

“What do
you mean
I can’t
name my
artisanal
gin after
my dog?”

It’s not that simple:

Do’s and don’ts for trademarking
your craft beer, spirit or wine

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You’ve worked for a long time tweaking recipes and formulas, taste-tested untold gallons of your amazing craft alcohol, and now you’re ready to name it and sell it. This should be the fun part, right? Maybe yes, maybe no.

As a maker of craft alcohol, whether you produce beer, spirits or wine, you may well be aware of the differences in the federal licensing and labeling requirements for malt beverages, distilled beverages and wines in the United States. You might also be familiar with the specific regulations regarding use of your brand name as it appears on your label under the Alcohol and Tobacco Tax and Trade Bureau (TTB) regulations.

What you may not be aware of is that your brand, the brand on which you have based your business, your marketing campaign, and your social media presence, may not be yours to use or register under United States federal trademark law.

A Certificate of Label Approval isn't a greenlight to use your brand.

The ability to use your brand (your trademark) and the ability to federally register your trademark are critical issues to craft alcohol producers, since their trademark, in its essence, distinguishes them as the source of their product and symbolizes the goodwill of their business. Your trademark is one of the most valuable assets of your business. It is most likely how your customers ask for your product; it may be the word your customers call your business; it is most likely part of the domain name for your website, and it is probably integral to your social media accounts.

Just because a craft alcohol producer has received their Certificate of Label Approval (COLA) does not necessarily mean they are able to use and/or register their trademark. Whether or not the maker of craft alcohol can use and register their trademark are questions answered by looking to United States federal trademark law, not the laws regarding the production, distribution and sale of alcohol.

In the United States, the Lanham Act, the regulations set forth under the Act, and the court decisions interpreting the Act, determine what a trademark is, who can use a trademark, when a person acquires ownership rights in a trademark, where you can file an application for federal registration of a trademark and how the application process works. Whether or not you can use a trademark and whether you have ownership rights in a trademark are questions determined under federal law as interpreted by the various federal courts across the United States. Whether or not you can register your trademark is determined by the United States Patent and Trademark Office (USPTO), the federal agency that grants trademark registrations.

So how do I know if I can use the quirky, cool brand name I really want to use?

Both the federal courts and the USPTO use similar standards to determine if you have rights in a trademark; that is can you use your trademark, and if so, can you register your trademark? To make this determination, the question asked is whether your trademark is likely to cause confusion with an already existing or registered trademark of another person. The federal courts and the USPTO look at several factors to determine whether there is a likelihood of confusion. The two most important factors are:

- = How similar are the trademarks in overall sight, sound and commercial impression or appearance
- = How closely related are the goods and/or services with which the trademark is used

Alcohol has lots of relatives, including sometimes restaurant services and even cigars.

Considering the regulatory system for alcohol which draws distinctions between malt beverages, distilled beverages and wines, it may surprise a craft alcohol producer which goods and services are closely related. For purposes of registration at the USPTO, generally, all types of alcohol will be considered closely related goods. There is no difference between beer and wine or wine and distilled spirits. In addition, sometimes various foods are considered closely related to different types of alcohol. Sometimes various services, such as restaurant services, are considered closely related. In a recent case, even cigars were considered closely related to wine.

So, for example, in the last several years, the following trademarks have been denied registration for the listed goods based on the cited already registered trademark for its respective goods:

- = **BEER CREEK DISTILLERY** for liqueurs and distilled spirits refused registration based on the likelihood of confusion with **BEER CREEK** for wines;
- = **MASTERMIND** for beer refused registration based on the likelihood of confusion with **MASTERMIND VODKA** for vodka;
- = **COCOMO** for tequila and tequila-based prepared cocktails refused registration based on the likelihood of confusion with **KOKOMO** for wine;
- = **ALEC BRADLEY STAR INSIGNIA** for cigars, tobacco, cigar boxes, cigar cutters and cigar tubes had the registration canceled based on the likelihood of confusion with the famous mark **INSIGNIA** for wines;
- = **THE CANNIBAL** for beer refused registration based on the likelihood of confusion with **THE CANNIBAL** for restaurant services and restaurant services, namely, providing food and beverages for consumption on or off the premises.

You're told you can't register your trademark — it's too confusing. Now what?

What does it mean if you are denied a trademark registration based on a likelihood of confusion with another already registered trademark? It means you do not obtain the benefits of a federal registration to help you protect your trademark across the United States. Perhaps more significantly, it *may* mean the company who owns the registration which blocked your application, may be able to stop you from using your brand on your product.

Of course, if you have to stop using your trademark, rebranding your business, or even just your product, will cost a significant amount of time and money. In addition to the unquantifiable loss of goodwill and purchaser recognition. You will also have to obtain a new Certificate of Label Approval since you have to change your trademark.

In a recent case, however, the USPTO stated you must have a COLA before you can obtain a trademark registration since it is only with a COLA that you can legally sell your craft alcohol and use your trademark.

So, if your COLA does not give you the right to register and use your trademark and you cannot get a trademark

registration without your COLA, here's a quick checklist of what a craft alcohol maker can do to obtain the legal right to use their trademark for their business or their product:

- = Run an internet search for the trademark you are thinking about using and see what shows up.
- = Hire a trademark attorney to run a trademark clearance search run to help determine whether your chosen trademark is likely to cause confusion with another trademark already registered or in use in the marketplace without a federal registration.
- = If there appears to be no bar to use or registration of your proposed trademark, have your trademark attorney file an application for federal trademark registration of your trademark for your goods. The filing can be made before you begin using your trademark.

To understand the steps and timing of the application process, the USPTO website has some helpful information at www.uspto.gov/trademarks-getting-started/trademark-process.

- = Wait till you reach the point in the application process when you will know your application is not being refused registration because of another already registered or used trademark.
- = At that point, finalize your label design and coordinate the filing for your COLA. You can also consider starting to promote your trademark in advertising.
- = Make any required filings to keep your trademark application pending until you have your licensing requirements in place and your COLA issues but watch the clock because you can only keep an application pending for a certain period of time.
- = Once your licensing requirements are in place and your COLA issues, begin selling your product and using your trademark.
- = Finally, take the required steps to notify the USPTO you are using your trademark on your product and obtain your Certificate of Registration of your trademark.

The good news? With some homework and planning you should be fine.

With some investigation and planning, a craft alcohol maker can obtain the necessary licenses and approvals related to the production, distribution, and sale of their brand of craft alcohol and the rights to use and register their brand as their trademark. You worked so hard to brew your beer, craft your spirit or create your wine. Shouldn't your brand which symbolizes these efforts be given the same careful time and attention? Your customers will thank you, and your business partners will too. ^{AS}_M

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