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VIRGINIA WINERIES AND VINEYARDS INTELLECTUAL PROPERTY

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Virginia wineries and vineyards have important and valuable assets in their intellectual property. These assets should be properly protected and maintained. Intellectual property generally includes trademarks, copyrights, patents and trade secrets. A summary of these rights is discussed below and will be discussed in greater detail at the November 2009 meeting of The Virginia Wineries Association.

TRADEMARKS

A trademark is any word, name, symbol or device, or any combination of these, used by a person to identify and distinguish his or her goods or services from those manufactured or sold by others and to indicate a source of the goods or services. For example, the name of your wine is a

trademark. It indicates a source of origin, and it is a valuable asset to your business.

Trademark rights are acquired by actual use of the trademark on the goods. This is called a common law trademark, and the trademark owner has rights in the trademark for the actual territory of use.

Trademark owners should register their trademark with the United States Patent and Trademark Office. This provides rights in addition to common law rights and places the public on notice of your trademark. For example, a federal trademark registration provides nationwide protection of your trademark. If you are using your trademark for wine on the East Coast, it may preclude use of the same trademark by another in California or Oregon. This is significant because you do not want another company using your name for wine in other parts of the country because, among other things, it could prevent your use of the name in such regions. Additionally, a federal registration places the public on notice of your winery's trademark and allows use of the ® after the trademark. The federal registration provides additional rights in enforcing your trademark in the event of infringement of your trademark.

In selecting a new name for your wine, winery or vineyard, you should conduct a trademark search to determine whether the proposed trademark is available for use and registration. If you select a name and it is currently being used by another for the same goods, you run the risk of infringing that winery/vineyard's trademark. This can be expensive if you begin printing materials and then have to change your name.

Also, trademarks must be used properly to maintain their value. A trademark is a proper adjective and should be used as such. For example, the words aspirin, cellophane, nylon and escalator were all trademarks at one time. However, because they were not properly used and maintained, they became the generic designations of the goods. Additionally, a registered trademark may be followed by the designation ® and an unregistered trademark by the designation "TM".

It should be noted that incorporation in Virginia under your vineyard name does not provide any trademark rights or any right to use your business name. Similarly, the fact that you have registered your name with the TTB (Alcohol and Tobacco Tax and Trade Bureau) does not provide your vineyard with trademark rights or the right to use your vineyard name. These issues will be addressed further at the meeting.

Additionally, registration of your domain name does not provide any trademark rights. A domain name is primarily an address to reach your Web site, although a domain name may function as a trademark if used as a trademark to designate your goods or services. However, this is not the common situation because domain names include a top level domain designation such as “.com” which businesses may not wish as part of their trademark. Having a federal trademark registration may preclude another from using your trademark as their domain name.

Policing of your trademark and enforcement of your trademark are important. If another is using your trademark or a trademark confusingly similar thereto for the same or related goods or services, they may be infringing your trademark rights. If you become aware of such use, you should contact trademark counsel. Allowing another to use your trademark may cause a loss of trademark rights.

COPYRIGHTS

Copyright protects the form of expression of your materials including text, graphics and artwork. For example, the artwork on your wine label is protected by copyright. Also, any product brochures your winery or

vineyard distributes is protected by copyright. Preferably, your winery/vineyard's written materials should include a copyright notice which includes the word "Copyright" or "©" designation (or both) and the year of first publication and the copyright owner's name, e.g., "Copyright ©2009 Stone Mountain Vineyards."

In entering into an agreement with your design firm, you should ensure that your agreement provides that your winery or vineyard owns the copyright rights in the art and graphics being developed. This may not be the case unless you have the proper agreement.

TRADE SECRETS

Trade secrets cover any aspect of doing business which you maintain confidential and provides you with a commercial advantage. For example, Coca-Cola has chosen to maintain its product formula a trade secret. Customer lists are trade secrets. You should also consider employment agreements with a confidentiality provision to protect trade secrets, including customer lists. You may also wish to consider non-compete provisions in employment contracts for certain valued employees.

PATENTS

Patent protection is probably not as important to your winery or vineyard. However, it is important that you know that if you have a new invention or a new ornamental design or a new plant that it can be covered by a patent. Utility patents cover any new and useful process, machine, manufacture, or composition of matter, or any improvement thereof. Design patents cover any new ornamental design, e.g. a bottle shape. You may also obtain a plant patent for any distinct and new variety of plant, including cultivated sports, mutants, hybrids and newly found seedings. A variant of a grape may be protected.

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The above aspects of intellectual property will be discussed at the November 2009 meeting of The Virginia Wineries Association. Our firm represents The Virginia Wineries Association, the Atlantic Seaboard Wine Association, and several Virginia wineries and vineyards with respect to certain intellectual property rights. If you have any questions concerning your winery or vineyard's intellectual property rights, please contact Ted Breiner, BREINER & BREINER, L.L.C., 115 North Henry Street, Alexandria, Virginia 22314, telephone 703-684-6885, or email tbreiner@bbpatlaw.com.

Please note that the above outline is only intended to be a very general overview of intellectual property rights and is not to be considered legal advice.