

Trademark Registration for Hemp and CBD Products

Practices

Intellectual Property Law

Intellectual Property Litigation

01.14.2019

Passage of the Farm Bill last December allows for the sale of hemp-derived products under certain circumstances. One set of products that falls under this umbrella are those containing cannabidiol (CBD). CBD is a cannabinoid, a chemical compound found in the cannabis plant, but, unlike the high-inducing THC which also comes from the cannabis plant, CBD is not intoxicating. CBD is believed by some to be helpful with a variety of health issues such as anxiety, inflammation, insomnia and others.

The Farm Bill defines hemp as the cannabis plant in amounts of no more than 0.3% THC. Under the legislation, cannabinoids derived from hemp, such as CBD, are legal and can be transferred across state lines for commercial purposes. However, there are firm conditions on the growth and sale of the hemp used in these products – it must be produced in a manner consistent with the Farm Bill, associated federal and state regulations, and by a licensed grower.

Potential Changes in USPTO Trademark Policy on CBD Products

The United States Patent and Trademark Office (USPTO) is a federal agency and cannot register a trademark for a good or service that is against federal law. In the past several years, as marijuana has been legalized by various states and awareness of CBD has grown, trademark applications covering CBD-containing products have been filed at a fairly steady clip. There are nearly 700 currently pending applications for marks which include CBD in their identification of goods and services. Most of these applications cover oils, tinctures, sprays, capsules, cosmetics and a variety of other goods containing CBD.

Up through mid-to-late 2018, the USPTO regularly refused registration of marks for CBD-related products on the basis that the growing and sale of cannabis is not lawful under the Controlled Substances Act (CSA). Only legal sales can qualify as use in commerce under Section 1(a) of the Lanham Act, the federal trademark statute, and use in commerce is required for registration. Intent-to-use applications were also refused on a

similar basis – an applicant must have a bona fide intent to lawfully use a mark in commerce and this requisite intent cannot not exist if the applicant intends to use the mark with (then non-legal) CBD products. Thus, the USPTO regularly rejected both applications filed based on current use and on those filed based on intent to use.

Starting around mid-2018, however, some Examining Attorneys started to hold off reviewing applications for CBD products for somewhat longer than normal. This could have been in anticipation of passage of a bill such as the Farm Bill making CBD products federally legal under certain conditions. With the signing of the Farm Bill, trademark applications which recite goods legalized under the law will presumably now be examined and refusals under the CSA will either not be raised or will be rebuttable upon explanation of the Farm Bill's legalization of the particular product recited in the application.

Increasing Potential for Registration for CBD Product Trademarks

As the Farm Bill only allows production and sale of CBD products under certain conditions, applicants may consider drafting their identifications of goods in a way which makes clear that the recited products will meet these conditions. For example, specifying that the hemp products contain amounts of no more than 0.3% THC is one potential stipulation that might be included in an identification of goods. Other stipulations might include statements that the products are produced by a licensed grower and in a manner consistent with the Farm Bill and associated federal and state regulations.

A Rush of Trademark Applications for CBD Marks

While it's too early to know how the USPTO will react to the federal government's legalization of some hemp and CBD products, it is now undisputable that, because these products can be legally sold under certain conditions, their associated trademarks should be protectable via federal registration. The time may be ripe to consider filing trademark applications for marks your company anticipates using for hemp or CBD products or for services related to those products. With 700 or so applications already on file with the USPTO for these products, it's clear that hemp and CBD trademarks are being created and filed for quickly.

Sarah Nagae focuses on trademark and copyright law, helping clients protect their business names, brand names, logos, artistic works and other forms of intellectual property. In 2013, she was among the first to become a Board Certified Specialist in Trademark Law in North Carolina.