

## Trademarking Your Beer Brand:

### *What Craft Brewers Need to Know*

By Ted Kelleher, Daina Nathanson and Elek Miller | March 2015

Your first batch of pale ale is finally on store shelves, and it's selling well. It's gotten a good write up from an influential beer blogger, and the packaging stands out on store shelves crowded with craft beers. Your tasting room is starting to get crowded; even the hats and t-shirts are starting to sell...

**...and then the certified letter comes.** A brewery in Omaha is claiming to already own the name you've given to your pale ale, and that your logo looks too much like their logo. In other words, they are accusing you of trademark infringement. Their lawyer is saying you have to pull all of your beer off the shelves and destroy the hats and t-shirts.

You assume it's a shakedown and resolve to fight. One of your customers is a local lawyer - you show him the letter. He pulls out his laptop and does a quick search online, and says, "I think you may have a serious problem." How does something like this happen?

Too often, this kind of thing happens because breweries are so excited about getting their product to market that they don't always take enough time to properly review the names they select for their beers to make sure that they are not infringing on another brewer's trademark. Even when they do properly review their brand names, they do not always take the proper steps to protect them from use by others.

### **Trademarks and Breweries**

A trademark is a brand name. Put another way, a trademark is a word, phrase, or symbol that identifies goods or services for consumers and indicates the source of those goods or services. The law allows the owners of a brand to protect the components of a brand - a product name and the logos, symbols and slogans associated with the brand. You can claim ownership of these brand components simply by using them, but you can substantially enhance your rights by making a filing with the U.S. Patent and Trademark Office (the USPTO). This process is called trademark registration. If you successfully register a trademark, you will be presumed to be the owner of the trademark on a nationwide basis. This ownership applies to the specific category of product (called a "class" by the USPTO) to which your trademark applies. For instance, if you register "Acme Pale Ale" in the product category of beer, it doesn't mean you have any rights to the name "Acme Pale Ale" in the category of area rugs and other textiles.

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To complete a trademark registration, you file an application with the USPTO claiming ownership of the product name and the logos and slogans and so on, and specifying what kinds of goods or services they apply to. The USPTO examines its records of filings to see if your marks resemble any previously filed marks. They also publish a notice of your claim in the Official Gazette, a USPTO publication. Members of the public, as well the USPTO examiners, can object to your registration. The objection can be based on an assertion that you are not the first person to use the mark, that your mark too closely resembles other registered marks, or that you've failed to comply with some of the technical requirements for registration. You have the right to respond to any objection, and then the USPTO will make a decision. If your mark is not opposed, it will be published on the Federal Register.

## Why Should Brewers Go Through the Hassle?

You opened a brewery to make beer and to make a living, not to do alot of tedious paperwork. Here are three key reasons why brewers should think seriously about trademark registration:

### 1 **Registering trademarks makes your brewery far more valuable as a business.**

When you think about it, a brand identity might be the most important thing a brewery owns. A brewery owns recipes for beer, but recipes are very hard to protect under intellectual property laws. It also owns equipment, and maybe real estate, but brewing equipment and real estate are widely available in the marketplace. But a successful beer brand is hard to duplicate. It's one of the most valuable assets a brewery can own. And the only effective way to nail down ownership of the brand is to go through the trademark registration process. Here's another way to look at it: If I were representing a client that was thinking about buying an existing brewery, one of the first things I'd ask the client to explore is whether the brewery had clear ownership of its brands, and this would mean exploring the status of their trademark registrations. If the brewery hadn't secured trademark registrations for its beer brands, I'd tell a potential buyer to be very cautious about the deal. At a minimum, the risk surrounding this issue would definitely drive down the purchase price. This wouldn't be happy news if you were trying to sell your brewery.

### 2 **Building a brand represents a big investment of time and money.**

Before you spend money on graphic designers, on labels, on advertising, on hats and t-shirts, and on other merchandise, you better make sure you have the right to use the name and logos. The process of "clearing" a trademark can avoid big problems down the road. Clearing a trademark involves searching USPTO data and other commercial data to see if anyone is using a name for a beer or logos or illustrations that are identical or similar to yours, and then analyzing those other trademarks to see if there are arguments for why your use would not infringe on their use, such as the goods being distinct from one another. This process can avoid the terrible result of spending money to develop a brand for your beer, only to see it all go to waste because someone else beat you to the punch by using or registering a mark sooner than you did. This is a scenario that happens with distressing frequency.

## 3

### **Trademark registration helps you prevent copycats from profiting off your brand identity.**

Imitation may be the highest form of flattery, but when you've spent time and money to build a successful beer brand, you need to make sure that you capture the benefit of those efforts. There are a lot of competitors willing to put a product in the marketplace that looks just enough like a successful product to confuse consumers and divert sales revenue

to the copycat. Under trademark law, the first person to start using a beer brand has superior rights in that brand and may have the power to force the sellers of copy-cat products to stop selling them, especially if the originator has a federal trademark registration. By actually registering the trademark with the USPTO, you get stronger tools to stop copycats, and a better chance at collecting financial compensation and penalties.

You need to think about brand protection in terms of both your brewery and each individual beer you brew. You should definitely seek trademark protection for the brewery name and the designs and logos associated with the brewery. If you have a flagship beer, one that will always be in production, it makes sense to seek trademark protection for that beer name, and any associated logos, too. If you are trying to prioritize your budget for this kind of stuff, then for seasonal beers or one-offs, trademark registration can probably wait until your budget permits.

Good brewers put their hearts and souls into the beer; it's hard to care as much about the legal status of what's on the label. But taking the right steps to create and then protect the brand is good business. It can help your brewery flourish economically so that you can put that beer into the hands of a lot of happy beer-lovers.



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