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New trademark protection considerations for cannabis/CBD brands

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The 2018 updates to the Farm Bill (the 2018 Farm Bill) have decriminalized products utilizing cannabidiol (CBD). In the short time since being signed into law on December 20, 2018, the U.S. has seen a surge in CBD products that can be utilized for a variety of purposes, including sleep, anxiety and skin conditions. For brand owners in or looking to enter this space—or the related cannabis space in jurisdictions where cannabis is legal—the 2018 Farm Bill has led to significant changes in the availability of federal trademark protection where it was previously unavailable under the Controlled Substances Act (CSA). As the law continues to develop federally and state by state, brand owners in the CBD and cannabis space should consider a trademark protection strategy that will grow with the changing legal environment.

CBD is derived from the hemp plant, which is related to the marijuana plant. While CBD is a component of marijuana, CBD does not on its own cause a "high."[1] The key provision of the 2018 Farm Bill related to CBD as it pertains to trademark rights and protection is the allowance of hemp products like CBD to be introduced into interstate commerce. Use of a mark in interstate commerce is the general standard for federal trademark protection, and this update to the 2018 Farm Bill allows brand owners offering certain CBD-related goods and services to file for United States federal trademark protection where it had previously not been allowed, as sale of such goods would violate federal law.[2]

Trends and prosecution of applications

The United States Patent and Trademark Office (USPTO) has seen a surge in applications filed for marks to be used with CBD goods. Trademark practitioners are finding that this increased number of applications, and perhaps an uncertainty by USPTO examining attorneys on how to treat these applications in view of the new law, has led to a backlog of application processing for CBD-related applications. Where federal trademark applications are usually examined within 3–4 months, there

[1] https://www.health.harvard.edu/blog/cannabidiol-cbd-what-we-know-and-what-we-dont-2018082414476

[2] *Gray v. Daffy Dan's Bargaintown*, 823 F.2d 522, 526, 3 USPQ2d 1306, 1308 (Fed. Cir. 1987); *see* 15 U.S.C. §§1051, 1127.

seems to be a consistent waiting period of well over six months before these applications are assigned to USPTO Examining Attorneys who are particularly familiar with the issue.

In the meantime, just this past May 2019, the USPTO introduced an examination guide specific to examination of marks for cannabis-related goods and services post 2018 Farm Bill.[3] Once applications finally reach an examining attorney, these new examination procedures will likely lead to increased issues and inquiries in office actions so that the USPTO can ensure that the goods listed in the application are in compliance with the 2018 Farm Bill and do not violate the CSA.

Overall trademark protection strategy for the cannabis industry

The 2018 Farm Bill only decriminalizes certain types of products, and does not legalize cannabis or CBD derived from marijuana (i.e., *Cannabis sativa* L. with more than 0.3% THC on a dry-weight basis), and, as such, federal trademark protection is still not available for marks used with these types of goods and related services. But, of course, certain states have now legalized cannabis at the state level, either for medical purposes only or for both medical and recreational use. As such, there has been a surge in cannabis-related brands seeking protection.

Cannabis brand owners should consider a broad trademark protection strategy that evolves with the changing federal and state law. Brand owners in the cannabis space who are not eligible for federal protection should consider state-based trademark filings for those states in which it has entered or plans to enter this space, and they should continue filing in applicable states as the brand grows. Requirements for trademark filings vary by state, including whether or not an application can be filed before the mark is in use in that state. While state filings do not have the same benefits or provide the same statutory rights as federal protection, where federal protection is not available and until/unless federal law changes, state trademark applications that are filed as early as possible in the brand's development are important first steps to protection and are useful for brand enforcement.

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[3] https://www.uspto.gov/sites/default/files/documents/Exam%20Guide%201-19.pdf