

**Intellectual Property Law
for the Craft Brewer**

New Brewery Accelerator Workshop
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Legal Disclaimer

Nothing in this presentation should be considered legal advice. If you have a specific legal situation, please consult a licensed attorney with the specific facts of your situation. Thank you!

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Today's Topics

Trademarks


- What is a trademark?
- How do I know if someone else is already using a mark?
- Why should I file for a mark?
- Best Practices

Other Intellectual Property

- Trade Dress/Design Patent
- Copyrights
- Trade Secrets

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What is a Trademark?

Identifies product source to the consumer

- Logo
- Brand name
- Combination

Why does the law care about trademarks?

- Protecting consumers from
 - = Confusion
 - = Deception

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What is a Trademark?



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Clearing the Name

What does clearance mean?

- USPTO – all alcoholic beverages & restaurants
- State trademark databases
- TTB COLA
- Popular Review sites – RateBeer, Untappd, BeerAdvocate
- Google – more than the first page!

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Clearing the Name

Why do I need to do a clearance?

- Avoid confusion among by consumers by avoiding using another's mark
- Stronger marks
- Easier registration
- Avoid litigation
 - ⇒ National median cost of litigation up through discovery = \$151,000
 - ⇒ Through trial = \$300,000

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Clearing the Name

Make sure you are not infringing someone else's registered trademark:

- Consider each word individually
- Do not need to consider generic words
 - ⇒ Brown Ale
 - ⇒ Brewing Company
- Do consider other beverages (wine, spirits, coffee, soda, water, energy drinks) as well as bars and restaurants

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Solutions to Conflicts

Further investigation

- Is the other mark in use? Is your mark in use?
- What are the related goods for the other mark?

Call the other party


- Consent/License
- Acquisition

Legal proceedings

- Cease and desist letter
- Trademark Office proceedings
- Mediation
- Litigation

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Why File for a Trademark?

Things that do NOT give rights to a mark

- Domain names
- State Business registrations
- Social Media pages
 - ⇒ Facebook®
 - ⇒ Twitter®
- Use on goods that are given away, but not sold (i.e. homebrew)
- Use on other goods (i.e. t-shirts)

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Case Study: Narwhal Brewery

New York homebrewers - Brewery-in-planning

- Dec., 2010 – Launched FaceBook® page
- April, 2011 – Registered Narwhal Brewery as an LLC with state of NY
- Twitter® account
- Instagram® account
- T-shirts
- Homebrew competitions

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Why File for a Trademark?

There are only 2 ways to gain trademark rights in a mark:

- Use on the specific goods for sale
- Registration

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Why File for a Trademark?

Gaining rights through use on goods for sale

- Ownership is established by actual use
- No need to register
- If discontinue use, will be considered "abandoned" and available for others
- ™ is the symbol used for unregistered trademarks
- Infringement for someone else to use
 - ⇒ The same or confusingly similar term
 - ⇒ Within the same geographic area or, in some cases, in a natural area of expansion

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Why File for a Trademark?


However,



- Trademark rights exist only as far as the 1st user has already extended his trade under that trademark
- So a "good faith" 2nd user can acquire rights in a remote market area

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Case Study: Slow Ride




<p>New Belgium</p> 	<p>Oasis Texas</p> 
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Facts: Oasis sold beer under the name prior to NB filing for a TM
 What happened: Lawsuit
 Outcome: Oasis owns it in TX; NB owns it everywhere else
 Cost: For Oasis, \$200,000

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Why File for a Trademark?




Federal Trademark Law

- Use mark on or in connection with goods across state lines
- Ownership is established by actual use or filing of an intent-to-use and use within required time period (have up to 3 years to use across state lines)
- ® is the symbol used for federally registered trademarks

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Why File for a Trademark?



Benefits of Federal Registration

- National protection
- Publication to others
- Incontestability after 5 years
- Promotes settlement
- Evidence in court

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When to File a Trademark

When you are invested in a mark:

- **Financially**
- **Emotionally**

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Best Practices

Consider all the areas you want to protect

- Beer
- Bar services
- Clothing
- Glassware

Consider all the marks you want to protect

- Brewery name
- Logo
- Tag line
- Beer names

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Best Practices

- Research your marks as thoroughly as possible before committing to them
- Put yourself in the other person's position when considering if a mark is "confusing"
- Try to take emotion out of the equation
- Talk to the other party before bringing in a lawyer
- Realize that settling differences now will save both parties time, money and stress
- Realize that at some point in time, you will be on the other side of the equation
- If you can't work it out, consider mediation rather than litigation

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Other Intellectual Property

- Trade Dress/Design Patent
- Copyrights
- Trade Secrets

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Trade Secrets

What to protect:

- Recipes
- Brewing Processes
- Customer lists (sometimes)

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Trade Secrets

How to protect:

- Limit those who you share the information to a need-to-know basis.
- Have those you do share the information with sign non-disclosure agreements.
- Label any copies of the information as “top secret,” “proprietary,” “confidential,” etc.
- Keep any hard copies in a secure, preferably locked, area.

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Questions?



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