Obtaining Federal Trademark Protection for Hemp and CBD Products

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Background

While marijuana remains illegal at the federal level, decriminalization of marijuana in over half the U.S. states has created many business opportunities and led to the creation of a multi-billion-dollar industry. Naturally, marijuana-based business owners build goodwill and brand recognition with their trademarks in the minds of consumers and would like to protect this valuable intellectual property. However, use of a trademark in commerce must be lawful under federal law, not state, to be the basis for federal registration under the U.S. Trademark Act.

The Controlled Substances Act (CSA) prohibits, among other things, manufacturing, distributing, dispensing, or possessing certain controlled substances, including marijuana. "Marijuana" is defined as all parts of the cannabis plant and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin. "Hemp" is a strain of the cannabis plant, with lower concentrations of the psychoactive component tetrahydrocannabinol (THC) and higher concentrations of cannabidiol (CBD). Inasmuch as hemp and CBD are chemical constituents of the cannabis plant, federal trademark applications citing hemp or CBD-based products have been routinely denied registration by the U.S. Patent and Trademark Office (USPTO) due to the federally unlawful nature of the underlying activities.

2018 Farm Act

On December 20, 2018, the Agriculture Improvement Act of 2018 (the 2018 Farm Bill) was signed into law, carving out "hemp" from the CSA's definition of marijuana. This means that hemp plants and derivatives such as CBD that contain less than 0.3% THC on a dry-weight basis are no longer controlled substances under the CSA

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and activities relating to these products are no longer considered "unlawful" at the federal level. In response, the USPTO did not issue new guidelines for examination of trademark applications for cannabis and cannabis-related products until May 2, 2019, making for quite the backlog of trademark applications awaiting examination for products presumed to be permissible for federal trademark registration protection under the 2018 Farm Bill.

Trademark Examination Guidelines

The examination guidelines definitively state that the 2018 Farm Bill removes the CSA as grounds for refusal of registration for any applications filed on or after December 20, 2018 that identify (i) hemp or (ii) CBD goods containing less than 0.3% THC. This means that applications filed before December 20, 2018 will be refused due to the unlawful use or the lack of bona fide intent to use in lawful commerce under the CSA, with the reasoning that such applications did not have a valid basis to support registration at the time of filing, as the products would have necessarily violated federal law. The USPTO is making concessions, however, and will allow these applicants to amend the filing date of the application to December 20, 2018 as well as amend the filing basis, if necessary, to ensure that there is no claimed use or intent to use of a trademark at the federal level prior to the 2018 Farm Bill.

Ingestible Goods vs. Topical Goods

Despite the passage of the 2018 Farm Bill, trademark owners should be aware that federal trademark registration is not currently available for all marks used on CBD or hemp-derived products. While the trademark office does not determine the lawfulness of products entered into the stream of commerce, its examination guidelines are informed by other federal statutes, laws, and regulatory agencies. Since the 2018 Farm Bill explicitly preserved the authority of the Food and Drug Administration (FDA) to regulate food and drug products containing cannabis or cannabis-derived compounds, and given the FDA's current stated position on the matter , the trademark office has determined that federal trademark registration of marks for foods, beverages, dietary

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supplements, or pet treats containing CBD is unavailable at this time, even if derived from hemp.

Filing Strategies

As one can imagine, given the previous prohibition on hemp and CBD trademark registrations, there is currently a "land rush" of hemp and CBD trademark applications with the USPTO. For example, there are currently over 2,000 pending applications that recite "CBD" in the goods or services. Any business in the cannabis industry should strongly consider implementing a trademark application strategy as soon as possible to protect valuable marks.

For one, while registrations cannot currently be obtained for ingestible hemp/CBD products, registration is possible for non-ingestible products. For example, marks for use on CBD oil for topical use are registerable, while CBD-based dietary supplements are not. Thus, mark owners who receive a registration for a non-ingestible product or service could argue that ingestible products are in the "natural zone of expansion" for the mark (in the event "ingestible" products are considered available for trademark registration in the future). This argument could be a strong deterrent in preventing others from coming into the market with ingestible products sold under similar marks.

Second, clearance of trademarks for use in connection with hemp/CBD products is likely even more important than ever, given that no applicant can have a claimed priority date (whether actual or constructive) prior to December 20, 2018 – and with over 2,000 pending trademark applications for "CBD" products alone – the fight over who will have actual priority for similar marks could prove to be an exhaustive exercise for any business in terms of legal expense and business disruption.

How Can We Help?

Frost Brown Todd has a dedicated hemp industry team and many of our trademark lawyers have assisted (and are now assisting) businesses in the hemp/CBD industry in securing federal trademark

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registrations for its valuable trademarks.

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