



1-10-2021

## Attitudes Towards IP Present Among Seattle Craft Breweries

Zahr K. Said

*University of Washington School of Law.*

Follow this and additional works at: <https://scholarlycommons.pacific.edu/uoplawreview>

---

### Recommended Citation

Zahr K. Said, *Attitudes Towards IP Present Among Seattle Craft Breweries*, 52 U. PAC. L. REV. 763 (2021).  
Available at: <https://scholarlycommons.pacific.edu/uoplawreview/vol52/iss4/7>

This Article is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in University of the Pacific Law Review by an authorized editor of Scholarly Commons. For more information, please contact [mgibney@pacific.edu](mailto:mgibney@pacific.edu).

# Attitudes Towards IP Present Among Seattle Craft Breweries

Zahr K. Said\*

I. SUMMARY OF THE STUDY (AND ITS LIMITATIONS) .....	764
II. IP IN CRAFT BREWING.....	766
A. Patents.....	768
B. Copyright.....	771
C. Trade Secrets and Regulation through Contractual Control.....	774
D. Trademarks .....	779
III. CONCLUSION.....	781

Craft brewing offers a rich case study for innovation theorists: it is an industry that has exploded in volume, grown in market share, and witnessed remarkable creativity and ingenuity in all aspects of brewing, distribution, service, and marketing.<sup>1</sup> Its cultural, technological, and economic facets have been studied in many disciplines, and there is increasing interest in the laws pertaining to craft brewing. This increasing interest is evidenced by a small but growing body of legal scholarship, with research appearing on issues of antitrust, alcohol regulation, false advertising, food and drug law, tax, and trademark law.<sup>2</sup>

---

\* Zahr K. Said is Associate Dean for Research and Faculty Development and Charles I. Stone Professor of Law at the University of Washington School of Law. The author wishes to thank Professor Dan Croxall for including her in this Symposium and the entire editorial staff for excellent work at every stage. Finally, the author gratefully acknowledges all interviewees and the many others in the craft brewing industry who offered generous assistance throughout the research and writing process.

1. Zahr K. Said, *Craft Beer and the Rising Tide Effect: An Empirical Study of Sharing and Collaboration Among Seattle's Craft Breweries*, 23 LEWIS & CLARK L. REV. 355, 356–58 (2019).

2. For a partial list, see, e.g., Ross Appel, *Worry Wort: A Path to Acquiring Trademark Rights in the Craft Brewing Industry*, 24 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 1029 (2014); Daniel J. Croxall, *Helping Craft Beer Maintain and Grow Market Shares with Private Enforcement of Tied-House and False Advertising Laws*, 55 GONZ. L. REV. 167 (2020); Daniel J. Croxall, *Cheers to Central Hudson: How Traditional Intermediate Scrutiny Helps Keep Independent Craft Beer Viable*, 113 NW. U. L. REV. ONLINE 1 (2018); Aric Codog, Comment, *The Antitrust Roadblock: Preventing Consolidation of the Craft Beer Market*, 50 U. PAC. L. REV. 403 (2019); Andrew D'Aversa, Comment, *Brewing Better Law: Two Proposals to Encourage Innovation in America's Craft Beer Industry*, 165 U. PA. L. REV. 1465 (2017); Hannah Jeppsen, Comment, *Let My Brewers Go! A Look at Home Brewing in the U.S.*, 10 J. FOOD L. & POL'Y 137 (2014); Michael D. Kanach & Daniel J. Christopherson, *Trademarks in the Golden Age of Craft Beer*, LANDSLIDE, Nov/Dec. 2015, at 38; Michael Mercurio, Note, *"Safe Harbor" on the Rocks: TTB Label Approval for Beer, Wine, and Spirits, and the Uncertain Status of the "Safe Harbor" Defense*, 7 NOTRE DAME J. INT'L & COMP. L., no. 2, 2017, at 107; Andrew J. Miller, Note, *Crafting A Better Industry: Addressing Problems of Regulation in the Craft Beer Industry*, 2019 U. ILL. L. REV. 1353; Shivani Patel, Note, *The IP of IPAs: A Look into Trademark Infringement in the Craft Beer Industry*, 26 J. INTELL. PROP. L. 249 (2019); Bryce Pfalzgraf, Note, *Taxing the Keg: An Analysis on the Potential Effects of Changing the Federal Excise Tax on Beer*, 2015 U. ILL. L. REV. 2141; Andrew Tamayo, Comment, *What's Brewing in the Old North State: An Analysis of the Beer Distribution Laws Regulating North Carolina's Craft Breweries*, 88 N.C. L. REV. 2198 (2010); Rebecca S. Winder, Article, *Trademark Protection in the Craft Brewing Industry: A Beer by Any Other Name May Be an Infringement*, 15 WAKE FOREST J. BUS. & INTELL. PROP. L. 148 (2014); Gabrielle L. Palanca, *More Collaboration, Less Litigation: Analyzing Craft Beer Within Intellectual Property's Negative Space*, U. COLO.

It seems fitting that the *University of the Pacific Law Review* has devoted an entire issue to the topic, becoming the first-ever volume of a law review to be dedicated to legal issues pertaining to beer and brewing.

In an earlier qualitative empirical research study of Seattle's craft brewing scene, I identified several norms that operate in the community with respect to sharing and collaboration.<sup>3</sup> Further, I argued that a meta-norm transcended the other norms. This was the "In-Group Membership Meta-Norm: Police Group Boundaries." In its focus on sharing, collaboration, and community dynamics, I deliberately left aside the more specific questions about practices and attitudes of intellectual property ("IP") law. Were brewers in this community using patents to protect their inventions? Did they seek copyright registration in their designs, or try to protect their recipes (which copyright makes difficult if not impossible)? Was trade secrecy a source of potential legal protection that brewers knew about and used? Were breweries using contracts with respect to collaborations, departing employees, and information-sharing? Or were they, as one interviewee memorably put it, more "handshakey"?<sup>4</sup> Finally, what did trademark law look like from the perspective of these Seattle craft brewers?

In this Article, I begin by providing an overview of the original study, summarizing its methodology and parameters only briefly. Then I draw on the interview data to describe practices and attitudes towards IP among Seattle's craft breweries. I offer analysis of the views and practices found among my interviewees with regards to five types of legal governance. Four of these are considered to be IP: patent, copyright, trademarks, and trade secrets. The fifth consists of contractual control through agreements—such as non-disclosure agreements and non-competes.<sup>5</sup> The IP overview focuses more on the issues related to patents, copyrights, and trade secrets, bracketing deeper analysis of the trademark issues for a discussion on its own. Given that trademark law is the primary source of litigation among craft brewers, it raises distinct and complex issues. Throughout this Article, I offer analysis and observations to support or triangulate insights gleaned from the study.

## I. SUMMARY OF THE STUDY (AND ITS LIMITATIONS)

Back in 2016, the blend of informality in the national craft brewing culture along with the many layers of formal laws that regulate the industry piqued my interest. A rich scholarship conversation exists on the interplay between formal and informal IP regulation, and I was curious to investigate craft brewing in light

---

L. REV. FORUM (May 31, 2017), <https://lawreview-dev.cu.law/more-collaboration-less-litigation1-analyzing-craft-beer-within-intellectual-property-negative-space/> (on file with the *University of the Pacific Law Review*).

3. Said, *supra* note 1, at 396.

4. Interview with Confidential Source #14, (July 21, 2017) (notes on file with the author).

5. I devote further discussion to trademark issues pertinent to craft brewing in a standalone essay: *Collegiality Costs: Trademark Scarcity and Craft Brewing's Politeness Problem* (book chapter on file with the author).

of the many insights of these scholars of innovation theory.<sup>6</sup> In addition, the past decade has seen an uptick in the use of qualitative empirical research to explore artistic and creative practice with the purpose of gleaning ground truth or creating a thick description that can illuminate how the legal regime aligns or misaligns with the industry it regulates. Such work can shed much needed light on phenomena that traditional scholarship can easily overlook.<sup>7</sup>

Over the course of a year and a half, I conducted many participant observations, informal interviews, and twenty-two formal semi-structured interviews of key figures involved in Seattle's craft brewing industry. I published an article based on this research, discussing the informal governance mechanisms in evidence in this city's craft brewing scene. From March 2016 to September 2017, I conducted a qualitative empirical research study of practices and norms in Seattle's craft breweries to investigate how interviewees described their processes and products and whether they protected them through legal mechanisms. Through twenty-two face-to-face semi-structured interviews with key figures in the industry, I investigated the practices and attitudes of craft brewers regarding their creative and scientific processes, their business decisions, and their sense of legal risk and upside.<sup>8</sup> I explored the rhetoric participants use in describing what they do, what they felt they owned and when they would seek to protect that ownership, as well as the extent to which they thought of IP law as a means of viable protection.

The study investigated practices and norms relating to innovation and IP, described breweries' attitudes and practices, and identified several general norms. Interviewees provided evidence of norms related to creation, sharing, collaboration, ownership, exclusivity, and policing the boundaries of group membership. The single most pressing insight, and the focus of the earlier article publishing the study's findings, pertained to the way that ownership and enforcement were mediated by a "meta-norm" of behaving one way towards craft-beer-insiders and another way towards outsiders—such as members of the industry affiliated with so-called "Big Beer." It was already clear to me—as a consumer present in the craft beer world—that a jingoistic divide separated the worlds of craft and large-scale industrial brewing. However, I knew this only anecdotally, and I did not anticipate how deeply the divide ran. Nor did I anticipate the ways in which notions of IP ownership and enforcement would be delimited by a sense of community belonging described in interviews again and again. The original article relayed these findings and deferred discussion of the potential doctrinal issues associated with particular areas of IP, to which this Article returns.

---

6. Said, *supra* note 1, at 389 n.179 (surveying major contributions in the scholarly conversation).

7. Said, *supra* note 1, at 361 ("Empirical research methods can help scholars identify various phenomena that standard doctrinal legal studies might miss.").

8. Said, *supra* note 1, at 410–11. A lengthy appendix in an earlier article sets out and explains the methodological choices adopted for the study.

Before progressing to new contributions, however, it is important to keep in mind the limitations and purposes of the study. My interview data are Seattle-specific, they capture only a snapshot of a point in time, and they feature the voices of only a subset of brewers and industry participants. There were fifty-five to sixty breweries in Seattle city limits, to put the number of formal interviews (i.e., twenty-two) into perspective. Accordingly, the data generated in this study must be considered with caution as a limited sample that can provide some insights into the lived experience of our IP laws and provide the basis for further follow-on work, rather than as evidence of the truth on the ground throughout the craft brewing industry (or even throughout all of Seattle's brewing). In other words, these interviews are not a basis for generalizable data.

Yet the interviews do provide compelling clues of what *could* be the case, in light of known IP policy problems, if the accounts offered in this study were borne out by evidence gathered in subsequent work and found to have reflected more widespread practices and norms throughout the craft-brewing industry. In addition, many of the statements and reported actions of interviewees can be triangulated through personal observation, industry news, and other scholarly accounts. Some of the interviews are even reflecting on experiences or disputes they have had elsewhere on the national craft brewing stage, and thus their accounts may relate more broadly to the beer industry beyond Seattle.<sup>9</sup>

## II. IP IN CRAFT BREWING

This Part describes the kinds of IP that could be available for craft brewers and then presents the results of questions posed to my twenty-two interviewees regarding practices and attitudes relevant to IP. It highlights the interviewees' range of attitudes toward IP, including views on sharing, collaboration, ownership, exclusivity, and enforcement. Multiple forms of legal protection could be available to protect the processes and outputs of craft brewing.

As one source of advice for brewers puts it, there are "four pillars" of intellectual property potentially available: patents, trademarks, copyrights, and trade secrets.<sup>10</sup> I asked interviewees about a fifth category: contractual control, which pertained to information flow as well as collaborations such as joint uses of beer brands and brewery resources. Breweries could seek utility patents for

---

9. Several interviewees (roughly a quarter) describe disputes they have had with national or craft brewers outside Seattle, thus providing broader relevance. Furthermore, accounts of growing trademark litigation nationally supplement my data. Indeed, if anything, the problem is likely to intensify, as others in the field have noted. See Kanach & Christopherson, *supra* note 2 ("[T]he number of disputes is likely to increase with thousands of existing and planned breweries (not to mention other beverage producers) fighting for an increasingly small pool of quality names."). Additionally, there are now 5,300 craft breweries in operation and another 1,500 planned, and these compete for trademark rights with wineries (10,000 in the U.S. today) and distilleries.

10. Scott Garrison, *Protecting Your Brewery's Intellectual Property*, MORE BEER!, [https://www.morebeer.com/articles/Brewery\\_Patents\\_Trademarks\\_Copyrights](https://www.morebeer.com/articles/Brewery_Patents_Trademarks_Copyrights) (last visited Apr. 14, 2021) (on file with the *University of the Pacific Law Review*).

equipment or processes, design patents for original and ornamental designs associated with the beer, or plant patents for new strains of hops; trademark protection for brand names, or sometimes beer names; copyright protection for logos, labels, and tap handle designs; and trade secrets, in practice and through contracts. Each area could be developed into its own offshoot and extended discussion, but all will be considered briefly in keeping with the larger purpose of providing an overview. Trademark law's role in craft brewing deserves further discussion that is beyond the scope of this Article.<sup>11</sup>

The original article relays the results of questions that asked interviewees about practices and habits related to originality, collaboration, exclusive control, sharing, and secrecy. These were designed to collect evidence of behavior that may map onto the IP system in ways that confer legal rights in the products and goodwill associated with efforts in the craft brewing industry. In addition to asking questions about craft brewers' practices and habits, I also asked questions about attitudes and beliefs. A set of questions sought to uncover what mattered to those in Seattle's craft brewing community, and I probed issues like pride and sense of ownership in their product; assessment of risk to their interests and hard work if those were undercut by competitors; and understanding of the law as a force that might make a difference for them, for better or for worse. Additionally, I asked about a paradigmatic pair of hypothetical instances of discovering a possible infringement. I varied the scenarios depending on the interviewee—orienting the question to the function they played at a brewery as well as the depth of their experience in industry and their market position, since those made the questions quasi-unanswerable when not tailored to the speaker.

The two primary hypothetical scenarios included learning that another craft brewery copied the interviewee's brand, trade dress, or name, and discovering that a departing employee took recipes or other information without permission. After the interviewee had answered, I asked whether their answer would change if the alleged infringer were a competitor employed by "Big Beer," or more specifically, Anheuser-Busch InBev ("AB InBev"). The interviewees provided rich (often colorful!) responses that suggested they may think bimodally about their interests and rights. Whether their actions follow suit cannot be adduced on the basis of my data, but it was clear that almost all spoke in a way that reflected a collectivist rhetoric and culture of oppositionality (a constructed "us"—craft brewers—against a constructed "them"—Big Beer). If subsequent scholarship

---

11. Trademark law merits greater focus and a deeper dive, for reasons Section II.D discusses; I return to trademarks' role in craft brewing in a separate standalone article as noted *supra*, note 5. For additional treatment of the topic, see, e.g., Tracy Jong & Luis Ormaechea, *Trends to Note in Alcoholic Beverage Trademark Law That Can Impact the Decision Making Process for Businesses at Critical Points in the Alcoholic Beverage Product Life Cycle*, 12 BUFF. INTELL. PROP. L.J. 19 (2018); Kanach & Christopherson, *supra* note 2; Drew Thornley, *Litigation, Not Collaboration: The Changing Landscape of Trademark Disputes in the Craft-Beer Industry*, 21 MARQ. INTELL. PROP. L. REV. 187 (2017); Patel, *supra* note 2; Winder, *supra* note 2; Palanca, *supra* note 2; Spencer T. Wiles, Note, *The TTAB Should Drink a Beer and Relax: Implications for Trademark Consent Agreements in the Craft Brewing Industry After in Re Bay State Brewing Company, Inc.*, 74 WASH. & LEE L. REV. ONLINE 103, 105 (2017).

revealed that these attitudes do translate into observable patterns of legal actions—namely, that craft brewers more commonly forbear from taking legal actions against other craft brewers and seek the maximum possible legal redress against Big Beer—then IP theorists should take note. If entity-driven and identity-focused enforcement continues, it may be worth considering policy-relevant modulations to how IP laws can and will have impact in practice, whatever theorists or policymakers might otherwise imagine.

#### A. Patents

Asking my interviewees about patents was unquestionably the line of inquiry that produced the fewest affirmative results in the sense that many had nothing to say about patents or no experience seeking, enforcing, or licensing patents. I asked interviewees whether they had ever filed for a patent for any aspects of their work, or whether they would consider doing so. The question was not as farfetched as it might have seemed, given that many of the people interviewed had come from corporate jobs at entities where patents were sometimes (or frequently) filed, given the scientific background of some of the interviewees, and given the extent to which nearly 100% of interviewees reported continuing to conduct research through reading and experimentation. One brewer had taught high school science for years, several had worked professionally in various forms of engineering and mentioned filing for patents in their earlier careers, one was working on a Ph.D. in science, and several without those credentials could hold forth at length about the scientific processes involved in brewing processes. I imagine most could have, but the conversations did not always remain, for pages of transcribed text, on yeast colonies and strains as they did in that one case.<sup>12</sup> Still, no brewer or industry participant reported having filed a patent. Few reported any interest in doing so even if they believed it were possible, and skepticism characterized all of the responses on this issue. One admitted if it was possible to get a patent, he would consider doing so, but he had to be pressed pretty hard to get to the idea that anything at all connected with his brewery *could* be patented.<sup>13</sup>

Brewers did sometimes discuss processes, devices, or modifications of various kinds that at least plausibly might be patented. In other words, some interviewees engaged in activity that, setting aside doctrinal limits on patentability, could be characterized as *potentially* creating patentable subject matter. For example, brewers engaged in experimentation with biological and chemical processes—whether through novel kinds of fermentation, cultivation,

---

12. Interview with Confidential Source #8, (July 3, 2017) (notes on file with the author).

13. Interview with Confidential Source #19, (Aug. 25, 2017) (notes on file with the author). This also came from a brewery in which part of the ownership or management team (which I describe in purposely vague terms to protect anonymity) had experience in legal practice, suggesting greater familiarity and perhaps comfort with legal tools.

and hybridization of yeast cultures, or other mechanisms for infusing flavor into beers.<sup>14</sup> Some of the methods sounded, even to the ears of this non-brewer whose IP expertise is not in patent law, clearly non-patentable because they were obvious or not novel or both. One brewer put it this way: “Yeah, we can’t really patent—I don’t think we have anything to patent.”<sup>15</sup> But some techniques were less clearly non-patentable. In some industries, the mere possibility of patentability can drive investments or make or break start-ups. Craft brewing is clearly not such an industry.

Generally, to the extent brewers interviewed were modifying or tweaking equipment for their purposes, they were doing it to make better beer or to save money or space, not to create a product they can use for a separate licensing stream or from which to reap revenues.<sup>16</sup> When asked about whether they would mind if someone copied an innovative device, brewers were often inclined to be flattered by and generous about the copying. One told me that he believed he was not in the manufacturing business. Paraphrasing him helps abstract up to a notion I heard echoed in other interviews: “We make beer, not stuff.”<sup>17</sup>

There was another, subtler reason in some of the explanations, too. Patenting seemed to sound somewhat off-putting in the value system of craft brewing. Unless brewers were contemplating selling devices or moving into a market in which the process or the thing to patent *was* the product, it is not what most wished to do.

There are examples of innovations, nationally, whose creators set out to innovate a product or process, such as the Crowler;<sup>18</sup> the “hop torpedo”;<sup>19</sup> and the PicoBrew, a device similar to a Keurig-brand coffee maker meant to revolutionize and simplify the home-brewer’s experience of beer whose startup has now failed.<sup>20</sup> These are not usually the province of the “small,” “independent,” and “traditional” brewers that make up the craft brewing industry as the Brewers Association (“BA”) defines it.<sup>21</sup>

---

14. Interview with Confidential Source #1, (Mar. 20, 2016) (notes on file with the author); Interview with Confidential Source #8, (July 3, 2017) (notes on file with the author).

15. Interview with Confidential Source #9, (July 3, 2017) (notes on file with the author).

16. Interview with Confidential Source #5, (Mar. 9, 2016) (notes on file with the author).

17. This is a paraphrase from Interview with Confidential Source # 5, (Mar. 9, 2016) (notes on file with the author).

18. *The Crowler*, BALL, <http://www.ball.com/na/solutions/markets-capabilities/capabilities/beyond-beverage-cans/crowler> (last visited Apr. 14, 2021) (on file with the *University of the Pacific Law Review*).

19. Ray Latif, *Torpedo: How Sierra Nevada Turned a New Package and a New Style into a Remarkable Weapon*, Brewbound (Sept. 12, 2013), <https://www.brewbound.com/news/torpedo-how-sierra-nevada-turned-a-new-package-and-a-new-style-into-a-remarkable-weapon> (on file with the *University of the Pacific Law Review*).

20. Michael Wolf, *Rest in Peace, Pico Brew*, THE SPOON (Apr. 30, 2020), <https://thespoon.tech/rest-in-peace-picobrew> (on file with the *University of the Pacific Law Review*) (describing the company as having acquired “quite a decent patent portfolio around automated home brewing as well as in other areas such as home distilling”).

21. *Craft Brewer Definition*, BREWERS ASS’N, <https://www.brewersassociation.org/statistics-and-data/craft-brewer-definition/> (last visited Apr. 14, 2021) (on file with the *University of the Pacific Law Review*).



An exception may be illustrative in proving the rule. The United States Patent and Trademark Office (“USPTO”) recently highlighted a brewery that sought a patent, and then also a trademark, in connection with a device used for adding hops to a beverage.<sup>22</sup> According to Port City Brewing’s co-founder, Karen Butcher, “The strategy of patenting the Hopzooka wasn’t to make money necessarily. It was a recognition of the level of innovation that it brought.”<sup>23</sup> Port City Brewing appears to have sought the patent, therefore, as part of an overall branding strategy—that is, more in line with its trademark goals than any true patent-forward strategy. Indeed, the USPTO celebrated this decision as “an important tool in the brewery’s marketing strategy. The name itself is a registered trademark and branded with an iconic label, which is placed on packaging to alert customers they’re drinking beer that has undergone a quality improvement process.”

Consistent with this emphasis on elevating branding and downplaying the exclusivity conferred by the patent itself, the brewery allows a no-cost license in exchange for seeking permission and providing attribution.<sup>24</sup> Karen Butcher’s husband and co-founder, Bill Butcher, justifies it in the collectivist rhetoric of the craft brewing industry: “If there’s better quality beer in the marketplace, that’s good for everybody.” Butcher’s rationale echoes a common rhetorical refrain in the industry, the notion that “a rising tide lifts all boats.”<sup>25</sup> Whether the logic merely serves public relations goals or actually influenced the Butchers’ actions, two things are clear: the patent was largely beside the point, and the average craft brewer would have been unlikely to see this opportunity or be able to bring it to fruition.

The USPTO itself noted that “Hopzooka® melds both trademarks and patents in a potent IP strategy *unique* within the brewing industry.”<sup>26</sup> Then again, the brewery launched with benefit of Karen’s prior career as a trademark attorney, which further underscores the exceptionalism of this particular example.

The attitudes expressed in my twenty-two interviews cannot prove that craft brewers do not seek patents or are disinterested in them, but the attitudes find support in external evidence such as this unusual case of a craft brewer’s patenting scheme, as well as in the common-sense explanation offered by the practical logistics of pursuing a patent: brewers lack resources and time, and the

---

22. Port City received U.S. patent no. 9,303,241 for an “Apparatus, system and method for adding hops or other ingredients to beverage.” *Brewing the Brand*, USPTO (Oct. 15, 2019, 5:24 PM), [https://www.uspto.gov/learning-and-resources/journeys-innovation/field-stories/brewing-brand\\_\(on file with the University of the Pacific Law Review\)](https://www.uspto.gov/learning-and-resources/journeys-innovation/field-stories/brewing-brand_(on file with the University of the Pacific Law Review)).

23. *Id.*

24. *Id.* (“Though the Hopzooka is patent-protected, Port City offers a no-cost license to any brewery wanting to use the process to improve their own beer, so long as their packaging or signage attributes ownership of the process to Port City.”)

25. Said, *supra* note 1, at 359–60.

26. *Brewing the Brand*, *supra* note 22 (emphasis added).

patent system is notoriously expensive and time-consuming. Many brewers have not yet even sought trademarks (which are cheaper, faster, and much easier to get); the idea of patents is correspondingly much more daunting in terms of effort and cost. Greater uncertainty also attends patent prosecution, and several interviewees were aware that it would take a long time to see the benefits of any such action. For the start-up culture of many small breweries, especially in Seattle where breweries are generally smaller and locally scoped, a longer-term protection on the federal scale is simply not of interest, or at least not a priority when compared with trying to remain in business or even grow in the immediate months and year ahead.

### *B. Copyright*

Asking interviewees about copyright law led to a bifurcated conversation: there were discussions of copyright in recipes (or the lack thereof) and copyright in merchandising and designs associated with service and marketing of the beer and brewery. I asked what they would do if they perceived that someone had copied their work product. And in so doing, I invited them to consider whether they had any copyright protection, either for artwork or non-functional designs associated with their brands or in choices pertaining to their recipes. Most had not registered any copyrights, and that question would not have been a helpful starting point since copyright protection arises upon fixation, not registration. Enforcement does depend on registration, but the idea was to get a sense of what they understood about their work and its status under IP law.

On the one hand, interviewees were receptive to the idea of copyright in their merchandise, logos, tap handles, and labels, though most interviewees had opted for trademark, if anything. Interviews showed that some breweries took time and effort developing creative designs in connection with their beer. A thriving art market in beer labels supports the interview evidence regarding creativity in designs for beer labels. The global market has seen an explosion of talent and interest in this art form, and artists' work is clearly protected through copyright—so long as it meets requisite originality standards—even when plastered onto a beer bottle or used to sell same.<sup>27</sup>

On the other hand, interviewees were resoundingly and unanimously negative when asked about copyright in their recipes. In one case, merely getting an interview required an exchange via email about whether there was any point to discussing IP in connection with beer since they were sure there was none in craft brewing! Interviewees informed me that they either supposed, or were certain, that recipes for beer are not copyrightable.

It was notable that interviewees could articulate the risk to other brewers

---

27. See Tony Naylor, *Brew Period: The Craft Beer Labels That Are Works of Art*, THE GUARDIAN (Sept. 3, 2017), <https://www.theguardian.com/lifeandstyle/2017/sep/03/brew-period-craft-beer-labels-works-of-art> (on file with the *University of the Pacific Law Review*).

should recipes become unusable because of copyright and that they had strong intuitions that were often descriptively aligned with copyright doctrines. For instance, they understood that brewing recipes could not, for the most part, be copyrighted because: there was nothing new in what they were doing (i.e., a lack of originality); or because there were only a set of basic procedures at issue and limiting access to those could make it difficult or inefficient to continue brewing (i.e., functionality and merger grounds). A number of them also rejected the idea of copyright on principle: a commitment to sharing recipes recurs as a refrain, even if brewers mean different things by “sharing.”<sup>28</sup>

Also, many brewers endorse copying: my interviewees referred to it as a necessary and valuable starting point, perhaps working backwards to reverse engineer a favorite beer (or experimenting by adding to an existing beer). Some brewers described starting to create a new beer by beginning with a bottle of someone else’s beer or starting with the yeast in the bottom of a just-enjoyed bottle, thus literally replicating constitutive parts of someone else’s beer.<sup>29</sup> Interviewees used the language of building blocks in ways similar to the rhetoric of improvement in IP scholarship and judicial opinions, in fact. Because so many brewers are autodidacts, learning their craft through their own experiments and research, copying plays a fundamental and constitutive role in professional development and in advancement of the field overall.

Beyond that, there exists a view that beer is impervious to copying.<sup>30</sup> There are weak and strong forms of this claim. The weakest claim is that if given the general outline of a recipe, someone else cannot recreate it perfectly anyway, which suggests that there is no point in protecting against copying and provides one possible explanation for brewers’ openness. Yet when I followed up for more detail, it emerged that some people mean they would share a list of ingredients or specify the hops used but not provide the exact amounts used; some would provide the full ingredients and amounts but not specify the techniques, temperature, fermentation time, and so on. The variability here shows that many brewers withhold some information even while ostensibly sharing, perhaps suggesting concern over exact copying should full information be made available.

The strongest form of this claim is that beer will not be identical even if the exact recipe is carried out with the same instructions and, in theory, the same techniques because equipment is different and space is different. Using the same

---

28. The terms described recall the sharing of recipes chef-to-chef, but subject to certain norms, in the study of copying and IP norms in French cuisine. Emmanuelle Fauchart & Eric Von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 *ORG. SCI.* 187, 192–94 (2008).

29. Interview with Confidential Source #1, (Mar. 20, 2016) (notes on file with the author); Interview with Confidential Source #7, (June 27, 2017) (notes on file with the author); Interview with Confidential Source #14, (July 21, 2017) (notes on file with the author).

30. Interview with Confidential Source #12, (July 19, 2017) (notes on file with the author); Interview with Confidential Source #16, (Aug. 2, 2017) (notes on file with the author); and Interview with Confidential Source #17 (Aug. 2, 2017) (notes on file with the author).

equipment in a differently configured brewery will, according to these brewers, make a different beer.<sup>31</sup> One interview provides a detailed explanation of how at each step of the process a brewer can inject subtle differences in the final product. In addition to the choice among kinds of hops, yeast, and water, all of the following can change the final beer: the selection of grain and malts;<sup>32</sup> the coarseness of the grain crush;<sup>33</sup> the heat source (infusion only versus a steam-jacket, electric, steam, direct fire); the means of spinning the grains; and the length of fermentation.<sup>34</sup> All of these differences can arise with two beers bearing the same style name and, in some cases, the same basic ingredients and recipe.

Brewers are quite emphatic about beer's imperviousness to copying, whether they endorse the strong or weak form. It may be perfectly accurate as a statement about brewing: I lack the technical knowledge to refute the claim, and I have spoken with so many knowledgeable brewers, both on and off the record, who hold this belief that I have no reason not to defer to them. If it is true, though, it is difficult to square with the idea of cloning beers, which is, as mentioned earlier, not just one of the phases of development in a brewer's gaining knowledge but also a challenge that homebrewers set for themselves—cloning and releasing recipes of their favorite beers.<sup>35</sup> Clones allow people throughout the country to brew their own copies of beers from far-flung places, thus giving them access to beers that are otherwise unavailable to them. The very idea of a clone is that it can stand in for another beer, which seems at odds with the imperviousness claim.

One wonders whether part of what makes beer impervious to copying is that the brewer who makes a beer has extremely subtle nuances in their technique—assuming all other factors are the same—or whether an implicit personality theory is at work. It could be a version of the Hegelian idea that one infuses oneself into a work in some sense but with a different outcome: rather than resulting in property, it results in openness and the need not to worry about protection.<sup>36</sup> Without the original personality carrying out the recipe, the beer

---

31. Interview with Confidential Source #8, (July 3, 2017) (notes on file with the author).

32. Interview with Confidential Source #16, (Aug. 2, 2017) (notes on file with the author) (“Sometimes, people use different suppliers for grain, um, so, you know, for our German lager, there’s a couple—three, four different German maltsters around, or I know people that do really good German-style beers, and they only use malts from Canada . . . Like, right at the grain before it even gets to the glass—you can have a variance in your product.”).

33. *Id.* (“Your grain crush [that is, the coarseness versus fineness, similar to coffee grounds] could have a very drastic impact on the, uh, the characteristics of your beer.”).

34. *Id.*

35. See generally *Craft Beer Clone Recipes: 50 States, 50 Craft Breweries, 50 Recipes*, AM. HOMEBREW ASS’N, <https://www.homebrewersassociation.org/top-50-commercial-clone-beer-recipes/> (last visited May 26, 2021) (on file with the *University of the Pacific Law Review*).

36. See Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 334 (1988). It may be that non-possession, non-use, and non-marking of the beer brewed according to Brewer A’s recipe, but without permission by Brewer B, seems, in the logic of the brewing world, no longer to be Brewer A’s beer. Again, that may also track state of the art brewing science; regardless of the empirical fact value, the rhetoric of brewers interviewed suggests a deeper theme at work.

cannot be identically copied. Another explanation lies in the difference between explicit and tacit knowledge; there is a strong belief that whatever explicit knowledge is passed along, the original brewer likely retains the tacit knowledge to make the beer uniquely.<sup>37</sup> This manifests itself in interesting ways when a brewery is famous for a “flagship” or classic beer, yet the brewery changes hands or a head brewer retires. Several brewers discuss inheriting a flagship beer and needing to maintain it even as the successor-in-brewing-interest. Most of these brewers will confess somewhat sheepishly to tweaking it slightly, either out of necessity (e.g., hop availability changes or consumer preferences alter slightly) or, even more sheepishly, because they prefer it slightly better their way.<sup>38</sup>

### *C. Trade Secrets and Regulation through Contractual Control*

I asked interviewees about their decisions to maintain secrecy around certain data or process, versus sharing it widely or disclosing it selectively. I also asked whether they used technical or physical measures (such as passwords on a computer or locks on a door or file cabinet) versus contractual provisions (such as non-disclosure agreements or non-competes which are permitted in Washington state).

It is tempting to speculate that widely held awareness of the uncopyrightability of recipes may cause some brewers to turn to secrecy. Juxtaposed with that speculation is another: if beer cannot be copied sufficiently to trigger upset, as is suggested by the imperviousness to copying claims discussed above, one might expect total openness with respect to secrecy about brewers’ recipes and perhaps techniques. Yet that is not exactly the case.

Interviewees describe certain behaviors that reflect efforts to maintain some secrecy. For instance, some interviewees stated that they keep their recipes password-protected or behind actual lock and key if the recipes or logs are kept with pen and paper (and a handful were).<sup>39</sup> Asked who has access to such recipes, brewers and owners generally made clear that the recipes did not circulate. However, these practices do not rise to the level of norms accompanied by clear sanctions. In fact, they are practices that brewers themselves abandon with some frequency. Since trade secrecy law requires significant efforts of maintaining secrecy, voluntarily divulging secrets eviscerates or weakens protection for the secret material. The goal of keeping secrets is in tension, however, with the value

---

37. MICHAEL POLANYI, *THE TACIT DIMENSION* (1967).

38. Interview with Confidential Source #1, (Mar. 20, 2016) (notes on file with the author); Interview with Confidential Source #2, (Mar. 22, 2016) (notes on file with the author); Interview with Confidential Source #21, (Aug. 30, 2017) (notes on file with the author).

39. Interview with Confidential Source #6, (Apr. 22, 2016) (notes on file with the author); Interview with Confidential Source #18, (Aug. 23, 2017) (notes on file with the author). One of the oldest breweries has kept continuous logs for every batch it has brewed, for decades. The Head Brewer describes a long shelf filled with thick binders contained handwritten brewing notes for each batch. Only select employees have access to them. Interview with Confidential Source #3, (Mar. 18, 2016) (notes on file with the author).

of sharing knowledge that is widely celebrated in the craft brewing industry. I identified this commitment as a sharing norm, in fact, whose primary rule was “share what you know, share what you have.”<sup>40</sup> The limit on this norm was an expectation of reciprocity; brewers were not expected to share with those who would not share with them. What differentiates norms from mere practices, after all, are sanctions that can be shown to punish those who violate norms.<sup>41</sup> Indeed, those who did not share generously faced sanctions, such as criticism and exclusion from sharing of resources and information available to others in the group.

One interviewee made the explicit link between sharing recipes and the community’s norms around openness as opposed to secrecy:

*Interviewer:* Are there parts of your beer and your brewing that are secret?

*Interviewee:* No.

*Interviewer:* Have you ever posted your recipes online or shared them or, would you?

*Interviewee:* I haven’t, but I guess I would . . . . To me, the thing about brewing that is unique . . . is that it’s super collaborative . . . . We’re all willing to share and help each other out. Now granted, like I don’t think people are—it’s not as collaborative as people are sharing *all* the recipes. But I do think that there’s a huge amount of technique involved. So even if I gave a brewer our exact recipe, the output would be slightly different, um, because the systems are unique . . . . And like it wouldn’t be terribly different, but it would be different, right? So I guess I’m not super protective [about] recipes.<sup>42</sup>

The interviewee hedges, though, by clarifying that people are not sharing “all the recipes,” and he repeats a version of the weak imperviousness to copying claim: the systems’ uniqueness means even an exact recipe would not produce an identical beer. But then he goes on to say that his own view of recipe-sharing is met, and exceeded, in a large craft brewer from Oregon:

I actually was surprised. One day I went to Deschutes’s website . . . if you drill down, . . . it’s pretty deep on the website, so it’s definitely not on the front page, but there’s a . . . beer geek link. And it’s kinda hidden, right—like it’s one of those secret things. Anyways, they tell you the recipe, but they don’t tell you the percentages of the grains. So they’re

---

40. Said, *supra* note 1, at 394.

41. *Id.* at 390–92.

42. Interview with Confidential Source #9, (July 3, 2017) (notes on file with the author).

like, here's the six things we use in this. And then it literally says, and how you get it, that's up to you.<sup>43</sup>

As this interviewee relays, at the time of the interview, the Deschutes website featured the recipes in a semisecret way (which has since changed). In the industry more generally, some brewers do post their recipes or welcome others to go ahead and make their day by attempting to clone their beer. Deschutes is reportedly known for the fact that it shares its recipes online, and at least one very successful brewery I interviewed said it has done the same.<sup>44</sup> Georgetown Brewing Company—creator of one of the most famous craft beers in Seattle, Manny's Pale Ale—also has its detailed recipe posted online for all to see.<sup>45</sup>

In some contexts, though, the sharing norm seems to trump most concerns over secrecy. Almost all brewers interviewed report that if someone called with a specific question, they would likely answer it fairly openly, aspirations of secrecy be damned. When pressed for why, a range of responses exist. Some brewers report that they would be flattered: several interviewees are early in their careers as brewers and cannot yet imagine being asked for such help.<sup>46</sup> But many reported being more senior and having been asked for help, including in ways that required they divulge some techniques or information ordinarily kept secret.<sup>47</sup> They defaulted to forgoing secrecy when in service of helping a fellow craft brewer. Overall, my interviewees overwhelmingly reported that being helpful and open are key to the community's values as they understand them.

Conditions do exist, however. Interviewees stated that they would likely default to varying levels of openness if requested. But it mattered who was making this hypothetical request. So long as they knew the person personally, or knew the person's reputation, or perhaps so long as they simply understood the reason for the request, they would likely default to openness rather than secrecy.<sup>48</sup> The level of openness varied some, but the responses generally started with partial openness and ended with follow-up questioning, near total openness. The major exception came when asked if they would share as openly with Big Beer:

---

43. *Id.* To find the recipe for a Deschutes beer, go to the website and click on any beer. Each beer is listed with its mix of malts and hops. DESCHUTES BREWERY, <https://www.deschutesbrewery.com>, (last visited May 5, 2021) (on file with the *University of the Pacific Law Review*).

44. Interview with Confidential Source #4, (Apr. 12, 2016) (notes on file with the author).

45. *Manny's Pale Ale*, GEORGETOWN BREWING COMPANY, <https://georgetownbeer.com/beer/details/manny-pale> (last visited Apr. 16, 2021) (on file with the *University of the Pacific Law Review*).

46. Interview with Confidential Source #1, (Mar. 20, 2016) (notes on file with the author); Interview with Confidential Source #3, (Mar. 18, 2016) (notes on file with the author); Interview with Confidential Source #6, (Apr. 22, 2016) (notes on file with the author); Interview with Confidential Source #8, (July 3, 2017) (notes on file with the author); Interview with Confidential Source #13, (July 20, 2017) (notes on file with the author).

47. Interview with Confidential Source #4, (Apr. 12, 2016) (notes on file with the author); Interview with Confidential Source #6, (Apr. 22, 2016) (notes on file with the author).

48. Interview with Confidential Source #15, (July 31, 2017) (notes on file with the author).

- Interviewee:* What happens if the person who calls wanting your help is—or not even help, just wants your recipe and info is from AB-InBev?
- Interviewee:* Yeah, I think my answer would be different, right? If I knew that ahead of time, I would probably be less willing to share.
- Interviewer:* Tell me why.
- Interviewee:* Well, just because of the amount of resources. Like I mean, a fundamental problem with capitalism is that those with the most resources can deliver the most damage [laughter]. So my ability to fight back against an opponent like that would be severely limited and they know that, and they take advantage of that . . . I don't think that they can do what we can do, cause I don't think they can. I don't think they get it. But at the same time, they have very talented people. And they have deep pockets, right—and could like, yeah, lawyer us up to the nth degree.<sup>49</sup>

The interviewee has previously stated he is willing to share what he knows, even if he is not sharing absolutely everything (i.e., “all recipes”). He has committed to the idea that brewers help each other out and described the community as “super collaborative.” But now he adds his unwillingness to help the giant conglomerates who compete with his market, and he clarifies the reasons for this change of attitude: a significant mismatch of resources that would make it impossible for him to defend against an attack by Big Beer which could “lawyer us up to the nth degree.” The norm of sharing information, resources, and assistance comes into tension with the norm against using legal tools and the norm to differentiate between craft brewers and Big Beer, treating the former (as a starting default, anyway) as a friend and the latter as a foe.

Another exception to sharing information freely lies in financial data, which are never shared as far as I have been able to tell.<sup>50</sup> Similarly, work derived from special, “non-brewing” talents such as expertise in software or microbiology is not typically shared.<sup>51</sup> It may be one place interviewees offered evidence of a competitive edge being enjoyed and protected, not shared. “Sweat of the brow” counts here, and special software created to help with inventory and brewing cycles or numbers crunched (e.g., optimizing cell counts) for example, will not be shared.<sup>52</sup> It is not that the information is unavailable through other means.

---

49. Interview with Confidential Source #9, (July 3, 2017) (notes on file with the author).

50. Interview with Confidential Source #16, (Aug. 2, 2017) (notes on file with the author).

51. Interview with Confidential Source #12, (July 19, 2017) (notes on file with the author).

52. Interview with Confidential Source #16, (Aug. 2, 2017) (notes on file with the author); Interview with Confidential Source #18, (Aug. 23, 2017) (notes on file with the author).



Rather, these particular brewers happen to have a special skillset or prior background, and they do not need to buy services that others might have to pay for or forgo. This results in saving costs and appears to stand outside the expectation of regular sharing practices.

I also asked interviewees about contractual means used to regulate information and innovation, including offering departing employee scenarios, and the responses were fairly uniform. A few breweries employ non-disclosure agreements (“NDAs”). However, only one brewery I spoke with had a non-compete, and it was a generous one, in a spirit intended to help both brewery and brewer thrive, divesting the brewer (a part owner) of his share should he go elsewhere.<sup>53</sup> The breweries employing NDAs, or willing to use them once they begin adding employees, typically came from large companies where they had signed them as employees themselves and had perhaps internalized an idea of competition not born in brewing. Whether it will take root and flourish in this community is a separate question.<sup>54</sup> Most brewers and owners I interviewed reported that they expected their employees and brewers—but not their fellow owners—to move, taking their knowledge with them.<sup>55</sup> Multiple interviews describe that as the natural way of things in the brewery industry; people go, taking their knowledge with them, just as they brought their knowledge to you on their way in.

The crux of this was always the relationship, though, and the nature of the departure. Bad faith changed the calculus, as did the target destination: going to start a competing brewery or to work for a competitor in craft brewing was expected and okay. Going to work for AB InBev often prompted a different response.<sup>56</sup>

In one case, the contracts drawn up at the time of founding and incorporation specified best practices in the event of unwinding, including clarifying that property created during employment would remain with the brewery. When asked about this contract, the owner stated that the purpose of all these legal documents was at base to protect the friendship the co-owners brought to the start of this business. The interviewee explicitly states the contract’s purpose is to help prevent future litigation, that is, he uses law only in seeking to avoid law.<sup>57</sup>

Overall, the use of contracts to regulate openness versus secrecy was fairly minimal among those interviewed. A possible explanation lies in the

---

53. Interview with Confidential Source #19, (Aug. 25, 2017) (notes on file with the author).

54. Interview with Confidential Source #15, (July 31, 2017) (notes on file with the author).

55. Interview with Confidential Source #4, (Apr. 12, 2016) (notes on file with the author).

56. Interview with Confidential Source #3, (Mar. 18, 2016) (notes on file with the author).

57. Interview with Confidential Source #16, (Aug. 2, 2017) (notes on file with the author) (“probably the only way if things go bad to save a friendship is to make sure we have everything on paper ‘cause we say, you know, you can’t—at that point, you’re—there’s so much emotion flying around—that you have to say, hey, this is what we agreed to. Remember that. It’s right here. So [the lawyers] helped us kinda craft, like, a . . . you know, if—if an—whatever hits the fan and, uh, we can—we can kind of resolve it—in the most civil way possible.”).

community's skepticism about the cost-to-value ratio of legal tools, as well as their inconsistency with some of the credos and values of the craft brewing community overall. Interviewees report a persistent sense that trust trumps law and that legal mechanisms are often costly, inscrutable, and perhaps poorly tailored to the aims of the actors seeking to engage in some sort of transaction.

One brewery reports an effort to transact with a customer using existing legal forms and reports that they found those useless. They turned to creating their own more informal agreement instead:

We were working with this guy. We were gonna do some contract brewing for him. And we were creating a contract. And he's like, his lawyer gave him a boiler plate thing. And he's like, they just read like wildly adversarial . . . it doesn't speak to the intent behind the agreement, right? . . . And so we ended up just making our own.<sup>58</sup>

Lawyers might be concerned that such agreements, if lacking a legal imprimatur, could be hard to enforce or entirely unenforceable. Without seeing them, it is difficult to say. But the evidence throughout these interviews and in accounts of the industry nationally suggest that informal agreements (or "a handshake") remain popular alternatives or perhaps the dominant way of proceeding, in many cases.

If this reliance on informal norms and trust, instead of using legal tools, is empirically accurate, it could be due to several reasons. The costs of legal counsel, even when using legal forms, is often prohibitive. Many in the brewing industry lack full awareness of the legal consequences that could flow from proceeding without formal legal protections, and thus they are operating with imperfect information. Finally, the culture of collegiality and collaboration celebrated by the BA and often referred to in accounts of the craft brewing industry may cast legal mechanisms as to counter to their culture. Indeed, one of the norms I identified in the community was "avoid formal law."<sup>59</sup> Legal tools create barriers, but they also expose hierarchies when one party is sophisticated (or has counsel) and the other does not. Insisting on a contract can throw a potential deal off, as though one party has shown up with a gun to a knife fight, where law is the gun and the more traditional handshake is simply a knife.

#### *D. Trademarks*

Trademark law was the one area of the study in which interviewees expressed an affirmative wish for legal rights and enforcement. Indeed, some had exercised or been subject to the exercise of the legal tool to enforce their IP rights. Most brewers I have spoken with informally or interviewed are keenly

---

58. Interview with Confidential Source #9, (July 3, 2017) (notes on file with the author).

59. Said, *supra* note 1, at 395–96.

aware of trademark law and believe or know that it might apply to their work. Those that have a trademark have worried about their name's legality at some point and continue to worry about enforcing their rights. Those who have not registered trademarks appear daunted; some report feeling naïve or worried that by sitting on their rights they may lose them.<sup>60</sup> Many feel they ought to do more; but when making decisions about how to spend any excess cash, they report finding higher priority uses, like purchasing new equipment, expanding their space, hiring personnel, or investing in sales and distribution.<sup>61</sup>

Many breweries represented in my interviews do have registered marks in brands, and most of those are federally registered. Some have trademarks in beer names. Many have received requests to discontinue use of a name, both formally (through a letter from a lawyer) and informally (a call or a visit from a neighboring brewer). Some have issued requests, but they are in the minority in my existing data sample. All know how crowded the field is because of having tried to use names (even without registering them) and having discovered their top choice, or top few choices, already taken.

Indeed, all interviewees except for one expressed frustration with the challenge of naming beers, which is consistent with recent empirical scholarship that has established the problems of trademark depletion and congestion.<sup>62</sup> The lone holdout opted to use a different naming convention that made the brewery's beers identifiable through trade dress rather than primarily by name, however, which suggests a kind of circumvention of the problem.<sup>63</sup> Some interviewees attributed the challenge to the crowded registration landscape (where wine, spirits, and beer may compete for the same word marks). Others attributed it to the continued growth in the market where the growing number of entrants makes competition over names even fiercer. Scholars have noted the strain this places on the industry's reputedly collegial culture.<sup>64</sup> Some pointed to the problem of puns: everyone wants to make references to hops or to play off the same jokes and references, and this makes naming, let alone claiming a name for registration, extremely difficult.

Because of the rise of litigation over beer names, the increased competition for names, the ubiquity of naming and branding, and the complex factual evidence the interviewees relayed, the topic requires separate, more detailed

---

60. Interview with Confidential Source #8, (July 3, 2017) (notes on file with the author); Interview with Confidential Source #9, (July 3, 2017) (notes on file with the author); Interview with Confidential Source #12, (July 19, 2017) (notes on file with the author); Interview with Confidential Source #17, (Aug. 2, 2017) (notes on file with the author); Interview with Confidential Source #18, (Aug. 23, 2017) (notes on file with the author).

61. Interview with Confidential Source #12, (July 19, 2017) (notes on file with the author).

62. Barton Beebe & Jeanne C. Fromer, *Are We Running out of Trademarks? An Empirical Study of Trademark Depletion and Congestion*, 131 HARV. L. REV. 945, 950 (2017).

63. I'm deliberately keeping the description vague, again, to protect anonymity of the brewery in question.

64. Stacy Hostetter, *The Privilege of Obscenity: The Slant on Bad Frogs and Flying Dogs*, 12 BUFF. INTELL. PROP. L.J. 99, 99 (2018) ("Beer trademarks have become perhaps the most contentious of battlegrounds in an industry that built itself on a community of collaboration and camaraderie.").

treatment on its own.

### III. CONCLUSION

This Article has offered analysis of twenty-two interviews in connection with participant observations and triangulation of other evidence, including scholarship and news accounts. It has suggested that among Seattle's craft brewers, these interviewees hold a range of views about creation, ownership, exclusive control, sharing, and collaboration, and they also hold a diversity of views about when law or informal measures should be used to protect their work products and processes.

There were numerous overlaps in the interviewees' attitudes towards IP and especially regarding trademarks. By and large, the brewers interviewed reported that they do not avail themselves of IP law as much as the law would permit. They report many reasons for their forbearance or avoidance, such as lack of legal counsel or know how (Interviews #8 and #9) or a marked preference for forbearance (Interviews #7, #14, and #16). Though formal rules exist that could protect brewers through IP law, informal norms appear to shape community behavior among craft brewers as much as, or more than, the law.<sup>65</sup> One simple reason is almost certainly that many craft brewers lack easy access to legal counsel, and they lack resources that would justify prioritizing legal services if lawyers can be avoided. However, the national culture of craft brewing—as reflected in the industry's highly influential trade organization, the BA—also reflects attitudes that litigation is better avoided and that the law and legal tools should be used sparingly.<sup>66</sup>

In addition, Seattle brewers interviewed were largely unified in using a rhetoric of sharing and in displaying behaviors that reflect a collaborative ethos. They tended to shy away from statements of ownership or exclusivity, rejecting the idea that their work was original and struggling as I pressed fact patterns on them to find a situation in which they would claim ownership of something about their beer or brewing. Unsurprisingly, then, their views on IP reflect an anti-property bias that typically inclined them towards not seeking protection through legal means (or even usually through contracts). Trademarks changed the calculus somewhat, which could reflect an emphasis on reaching and pleasing consumers above almost all else. However, the status in trademark is also complicated by the fact that it is the one area of craft brewing in which litigation has occurred and may be gaining in frequency.<sup>67</sup> As noted, further work is

---

65. Said, *supra* note 1, at 389–96.

66. Jenn Fields, *Let's Make Beer Together! Competitors Who Collaborate*, U. DENVER (Mar. 16, 2016), <https://daniels.du.edu/blog/59317-2/> (on file with the *University of the Pacific Law Review*) (citing Julia Herz, the program director for the Brewers Association: "The culture of collaboration is exponential when it comes to small and independent craft brewers — unlike anything I've seen within any other business community").

67. Kanach & Christopherson, *supra* note 2 ("[T]he number of disputes is likely to increase with thousands of existing and planned breweries (not to mention other beverage producers) fighting for an

necessary to tell the full story.

---

increasingly small pool of quality names.”).