’”\(^\text{36}\) This aligns with the Federal Circuit’s stance in In re Tam

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\(^{34}\) Tam, 808 F.3d at 1330 n.1.

\(^{35}\) Id.

\(^{36}\) Letter from Assistant Attorney General Joshua Salzman, an attorney advising the Director of the U.S. Patent and Trademark Office to a clerk for the Court of Appeals for the Federal Circuit in the pending Trademark Office appellate case In re Brunetti (CAFC No. 2015-1109). See generally Bob Cumbow, Government Concedes that Recent Federal Circuit Ruling on Registration of “Disparaging” Trademarks Applies to “Scandalous and Immoral” Marks As Well, IP LAW TRENDS:
and follows sound logic.

The label approval process is analogous to that in the Pre-Tam trademark application process in all of its most important aspects. In both processes, businesses are required to undergo an approval process in order to gain a benefit that is exceptionally beneficial, if not crucial to the business’s success. In the TTB proceeding, an approved label gives the benefit of distribution and sales rights for the company’s goods in interstate commerce; in the USPTO proceeding, an approved trademark application gives the benefit of exclusive use of a given mark for the company’s goods in interstate commerce. Neither benefit is something that the company must have to operate as a business – trademark registrations are not required to use a given mark, nor do breweries have to distribute their goods to others states (in fact many breweries have no desire to grow outside of their backyard) – but in both cases the benefit grants access to a valuable business practice. In both processes, the approval is hinged on a government actor determining whether expressive content is obscene. As such, the TTB’s ban on label approval for obscene and indecent marks is essentially identical in source and effect as the ban on registration implemented by the USPTO pre-Tam. Assuming the longevity of Tam, the labeling process is thus arguably unconstitutional in identical fashion.

B. Differentiating the TTB and USPTO

One possible rationale for differentiating the two processes, and thereby validating the ban implemented by the TTB, is an increased risk that consumers may infer government involvement or approval of alcohol labels than with trademark registrations.

In Tam, the government suggested the prohibition on obscene marks was outside the realm of constitutional protection under a theory of trademark registration as “government speech.” The Tam court rejected this notion however, noting that:

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[Note 37]: Tam, 808 F.3d at 1339.
[T]he government appears to argue that trademark registration and the accoutrements of registration — such as the registrant’s right to attach the ® symbol to the registered mark, the mark’s placement on the Principal Register, and the issuance of a certificate of registration — amount to government speech. . . This argument is meritless. Trademark registration is a regulatory activity. These manifestations of government registration do not convert the underlying speech to government speech. \(^{38}\)

The court laid out several reasons why the government’s argument failed, and many of these reasons translate to the TTB labeling process as well. \(^{39}\) This is because many elements of the label approval process bear resemblance to the trademark registration process and thus the *Tam* holding extends without effort. For example, alcohol labels approved by the TTB are maintained on a public database much like the public database maintained by the USPTO for trademark registrations on the Principal Register.

But maintenance of a public database was found to be of little persuasive value to the *Tam* court which held that “a registered mark’s placement on the Principal Register or publication in the PTO’s Official Gazette does not morph the private expression being registered into government expression.” \(^{40}\) Rather, the court focused on the fact that “[t]here is apparently no government-published book of all trademark registrations; instead, the Principal Register is at most an internet database hosted on the PTO’s website.” \(^{41}\) Perhaps most tellingly, the court recognized that if the presence of ‘speech’ in a government database qualified that language as government speech, then the act of any licensing by the government would preclude First Amendment protection. \(^{42}\) Trademarks registered with the USPTO

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38. *Id.* at 1345 (internal citations omitted).
39. *Id.* at 1345-55.
40. *Id.* at 1347.
41. *Id.* (emphasis added).
42. See *id.* at 1347-48 (“If being listed in a government database or published in a list of registrations were enough to convert private speech to government speech, nearly every action the government takes—every parade permit granted, every property title recorded, every hunting or fishing license issued—would amount to government speech. The government could record recipients of parade permits in an
should have had a stronger claim to government speech than TTB label approval, given the issuance of a certificate bearing an official government seal. But even accepting that line of thinking, the argument still failed because, according to Tam, “[t]he public simply does not view these registration certificates as the government’s expression of its ideas or as the government’s endorsement of the ideas, inventions, or trademarks of the private speakers to whom they are issued.”43 Put another way, “the public is unlikely to believe that a registered trademark designation accompanying a word or logo on a product reflects government endorsement” and the same must surely be said of alcoholic beverages considering the country’s fraught history with the products.44

The court repeatedly rejected the government’s argument with analogies to copyright law, recognizing that if the government’s argument was to be accepted, then by extension, materials subject to copyright registration would also constitute government speech immune to constitutional protection—a concept not proffered by any party.45 This approach does not apply to the labeling laws universally however. In refuting the government’s position in Tam, the court took into account the fact that

[t]he vast array of private trademarks are not created by the government, owned or monopolized by the government, sized and formatted by the government, immediately understood as performing any government function (like unique, visible vehicle identification), aligned with the government, or (putting aside any specific government secured trademarks) used as a platform for government speech. There is simply no meaningful basis for finding that consumers associate registered private trademarks with the government. . . .

The government argues that use of the ® symbol, being

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43 Tam, 808 F.3d. at 1348.
44 Id. at 1347.
45 See id. at 1345-46.
listed in a database of registered marks, and having been issued a registration certificate makes trademark registration government speech. These incidents of registration do not convert private speech into government speech. . . . Markholders are not even required to use the ® symbol on their goods. 15 U.S.C. § 1111.46

One could argue, for example, that the TTB’s mandated inclusion of text titled in bold, capitalized letters “GOVERNMENT WARNING,” rises above the mere right to include the ® symbol. The government warning is not only required per TTB regulations, but the government even goes so far as to control the size and format. And unlike the optional use of a registration symbol, the aforementioned warning could easily be understood as a platform for government speech given the heading “GOVERNMENT WARNING.”47

Even here, however, the argument can and should be refuted by the TTB’s own regulations. In addition to a ban on obscene material, the TTB also bans, among other things, any material that simulates government approval or involvement.48 By implication, even the TTB

46 Id. at 1346-47 (emphasis added).
48 Id. at § 7.29(b) (“Simulation of Government stamps. No label shall be of such design as to resemble or simulate a stamp of the United States Government or of any State or foreign government. No label, other than stamps authorized or required by the United States Government or any State or foreign government, shall state or indicate that the malt beverage contained in the labeled container is brewed, made, bottled, packed, labeled, or sold under, or in accordance with, any municipal, State, Federal, or foreign government authorization, law, or regulation, unless such statement is required or specifically authorized by Federal, State, or municipal, law or regulation, or is required or specifically authorized by the laws or regulations of the foreign country in which such malt beverages were produced. If the municipal or State government permit number is stated upon a label, it shall not be accompanied by an additional statement relating thereto, unless required by State law.”). See also id. § 7.29(d) (“Flags, seals, coats of arms, crests, and other insignia. Labels shall not contain, in the brand name or otherwise, any statement, design, device, or pictorial representation which the appropriate TTB officer finds relates to, or is capable of being construed as relating to, the armed forces of the United States, or the American flag, or any emblem, seal, insignia, or decoration associated with such flag or armed forces; nor shall any label contain any statement, design, device, or pictorial representation of or concerning any flag, seal, coat of arms, crest or other insignia, likely to mislead the consumer to believe that the product has been endorsed, made,
does not actually presume that the presence of a government warning on a label indicates inherently meaningful government approval or involvement. Weighing the several factors mentioned by Tam in their totality, it would seem that the same conclusion is warranted in labeling laws as in trademark law; namely, that the public is unlikely to believe a government warning upon an alcohol label reflects government endorsement of the primary brand or its representations.

C. State Labeling Laws

It bears noting that TTB label approval is not required by the TTB unless an alcoholic beverage enters interstate commerce and crosses state lines. Thus, many alcoholic beverages intended purely for intrastate use are not subject to TTB review. That does not preclude the issue, however, since many states independently mandate TTB approval regardless of whether the beverage will leave the state of manufacture. Of those states that do not mandate TTB approval, some have relatively duplicative laws regarding alcohol labeling regardless, while others states are in fact more stringent than the TTB – a problem that is inherent when obscenity is within the eye of the beholder.

The fact remains however, that for breweries situated within a state that does not mandate federal label approval and has either no intention to package product or no intention to distribute across state lines, the process we have been discussing is not necessary to carry on business. But this argument also falls prey to Tam. Specifically, in Tam, the government argued that the ban on disparaging trademarks did not implicate the First Amendment because a trademark registration is not required in order to use a mark, and thus it does not prohibit speech. But case law has made clear that the First Amendment’s standards, including those broadly invalidating message discrimination, are not so limited because a denial of benefits creates a serious disincentive to adopt a mark which the government may deem offensive or disparaging. This logic is no less applicable here as

50 Tam, 808 F.3d at 1339.
51 See Pitt News v. Pappert, 379 F.3d 96, 111–12 (3d Cir. 2004) (“The threat to the First Amendment arises from the imposition of financial burdens that may have
alcohol manufacturers are undoubtedly disincentivized from choosing marks that may be interpreted by the TTB as obscene, since labels bearing such marks will be rejected and incapable of use in interstate commerce and possibly even intrastate commerce, depending on the state of manufacture.

Moreover, many, if not most, breweries do have an intent to package and distribute product in interstate commerce. So even for those states that have created labeling laws not incorporating the TTB regulations, the issue remains since any flouting of the labeling laws essentially precludes later distribution of a product. This can be a bitter trap for artisan manufacturers that did not accurately anticipate their own growth. Alcohol manufacturers may gain local fame with a particular brand only to find out much later that should they wish to enter the national, or even regional scene, some beers would need to be rebranded in order to gain the federal approval necessary for out-of-state distribution. Rebranding is not only a large expense in terms of financial investment, but can also have massively detrimental impacts on the brand value associated with a beverage. It does a small craft brewery little good to gain widespread local fame, enough to achieve cult status, and then learn that their ticket to the big show is a flagship beer that would have to be re-named and would thus go unrecognized. A rebrand can easily negate any value of initial popularity altogether and is thus analogous to the chilled trademark speech cited by Tam. 52

Much like a trademark registration, the ability to distribute a particular brand out-of-state “bestows truly significant and financially valuable benefits upon” those with approved labels irrespective of the opportunity for in-state sales. 53

Moreover, should a brewery find luck in the TTB label approval process and pass the sniff test of federal regulations, individual state regulators may yet reject certain labels for being obscene. For example, Michigan based Founders Brewing Co. ran into issues when the state of Alabama refused to approve labels for one of the brewery’s flagship beers, a scotch-style ale lovingly named Dirty Bastard, and a specialty release, the barrel-aged Backwoods Bastard despite the

the effect of influencing or suppressing speech, and whether those burdens take the form of taxes or some other form is unimportant”).

52 See Tam, 808 F.3d at 1341 (internal citations omitted).
53 Id. at 1340.
brewery’s acquisition of TTB label approval.54 Somewhat ironically, the state of Michigan (who evidently approved of the word “Bastard” in Founders’ case) initially denied Flying Dog the right to sell its Raging Bitch IPA within the state.55 Nor is it purely a problem with hops as Alabama drew yet more notoriety in 2004 after rejecting a cabernet sauvignon label for CYCLES GLADIATOR made by Hahn Family Wines.56 The label featured an artistic rendering of a nude woman alongside a bicycle. It was found to be a violation of the prohibition against “immodest or sensual” posing despite the artistic lens.57 The woman is seen from the side and most, if not all, other states and the TTB had approved the label without issue. Both of the above breweries fought the decisions to censor their beer and in fact both were eventually allowed to distribute in the states mentioned. However, both businesses were forced to expend time and money attempting to navigate these vague areas of law and defend what they considered to be their constitutional right.

IV. BAD FROGS AND FLYING DOGS

As explored above then, the holding of Tam is applicable both in its own internal logic and with regards to the rejected defenses proffered by the government. As such, one might argue that the holding in Tam can be applied in the state and federal labeling laws and the prohibitions on obscenity should therefore be struck down as unconstitutional. Should such a case be brought, the government may well offer, if not different arguments, at least additional defenses unique to the alcohol industry.

Specifically, alcohol’s arguably internally dodgy constitutional status may well provide a rationale for differentiating the validity of obscenity prohibitions in alcohol labeling laws that are otherwise

54 The applicable ABC rule in Alabama reads: “The ABC Board may exercise its discretion to prohibit advertising it considers objectionable.” Ala. Alcohol Beverage and Control Board Admin. Code r. 20-x-7-.01(b) (2001).
56 CYCLES GLADIATOR, Reg. No. 4,032,145.
unconstitutional with regards to the trademark framework or even business practices in general. Post-prohibition regulations made clear that alcohol licenses are a privilege, not a right.\textsuperscript{58} The Twenty-first Amendment repealing the prohibition instituted by the Eighteenth Amendment, did not allow alcohol manufacture and sales so much as grant the states the right to allow "transportation or importation . . . or possession" thereof.\textsuperscript{59} In fact, states may absolutely prohibit the manufacture, transportation, sale, or possession of alcoholic beverages.\textsuperscript{60} Thus, it might go without saying that there is no right inherent in the use of a particular label since there is no right to partake of the underlying industry. States were granted broad discretion over its regulation, and even legalization, of intoxicating beverages under the police powers "[o]n account of [the] inherent and potential menace to public welfare caused by [the] liquor business," and in fact courts have recognized that the "police power to regulate and control [the alcohol industry] runs broad and deep, much more so than the power to curb and direct ordinary business activity."\textsuperscript{61}

Even if the rationale of \textit{Tam} may well be readily translated to the federal prohibitions then, one might argue that the states may retain verbatim prohibitions under the broad protection of their police powers. Essentially, one might argue that the state’s exceptionally potent police powers over alcohol trump alcohol manufacturer’s free First Amendment rights. Enter, once again, Raging Bitch IPA. As indicated above, Flying Dog filed suit against the Michigan Liquor Control Commission when its label for Raging Bitch IPA was rejected

\textsuperscript{58} See Brown Distrib. Co. v. Oklahoma Alcoholic Beverage Control Bd., 597 P.2d 324, 326 (Okla. 1979) (explaining that under the Twenty-first Amendment, state "legislature[s] subject to constitutional restrictions, may lawfully grant right to engage in traffic of liquor to certain class or classes of persons and withhold it from others, and no one may complain because liquor legislation has denied him the privilege of engaging in liquor traffic") (emphasis added); see also Cal. Const. art. XX § 22 ("Until the Legislature shall otherwise provide, the privilege of keeping, buying, selling, serving, and otherwise disposing of alcoholic beverages . . . and the privilege of keeping, buying, selling, serving, and otherwise disposing of beers on any premises open to the general public shall be licensed and regulated under the applicable provisions of the Alcoholic Beverage Control Act, insofar as the same are not inconsistent with the provisions hereof").

\textsuperscript{59} U.S. CONST. amend. XXI, § 2.

\textsuperscript{60} See Francis v. Fitzpatrick, 129 Conn. 619 (1943).

\textsuperscript{61} Ruppert v. Liquor Control Comm’n, 138 Conn. 669, 674 (1952) (citing Mugler v. Kansas, 123 U.S. 623, 662 (1887)).
for containing "language deemed detrimental to the health, safety, or welfare of the general public."\textsuperscript{62} Flying Dog maintained that rejection of its label for such purposes was, much like in \textit{Tam}, a violation of its First Amendment free speech rights.

Initially, the district court hearing Flying Dog's case upheld the label's rejection.\textsuperscript{63} But, undeterred, Flying Dog appealed, and in March 2015, the 6\textsuperscript{th} Circuit Court of Appeals sided with beer.\textsuperscript{64} Specifically, the \textit{Flying Dog} court cited the Supreme Court's application of the \textit{Central Hudson} test in a case banning inclusion of alcohol content on beer labels.\textsuperscript{65} In that case, \textit{Rubin v. Coors Brewing Co.},\textsuperscript{66} the court held that the speech was commercial in nature but the ban violated the First Amendment by failing to satisfy the analytical framework set forth in \textit{Central Hudson}.\textsuperscript{67} More importantly, the court also held that "\textit{Rubin} resolved any doubt that First Amendment commercial speech principles apply to the content of beer labels."\textsuperscript{68} Since \textit{Rubin}, case law has frequently specified that First Amendment protection is not negated by the Twenty-First Amendment.\textsuperscript{69}

Thus, in \textit{Flying Dog}, the court held that "although the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders, the Amendment does not license the States to ignore their obligations under other provisions of the Constitution." Thus, the Twenty-first Amendment does not "diminish the force" of the Supremacy Clause, the Equal Protection Clause, or the Free Speech and Establishment Clauses of the First Amendment."\textsuperscript{70}

\textsuperscript{64} \textit{Flying Dog}, 597 F. App'x at 343.
\textsuperscript{65} \textit{Flying Dog}, 597 F. App'x at 353.
\textsuperscript{68} \textit{Flying Dog}, 597 F. App'x at 354.
\textsuperscript{69} See, e.g., 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 (1996) (finding Rhode Island's statutory ban on advertisements displaying accurate information about retail prices of alcoholic beverages to be "an abridgement of speech protected by the First Amendment" that was "not shielded from constitutional scrutiny by the Twenty-first Amendment").
\textsuperscript{70} \textit{Flying Dog}, 597 F. App'x at 354 (citing 44 Liquormart, 517 U.S. at 516.
In reaching their final holding, the *Flying Dog* court relied heavily on *Bad Frog*. In *Bad Frog Brewery*, a district court upheld a rejection of the brewery's beer label that showed a frog “giving the finger,” only to be reversed by the Second Circuit on the constitutional question.\(^\text{71}\)

The *Flying Dog* court also cited *Bad Frog Brewery* for “persuasive authority that . . . banning a beer label for vulgarity violates the First Amendment” and thus “any reasonable state liquor commissioner is on notice that banning a beer label based on its content would violate the First Amendment unless the *Central Hudson* test was satisfied.”\(^\text{72}\) This case law makes clear, that whether alcohol manufacture is a privilege or a right, alcohol labels are commercial speech subject to *Central Hudson* scrutiny and, thus, any prohibitions on obscene material must pass *Central Hudson* in order to be constitutional.

While a thorough examination of *Central Hudson* is outside the bounds of this article, a brief inspection indicates that to pass muster, we must decide: (1) whether the speech at issue concerns lawful activity and is not misleading; (2) whether the asserted government interest is substantial; and, if so, (3) whether the regulation directly advances the governmental interest asserted; and (4) whether it is not more extensive than is necessary to serve that interest.\(^\text{73}\) To the extent that all fifty states have legalized the manufacture and sale of alcohol, the first criterion is not reasonably within dispute. Rather, controversy must hinge on whether a substantial government interest is implicated and whether the regulation is both direct and narrow.

The government actor in *Bad Frog* is indicative of the usual state stance with regard to interest, namely, the state’s interest in “protecting children from vulgar and profane advertising.”\(^\text{74}\) While the protection of minors from obscene materials has long been deemed a substantial interest of the state,\(^\text{75}\) blanket bans on obscene alcohol labeling are, as

\(^{\text{71}}\) *Bad Frog Brewery*, Inc. v. N.Y. State Liquor Auth., 134 F.3d 87, 91-100, 102-03 (2d Cir. 1998).

\(^{\text{72}}\) *Flying Dog*, 597 F. App’x at 355.


\(^{\text{74}}\) *Bad Frog*, 134 F.3d at 98.

\(^{\text{75}}\) *See Sable Commc’ns of Cal.*, Inc. v. FCC, 492 U.S. 115, 126 (1989); *see also* *Reno* v. American Civil Liberties Union, 521 U.S. 844, 875 (1997) (“[W]e have repeatedly recognized the governmental interest in protecting children from harmful materials”).
reiterated by *Flying Dog*, neither narrow nor direct enough to withstand *Central Hudson* scrutiny. Rather, "[defendant’s] complete statewide ban on the use of Bad Frog’s labels lack[ed] a ‘reasonable fit’ with the state’s asserted interest in shielding minors from vulgarity, and [the defendant] gave inadequate consideration to alternatives to [ ] blanket suppression of commercial speech." This relatively well-settled, if not thoroughly integrated, case law is not touched upon or overthrown by the holding in *Tam*.

That being said, the law may yet be in flux. Turning to California, we find *Actmedia* and *Retail Digital Network*. In the 1980s, an advertising company leased advertising space on shopping carts at grocery stores to alcoholic beverage manufacturers. This was found to be a violation of the state’s alcoholic beverage control act which forbid an alcohol manufacturer from paying money or furnishing anything of value to a retail licensee, such as a grocery store, for the privilege of placing or painting a sign or advertisement in the retailer’s premises. That law is still in effect today because, despite being challenged on first amendment grounds, the court in *Actmedia* found that the law passed *Central Hudson* muster. Specifically, the court held that "like other tied-house statutes . . . section 25503(h) is primarily designed to prevent or limit a specific evil: the achievement of dominance or undue influence by alcoholic beverage manufacturers and wholesalers over retail establishments." Protection from this "specific evil," much like the protection of children from obscene materials, had long been deemed valid as a substantial interest of the state – namely, temperance. As the *Actmedia* court noted, drafters of tied-house laws were concerned that a free market of advertising alcohol would lead to market consolidation, manufacturer and wholesaler dominance over retailers, and thus "incentives for retailers to be far more aggressive in encouraging their customers to purchase the alcoholic beverages they stocked. They feared that the increased

76 *Flying Dog*, 597 F. App’x at 369-71.
77 *Bad Frog*, 134 F.3d at 101 ("[T]he government may not ‘reduce the adult population . . . to reading only what is fit for children’") (quoting Bolger v. Youngs Drug Products Corp. 463 U.S. 60, 73 (1983)).
78 *Actmedia, Inc. v. Stroh*, 830 F.2d 957, 958 (9th Cir. 1986), *implied overruling recognized by Retail Digital Network LLC v. Appelsmith*, 810 F.3d 638 (9th Cir. 2016) (requiring “heightened judicial scrutiny of content-based restrictions on non-misleading commercial speech”).
aggressiveness on the part of retailers, combined with the already ‘overly aggressive marketing techniques’ of the large [manufacturers] who would pay to advertise in retail outlets . . . would increase consumption of alcoholic beverages.’ Finally, Actmedia found no difficulty in holding that the statute was no more extensive than necessary for its purpose since “to the extent that the California legislature has determined that point-of-purchase advertising is a direct cause of excessive alcohol consumption, limiting that advertising is ‘obviously the most direct and perhaps the only effective approach’ available.”

Actmedia stood in solidarity with labeling regulations for some time lending credence to the validity of regulating alcohol advertising generally. However, a contender has arisen in this arena as well. Retail Digital Network, another advertising company, sought to install video display units in off-premise retail locations with the idea of selling advertising space to alcohol manufacturers. The Department of Alcoholic Beverage Control cited Actmedia though and advised them that such would be in violation of the ABC Act. Like its analog predecessor, the advertising company sued alleging First Amendment violations. The trial court granted summary judgment based on Actmedia but, unperturbed, this advertiser sought review in the Ninth Circuit arguing that the Supreme Court case of Sorrell v. IMS Health, Inc. established a new level of scrutiny in commercial speech cases. Specifically, Sorrell created “heightened scrutiny” and Actmedia’s holding was irreconcilable with it. Somewhat surprisingly, the three member panel agreed with the advertiser and held that intermediate scrutiny in cases such as these have now give way to Sorrell’s “heightened scrutiny.”

In remanding the case, the Ninth Circuit noted the state’s “broad goal of ‘temperance’ [] remains ‘a valid and important interest of the state under the Twenty-first Amendment’” but expressed skepticism on whether the content-based burdens of expression regarding point of

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80 Actmedia, 830 F.2d at 966.
81 Id. at 967 (quoting Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507 (1981)).
82 See Retail Digital Network, LLC v. Appelsmith, 810 F.3d 638 (9th Cir. 2016).
83 Id.
84 Id. at 645.
85 Id. at 653.
sale advertising directly advanced that goal or did so in a permissible fashion.\textsuperscript{86} One such reason for this skepticism was the "increasing number of statutory exceptions to section 25503(f)-(h)" that the state has evidently deemed acceptable – a trend that is arguably present with regards to obscenity restrictions as well as evidenced by Tam, Raging Bitch, and Bad Frog.\textsuperscript{87} The Department of Alcoholic Beverage Control has petitioned for re-hearing of the case \textit{en banc}, but the big question in the interim remains – what exactly does "heightened scrutiny" mean for alcohol manufacturers?\textsuperscript{88} \textit{Sorrell} may well mark the abandonment of \textit{Central Hudson} for commercial speech regulations, and with it much of the rationale for labeling regulations prohibiting obscene material but the hammer will likely need to fall with regard to pure retail advertising first. Only after escaping the puritan values of temperance that \textit{Central Hudson} has long upheld can obscenity hope to sneak in the backdoor.

V. CONCLUSION

In conclusion, \textit{Tam} does not directly apply to the TTB, but the Federal Circuit’s ruling — that a government ban on expressive content with a particular message is unconstitutional if the ban deprives an applicant of a substantial benefit — could. Meanwhile, similar state prohibitions, seemingly outside such constraints previously, is also under attack. As such, decades worth of case law may be ready to give way that could potentially allow alcohol manufacturers breathing room in their very crowded marketing efforts. Until such time however, alcohol manufacturers must leave the moral low-ground on tap and off packaging.

\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} The court has not yet acted on the petition, but has granted requests from a number of parties to appear as amici, including: California Craft Brewers Association, National Beer Wholesalers Association, Wine & Spirits Wholesalers of America, Wine & Spirits Wholesalers of California, and California Beer & Beverage Distributors.