

Craft Brewers Beware: How to Keep Your IPA From Going MIA

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Special Bulletin

It must seem to most beer enthusiasts that the owner or operator of a craft brewery is living the dream. As a home-brewer, occasional home-brew judge, and fervent supporter of the craft brewing movement, I am no exception. Once the dream is realized, however, the realities of running a business necessarily come home to roost. No business is successful for very long if certain fundamentals are not paid adequate attention.

Every business needs a superior product, or at least one that its clientele believes to be superior. For craft brewers, the attention paid in this area usually is not a problem, since most of you took the business risk because you have a passion for great beer. However, as your production increases, your great brew becomes only part of the story. Hiring and retaining talented, dedicated, and loyal employees are vital to both your production and your sales.

Special People; Special Knowledge

Relationships with knowledgeable, trusted, and dependable suppliers of raw materials are indispensable to maintaining your product's consistent quality. Marketing, whatever the strategy, is necessary to get the word out. Once the recipes, people, suppliers, and marketing are in place, developing techniques and procedures that ensure sanitation, safety, and regulatory compliance are critical to both a consistent product and simply *staying* in business. This all involves a great deal of time and sweat, and more than a little money.

The Dilemma

As the owner of a craft brewery, you may worry that your brewmaster or head assistant will take employment with another brewery or open up a new brewery just down the street, using the knowledge and skills learned from you and your operation to compete against you. You might worry that your top salesperson will go to work for a competitor and exploit the contacts made and knowledge gained while working for you to poach your brewery's customers and market share or, worse yet, to disparage your reputation.

So how does the craft brewer protect all that hard work and earned reputation? Investing a little thought and effort ahead of time can avoid later conflicts with former employees, the loss of competitive advantage, and damage to a hard-earned reputation. One way to reduce the likelihood of these outcomes is to ensure that everyone participating in your organization is on the same page, understands your expectations, and buys into the success of your brewery. But that may not be enough. You also should consider legal steps you can take.

Covenants Not to Compete (Non-Compete Agreements)

Nobody likes the idea of denying someone else their right to make a living, and that is not what a properly drafted non-compete agreement seeks to accomplish. When you invest in certain employees by teaching them a skill or trade, allowing them to build relationships with your clientele, and entrusting them with confidential and valuable information, it is not unreasonable for you to ask for some protection for your investment in them. A reasonable non-compete agreement, where appropriate, may provide you with this protection.

Brewmasters and assistant brewers are obviously the key personnel in any brewery. They are trusted, highly skilled, and creative, and may be identified by your customers, at least partially, as the talent responsible for your brewery's product. You may have spent time and money in recruiting, training, and promoting them. They have access to your brewery's most confidential product information and have valuable relationships with your suppliers. Putting their skills, knowledge, and relationships to work for a competitor, or for themselves, in competition with you, is not what you bargained for when investing in their career.

Almost as valuable to your brewery as a recognized brewmaster may be your salespeople. Talented salespeople can drive your growth as much as the marketing plan or the quality of your brew. This is especially true when you start expanding distribution into new geographic areas. Salespeople get your product into pubs or other retailers, and ultimately get it in front of the consuming public. But as any salesperson will tell you, some products are easier to sell than others. The quality of your craft brew and its success in the hands of a retailer bestow you're your salesperson as much trust and credibility as the salesperson's own natural ability. Is it really fair to you for a competitor to lure your salesperson (who gained credibility and developed relationships with customers by selling your exquisite brew) away from you for the purpose of using that credibility and relationship to convince the customer that the competitor's product is just as good, or better, than yours? As part of a comprehensive employee retention plan, non-compete agreements can be instrumental in avoiding this problem.

Limitations on Non-Compete Agreements

In North Carolina, non-compete agreements are enforceable if employees are required to agree only to reasonable restrictions on their future employment that are necessary to protect their former employer's legitimate business interests. Protection against the misappropriation of both customer relations and trade secrets (discussed below) by departing employees are recognized as a legitimate business interest justifying such agreements.

However, to be enforceable, the restrictions must be in writing and reasonable in duration, territory, and scope. Reasonableness depends on factors specific to your individual business and the duties of the particular employee involved. In the drafting of an enforceable non-compete agreement, it will be necessary to take into consideration your method of manufacture, market, range of distribution, and business plan, as well as the particular employee's own specific knowledge, skills, and interactions with your customers or suppliers.

The Reciprocal Benefit Requirement

Your non-compete agreement must include a reciprocal benefit for your employee over and above mere continuation of your employee's employment. This means that your employee must enter into the non-compete agreement prior to, or contemporaneous with, being hired, promoted, or granted some other new benefit such as a raise in return for the agreement not to compete. An agreement to *continue* employing the individual without some new and material benefit is not enough.

Trade Secret Protection

While you may not have a patentable recipe or process for making your beer, or one that is worth the time and money to patent, you probably do have recipes, processes, customer information, and ways of doing things that have cost you time, money, and sweat to develop and that give you a competitive advantage.

North Carolina law protects such so-called "trade secrets" from misappropriation by others. All types of business or technical information (including formulas, techniques, methods, patterns, programs, processes, devices, or compilations of information) may be the subject of trade secret protection. The information must have commercial value derived from the fact that it is generally not known or readily ascertainable, through independent development or otherwise, by others who can obtain an economic benefit from its disclosure or use. A trade secret may be protected even though the very same information also has been developed or used by others. "Misappropriation" simply refers to the acquisition, disclosure, or use of another's trade secret by getting and taking it from that person without consent. Your competitor is entitled to acquire the same information you have by independent development or reverse engineering, or from someone with the right to disclose it, but not by getting it from someone to whom you entrusted it for your benefit. This is so even though you did not have an agreement with the person who wrongfully acquired or wrongfully disclosed the information.

The Duty to Protect Your Trade Secrets

Importantly, however, you, as the "owner" of a trade secret, must be able to prove that you took steps reasonable under the circumstances to identify the trade secret and maintain its secrecy.

You must take the time to identify your sensitive trade secrets beforehand, or the employee who leaves your brewery to go to work for a competitor may not realize that you expected confidentiality, or even that you regarded the information as valuable. But, identifying the special factors which make your products and services unique and desirable, or that simply give you a competitive advantage in the marketplace, only begins the process of its protection. You must take further steps to ensure that the information remains confidential* and that those entrusted with the information understand that you expect it to remain so.

Conclusion

A properly designed non-compete agreement, tailored to your brewery's specific needs, can protect you from a loss of business and costly litigation later on, while also notifying the employees, up front, that you expect some measure of loyalty in return for their training. Furthermore, with a plan in place and the expectations made clear, valuable business information can be protected as a trade secret, causing employees to think twice before choosing to exploit your investment and innovation for their own advantage or, more importantly, for someone else's.

* A very famous example is Coca-Cola® which keeps the only copy of its formula locked in a safe in Atlanta, but a locked desk drawer or password-protected computer program may well suffice.

For further information regarding the issues described above, please contact Norman J. Leonard.

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