

# MALT MADNESS

MARKET BARRIERS, BUSINESS SOLUTIONS  
& GROWTH OPPORTUNITIES

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 BAKER TILLY



## WHY TRADEMARKS AND TRADEMARK PROTECTION MATTERS

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## Brand Identity

- Brand identity is one of the most important assets of a brewery or distillery
  - Sets you apart from a crowded field
  - Establishes and creates brand loyalty
  - Reduces marketing costs by simplifying your message
  - Affects the overall value of your business

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## Brand Protection Strategy

- Given the importance of brand identity in the brewing and distilling industries, you need a trademark strategy and plan
  - Identify your trademarks and brand message
  - Ensure that your brand is distinctive
  - Ensure that your brand is not infringing the rights of any third party
  - Take steps to protect your brand

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## What is a Trademark?

- ANY word, name, symbol or device; or any combination that identifies the source or origin of a product or service
- It must be distinctive enough to indicate source rather than describe something about your business or product
- It must be in use in commerce (interstate commerce for federal protection)

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## Selecting a Trademark (Strength)

- Inherently distinctive marks
  - Immediately registerable on the Principal Register without proof of secondary meaning
  - **Fanciful marks**—Terms that have been invented for the sole purpose of functioning as a trademark or service mark and are unknown or uncommon in the language (*e.g.*, XEROX, EXXON)
  - **Arbitrary marks**—Common words that do not suggest or describe a significant ingredient, quality or characteristic of the goods or services (*e.g.*, Apple for computers)
  - **Suggestive marks**—Require imagination, thought or perception to reach a conclusion as to the nature of the goods or services

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## Selecting a Trademark (Strength) (cont.)

- Marks that lack distinctiveness
  - **Merely descriptive marks**—Describes a significant feature of the good or service rather than indicating source. Merely descriptive marks are not immediately registrable on the Principal Register but may obtain distinctiveness over time.
    - Five or more years of exclusive and continuous use in commerce may result in the ability to register on the Principal Register
    - Common law rights may arise earlier

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## Selecting a Trademark (Strength) (cont.)

- **Generic marks**—Marks that have become the commonly recognized term to describe a product (*e.g.*, aspirin, hula-hoop, incorporated, .com). Generic marks are unenforceable.
  - Combinations of merely descriptive/generic words can be inherently distinctive if they are used in a unique manner. However, adding a descriptive/generic term to a trademark may not make the trademark more distinctive. The descriptive portion of the mark will be deemed weak and not carry much weight when determining whether there is infringement.

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## Selecting Trademarks

- Three types of "risk" to be concerned with:
  - Is the trademark registerable at the federal level from a procedural standpoint?
  - Will the trademark violate the rights of any third party?
  - Is the trademark already diluted or does it have the capability of distinguishing your brand in the marketplace?

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## Securing a Federal Trademark

- Minimum requirements for federal protection
  - **Use**—Actual use or bona fide intent to use the mark in interstate commerce
  - **Goods**—Interstate commerce involves sending the goods across state lines with the mark displayed on the goods or the goods' packaging
  - **Services**—Interstate commerce involves offering a service to those in another state or rendering a service that affects interstate commerce. Use of a trademark on the Internet may constitute interstate commerce.

AMP1

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## Risk of Waiting

- Party A begins using TM in 2010
- Party A does not bother to file for federal protection until 2014
- Party B begins to use a similar trademark in 2012 and immediately files a federal application
- Party B's pending trademark application (or registration) will block Party A's application
- Party A must now oppose or seek to cancel Party B's trademark application/registration even though Party A has priority

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## Incontestability of Junior User

- Party A begins using TM in 2005
- Party A does not bother to file for federal protection until 2013
- Party B begins to use a similar trademark in 2006 and immediately files a federal application
- Party B's trademark application becomes registered in 2007
- Party B files Sections 8 and 15 Declaration/Affidavit between the fifth and sixth years after registration, making its trademark registration incontestable
- Party A is precluded from cancelling Party B's trademark registration even though Party A has priority

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## Intervening Common Law Rights

- Party A begins using TM in 2005 in Wisconsin
- Party B begins using similar TM in 2006 in California
- Party A files a trademark application, which becomes registered in 2007
- Party A expands its business, ultimately establishing an office in California
- Party A sends Party B a cease and desist letter based on its federal trademark registration
- Party A is precluded from stopping Party B because Party B began using its trademark before Party A filed its application. Party A's federal trademark grants nationwide rights subject to Party B's then existing common law rights in California. But, Party B is precluded from expanding outside of the territory it had when Party A's trademark became registered.

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## Infringement



- Is the junior trademark likely to cause confusion among ordinary and relevant consumers?
- Courts attempt to determine what is in the mind of the ordinary and relevant consumer

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## Infringement (du Pont Factors)

- Weight given to the relevant *du Pont* factors may vary
- The two most important factors are:
  - The similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression
  - The relatedness of the goods or services as described in the application and registration(s)



## Infringement (du Pont Factors) (cont.)

- The following factors may also be relevant:
  - The similarity or dissimilarity of established, likely-to-continue trade channels
  - The conditions under which and buyers to whom sales are made (*i.e.*, impulse vs. careful, sophisticated purchasing)
  - The number and nature of similar marks in use on similar goods
  - Strength of the trademark





## Scandalous, Immoral, or Disparaging Trademarks

- June 2014—TTAB (in a 2-1 decision) held that the term "Redskin," even in the context of professional football, disparages a "substantial composite" of the Native American population. Therefore, the six Washington Redskins trademark registrations were cancelled and found unregistrable.
  - "the term REDSKINS . . . has always been and continues to be pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging, and racist . . ."
  - The major effect of this decision (if it is not overruled on appeal) is that the "Washington Redskins®" becomes the "Washington Redskins™"

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## Scandalous, Immoral, or Disparaging Trademarks (cont.)

- December 22, 2015: *In Re Simon Shiao Tam*, the court found that the disparagement prohibition in section 2(a) of the Lanham Act, which "bars the Patent and Trademark Office ('PTO') from registering scandalous, immoral, or disparaging marks," was an unconstitutional violation of the First Amendment
  - Applicant, Simon Shiao Tam, is the frontman in an Asian-American rock band called The Slants. Tam named his band The Slants in order to "reclaim" and "take ownership" of Asian stereotypes.
- Raises the issue of unprotected commercial speech versus protected First Amendment speech in the context of federal trademark protection

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## Proper Trademark Notice

- Common law trademarks (any mark that is not registered) should use the "TM" symbol at the end of the mark. For services, trademark owners can also use the "SM" symbol.
- For marks registered with the U.S. Patent and Trademark Office on either the Principal or Supplemental register, the owner should use the "®" symbol
- Failure to use notice does not affect a trademark owner's rights
- Notice does not create trademark rights. It is merely used to inform consumers and competitors that the owner intends to use the mark as a trademark.

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## Questions?

## THANK YOU!

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# A FLIGHT OF FINANCING OPTIONS

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## Opening Considerations

- The appropriate financing solution depends on the size and circumstance of the business
- Self financing vs. equity financing vs. debt financing
- Credit history, business plan, projections, etc.





## Debt

- Bank lending
  - Collateral
  - Personal guaranties
- Small Business Association loans
  - 7(a) General Small Business Loans Program
  - 504 Loan Program (CDC Loan Program)

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## 7(a) General Small Business Loans Program

- Purpose: Working capital or to acquire/expand a business
- Maximum amount: \$5 million
- Maximum maturity: 5–25 years
- Guaranty percentage: Varies, based on size of loan
- Interest rates: Negotiated
- Fees: Based on maturity and guaranty percentage

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## 504 Loan Program

- Purpose: Major fixed assets such as real estate, improvements and construction
- Secured bank loan covers 50% of cost; secured loan through CDC covers 40%; down payment of 10%
- Maximum amount: None (but \$5 million cap for SBA-backed portion)
- Maximum maturity: 10 and 20 years
- Interest rates: Set at a percent above a specified rate
- Fees: Approximately 3% of debenture

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## Other Options

- Equity: Friends and Family, Angels and VC
- Crowdfunding: Equity vs. Rewards
- Equipment leasing
- Microloans
- WWBIC
- Focus on Energy: Incentives
- Tax credits: Historic and New Markets

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## Improving the business of beer

Scott Ebert, Partner, Baker Tilly



Candor. Insight. Results.



## So who is Baker Tilly ...



Candor. Insight. Results.

### ... and what do they know about the craft beer industry?

- > Accountants and business advisors for over 80 years
- > Specialized beverage practice that concentrates on the craft brewing industry – *part of our food and beverage team*
- > We have a national team of craft brewery specialists that help with
  - Distribution rights
  - Sales channel management
  - Financial modeling and financing
  - Compliance
  - Technology
  - Other consulting services  
(i.e. expansion, HR, and waste management)

***And like you, we like a good craft beer***



## Issues that may bubble up...



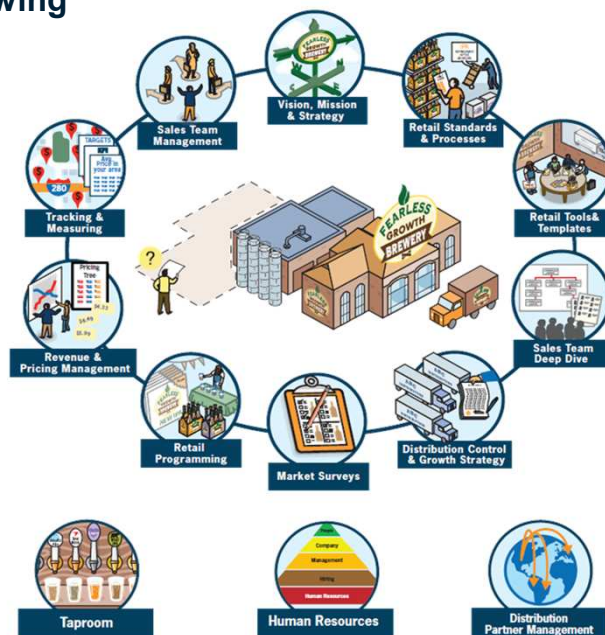
Candor. Insight. Results.



## Craft brewing



Candor. Insight. Results.

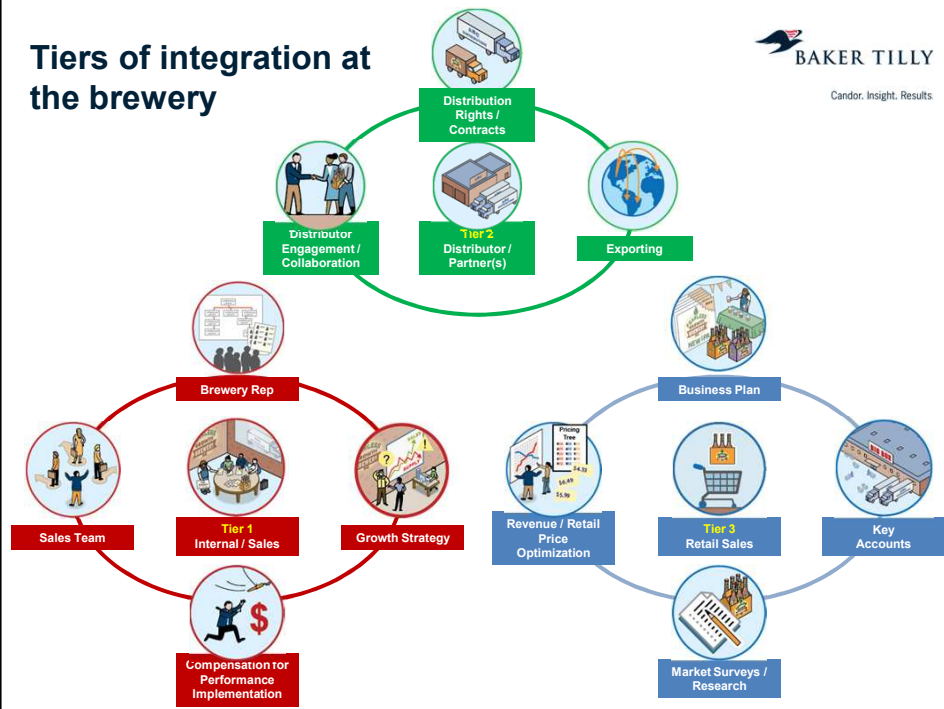




## Tiers of integration at the brewery



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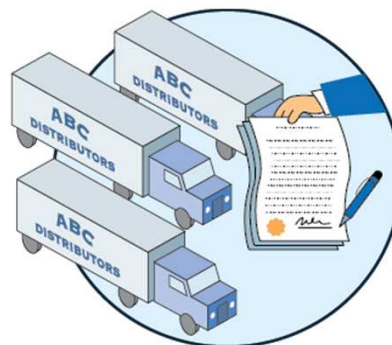


## Distribution agreements – market trends



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- > Where is the value?
- > How and where to market
- > What can you ask for?
- > Recent examples of wins/losses







Candor. Insight. Results.

**WARNING:** Working with the Baker Tilly Craft Brewery Team may cause success to follow. Success may cause a desire to over indulge. Baker Tilly is not responsible for any mischief caused by pending success and drinking thereafter.

**Questions?**



## Connect with us



Candor. Insight. Results.



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## REGULATORY HICCUPS IN THE NEWS

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## Regulatory Hiccups in the News

**JOURNAL SENTINEL**  
Aug. 12, 2015

"Wisconsin hurdles send Sanford chef Justin Arahamian's new brewery to Chicago"

**JOURNAL SENTINEL**  
Sept. 8, 2015

"Craft brewers say they face hard choices with state law on brewery ownership"

**The Washington Post**  
Apr. 21, 2015

"Minn. bar busted for selling Spotted Cow beer in best undercover investigation ever"

**Milwaukee**  
MAGAZINE  
Apr. 17, 2015

"Soon-To-Open Company Brewing Splits With Bavette Owner"

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## Types of Licenses and Permits

- **Class "A" license**: retail sales of fermented malt beverages for consumption off the premises where sold and in original packages, containers, and bottles. EXAMPLE: Grocery store
- **Class "B" license**: retail sales of fermented malt beverages to be consumed either on the premises where sold or off the premises. EXAMPLE: Bar or restaurant
- **Brewer permit**: manufacturing of fermented malt beverages (no limit on amount manufactured).
- **Brewpub permit**: manufacturing of up to 10,000 barrels of fermented malt beverages

\*1 barrel = 31 gallons, or about 331 twelve-ounce cans of beer



## Questions?

## THANK YOU!