Which Hemp and CBD Trademarks Can be Registered?

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Authors:

Cynthia L. Stewart

Wave of Trademark Applications Filed for CBD-Related Products

On May 2, 2019, the U.S. Patent and Trademark Office (USPTO) incorporated into its trademark examination procedures the 2018 Farm Bill's modifications to the federal Controlled Substances Act.

These changes make it clear that, subject to a significant exception discussed below, the USPTO will register trademarks for hemp and certain cannabidiol (CBD) products because the 2018 Farm Bill removes hemp and low-THC products from the definition of marijuana under the Controlled Substances Act.

This opens the door for the registration of trademarks for CBD products that are used as salves, ointments, skin oils and other products that are ***not consumed***.

Trademarks for foods and supplements using CBD are still not permitted, but there are methods of protection available.

The USPTO examination guide limits the registration of trademarks to goods and services that it deems to be "lawfully" provided in interstate commerce, excluding foods, beverages, dietary supplements and pet treats using CBD that have ***not*** been approved by the U.S. Food and Drug Administration (FDA). (Note that the hemp industry disagrees with the FDA's public guidance on CBD ingestibles.)

However, if a retailer or supplier in the industry sells ***both*** USPTO permitted and non-permitted CBD products, there are significant advantages to registering a trademark for only the permitted CBD products. In addition to the benefits discussed below, a federal registration of a trademark covering the permitted goods will also provide protection for related goods, even if those goods are not listed on the trademark registration. For example, a federal trademark registration for HempCo for CBD salves (which are

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permitted) should allow the trademark owner to block a third party from using HempCo for CBD drops and supplements (which are not currently permitted, according to the FDA).

Trademarks for "generally recognized as safe" products are permitted.

On December 20, 2018 — the same day the 2018 Farm Bill took effect — the FDA specifically approved the use in human food, and the sale of, hulled hemp seeds, hemp seed protein powder and hemp seed oil. Therefore, trademarks for these hemp products may be federally registered at the USPTO.

Trademarks for advocacy groups, trade associations, consulting services, advertising services, and similar businesses are permitted.

Because it is clearly legal for advocacy groups and trade associations to educate the public and advocate for changes in hemp and marijuana laws, the USPTO is willing to issue trademarks to those groups and to others providing services to the legal hemp industry.

Benefits of Registration

Regardless of the uncertainties of the past, NOW is the time to protect CBD and hemp brands by securing a federal trademark registration. The benefits of registration are significant, including:

- A presumption of nationwide rights to the registered trademark for the listed goods/services. Until recently, companies selling CBD products in interstate commerce could not obtain nationwide protection of their trademark. One important benefit of having a federal trademark registration is to reserve the right to expand nationwide using the registered trademark.
- Constructive notice to third parties of a registrant's rights in the trademark. This benefit removes as a defense the argument that an infringer was without knowledge of a trademark.

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- The right to use the ® designation. This designation makes it impossible for a third party to deny a claim of trademark rights, and it provides significant prophylactic benefits.
- The right to file the trademark registration with U.S. Customs to block infringing imports.
- The practical benefit of having a registered trademark show up in trademark searches conducted by third parties who are trying to clear their own trademarks. Clearance is a typical first step for many businesses when deciding on a name for a new product or service.

The Registration & Trademark Clearance Process

It typically takes from 12 to 18 months after filing an application to obtain a federal trademark registration. There are several stages of processing for a trademark application, including the review of the application by a trademark examiner (which occurs from three to six months from filing) and the publication of the application for opposition by a third party after the application has been approved by the trademark examiner.

Trademark counsel can provide guidance on the intricacies of the trademark filing process, such as the requirement that all goods containing CBD be described as containing "cannabidiol derived from industrial hemp and derivatives containing a delta-9 THC concentration of no more than .3% on a dry weight basis." In addition, the first use date, which is required for all trademark applications where the trademark is in use, must be ON or AFTER the adoption of the 2018 Farm Bill (i.e., no earlier than December 20, 2018).

Note, however, that the real benefit of trademark counsel comes from the trademark clearance process that occurs *before* the filing of a trademark application. Trademark counsel will research your mark in advance of filing to evaluate the odds that it will be approved by the USPTO and thereafter be successfully registered. An important part of the clearance process is to identify potentially conflicting pre-existing marks or the lack thereof.

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Register Now

For companies selling CBD and hemp products that meet the USPTO's registration criteria, *now* is a good time to protect your brand! For any questions, contact Cynthia Stewart or any one on Frost Brown Todd's Hemp Industry or Intellectual Property teams.

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