## *Tiger Lily Ventures Ltd. v. Barclays Capital Inc.*, 35 F.4th 1352 (Fed. Cir. 2022) (Lourie, Bryson, Prost)

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Barclays Capital Inc. filed oppositions with the Trademark Trial and Appeal Board (TTAB) against Tiger Lily Ventures Ltd.'s two applications for the standard character mark "LEHMAN BROTHERS" alleging that Tiger Lily's marks are likely to cause confusion with its own LEHMAN BROTHERS marks. In 2008—shortly after Lehman Brothers filed for bankruptcy—Barclays acquired Lehman Brothers' rights to its LEHMAN BROTHERS federal trademark registrations. But, over the years that followed, Barclays had allowed its acquired LEHMAN BROTHERS trademark registrations to expire.

Tiger Lily then filed two applications to register the LEHMAN BROTHERS mark for beer and spirits and for bar services and restaurant services. In addition to its oppositions to Tiger Lily's applications, Barclays filed its own application to register the LEHMAN BROTHERS mark but for use in connection with financial services. The TTAB sustained Barclays two oppositions.

Tiger Lily appealed to the Federal Circuit, which affirmed the TTAB's ruling. The Federal Circuit found that there was sufficient evidence to support the TTAB's findings that, despite their expiration, Barclays had shown that it did not abandon its rights in the LEHMAN BROTHERS mark (and therefore had prior use of the mark) and that there would be a likelihood of confusion if Tiger Lily used the LEHMAN BROTHERS mark.

Turning first to abandonment, the Federal Circuit noted that even limited use can be sufficient to avoid an abandonment finding. Although Barclays had allowed its registrations to expire, the Federal Circuit found that Barclays' continued use (even if limited) as well as Lehman Brother's continued use (under a license from Barclays) of the LEHMAN BROTHERS mark was sufficient to avoid an abandonment finding. Particularly relevant to the Federal Circuit was Tiger Lily's concession that at least one Lehman Brothers affiliated company has continuously used the LEHMAN BROTHERS mark.

**Tiger Lily's attempts to capitalize on the fame and widespread consumer recognition (even if negative) of Barclays' LEHMAN BROTHERS mark played a dominant role in finding a likelihood of confusion of its proposed LEHMAN BROTHERS mark.**

Turning to likelihood of confusion, the Federal Circuit noted that Tiger Lily did not dispute the TTAB's finding that the marks are identical, but rather argued that (a) the goods and services offered by Barclays are dissimilar to those offered by Tiger Lily; and (b)Tiger Lily's use of the mark would not lead to consumer confusion. The Federal Circuit gave weight to Barclays' argument that commercial trademarks are often licensed for use on products different from the original source of the trademark and the fact that Barclays itself had used the LEHMAN BROTHERS trademark on products related to alcoholic beverages in marketing its banking products and services. Additionally, the Federal Circuit explained that the high degree of fame achieved by the LEHMAN BROTHERS mark affords the mark a broad scope of protection.

Finally—and perhaps most important to its analysis—the Federal Circuit noted that Tiger Lily itself admitted that it sought to draw a connection between its goods and services and the legacy of Lehman Brothers. Tiger Lily argued that it was trying to trade on the "bad will" (rather than goodwill) associated with the LEHMAN BROTHERS mark, but the Federal Circuit said that there was no legal support for the distinction between bad will and goodwill that Tiger Lily sought to draw. The Federal Circuit said that Tiger Lily's attempts to capitalize on the fame and widespread consumer recognition (even if negative) of Barclays' LEHMAN BROTHERS mark played a dominant role in finding a likelihood of confusion.

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