

## The Importance of Brand Identity and Trademark Protection for Breweries and Wineries

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Too often, small startups, including brewery and winery businesses, only consider protection of their brands and other intellectual property as an afterthought. With hundreds of new wineries and craft breweries developing across the United States, the gold rush for naming rights for catchy and fanciful names is in full swing and it seems as though unique names are harder to secure. For example, as of the date of writing this article, there were 601 trademark records in the beer category that use the word “Hops” in their name! Aside from the flavor of the product, the company and brand names are the single most important factor to help consumers remember and distinguish the source of that fantastic beer or wine.

In order to stand out from competitors in a seemingly saturated market, breweries and wineries must think more creatively for brands that can truly set them apart. Even though this may pose a challenge for some manufacturers, over time this will drive the industry to develop more compelling and fanciful names that their customers can identify with with. An added benefit to seeking unique and unheard of brands is that “fanciful” or “arbitrary” brands are entitled to a greater scope of protection as trademarks compared to “descriptive” or “generic” names. An example of fanciful trademarks are “Dogfish Head” brewery or “Little Black Dress” for wine. These marks are deemed unique because they are unrelated to and do not describe the products they are intended to sell. Therefore, creativity and due diligence to avoid existing brands are necessary to *selecting* the right brand name. But since these names carry so much of the identity for small craft brewers and wineries, it is imperative that one also *protect* brands once adopted.

Federal trademark registration is the best initial strategy to accomplish this protection. Trademarks are the words and pictures (occasionally sounds and colors) that distinguish ones products and services from another. One can develop certain trademark rights through use of the name alone, however, federal registration of a trademark grants important rights to the owner. First, registration grants the owner exclusive rights to sell products under that category throughout the United States. In addition, the owner of the registration is granted jurisdiction in the Federal Courts and can be awarded legal fees in certain cases. Plus, registration allows you use of the “®” symbol adjacent to your brands which, due to its presence on almost every established brand you see in commerce, makes the “®” symbol a brand decorator or symbol of brand legitimacy.

Since many small craft brewers and wineries are start-up companies on a strict budget, the question is often posed whether a trademark application is worth the time and expense. Despite the costs and the time it may take, if you plan to build your business around the sale of a product that people identify with a catchy name, and your success depends on standing out from a competitor on a store shelf, you are doing a disservice to your company by not protecting the brand. Taking proactive steps now to protect your company’s trademarks will allow the business to own and control the brands they use to attract customers. Plus, compared to other costs and expenses you will face with starting an alcohol manufacturing business, trademark registration is a minor investment.

Your trademarks also have the potential to possess great value as a business asset and their value is directly related to your success and your promotion of the brand. Registering your trademark creates an intangible business asset that can build significant value and can later be sold or licensed. The more successful you become, the more valuable your trademarks become – but only when they are adequately registered and protected. Creating a popular brand that you fail to protect with a trademark could result in a significant loss of value if you later decide to sell the company. Moreover, adopting a name already registered by another person or company could force the business to change its name or to expose it to a lawsuit seeking profits and legal fees.

Trademark rights, whether registered or not, can only be established through a company's use of a brand "in commerce," meaning that goods or services must be sold under the brand. Accordingly, alcohol manufacturers wishing to roll out a new brand must be very careful that they do not overly promote that brand before they can show actual sales. Promoting a new alcohol brand or company name, without having actual sales in commerce, can expose that brand to theft from a competitor – because it has no protection until sales occur. In such a case, before rolling out a new brand the company should apply for their trademark on an "intent to use" basis. This allows a preliminary protection to be extended to the brand, but postpones the formal registration until the company can show use in commerce.

Seeking early legal advice on trademark matters can help you to avoid problems and frustration that might arise later. For example, is the brand sufficiently unique to warrant protection? Is the brand already registered by another company? Or, even if the brand is not registered by another company, is it being used in another state? These items should be considered as early as possible in the company's formation process to avoid the possibility that your brands is not able to be used or protected.

If you have questions about trademark registration, copyrights, domain name disputes, unfair competition and/or general business matters related to the beer, wine and hospitality industry, please contact Evan C. Pappas or at (717) 221-7979.