

KNOW WHERE YOU STAND

WHETHER YOU'RE JUST STARTING OUT OR LAUNCHING A NEW BEER, THERE ARE A WEALTH OF INTELLECTUAL PROPERTY ISSUES TO CONSIDER IN THE WORLD OF BREWING. HERE, CIARA CULLEN AND BEN MARK, PARTNERS AND MEMBERS OF THE FOOD & DRINKS TEAM AT RPC, OUTLINE THOSE DO'S AND DON'TS, THE CHANGING BREWING LANDSCAPE AND HOW TO THRIVE IN 2021 AND BEYOND.

I'm starting my own brewery, what are those early do's and don'ts to look out for?

Ciara Cullen, explains

DO: Consider what intellectual property rights (IPR) you own or might create and how those IPR might need to be protected.

Companies often create more IP than they expect. The main categories are:

Trade marks: A trade mark can consist of any sign that can be represented clearly and precisely. Whilst packaging shapes, colours and even sounds are capable of protection as trade marks, they are typically comprised of signs and/or symbols. The core function of a trade mark is to allow consumers to identify the origin of a product or service and to differentiate it from those of third parties.

Items commonly protected by trade marks include company and product names, logos, product packaging (including, for example, the shape of beer bottles), and slogans.

Trade marks are useful as they allow their owner to prevent competitors from using the same or similar marks which might confuse consumers or suggest an association between the two companies. Although trade marks can be registered or unregistered, it is desirable to obtain registration as this provides certainty over when the right came into existence and avoids disputes regarding who began using an unregistered right first. It is also desirable to obtain trade mark protection at an early stage, to avoid a situation where time and expense has been invested in a brand, only for a third party to later dispute its use or to apply for registration itself.

Copyright: Copyright arises automatically and protects traditionally 'creative' works. Copyright will therefore usually exist in company logos and in any artwork pres-

ent on product packaging or in marketing materials.

Copyright also protects literary work (i.e. text), as long as it meets the test of being the author's own intellectual creation. Marketing slogans, website content and even product descriptions may therefore be capable of attracting copyright protection.

Copyright does not need to be registered, and generally lasts for 70 years from the end of the year in which its creator dies. The owner can use their copyright to prevent any unauthorised use or copying of the works.

Design rights: Design rights protect the appearance of more functional articles, provided they are novel.

This could apply, for example, to the various parts of a beer bottle, such as its overall shape, or just the shape of a particular feature, such as the neck.

Certain design rights are also capable of protecting two dimensional products such as patterns and layouts.

Design rights can be registered or unregistered, and allow their owners to prevent the manufacture and/or sale of lookalike products.

Patents: these generally protect technical "inventions", for example a new technology which allows a brewery to make beer faster or using an improved process.

The registration of a patent can be a long and expensive process, but once granted, patents provide inventors with a 20 year monopoly.

It is therefore worth any new business considering what IP it may own or create and how best to protect it. This will also be helpful if/when that business wants to seek further investment or to fundraise, as prospective investors will take comfort in knowing that the company's IP is protected.

DO: make sure you have appropriate contractual arrangements in place



to ensure that any IP created for the company (in particular by third party contractors) belongs to it, so that you can use it and deal with it as you wish. Again prospective investors will be keen to see that these types of arrangements are in place, to avoid future disputes regarding ownership.

DO: Make sure, when developing your new brand, that its use would not infringe someone else's IPR. The main things to check, before a brand is selected, are that the proposed company name and any logo are clear and not in use by a third party, particularly one that operates in the same sector. This will help to avoid disputes and wasted costs on brands that subsequently need to be abandoned.

Equally, when producing any marketing materials, do make sure that you have appropriate permissions to use all content (e.g. stock photos, which can often be licensed online for the payment of a small fee).

DON'T: share information about your company and/or its IPR with third parties, unless that information is publicly available or you have appropriate documentation in place to protect confidentiality (e.g. a Non-Disclosure Agreement).

DON'T: assume that because materials are available online, they are free to use or copy! Be careful where you take your inspiration from.

Has the IP landscape changed in recent years?

Ben Mark explains

One of the most significant changes to the IP landscape in recent years has been the broadening of the scope of copyright protection, through a string of EU cases.

You can find some of our commentary on these cases here and here, but essentially their effect is that even more functional (as opposed to artistic) designs can now benefit from copyright protection.

The threshold for a 'work' to benefit from copyright protection is now relatively low, so it is worth being especially cautious when copying anything from the internet, even if it is not obviously an artistic work. For example, T&Cs may appear purely functional but they may still constitute literary works that are protected by copyright.

Similarly, the design of a functional item like a beer bottle may now be protected by copyright as well as by design rights. This is significant because copyright protection lasts for much longer. Also and although not strictly IP-related, many businesses will be aware of the General Data Protection Regulation or 'GDPR', which came into force in April 2016.

Any business that processes customer data (including breweries) should ensure that they understand and comply with the requirements of the GDPR, to avoid

Ciara Cullen and Ben Mark are partners and members of RPC's food and drinks team

the sanctions and significant financial penalties that data breaches can carry. Breweries in 2020 have operated in a challenging sector. What advice do you have for businesses as they move forward into 2021 and beyond?

Ciara Cullen explains

2020 has been challenging across the board but for businesses that operate within, or service, the hospitality sector, the impact of the COVID-19 pandemic has been felt particularly acutely. When bars, restaurants and pubs were forced to close in March 2020, many breweries saw a significant percentage of their business dry up overnight. In August 2020, an off-sales extension was granted, making it easier for licensed premises to sell alcohol to customers off-site consumption.

Whilst the intention behind the extension was to ease some of the financial strain that the forced and early closure of venues has created, the impact of the COVID-19 pandemic will continue to be felt by the hospitality sector, and those who supply it, for some time yet. Whilst certain factors like consumer confidence and further waves of COVID-19 are outside the control of businesses, innovation and versatility will be key components of future success.

Health and wellbeing has been a huge trend in recent years and the desire to obtain and maintain a healthy mind and body has only been exacerbated by the pandemic.

For the food and drink sector, this has resulted in many alcohol brands creating or adding to their low and no-alcohol offerings. Year on year, consumers are also becoming increasingly ethically and environmentally conscious. To satisfy the growing demand for products that are made in a responsible and sustainable way, breweries should consider who and where they source their ingredients, services and labour from.

Recent events have also changed (possibly forever) the ways in which many businesses operate. For the food and drink sector, this has meant a huge surge in home delivery services (independent and through platforms like Deliveroo).

In the current climate, breweries should consider the channels through which

their products are sold and any direct to customer routes that are available.

In the post COVID-19 world, greater attention is also being paid to contractual provisions that were previously thought of as largely boilerplate and innocuous.

Where new contractual arrangements are entered into or when new agreements are negotiated with key suppliers and customers, it will be important, at the outset, for the parties to consider the risk that some or all of them may be unable to perform their obligations, in the event of a second lock-down or similar force majeure event.

Ensuring that this risk is properly and fairly apportioned and that appropriate contingency plans are in place will help to ensure (as much as is possible) the continuance of both the contract and the parties' ability to do business with each other.

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Ciara Cullen, RPC

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