Now is the Time to Plan IP Strategies for Industrial Hemp

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The use case for industrial hemp – defined under federal law as cannabis plants or plant parts containing no more than 0.3% THC – has evolved, if not ballooned in recent years. There are hemp-based salad dressings, inks, paints and body care products. Hemp is being incorporated into electrical supercapacitors and bio-fuels. Hemp-derived CBD oil, touted as a tonic for pain and anxiety, is available in grocery stores and cafes across the country. But the question remains: As hemp technology grows more sophisticated, what can innovators in this industrial hemp space do to protect and profit from their inventions? This article provides guidance on IP protections and patent application process as it relates to industrial hemp.

What is the Legal Status of Industrial Hemp in the U.S.?

With the wide range of opportunities for industrial hemp, why is the United States not a leading producer of industrial hemp? In 1970, the Controlled Substances Act (CSA) made it illegal to produce or possess marijuana as a Schedule I controlled substance. Under the CSA, marijuana was defined as all parts of the plant Cannabis sativa L., including industrial hemp, except for certain non-psychoactive parts of the plant including the mature stalks of such plant, fiber produced from such stalks, and oil or cake made from the seeds of such plant. Accordingly, this language banned the growth and production of industrial hemp in the U.S., but allowed U.S.-based companies to import hemp seed oil and other products derived from these exempted non-psychoactive parts of the cannabis plant.

In more recent years, Congress passed the Agricultural Act of 2014 to allow licensed research programs for the growth or cultivation of industrial hemp to be administered by either state departments of agriculture or universities in states where such activity is legal. To

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date, at least 41 states have passed legislation related to industrial hemp, defining hemp and removing barriers to its use, and at least 39 states have allowed for hemp cultivation and production programs. In Kentucky, as one example, more than 200 growers and more than 70 processors or handlers have obtained licenses through a pilot program to develop infrastructure with sufficient capacity to process hemp grown by farmers all across the region, creating jobs and investments within the state. Congress recently passed the 2018 Farm Bill, which removed industrial hemp, or any part of the cannabis plant with a THC concentration of not more than 0.3 percent, from the legal definition of marijuana, thereby nationally legalizing the growth and production of industrial hemp in the U.S.

Can the IP Rights of Industrial Hemp be Protected in the U.S.?

Although the growth and production of industrial hemp was recently heavily regulated by the federal government, the U.S. Patent and Trademark Office is actively reviewing and granting patents related to industrial hemp technology. In fact, the U.S. Department of Health obtained a utility patent relating to potential use of non-psychoactive properties of the cannabis plant to protect the brain from damage or degeneration caused by certain diseases.

What IP Rights does a Patent Holder Have in the U.S.?

A patent grants a patent holder the right, for a limited time, to exclude others from making, using, offering for sale, selling, or importing into the United States the patented invention. In order to be entitled to patent protection in the U.S., an invention must be useful, novel, and non-obvious.

What Types of Intellectual Property Rights Are Available to Protect Industrial Hemp-Related

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Technologies in the U.S.?

There are three types of patents: utility, design, and plant. In general terms, a utility patent protects the way an article is used and works, while a design patent protects the ornamental appearance of an article. A utility patent may therefore protect products made with industrial hemp, chemical compositions of those products, and/or the manufacturing process of making those products. A design patent may protect the aesthetic design of a product's packaging. A plant patent may be obtained by one that invented or discovered and asexually reproduced a distinct and new variety of plant, other than a tuber propagated plant or a plant found in an uncultivated state. The term of a utility or a plant patent lasts for 20 years from the date of filing the patent application, while the term of a design patent lasts for 15 years from the date of grant of the patent.

In 2013, the U.S. adopted a first-to-file patent system, meaning that the right to a granted patent for a given invention lies with the first person to file a patent application directed to that invention, regardless of the date of actual inventive activity. Further, the filing date of a patent application determines the date against which the invention disclosed in the patent application will be tested by the U.S. Patent Office for the statutory requirements for patentability, including novelty and non-obviousness. It may, therefore, be advisable to file a patent application as soon as an invention has been sufficiently developed to support a patent application. If an invention is still undergoing refinement, it is possible to file separate patent applications in a series to capture each version of the invention as it is being refined. For patent applications with limited budgets, this tactic of filing serial patent applications may be carried out in a cost-effective manner using the provisional application process in the U.S. Such a patent filing strategy may be especially worthwhile in the fast-growing field of industrial hemp technology.

In addition to patents, the Plant Variety Protection Act (PVPA) provides intellectual property protection to breeders of new varieties of seeds and tubers. Once granted, a PVPA certificate protects such new varieties of seeds and tubers for a term of 20

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years, or for a term of 25 years for vines and trees. Similar to patents, a PVPA certificate grants its owners the rights to exclude others from marketing and selling their new varieties, to manage the use of their new varieties by other breeders, and to enjoy legal protection of their work. Any of these types of intellectual property protections may be obtained to provide overlapping intellectual property coverage of an industrial hemp related invention.

What Can Frost Brown Todd (FBT) Do For You?

There are many mature and startup companies benefitting from the current pilot program regime poised to take full advantage of permanent hemp legalization. FBT has led the hemp industry's lobbying efforts over the past decade and is recognized as one of the nation's leading law firms in representing hemp clients as they navigate these emerging legal and regulatory frameworks. FBT has also worked with the U.S. Patent and Trademark Office to secure intellectual property rights for hemp clients and has advised hemp-seed clients on issues relating to PVPA. Attorneys in the Intellectual Property Practice Group can leverage their experience in a variety of technical arts, including the chemical and mechanical arts, to provide strategies for protecting your intellectual property rights related to industrial hemp technologies.

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