

Brand Brawls Over Beer

The Importance of Trademark Clearance and Protection for Breweries

By Jacob Paul and Kay Collins

The popularity of craft beer has led to an explosion in the number of new breweries and beer products entering the market each month. Currently there are almost 2,400 craft breweries operating in the U.S., 160 of which are located in Colorado. Although brewery owners are known for coming up with catchy and unique names for their breweries and their beer products, it is becoming difficult to create new names that are not already taken. This dilemma has been evident in the recent spate of trademark disputes involving breweries and beer names.

Take the case of Strange Brewing Company located in Denver. Opened in May of 2010, the brewery was just beginning a small expansion when it received a cease and desist letter. The letter came from Strange Brew Beer & Wine Making Supplies located in Marlboro, Massachusetts and demanded that the brewery change its name. Although the distribution radius of the Denver brewery was only 30 miles at the time, the Massachusetts brew supply store markets and sells its products nationally, including Colorado. Under U.S. trademark law, the supply store is required to make sure that no one else is using its name in an infringing manner. Unable to resolve the dispute amicably both parties turned to local and national social media outlets to publicize their position and garner support for their case. Both parties are currently seeking a resolution to their dispute that does not involve litigation; however, no agreement has yet been reached.

Another case comes out of Minnesota where local brewery Lift Bridge Brewing Company is suing a Wisconsin brewery, Lucette Brewing Co. over the out of state brewery's incursion into Minnesota with its beer, Farmer's Daughter. Lift Bridge had been selling its own beer, a spiced blonde ale named Farm Girl, for three years before Lucette began selling its similarly named brew in Minnesota. The breweries were unable to reach an amicable agreement and are now involved in trademark infringement litigation in federal court in Colorado.

There are several steps brewery owners can take to minimize their chances of ending up in costly trademark litigation. The first is to conduct a thorough search of the proposed name before a commitment is made to use the term. The search should not be limited to exact marks and exact products, but must include similar terms and goods that may create consumer confusion. For instance a pre-existing name for wine will likely block a later registration for the same or similar name for beer. A properly conducted search of the trademark database of the United States Patent and Trademark Office, as well as a common law search for unregistered marks, will reveal the names that must be avoided.

Once the proposed name has been cleared, the best way to protect the mark is to register it with the United States Patent and Trademark Office. Trademarks and trade names may be registered with the state, but this step provides little enhanced protection for trademark owners. Federal trademark registration gives the owner the presumptive exclusive right to use the mark all over the United States and prevents third parties from registering confusingly similar marks. In addition, in a trademark infringement lawsuit, a federal registration creates the rebuttable presumption that the registrant has the exclusive rights to use the registered trademark. The trademark registration also provides notice to third parties that the registrant is asserting exclusive rights to the mark. Applications may be filed based upon “intent to use” to reserve rights in the trademark until it has been used on goods or services in interstate commerce. The filing date becomes the “constructive use” date to establish seniority in the mark.

The next step is to police the mark by monitoring third party uses of similar or identical marks, and requiring those parties to stop using the infringing name. A trademark owner could lose trademark rights in its name if it allows unlicensed use by others. Generally craft brewers across the U.S. are a friendly and collaborative group to whom the idea of sending cease and desist letters is not appealing. However, with creativity, the adversarial nature of infringement disputes can be avoided. Nothing typifies the sense of camaraderie among breweries more than the story of Avery Brewing and Russian River Brewing. Upon discovering that each brewery was brewing a beer under the same name, the principals of these companies decided that rather than fighting over the name “Salvation” they would work together to create a new beer. The result is called “Collaboration Not Litigation Ale”.

Trademark litigation is not only financially onerous, but also detrimental to the day-to-day operations of the brewery. The true cost of a lawsuit is not measured just in attorney's fees, but also in time away from the brewery, damage to the company's image, stress on the principals and the employees, loss of good will in brand names and the possibility of having to pay a damages award. Given these consequences, and the importance of creating strong brand identity and customer loyalty, it is necessary for brewery owners to take advantage of the preventative measures available to them through trademark law.