

INTELLECTUAL PROPERTY

What's trending, how to capture it

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Technological advancements have permitted an evolution in wine labels, bottle shapes, closures and packaging designs. As technology has advanced, so has each winery's need to stand out and attract customers.

Before the turn of the new millennium, most wine brands were difficult to differentiate from one another. They habitually utilized standard bottle shapes and sizes, homogenous wine labels, traditional cork closures, staid packaging and marketing materials. Today the beverage industry has become increasingly competitive. Thus, wine labels and packaging elements are essential tools for establishing a brand's presence and engaging customers.

The first step in understanding what is trending in today's wine industry is to identify the elements of a wine brand that can hold value. In addition to the brand name or trademark, consider protectable elements in the product packaging such as label design, logo, images and bottle shape. Next, capture the protectable intellectual property aspects in the wine brand. Doing so will help establish a unique value position for a brand.

A trademark can be almost anything that triggers brand association in the mind of consumers. A trademark is a word, name, symbol or device, or any combination thereof, used in commerce to designate source of a good or service. This definition encompasses words, images, configurations, colors, sounds and smells.

Word marks-brand name

The most commonly known trademarks are the word marks or a product's brand name. It is the brand a consumer would ask for at a restaurant, supermarket or liquor store. For example, Domaine Carneros Ltd. (Napa, Calif.), has trademarked Domaine Carneros consisting



of the words "domaine" and "carneros." Likewise, the fanciful name or sub-brand Le Rêve also functions as a trademark. Both word marks can be and are protectable trademarks, even if in a foreign language.

Logos/images

In addition to word marks, symbols such as logos, designs or images can function as trademarks. Domaine Carneros also owns a trademark registration for the design of a double rams head. This design element is protected by itself and may be used with or without the brand name of the wine.



Darius Khaledi Winery, LLC (Napa, Calif.), owns the image of King Darius in profile holding an amphora.

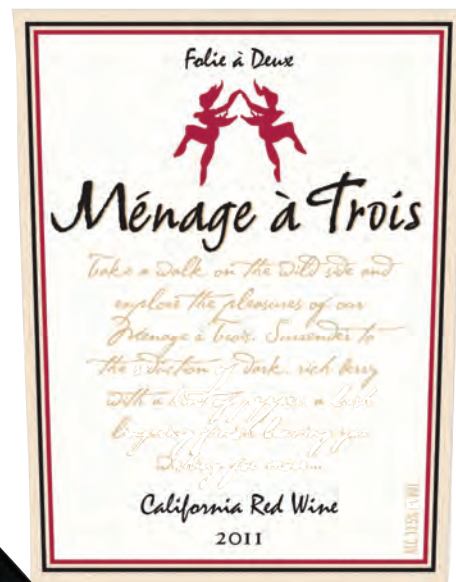
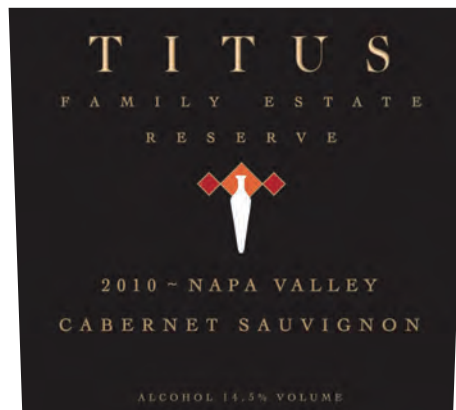
Likewise, Titus Vineyards (St. Helena, Calif.), has trademarked their distinctive amphora which is prominently featured on its wine label.

Sutter Home Winery Inc. (St. Helena, Calif), owns the inkblot image of two dancers featured on its Ménage à Trois brand.

JZ Wine Co. (Cuyahoga Falls, Ohio), has introduced a trademarked design of a pizze.

Tagline/slogans

In addition to word marks, a slogan or tagline may also be protectable as a trademark. A well-known slogan comes to mind: "We will sell no wine before it's time," a trademark owned by



Constellation Brands Inc. (New York, N.Y.) to represent its Paul Masson brand wine.

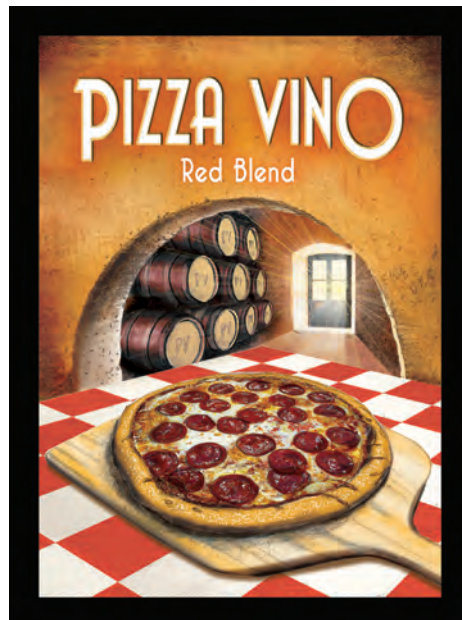
"Please stick your nose in our business" is a trademarked slogan owned by Vintage Wine Estates Inc. (Santa Rosa, Calif.) representing their Cartlidge & Browne wine brand's offbeat way of expressing the attitude that wine should not be taken so seriously!

Color

Color can also function as a mark. For example, Freixenet has two registered trademarks including color for sparkling wines. The color matte black and gold have been exclusively used by Freixenet for its sparkling wines and functions as a trademark for that product.

Configurations

Similar to color, configurations can also function as trademarks. Offbeat IP LLC (Sonoma, Calif.) owns a mark consisting of a three-dimensional configuration of a specific design feature of the packaging, i.e., lines of various dimensions circling a bottle in various directions and crossing over each other to give the appearance of ribbon. Offbeat uses the distinctive criss-crossed rib-



bons to designate its wines separate and apart from its wine brand Slices. The prevalent use of these distinctive ribbons allowed Offbeat to register the ribbon design as a trademark thus preventing any other winery from using a similar ribbon design.

Francis Coppola Winery (Geyserville, Calif.), owns a configuration mark for its Director's Cut "film" label where the



mark consists of the shape and placement of a label on a bottle. The thin, long rectangular label wraps around the bottle diagonally twice.

Label design

The protectable design elements in a wine label itself can be trademarked. Offbeat owns the word mark Jellybean for wines. Offbeat also trademarked its



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uct feature such as a capsule, cork, box or bag for wine can be trademarked.

Trade dress

Overall trade dress is the combination of color, graphics, shape, and design of a product's packaging. Trade dress represents the "look and feel" of the overall packaging or brand image. Appropriating most all of the graphic elements of a wine label can lead to a claim of trademark infringement.

When you see packaging or labeling that is "too close" to your own, for example, when someone uses the same color, design elements, type face, color place-

label design. The mark consists of a circle with the word Jellybean in stylized letters in the center surrounded by two broken circles of miniature jellybeans and two broken circles of solid lines.

Product feature

A single element of wine product packaging can be trademarked. Some wineries have trademarked their distinctive capsule and cork designs. Thus, a single prod-

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ments, etc. but uses a different brand name and a distinctly different type of wine, you still may have a claim for trademark infringement as consumers have an imperfect recollection of brands. It is prudent to check with trademark counsel as they will be able to help you determine the merits of a possible claim.

Design patents

Another potential strategy is to seek patent protection for nonfunctional designs. In the alcohol beverage industry, this typically means unique bottle designs, packaging or closures. A design patent claims a new, novel, non-obvious and nonfunctional design of a product. A design patent covers the design of an object, so long as the design is not required by the function.

Moreover, the design must be novel as not obvious to one of ordinary skill in the art. Design patents are based on registration. **Thus, design patents have a limited life span of 14 years.** But as long as the design patent remains in force, the owner of the design patent has the exclusive right to make, use, or sell the patented design.

Summary

One wine brand can contain several protectable elements. Once you have identified the protectable elements, the next step in building brand equity is to protect the intellectual property. This process begins by searching existing intellectual property and preparing and submitting trademark and design patent applications with the appropriate government body in the various countries around the world in which you plan to sell your wines.

It is imperative to take a long-term view in securing protection as most countries operate on a "first-to-file" basis, thus the first one to submit the application for a brand will gain an advantage.

Protecting your brands intellectual property will cost significantly less than your investment in wine labels and packaging. Take a closer look at your brands, consider protecting the investment. The investment may prove valuable should the emulators arrive. With so many factors to consider, it is important that a company creates brands, labels and packaging that are memorable and protectable. **PWV**

*Should you need assistance in identifying protectable elements of a brand or securing registration in the U.S. or worldwide, please contact **Katja Loeffelholz**, a registered attorney with the United States Patent and Trademark Office and of counsel at Dickenson, Peatman & Fogarty at kl@dpf-law.com.*

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