

SPECIAL BULLETIN: Intelligent Beer: Tapping Into Intellectual Property

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You are a successful brewer with a good quality beer, but how can you safeguard your success from imitators and solidify your relationship with your customers? The answer is: by actively protecting and enforcing your Intellectual Property.

The most successful breweries have at least one consistent trait: the fierce protection and enforcement of their (i) brand names, (ii) label designs, and (iii) formulas and processes – in other words, their "Intellectual Property."

What Is Your Brand?

A brewery's brand name is a trademark and it represents and protects the brewery's goodwill. Your brewery's trademark will create a connection in the consumer's mind between your brand and the quality of the beer that consumers will come to expect from your brewery. Over time, positive experiences with your brewery's brand name will create brand loyalty causing consumers to continuously purchase your beer over that of your competitors. Because of this relationship, it is important for you to protect the asset that creates your repeat customers and profit.

Your brewery's trademark should be a *distinctive* word, phrase, picture, or symbol. 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 prone to challenge. Difficulties in protecting and enforcing rights to your trademark will decrease the value of your brand.

Your brewery's first step in choosing distinctive trademarks is searching for those that resonate with you and the image you want to project, and then ensuring their availability. Missing this second and simple step could 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 brewery's rights in its 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 your goals for your brewery's distribution.

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

Who Owns That Label?

Your brewery's label also can be one of your trademarks. As a trademark, your label represents your brewery's goodwill and, like its brand name, needs to be protected. But, in addition to trademark law, the design elements of a label introduce elements of copyright law, a separate body of federal law with which you must comply in order to ensure that your brewery has ownership of, and the right to use, the label design you choose.

Copyrights protect printed 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, copyrights to designs 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 breweries 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 brewery that hired the graphic designer to create the design.

Despite the counterintuitive nature of that result, it is possible that your brewery could pay a designer to create a label 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 your brewery. This copyright ownership concept extends beyond your brewery's label to all 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 your brewery, rather than the individual or firm hired to create them, becomes the copyright owner of the materials created on its behalf. A written and properly drafted agreement assigning ownership of the creative work to your brewery, before work is commenced, is critical to avoiding disputes down the road and ensuring that your brewery enjoys the use of its marketing materials without third-party-imposed restrictions. In addition, ownership of the copyrights to the designs used to promote your brewery may be another mechanism allowing you to stop imitators.

Is The Secret To Your Success Secret?

Your brewery's recipes and processes, which you will 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. A trade secret is information that (i) adds commercial value to your business by virtue of the fact that the information is unavailable to your competitors (i.e., provides a competitive advantage) and (ii) 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 from unnecessary disclosure by you, thus qualifying 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 that helps 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 the 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 must be on lock down. Guarding the secrecy

of 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 (i) limiting the knowledge of, and access to, the information to only those individuals who require it for your brewery's purposes and (ii) having appropriate procedures and documents in place restricting your employees or contractors from disclosing the information to others. Your brewery can take simple steps to keep its trade secrets confidential, such as using employment agreements, confidentiality and nondisclosure agreements, and password-protected software programs.

The Takeaway

Intellectual property can have substantial value, is worthy of protection, and should not be overlooked. Your brewery's intellectual property is critical to its 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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