

# Intellectual Property Rights: A Necessary Ingredient of a Brewer's Brand Strategy

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Intellectual property rights were on the minds of many brewers at this year's Craft Brewers Conference ("CBC") in Washington, D.C. The CBC workshops on trademark and copyright protection were well attended. The takeaway from these workshops was that brewers should invest in protecting their intellectual property rights early on, before problems arise, because those rights can determine the success or failure of a brewer's brand down the road.

Creating a strong brand identity results in purchasers associating your brewery's quality products with the name of your brewery and solidifies your relationship with them as customers. Over time, you will invest substantial resources in creating and marketing your brewery's brands. Bound up in those brands are intellectual property rights. Failing to protect those rights on the front end could cost you dearly later on. Stories abound of brewers receiving "cease and desist" letters informing them that they do not have the right to use their label design, the name of their flagship beer, or even the name of their brewery.

## Who Brewed That Beer?

The name of your brewery and the names of your various brews are trademarks, and these trademarks represent and protect your brewery's goodwill – that is, the connection in the consumer's mind between your brands and the quality of the beers those consumers will come to anticipate and expect from your brewery. Over time, a consumer's positive experiences with your brewery's brand names create brand recognition and loyalty which result in the consumer purchasing your beers over those of your competitors and recommending that others do the same. Because of this relationship, it is important for you to protect the assets that build your brand recognition and loyalty which in turn generates profits for your brewery.

Difficulties in protecting and enforcing rights to your trademarks will decrease the value of your brands. Therefore, your trademarks should be *distinctive* words, phrases, pictures, or symbols. Non-distinctive trademarks (such as terms describing the geographic origin, type of product, or other characteristics of your product) are more difficult to protect and enforce and, thus, they are more prone to challenge.

Your first step in choosing distinctive trademarks is to search for those that resonate with you and the image you want to project. The second step is to then ensure their availability. Missing this simple second step can result in turning your investment of time and money into a valueless trademark or, worse, the unintentional infringement of a third party's valid trademark.

Your rights in a particular trademark can be established only by your brewery being the first to make commercial use of the trademark. Although registration of a trademark is not required, the principal benefits of being a trademark owner – the right to the exclusive use of the trademark and the ability to prevent competitors from using similar trademarks – will be limited without the appropriate registration. Registration of a trademark can be sought on a state, federal, or international level depending on the goals for your brewery's distribution.

If you take appropriate steps to protect your trademarks by establishing their availability, registering them, and then enforcing your rights to them, your ownership of the trademarks and the benefits your brewery receives from that ownership can be enjoyed perpetually.

### **Who Owns That Label?**

Just like your brewery's name and the names of your various brews, your brewery's various labels and taglines also can be trademarks. Sweetwater® and Sweetwater Blue® are trademarks. So is the tagline Don't Float The Mainstream®. But none of these would be as valuable as they are without association with the distinctive jumping trout and blue swirl font emblazoned upon a scroll. As trademarks, your labels represent your brewery's goodwill and, like your brand names, need to be protected. But, in addition to trademark law, the design elements of your label introduce elements of copyright law, a separate body of federal law with which you must comply in order to ensure that you have ownership of, and the right to use, the label design you choose for your brewery and your brews.

Copyrights protect fixed forms of expression such as drawings, photographs, and designs. A copyright is valuable because it provides the copyright owner with certain exclusive rights, such as the right to reproduce a design on a label. Unlike trademarks, design copyrights are not established by use but come into existence at the moment of creation. The author of the design, not the user of the design, is the copyright owner. Consequently, the most common label issue encountered by brewers is that the creator of the label design, who is usually a third party graphic designer, is the owner of the copyright to the work, not the brewer who hired the graphic designer to create the design.

Despite the counterintuitive nature of that result, it is possible that you could pay a designer to create a label for your brewery or brews and then find that you have no right to use "your" label because you did not properly secure the transfer of the copyright ownership from the designer to you and your brewery. This copyright ownership concept extends beyond your brewery's labels to all of its creative materials such as its marketing materials, logos, packaging, and websites.

When it comes to graphic artists and other independent contractors hired to create your branding materials, you must proactively take steps to ensure that you or your brewery, rather than the individual or firm you hired to create them, becomes the copyright owner of the materials created on your behalf. A written and properly drafted agreement assigning ownership of the creative work to you or your brewery, before work is commenced, is critical to avoiding disputes down the road and ensuring that you enjoy the use of your marketing materials without third-party-imposed restrictions. In addition, ownership of the copyrights to the designs used to promote your brewery and brews may be another mechanism allowing you to stop imitators.

### **Is The Secret to Your Success Secret? \_**

Your brewery's recipes and processes, which you jealously guard from disclosure, are "trade secrets." In fact, almost all of your brewery's business, financial, and technical information can qualify for trade secret protection – as long as you treat it as a secret. A trade secret is information that:

- Adds commercial value to your business by virtue of the fact that the information is unavailable to your

- competitors (that is, provides a competitive advantage); and,
- Is the subject of reasonable efforts by you to guard its secrecy.

For example, your marketing strategies and customer lists are critical to your success and probably guarded by you from unnecessary disclosure, thus qualifying them as trade secrets. Since they are likely to be shared by you with persons such as consultants and salespeople (the latter of whom turn over frequently), they are more likely to be misappropriated and then sold to, and used by, your competitors. Breweries most often encounter trade secret protection and enforcement issues upon the departure of their star salesperson or a partner or employee who developed a recipe or process.

There is no registration process to help with trade secret protection since all of the available intellectual property registers result in the protected materials becoming matters of public record, whereas, by definition, trade secrets must be kept confidential to qualify for protection under the law. Thus, the "guarding secrecy" requirement is most important when it comes to protecting and, ultimately, enforcing your brewery's trade secrets.

But the secrecy requirement does not mean your entire brewery operation must be on lockdown. Effectively guarding your brewery's trade secrets requires only that you take commercially reasonable steps to ensure that your valuable information is kept confidential. Commercially reasonable steps include:

- Limiting the knowledge of, and access to, the information to only those individuals who require it for your brewery's purposes; and,
- Having appropriate procedures and documents in place restricting your employees or contractors from disclosing the information to others.

You can take simple steps to keep your brewery's trade secrets confidential, such as using employment agreements, confidentiality and nondisclosure agreements, and password-protected software programs.

## **Conclusion**

Intellectual property can have substantial value, is worthy of protection, and should not be overlooked. Your intellectual property is critical to your brewery's success as a business and you must, from the outset, make the effort and take advantage of the considerable protections afforded by the law.

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