

Trademarks: Choosing your Craft Beer Brand Names Part I

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Naming your brewery and your beer is a vital part of any business because those names are how your customers find you, recommend you to their buddies and rave about you online. That name is how you develop a following and a customer base that sustains the dream that is brewing for a living, but choosing a name is frequently more easily said than done. There are a variety of factors to consider when sitting down over a pint to brainstorm, and the following list will help you to pick a name that is strong and protectable.

Avoiding the generic

The hallmark of a strong brand is the ability to protect it. Therefore, when deciding on a name, consider the factors that the trademark examiner is going to look for when determining whether your brand is eligible for protection. For starters, legally, there is a spectrum of protectability. On the one end are entirely generic terms, which are not trademarkable under any circumstances. The well-known examples here are Kleenex tissues and Xerox copiers. Both of these brands became so well known that many people thought that the name described the product, not the brand. Had that been the case, then anyone would have been able to throw Kleenex into his or her brand names and packaging. Now, both of these companies won out in the end and convinced the courts that their names were not generic, but only after long legal battles and hefty spending in terms of marketing to educate consumers.

On this same track, whenever possible, avoid geographic indicators, surnames and purely generic, descriptive names. These categories are generally not trademarkable. Consider this: By granting a trademark the government is, in simplistic terms, giving you an exclusive right to use that name on wide swaths of product types. Geographic references and names are essentially basic communication, so the government is understandably reluctant to grant any one person or business exclusive rights in, say, "Smith" Brewing or "California" Brewing, for example. In any event, these names do not trigger much in the mind of consumers and are easily lost in the crowd, so they do not make for great choices anyway.

(continued)

Trademarks: Choosing your Craft Beer Brand Names, Part I (page 2)

Secondary distinctiveness

The next level on the protectable spectrum encompasses descriptive names. Descriptive terms, intuitively enough, describe the goods or services that they represent in some way. Think “Salty” for a brand of chips. This mark would be considered descriptive because salty describes the flavor of the product without much of an imaginative leap. Descriptive terms are assumed to be not trademarkable on their face. However, descriptive terms, surnames and geographic indicators can be given protection if you can prove that the name has acquired something called “secondary distinctiveness.” Proving secondary distinctiveness is essentially proving that consumers associate a particular name with your brand only — when consumers see your product, they know exactly which source it comes from.

Secondary distinctiveness may be gained in one of two ways.

The first is to register the mark on what is called the **Supplemental Register**. The Supplemental Register is the baby brother of the official, big time register that grants automatic protection. If your mark is on the Supplemental Register for five years without being successfully attacked (generally by someone else already using the same or a similar mark), then you are assumed to have secondary distinction.

But you can also “earn” secondary distinction. The traditional methods of earning secondary distinction are showing extensive sales, marketing efforts and market surveys. Some of these methods can be expensive though, so be sure to think ahead.

In the craft beer industry we have a few extra options as well. Beer review sites such as **BeerAdvocate** or **RateBeer** can be used as evidence that your brand has gained a secondary meaning, especially if there are many reviews from a wide range of areas. Lastly, awards that your brewery or particular beers have won can be used. National competitions and awards will trump state competitions and awards, but both are viable options.

So, descriptive terms can be trademarked, but it is a longer, somewhat trickier path to follow.

Suggestive and arbitrary terms

However, if your brand falls on the next level of the spectrum — the suggestive or arbitrary level — then protection is far easier to obtain because you can register on the **Principal Register** and gain a lot more protection upfront rather than the decidedly more limited protection the Supplemental Register provides.

Trademarks: Choosing your Craft Beer Brand Names, Part I (page 3)

What are suggestive and arbitrary terms? Well, the term is such that consumers can see the connection, but it requires an imaginative leap of some kind. A classic example of a suggestive brand is Tide laundry detergent. Tide implies the ocean and the cleansing connotations therein; it also has that back and forth motion that your laundry machine utilizes. The connection between the movement and the clean connotations can be linked logically with laundry detergent, but it takes some thought, imagination, creativity, etc. The classic example of an arbitrary brand is Apple computers. If we were dealing with Apple Candles for apple scented candles, it would likely be considered generic or descriptive at the very least. But for computers? The connection between the computers and the fruit is arbitrary, no matter how creative you get after the beer kicks in.

Accordingly, the mark is given a lot of protection.

The unique

Finally, the strongest of marks are the unique and fanciful. The most unique mark you can have is almost always going to be the word that you made up, but even these words can lose protection if they become generic over time.

A great example in this realm is Google. Originally, because it was a word that the company simply made up, people knew that the name was associated with a single, distinct company and, therefore, the term was given lots of protection. But the term Google is frequently used as a verb, rather than a noun, these days. If someone is going to “google something,” do they mean that they are going to type it in to the search engine Google specifically or simply search for the thing online, generally? Most people say the former, but the fact that the debate is taking place at all is a great example of how important it is to protect your brand.

And as a last aside for those of you with multilingual skills, be wary of fancy foreign words at your disposal. Trademark examiners follow what is called the doctrine of foreign equivalents. Essentially, when determining whether two marks are too similar to each other, foreign words are translated into English for the purposes of the analysis. So, if you were hoping to trademark “Manzana” for your new line of computers, Apple has already beat you to it.

So, imbibe a few of the hoppy brews that will put you on the map and get those creative juices flowing to find a name that will let your fans find you and share in the deliciousness.

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Trademarks: Choosing your Craft Beer Brand Names, Part I (page 4)

Continue to Part II, covering Trademark clearance in the Start A Brewery Library.



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Candace L. Moon is a San Diego-based attorney who has spent the last eleven years dedicating her law practice to the craft beer industry. She has worked with over 450 craft breweries and craft breweries-in-planning nationwide, handling many different legal areas including alcoholic beverage law, contract review and trademark law.