

Making and Keeping Your Mark: Hemp Brand Protection in a Brave New World

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For North Carolinians, hemp is here.

The federal legalization of hemp grown under state-sanctioned research programs in the Agricultural Act of 2014, combined with the myriad uses of hemp, including cannabidiol (aka, "CBD") oil, has spurred a diverse and vibrant statewide hemp industry. And every level of the process is seeing new market entrants, from plant cloning to licensed growing, to processing of hemp fiber and

extraction of CBD, to the manufacture and retail of an incredibly wide range of hemp products.

In the rush to this nascent market, these entrants often are, and are wise to be, concerned about protecting their brands. But how does one go about protecting the "brand"? Usually, that means protecting the name, the logo, the phrase, or the like, which is best done by registering those items as trademarks. The federal law that governs trademark law, the Lanham Act, defines a trademark as, "any word, name, symbol, or device, or any combination thereof, used in commerce to identify and distinguish the goods of one manufacturer or seller from those of another and to indicate the source of the goods." While trademark rights are acquired based on use alone, trademark registration provides significant benefits in protection and enforcement for the rights holder. A trademark can be either in standard characters or as a design, and the United States Patent and Trademark Office ("USPTO") issues federal trademark protection by use of a federal register of trademarks.

But, in the world of hemp and CBD, it is not as simple as just registering the characters or the design. Marks used in connection with hemp products, including those containing CBD, or hemp-related services can only be registered with the USPTO if the applicant can demonstrate lawful use in commerce. At the federal level, it is important to remember that hemp and CBD are not legal in all 50 states, and even in those states in which there is some legality, it is limited, as we have discussed in prior articles. Unfortunately, given all of the legal uncertainty in the landscape, the USPTO has refused to register numerous trademarks on the federal register that are used in connection with cannabis-based products or services, even legal hemp.

Brand protection strategies should not be abandoned in the face of generalized resistance from the USPTO. Those who take a broad and long-term view of brand protection will find themselves in the best market position in the future. For one thing, it makes sense to proactively search the registry prior to brand development to evaluate what, if any, potential issues could arise with other market competitors. Also, federal

legislative efforts are underway to legalize hemp at the national level, which would clearly and dramatically impact the current federal trademark registration climate. Among other things, prudent industry participants will have their trademark applications well developed and ready to file. In addition to these strategies for federal registration, it also makes good sense to consider state registration for the use of the mark in North Carolina.

Our firm's Agribusiness Practice Group provides full-service legal representation to those in the agricultural community. We represent all types of individuals and entities involved in the hemp and CBD industry and provide them advice across a spectrum of legal issues, from licensure to business organization and planning, to intellectual property protection. We welcome the chance to speak with you about your legal questions and needs.

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