

Taco Tuesday: It's a Tasty Cultural Phenomenon Not a Trademark

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More and more, we see trademark applications being filed for cultural phenomena, viral sensations and catchy hashtags. We've covered this topic before. Do you remember [#covfefe](#)? A recent non-precedential [decision](#) issued just after Thanksgiving once again confirmed that common laudatory phrases are often incapable of functioning as

trademarks. The TTAB's decision in *In re Monday Night Ventures LLC* was simple: TACO TUESDAY is indeed tasty, but it is not a trademark for beer. The Board found that TACO TUESDAY failed to function as a trademark for beer because it is a widely used message. In reviewing the Examiner's refusal, the Board's set out to answer the following question:

We must assess whether Applicant's proposed mark, TACO TUESDAY, functions as a mark based on whether the relevant public would perceive TACO TUESDAY as identifying the source or origin of the beer.

To perform the failure-to-function analysis, the Board reviewed the evidence of record, which consisted of the specimens of use (including a beer menu), the mark as shown on a mockup of a beer can and lots of third-party use of Taco Tuesday submitted by the Examiner. The third-party use fell into two categories: (1) general uses of Taco Tuesday to refer to events on Tuesdays featuring tacos and drinks, including beer and (2) uses of Taco Tuesday on or in connection with beer. Notwithstanding the voluminous evidence of third-party use, the Applicant contended that the failure-to-function refusal was "illogical and incongruous" because TACO TUESDAY is not informational when applied to beer. The Board disagreed.

After reviewing the evidence, the Board concluded that Taco Tuesdays often involve beer consumed with tacos. "Thus consumers are accustomed to encountering 'Taco Tuesday' in the context of beer." While the beer menu specimen was adequate and did not show use of the mark in an informational manner, the Board found that Taco Tuesday cannot function as a trademark because of the environment in which it is perceived by consumers.

While we surely did not need the Board to tell us that Taco Tuesdays and beer are a great pairing, the decision does provide helpful guidance for would-be trademark applicants of cultural phenomena. Common phrases are often incapable of functioning as trademarks, especially when applied to goods or services that are complementary to the phrase. It is a pretty safe bet that the USPTO would also likely reject TACO TUESDAY for margaritas, but would such a refusal extend to wine? I think wine and tacos are great together, but we'd be wise to see how many restaurants and wineries do a taco-wine pairing before fling an application. In fact, checking the internet before making a trademark filing for one of these types of marks is a great suggestion. While you might be first to file, that doesn't mean the USPTO will let you have exclusive rights. A better strategy for one of these catch phrase trademarks might be to apply it to goods and services which are actually illogical and incongruous with the phrase.

So go and enjoy some tacos and beer – it is Tuesday after all.