

TRADEMARKS

'Radler' a brand only in NZ

Allan Swann

DB Breweries has been throwing its weight around, barring opponents from using the term "Radler" – utilising a trademark that should never have been issued in the first place, critics say.

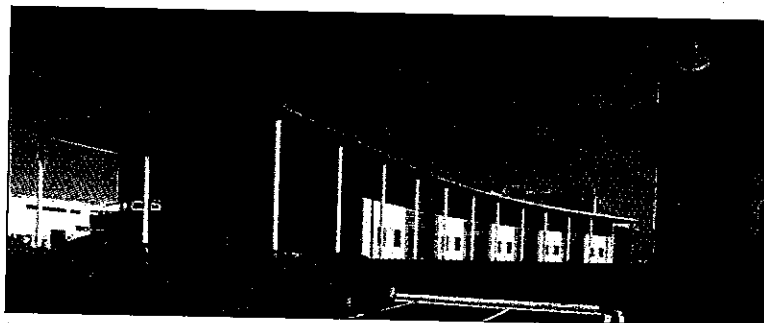
Dunedin's Green Man Brewery has been served papers by DB Breweries' lawyers, Simpson Grierson, demanding that the small company stop using the term radler, which it trademarked in 2004.

Green Man Brewery has had to comply, scrapping its radler beer and signing settlement documents that include a clause forbidding Green Man from contesting the trademark.

A radler is a low alcohol lemonade and beer mix, which is designed to refresh cyclists (hence the name, which means cyclist in German) and avoid higher alcohol tax.

While to the average reader this may seem absurd, akin to owning the beer style "pilsner" or "sedan" in the car industry, the Intellectual Property Office (iponz) registered the mark, despite its own rules stating that trademarks must be a "distinctive mark of a single trader's good or service, or a term that is customary in the trade."

The term is nearly a hundred years old and is hardly distinctive –



DB BREWERIES: Controversially awarded the ownership of the brand, it has prevented other beer makers from using it. Breweries in Europe use the name generically

even DB's website makes reference to its pre-New Zealand existence.

"Whoever allowed themselves to be sucked in at the trademarks office should be under the spotlight," Green Man Brewery chairman Michael Weusten said.

Green Man's general manager Jeremy Seaman estimated the action had cost the small company around \$50,000 once lawyer fees, recall costs, advertising and future earnings are counted.

DB spokeswoman Hailey Bloore told *NBR* that given the time and investment in Monteith's and its intellectual property, it had every right to protect its brand.

"If we don't defend our rights now, whether against big players or small players, we might ultimately lose the trade mark protection we have obtained," she says.

So why did the trademarks office allow such a blatant breach of its own policy in registering the trademark?

According to papers obtained by *NBR* under the official information act, these objections were actually raised at the time by examiner Ingrid Bayliss who stated: "The mark Radler does not appear to be registerable because it consists only of signs that may serve, in trade, to designate a particular type of beverage. Radler is defined as "beer mixed with lemonade."

"The mark does not appear to be registerable because it does not appear to have any distinctive character."

DB Breweries' response stated simply that beer mixed with lemonade is known as a shandy in New Zealand, and that "Radler" is

distinctive to DB here.

"No other trader in New Zealand would choose to use this unique term without proper motive," responded Simpson Grierson, acting for DB.

The trademark was accepted by iponz within 15 days and signed off by Neville Harris, the then commissioner of patents, trademarks and designs.

Neither Mrs Bayliss nor Mr Harris was made available to *NBR* by iponz.

"Iponz has a policy of not commenting on individual decisions," spokesman Simon Gallagher told *NBR*.

Iponz generally acted on the presumption of validity in cases that weren't clear cut, he said, and where there were no objections in the registration process, relied on outside parties to raise these issues as they arise.

While there are options available to contest the trademark, Mr Weusten told *NBR* that, being a small operation, it simply didn't have the funds to fight a protracted legal battle with DB – effectively giving DB a monopoly on a style of beer.

The Commerce Commission redirected *NBR*'s

enquiries back to iponz.

The problem is that the trademark, despite being known overseas, can still be defined as what New Zealanders understand it to mean, intellectual property lawyer David Macaskill from James and Wells said.

This means that any legal case will be protracted, and based around presumed common understandings of the term circa 2003 – a fee-charging lawyer's dream.

But it's not just the small guys who have been bruised by the now five-year-old trademark – DB's major rival Lion Nathan attempted to list its own Barefoot Radler product in October 2007, but was forced to abandon its registration.

The two local brewing giants are wary of recreating the fiasco surrounding last year's court battles over the use of the term "Summer Ale" on competing products.

Consumption of traditional beers has slowed, and both companies have placed increased focus on their high growth boutique brands – such as Lion Nathan's Mac's range and DB's Monteith's range.

