

Managing boozy brands in a zero-proof world

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While “dry January” has been a common new year’s resolution for years, more and more individuals — especially millennials and younger generations — are choosing to live an alcohol-free lifestyle year-round. Non-alcoholic beer and so-called mocktails have long served non-drinkers looking to blend in at a bar or cocktail party, be a responsible designated driver, or simply enjoy the taste of a beer without the buzz. But over the past few years, and especially in 2021, the non-alcoholic beverage sector has evolved, and the owners of liquor brands must evolve their brand management strategies accordingly.

The most notable development in the non-alcoholic beverage world has been the proliferation of non-alcoholic beverages emulating the tastes of various distilled spirits. These taste-alike beverages can be consumed alone or substituted for traditional distilled spirits in drink recipes. The non-alcoholic “spirits” trend is so powerful that in 2021, the world-renowned San Francisco World Spirits Competition introduced the category of “non-alcoholic spirits,” recognizing 29 such products.

The buzz words used to market and label products in the non-alcoholic spirits category include “faux spirits,” “zero alcohol,” “alcohol-free spirits,” “boozeless,” “virgin,” “booze-free cocktails,” “tequila alternative,” and “not vodka.” And just as there is no uniformity in how these products are marketed and labeled, there is no uniformity in how brand owners identify these non-alcoholic spirits to the U.S. Trademark Office. This lack of uniformity can complicate efforts by brand owners to police and enforce their liquor trademarks.

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The core elements of a U.S. trademark application are the owner, the mark, and an identification of the goods or services, commonly referred to as the “ID.” If the trademark application matures into a registration, the combination of the mark + the ID (as opposed to the mark alone) defines the owner’s scope of trademark protection.

This means that two entities may share the same mark for different or unrelated goods. For example, one entity could use and register the mark The Barnaby for hotel services while another entity uses and registers the mark Barnaby for watches and jewelry.

Selecting an ID is a deceptively simple task. As a starting point, because the U.S. Trademark Office generally requires that a mark be used before it is registered, the ID must accurately reflect the good or service on which the mark is being used. At the same time, as a best practice, brand owners typically wish to identify their goods or services as broadly as the U.S. Trademark Office will allow. So, for example, a synthetic fiber carpeting manufacturer could accurately identify its goods as “synthetic fiber carpeting,” “carpeting,” or “floor coverings.”

Some brand owners have transparently identified their non-alcoholic spirits products to the U.S. Trademark Office as “de-alcoholized liquor” and “non-alcoholic spirits made with aromatic herbs.”

In practice, most trademark attorneys would include all three descriptions in a trademark application because all three are accurate and, collectively, they provide broad coverage. But, in some cases, selecting an ID is not so cut and dried.

For various reasons, including cost-saving reasons, many trademark applicants will begin the process of selecting an ID by consulting the U.S. Trademark Office’s ID Manual at <https://bit.ly/38YUqqr>. For well-established types of goods, like mattresses and tennis racquets, finding an ID is a straightforward task. But when new categories of goods and services arise, the U.S. Trademark Office typically takes a while to establish standard IDs to describe the new items. This lag time is evident with respect to non-alcoholic spirits.

Within the U.S. Trademark Office’s 45 classes for organizing all goods and services, there are four primary classes covering the lion’s share of beverages. Class 29, titled “meats and processed foods,” houses milk and other dairy-based beverages. Class 30, titled “staple foods,” houses prepared coffee, tea, and cocoa drinks. Class 33 is titled “wines and spirits” and houses nearly

every alcoholic beverage except beer which, as a historical relic, is assigned to Class 32.

Class 32 is titled "light beverages." In addition to beer, Class 32 light beverages include a wide array of non-alcoholic beverages and mixers such as lemonade, fruit juices, sports drinks, energy drinks, bottled, sparkling and flavored waters, carbonated soft drinks, club soda, and tonic water. Class 32 even includes so-called "just add" bar mixes which, sans the to-be-added alcoholic spirits, are just sugary soft drinks.

It follows logically that non-alcoholic spirits are destined to classification in Class 32 as light beverages. Some brand owners have transparently identified their non-alcoholic spirits products to the U.S. Trademark Office as "de-alcoholized liquor" and "non-alcoholic spirits made with aromatic herbs." Other non-alcoholic spirits brand owners have intentionally or unintentionally obscured the commercial nature of their products by identifying them as "flavored waters," "water-based beverages," "soft drinks," and "herbal juices."

Many brand owners primarily police their brands by subscribing to a third-party service that filters through the filing data for all new U.S. trademark applications by mark and class and identifies potentially conflicting marks by sending a watch notice. At the outset, the brand owner must tell the third-party service which trademark

classes to monitor. Most sophisticated owners of liquor brands already monitor Class 32 (in addition to Class 33) for conflicting marks in an abundance of caution, especially because beer is in Class 32. But even the most sophisticated of these brand owners might see an application for a similar mark for "flavored water" or "soft drinks" and conclude that the application is benign when, in fact, it is a product created to mimic the Class 33 liquor and, in many cases, compete directly against it.

If non-alcoholic spirits follow the path of non-alcoholic beer, the owners of iconic liquor brands may soon be introducing alcohol-free versions of their popular products to capitalize on a new market. And even if such branded taste-alike beverages do not come to fruition, these brand owners will still likely enforce their brands against taste-alike drinks with confusingly similar names.

But identifying these potential encroachments is the first step. So, whether ensuring the freedom to introduce new non-alcoholic counterparts or preventing consumer confusion, in the new zero-proof world, increased scrutiny and investigation of all Class 32 applications will likely prove worthwhile to owners of liquor brands.

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About the author



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