

Trademarks and Hemp-Derived Cannabidiol: Brand Protection for CBD Products

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Cannabidiol (commonly referred to as 'CBD') has been in the news for several years now, due to its touted health and wellness benefits.

This is especially the case since the Agricultural Act of 2018, or AIA, became law in January. As a result of the AIA, hemp-derived CBD is no longer an illegal controlled substance under Schedule I of the federal Controlled Substances Act of 1972 ("CSA").

While the market for CBD products was already expanding before passage of the AIA, investment in the sector is now accelerating rapidly. Many of the businesses processing, manufacturing, and selling CBD products are undoubtedly looking to establish a strong brand identity for their products and to protect that brand from misuse or exploitation by competitors. A major component of brand protection typically involves the registration and enforcement of trademark rights.

Trademarks Generally

Trademarks typically consist of words, phrases, symbols, designs, or any combination of those things, identifying and distinguishing the source of the goods or services of one party from the goods or services of another. Trademarks can include all of the elements that constitute a "brand."

Technically, the term "trademark" is the precise term for a mark used for goods, while "service mark" is precise for a mark used for services. The term "trade name" is used for a mark describing the company or other organization providing the goods or services. Trademarks, service marks, and trade names are very similar, and the terms are often used interchangeably as simply "trademarks."

Trademarks are important to brand protection because the trademark owner typically has the right to the exclusive use of the trademark and the ability to prevent others from using confusingly similar trademarks for the same or similar goods or services. Although registration of a trademark is not required, the principal benefits of being a trademark owner will be limited without the appropriate registration. Registration of a trademark can be sought on a state or federal level, depending on the scope of the trademark use and the goals of the trademark owner.

Trademarks and CBD before the AIA

Many factors have a bearing on the existence, scope, and enforceability of trademark rights. Despite the AIA, the most significant factor in the context of products containing CBD may still be the legality of the product and its associated marketing.

Even before the AIA was enacted and hemp-derived CBD was decriminalized under federal law, producers of CBD and CBD-containing products were filing federal trademark applications with the U.S. Patent and Trademark Office ("PTO") in an attempt to protect their brands. Some of those applications, especially those filed early on, were actually granted. But many of those applications were denied, primarily on two bases. First, as discussed above, CBD was then still an illegal Schedule I controlled substance under the CSA. Second, the sale of CBD in certain products, or in certain ways, was considered to violate the Federal Food, Drug, and Cosmetic Act of 1938 ("FD&C Act"). While the first basis for rejection (illegality under the CSA) has been resolved, the second basis (illegality under the FD&C Act) may still apply depending on the type of CBD product being sold and the associated marketing of that product.

CBD and the FD&C Act

CBD is no longer a Schedule I controlled substance under the CSA. But, the AIA left regulation of hemp and hemp-derived CBD to the United States Department of Agriculture, the Federal Food and Drug Administration ("FDA"), and, if they so choose, applicable state-level agencies. Simultaneous with the passage of the AIA, the FDA issued a non-binding press release that signaled the FDA's intent to regulate hemp and hemp-derived CBD being used to produce food, cosmetic, and dietary supplement products. You can read more about the FDA's statement [here](#).

In February, the North Carolina Department of Agriculture and Consumer Services, Food and Drug Protection Division (the "Division") disclosed its intent to issue warning letters to certain CBD product processors, manufacturers, and sellers. The Division asserts that under the FD&C Act, which has been adopted and implemented by North Carolina, (i) it is illegal to sell any human food or animal feed in North Carolina that contains CBD because CBD is the active ingredient in an FDA-approved drug, (ii) CBD cannot be considered a dietary supplement because of its inclusion in an FDA-approved drug, and (iii) any product that contains CBD and makes health-related claims must be approved by the FDA before sale.

In light of these regulatory considerations, the range and scope of products containing CBD that can be sold legally (or, at least, without ambiguity) under state and federal law is fairly narrow. Likewise, the manner in which those products can be marketed – and the claims that can be made in connection with the products – is also limited by state and federal regulations.

Legality Under the FD&C Act Impacts Trademark Protections

One of the requirements for federal trademark registration is that the trademark for which protection is sought must be lawfully used in commerce. This is sometimes called the "lawful use" requirement. Trademarks applied to goods or services that are sold in violation of federal laws, such as the FD&C Act, are generally denied federal trademark protection because they violate this lawful use requirement.

The flood of CBD-related trademark applications into the PTO since enactment of the AIA, coupled with a

growing public understanding of the regulatory challenges that impact the CBD industry, undoubtedly means that PTO examiners are on the lookout for products or marketing that violate the FD&C Act. Where a trademark application indicates that the product sold may involve CBD, examiners are likely to scrutinize the product and its related marketing (including social media, websites, and other marketing materials), and may request that the applicant goes on record concerning the product's ingredients and method of production. If an examiner's investigation reveals a violation (or purported violation) of the FD&C Act, then the application will be denied.

Even those sellers of CBD products that have already obtained valid trademark registrations for their products should be mindful of these legal issues. Registered trademarks used in connection with products or marketing that are found to be illegal under federal law may be very difficult or impossible to enforce against third parties using confusingly similar marks for similar goods, regardless of whether the user has an existing registration. Such trademark registrations also may be vulnerable to challenge and cancellation by those third parties when trademark enforcement actions are taken against them if the trademark use upon which the registration was issued is found to be unlawful.

Conclusion

The recent decriminalization of hemp and hemp-derived CBD has subjected those substances to extensive regulation by federal and state authorities. Participants in the industry must understand the nature of the products they are selling or producing and the related activities undertaken in their business. By understanding those laws and regulations, businesses can better position themselves to obtain enforceable trademark registrations that protect their brand and build value in a highly competitive market.

Ward and Smith's Hemp Law team has written extensively on these issues. They caution that the legal landscape is dynamic, with major developments occurring rapidly. Until the industry matures and federal and state regulators issue and implement final regulations, it is imperative that cannabis industry participants obtain timely updates and advice from knowledgeable counsel to protect their investments and minimize market risk.

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