



# Intellectual Property Update

Ryan Smith

## *The Moose Protects its Territory*

**M**oosehead Breweries of Saint John jealously guards its many MOOSE trademarks in Canada and abroad. When a brewery in New York State started selling soda pop with the trade-mark MOOSE WIZZ and a label depicting the head of a moose, Moosehead sprang into action to defend its turf.

Moosehead has used its trade-mark MOOSEHEAD since 1931 in the United States with ale, beer, stout, porter, and lager. Since the late 1970s Moosehead has used and protected other MOOSEHEAD trade-marks in the United States which brand many consumer products such as playing cards, pens, mugs, and drinking glass-

es. Moosehead sells its products in bars, pubs, restaurants, and beverage stores. Its products are sold primarily in beer bottles. Moosehead spends large sums of money on advertising its products bearing the MOOSE family of trade-marks and as a result enjoys a strong reputation and goodwill.

The Adirondack Pub & Brewery of Lake George, New York, produces root beer products under the MOOSE WIZZ brand. Adirondack began using the MOOSE WIZZ brand in late 2008. Moosehead claimed that Adirondack offers its MOOSE WIZZ root beer to the same classes of purchasers to whom the MOOSEHEAD products are offered. MOOSE WIZZ brand root beer is sold in bottles that depict

the head of a moose on their labels. Adirondack applied for a trademark in the U.S. Patent and Trademark Office for MOOSE WIZZ but abandoned the application when Moosehead opposed it.

The main issue of the case is whether consumers would be confused between the MOOSEHEAD branded beer and the MOOSE WIZZ branded root beer.

The MOOSE WIZZ lawyers argued that there is a substantial enough difference between beer and root beer, the places where the products are sold, and the consumers targeted with the products, to prevent any confusion.

In response the MOOSEHEAD lawyers argued that because more and more brewers of alcoholic beverages were beginning to produce non-alcoholic beverages as well, that the likelihood increased that consumers could be confused by the two offerings being in the marketplace at the same time; therefore, as a result of that trend, the traditional line between brewers of alcoholic beverages and non-alcoholic beverages had blurred.

A jury found that there indeed could be confusion between the MOOSEH-



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EAD trade-marks and the MOOSE WIZZ trade-mark that brands root beer. In making that finding, the jury awarded damages to Moosehead. A judge will decide later whether to prohibit the further use of the MOOSE WIZZ trade-mark and moose head depiction on its labels.

This case emphasizes an important point in confusion analysis in trademark law. The determination about whether two trade-marks may be confusing with one another can change when the environment in which the trade-marks are used changes.

In the recent past the brewers of alcoholic beverages brewed exclusively alcoholic beverages and the makers of non-alcoholic beverages refrained from making any alcoholic beverages. If that situation had persisted, Moosehead may never have brought a claim against the MOOSE WIZZ trade-mark and if it did it would have been more difficult to persuade someone that confusion could result from the use of the two trade-marks in the same marketplace.

In the current case, it seemed to be a critical point that Adirondack brewed beer along with the MOOSE WIZZ-branded root beer. Further, that a trend had emerged where traditional alcoholic beverage makers were now making non-alcoholic beverages and vice versa. It was that confluence between alcoholic and non-alcoholic beverages being made by the same party and marketed under the same or similar brands that ultimately resulted in the finding that confusion could or would occur between MOOSEHEAD and MOOSE WIZZ.

This case is instructive for established brand owners and those who adopt new brands. Pay attention to changes or likely changes in the industry where the trade-mark will be used. Will new trends or developments increase the

likelihood of confusion for the brands operating in that industry? Such considerations should take place before adopting a new brand and before deciding that a new competitor's brand will never be confusing with the established brand. ■

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