

WHAT'S BREWING IN THE CRAFT BEER INDUSTRY?

Kathleen Guthrie Woods

Entrepreneurs brainstorm new businesses over beers, executives seal big deals over beers, so it seems obvious that the business of brewing and selling beer would be similarly amicable. “Historically,” says Bruce Copeland, who represents craft brewers as a partner of Nixon Peabody, “a lot has been done by handshake, including multimillion dollar relationships.” But the craft brewing industry has exploded in recent decades, and as a result, starting, sustaining, and expanding businesses have become more complicated. According to the Brewers Association, the industry grew nationally last year 18 percent by volume and 20 percent by dollars. Of this, craft brewers sold more than 15 million barrels, up from 13.2 million in 2012. “It’s more competitive,” says Brian Stechschulte, executive director of the San Francisco Brewers Guild, “definitely friendly, but no longer just happy-go-lucky home brewers.” “From a lawyer’s perspective,” says Copeland, the old agreement-by-handshake way of doing business “is very scary.”

New brewers today must not only create great beer, they must create a great business plan, and they get into trouble when they don't consider a long-term approach. Legal issues they might face include business formation, licensing, trademark protection, distributor agreements, branding conflicts and marketing regulations, and employment contracts.

If you are curious about this area of practice, read on to learn more about this dynamic industry. If you've ever dreamed of brewing your own beer—and maybe one day sharing it beyond your neighborhood—read on for tips on how to avoid legal hangovers.

A PINT OF HISTORY

Craft beers were first introduced to the San Francisco Bay Area during the mid-nineteenth-century Gold Rush as immigrants from Ireland, Germany, England, and the Netherlands settled in the Bay Area and introduced their brewing techniques and traditions. “If you go back a century, there were breweries on every corner,” says John Hinman, founder and partner of Hinman & Carmichael. “People delivered in their neighborhoods.” In 1871, German immigrant Gottlieb Brekle introduced “steam beer,” the first style of beer to originate in the United States, at his Pacific Street saloon, which later became Anchor Brewing Company. There was great diversity, and dozens of establishments flourished as they served a thirsty population.

Then there was a little hiccup called Prohibition. On January 17, 1920, the production, sale, and distribution of “intoxicating liquors” were outlawed. By the time it was repealed in April 1933, the industry had consolidated into a handful of large breweries that produced cheap and similar-tasting beers.

Local craft brewing began its comeback when Fritz Maytag purchased Anchor Brewing in 1965 and released the first American porter (Anchor Porter) and the first modern American India Pale Ale (IPA) in the 1970s. Jack McAuliffe, a homebrewer, founded New Albion Brewing Company in Sonoma in 1976, the first microbrewery in the United States since Prohibition, and shortly thereafter, Mendocino Brewing Company became the nation's first brewpub.

While these pioneers inspired homebrewers, it was President Jimmy Carter who made them legal when he signed H.R. 1337 in October 1978. The new law legalized the home production of a small amount of beer or wine for personal consumption, and unique and tasty brews quickly gained popularity beyond social circles. From 1979 until 2013, the number of breweries in operation across the United States rose from 42 to more than 2,800. According to the Brewers Association, 413 breweries opened in 2013—304 microbreweries and 109 brewpubs.

Why the recent rapid growth? Robert Binion, a partner at Carroll, Burdick & McDonough, credits in part the “spirit of independence, the entrepreneurial movement” that appeals to potential brewers, as well as the popularity of the local slow food movement. “Millennials’ tastes are much broader than [those of] boomers

What's a Craft Brewer?

“For taxation purposes,” says John Hinman, “a ‘small producer’ is not ‘craft,’ because a major producer can make ‘small batch production.’” Confused? Here are some easier-to-grasp definitions.

A **microbrewery** produces fewer than 15,000 barrels annually, with 75 percent or more of its beer sold off site.



A **nanobrewery** produces fewer than four barrels each year.



A **brewpub** is a restaurant-brewery that sells 25 percent or more of its beer on site, and its beer is brewed primarily for sale in its own restaurant and bar.



A **large brewery** has an annual production of more than six million barrels, and while large breweries may produce mass-market brews, they may also have line extensions for craft brews.



for craft beers and unique spirits,” says Hinman, who got his start in the beverage industry in 1978 by representing wineries. (At one time he also represented pioneer Pete’s Brewing Company.) Even though craft brewers have to secure licenses, he says, “beer is pretty easy to make.”

Ron Silberstein began making his own home-brewed beer in the early 1980s, and he perfected his techniques while attending UC Hastings College of the Law and practicing as an immigration attorney in the San Francisco Bay Area. As his beer was gaining popularity among friends, he took note of the first local brewery openings. “Other people were doing it, but a lot of beer was bad,” he says, “so I thought ‘I can do better than that.’” In the 1990s, while continuing his law practice, he spent weekends at UC Davis taking courses, spent vacations at conferences (“A hundred people were at the craft brewers conference then; now there are 10,000 attendees.”), took on an apprenticeship, created a solid business plan, and pursued his dream. The ThirstyBear Brewing Company brewpub opened on lucky Friday the thirteenth of September 1996, and today is the oldest brewery-restaurant in San Francisco.

Silberstein’s legal background was an asset. “It helps you ask the right questions,” he says, stressing that as an entrepreneur you need to “know what you *don’t* know or you’ll get blindsided.”

The basic arc of a craft brewer, says Hinman, goes something like this: “You have a great beer recipe, which can be produced in six to eight weeks (versus wine, which takes years). You create a route to market (a principle challenge), you get distribution, and you must produce enough product to satisfy the market, get it there safely without compromising the product, and produce a consistent supply chain.” At each stage, there are potentially costly and

What Is a Craft Brew?

Popular opinion indicates that a craft brew is marked by flavor, brewing technique, innovation, and quality. The brewery might “interpret historic styles with unique twists and develop new styles that have no precedent,” says the Brewers Association.



Think of it this way, says Bruce Copeland of Nixon Peabody: “Mass-produced beer is a recipe; craft-brewed beer is art.”

business-ending legal challenges.

Below, local experts discuss what they consider the hottest issues facing craft brewers today, along with some recommendations.

LICENSING

“The biggest daunting thing for young brewers wanting to become professionals is learning the ins and outs of the Alcoholic Beverage Control (ABC) laws,” says Stechschulte. It’s a highly regulated industry (“Many of the regulations are good and necessary,” he says), and “there’s so much that can make your head spin.” And while “it’s a national marketplace,” Hinman adds, “every state has different laws; it’s like fifty different countries.”

When getting started, says Stechschulte, it’s important for the brewer to work with a lawyer who has ABC knowledge and experience, who can help with licensing and filing for licenses, can help create a viable business plan, and can interpret new industry advisories, such as the one introduced in February addressing the circumstances under which a manufacturer may sell beer to consumers on the manufacturer’s own premises.

TRADEMARKS

Marlene Williams, a partner at Nixon Peabody, says the most common mistake she sees clients make is “not protecting their trademarks and not enforcing them when they should.”

Take, for example, the issue of choosing brewery and beer names. “The number of puns on ‘hops’ is running out,” Stechschulte says. Brewers can do the initial search themselves on Google or through the U.S. Patent and Trademark Office to see if anyone else is using a name, says Williams, but to be on the safe side, they really should

involve lawyers. Filing an application to register the name is the next step. Brewers will want to establish their rights to a name first before they get up and running, creating labels, establishing a domain. Otherwise, says Williams, “someone else can come in and register, and take it.”

“When someone has been using the name for ten years and someone across the country doesn’t check thoroughly,” says Stechschulte, “this creates a lot of problems.” When there is a conflict, “some agree to cooperate, some sue,” says Binion, but “typically,” says Stechschulte, “we hear about it when there’s a bad reaction, when a big company sends a letter and the little guy takes it to social media.”

Williams cites a current trademark dispute between Narwhal Brewery, which has been operating and building a brand under the name since 2010, and Sierra Nevada Brewing Company, which filed a trademark application for its Narwhal Imperial Stout. Binion refers to a case in December of 2013 in which a tiny Missouri brewer ran afoul of Starbucks when it named a new stout *Frappicino*. “It’s very costly for a small firm to have to rebrand,” says Williams. To put it into perspective, she says, “The cost for searching and filing with an attorney can be \$3,500 to \$5,000—a lot less than if you run into trouble.” Williams’ advice: “Plan to grow—register your trademarks.”

“At the same time,” says Williams, “you have to enforce your rights or they get diluted.” This can be handled amicably—such as when the two parties get on the phone and work out a mutually beneficial agreement—or not, as in the case of trademark bullying. Williams encourages clients to consider backlash that could result from less-than-friendly negotiations. “People care a lot about small players and will be sensitive about how you enforce your rights.” The impact of popular opinion was evident in 2009 when

Meet the Brewers

San Francisco Brewers Guild hosts monthly “Meet the Brewer” events at different member breweries or bars. Mingle with local brewers, ask questions, and listen to stories about the trade. Brewery tours are frequently included.



Hansen, the owner of the Monster trademark, went after Rock Art Brewery and its “Vermonster” beer. Vermonster fans got on Twitter, Facebook, and YouTube to protest, and the parties were motivated to reach an agreement.

DISTRIBUTION

Prior to Prohibition, distribution was handled by families, but now “distribution is consolidating,” says Copeland. “Big distributors are buying up family distributors all over the country.”

“Distribution is a whole separate business model, business plan, marketing—a different set of problems,” says Silberstein. It’s one thing for small brewers to serve in their own brewpub or deliver small quantities locally; it gets complicated when they want to expand. An experienced attorney can help

a small brewer navigate the tricky three-tiered distribution system as well as complicated tax laws, which are different across the states.

FUTURE ISSUES

“Not everyone can be Sierra Nevada or New Belgium and become national players,” Silberstein says. “What’s going to happen when small brewers, collectively, start taking market share from the big brewers?” Copeland wonders. “I’m guessing big brewers will start getting into acquisition, buying the smaller guys.” Hinman also sees increased competition, especially for shelf space, on the horizon.

Whatever legal challenges the future brings, the attorney’s job is to help brewers stay out of trouble and focus on what they do best. “I can’t make beer,” says Binion, “but I can make it easier for *you* to make beer.”

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