

FOOD FOR THOUGHT

FROM OUR FOOD, BEVERAGE, & CONSUMER PRODUCTS TEAM

APRIL 2018, ISSUE 4

TOP TIPS REGARDING INTELLECTUAL PROPERTY, PART 2 (OF 3)

by **Matt Abell**, mabell@hollandhart.com

It is more important than ever for F&B companies to identify, clear, and protect IP rights (whether in the form of recipes or formulae, packaging improvements, branding, food processing methods, supply chain efficiencies, customer lists, research and development, or otherwise). Here are a few additional tips to consider with respect to IP in the F&B space:

Trade Secret vs. Patent Determination

Because patent and trade secret protection are mutually exclusive, your company should consider which form of IP protection to pursue for a given invention. In making such determination, your company should consider: (i) whether the invention is easy to reverse engineer; (ii) how difficult (and expensive!) it will be to meet patenting requirements for the invention; and (iii) whether it will be problematic to keep the invention, or elements thereof, secret (i.e., difficulties in keeping these from being disclosed/disseminated outside of your company).

Consider Implementing A Trade Secret Protection Program

Trade secrets are valuable assets and are relatively inexpensive to protect, as this form of IP is not conditioned on state or federal registration. Best of all, by taking the right precautions, trade secret protection may last in perpetuity (and any party that obtains your company's trade secrets illegally may be sued for misappropriation). Consider developing and implementing a meaningful trade secret protection program to properly safeguard your company's trade secrets (e.g., recipes, supplement formulations, ingredient sourcing strategies, etc.). A program may include, but should not be limited to, the following precautions: (i) broad usage of confidentiality/non-disclosure agreements/provisions with employees, independent contractors, vendors, and suppliers (including co-packers); (ii) use of guest sign-in and sign-out policies, restricted access policies, data security and destruction policies, and password policies; (iii) reaffirmation of confidentiality obligations in exit interviews for departing employees; and

(iv) labeling of confidential information with confidentiality and trade secret legends.

Use of Internet Assets / Content

Nastygrams (i.e., demand letters) are no fun; and paying fines or weighted license fees for the unauthorized use of third party IP is worse. Do not assume that assets/content (e.g., graphics files, copy, etc.) found online may be used by your company for free, or that they are otherwise licensed for your company's use, merely because they are accessible via the Internet. Content accessed via the Internet should be used and licensed from the applicable rights holder (or its designee) to avoid an infringement or misappropriation claim. There is no such thing as a free (Internet) lunch!

Check out our [previous newsletter](#) for even more tips and watch for our final tips in the next quarterly newsletter.

Have IP, commercial contracts, or licensing questions? Contact [Matt Abell](#) for a free consultation.

MEET OUR STRATEGIC PARTNERS: SILVERWOOD PARTNERS

Silverwood Partners, a boutique investment banking firm based in the Greater Boston Area, is one of our valued strategic partners. We frequently collaborate with Silverwood. Their expertise and contacts in the consumer, technology, and healthcare industries have proven to be highly beneficial in many of our business dealings.

Silverwood's associates have many years of experience within the consumer natural products industry, where they have been involved in many high-profile transactions and raises for natural food and beverage products. Silverwood recently published an industry analysis, "The Plant-Based Revolution," which contains an in-depth and extensive review of the trends, statistics, and recent investments within the natural products industry. To read the analysis, please click [here](#).

We would like to thank Silverwood for all of their contributions to the industry, and we look forward to collaborating with them in the future!



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NEW BREW! FIVE REGULATORY TIPS FOR STARTING YOUR NEW BREWERY

By Beau Bump, bbump@hollandhart.com

So you decided to start a brewery—that's awesome. You're in good company. The number of craft breweries in the U.S. has ballooned in the past decade, growing from 1,511 in 2007, to 2,475 in 2012, to 6,372 as of the end of 2017. Whether your new operation is a standalone brewery, brewpub, or a new feature to an existing restaurant, these five tips will help position you for regulatory approval of your new brew:

1. State and federal – both required, but in which order?

It's a basic question, but you have to start somewhere. In some jurisdictions, federal regulatory approval (by TTB) is required before you start the state process. In other jurisdictions, you can dual-track it and start down both paths at the same time. Knowing in which order you need to seek regulatory approval is important to kick off the party.

2. Location, location, location? Yep – you need one.

TTB requires that your building exist and equipment be at least on order for approval of your Brewer's Notice. Pick a home for your new brew early on.

3. Bond? What bond?

Thanks to the PATH Act of 2015, you are likely exempt from furnishing a bond to commence operations from the federal standpoint. The exemption applies to producers who reasonably expect to incur not more than \$50,000 in annual excise tax liability, and who pay excise taxes on a semi-monthly, quarterly, or annual basis. Check with your state regulator in case there is a state-level bond requirement.

4. Pancake beer? Why not? Sounds delicious...

If you plan to brew with non-traditional ingredients—even if you do not plan to distribute out of state—you may need to seek formula approval from TTB. But please don't let that prevent you from creating a pancake beer.

5. You might as well just tell them about it.

Once you have your product lineup in place, you likely need to register your product with your state regulator, and seek COLA approval from TTB if you plan to distribute your product out of state.

Navigating state and federal regulatory processes in a deliberate and strategic fashion will keep your new brewery on track to open, and will help to put even more delicious suds in our tulip glasses. Best of luck!

This newsletter is not a substitute for the advice of an attorney. The statements and advice provided are for educational purposes only. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.

UPCOMING EVENTS

FOODBYTES! MONTREAL

FoodBytes! by Rabobank is a next-gen pitch competition-meets-networking event that brings together the game-changing startups, investors, and industry leaders pioneering the future of food and agriculture. Learn more about the upcoming FoodBytes! competition on May 16, 2018 [here](#).

BOULDER FOOD GROUP 929 PRL SUMMER SERIES

Holland & Hart is a proud sponsor of the 929 PRL Summer Series which are community-focused charitable celebrations. 100% of ticket sales will benefit the nonprofit organizations. For more information and to register for any of the upcoming events, please visit their [website](#).

Please join us:

- May 17, 2018: [Western Resource Advocates](#)
- June 14, 2018: [Growe Foundation](#)
- July 19, 2018: [Thorne Nature Experience](#)
- August 23, 2018: [Chef Ann Foundation](#)
- September 20, 2018: [Colorado Water Trust](#)

CONGRATULATIONS TO NOKA!

N O K A

NOKA was one of nine companies selected (out of 670 applicants!) to be

a part of the Spring 2018 Chobani Incubator, a high honor in the food start-up industry. NOKA makes superfood smoothie packs that deliver balanced nutrition and naturally delicious flavor from organic whole fruits and veggies, packaged to be refreshing anytime and anywhere you want them.

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