



WHAT YOU NEED TO KNOW: THE LATEST ON CANNABIS- RELATED INTELLECTUAL PROPERTY LAWS



AN INTELLECTUAL PROPERTY FIRM



The Agricultural Improvement Act of 2018, aka the 2018 Farm Bill, *removed “hemp” from the definition of marijuana* under the Controlled Substances Act (CSA), effectively making the growth of industrial hemp legal in the eyes of the federal government. This reclassification is of particular importance to those who produce cannabis and cannabis-related products in the United States and wish to protect their intellectual property (IP) rights by registering with the *United States Patent and Trademark Office* (USPTO).

Changing Times

The longstanding position of the USPTO has been that in order to obtain federal registration for a mark, that mark’s use has to be legal under federal law. Thus, prior to this reclassification—even if state laws said otherwise—any cannabis and cannabis-related goods or services were in violation of federal law and therefore disqualified from patent or trademark registration and protection.

“Over the years, Ludwig APC has represented a number of *cannabidiol* (CBD) businesses in their trademark matters,” explains Eric Ludwig, whose California-based law firm specializes in IP and business litigation around the globe. “Until very recently, we have been extremely limited regarding the kinds of intellectual property protections we could seek for them. With passage of the 2018 Farm Bill, we are beginning to see real progress in this area. This is especially important because as more and more states legalize cannabis and cannabis-derived products, we are seeing a sharp increase in the development of related IP and the desire of clients to protect it.”

USPTO Guidance

In May 2019, the USPTO issued *Examination Guide* 1-19 to clarify its position on marks for cannabis and cannabis-related goods and services following enactment of the 2018 Farm Bill. In the guide, the USPTO . . .

- Reaffirmed its refusal to “register marks for goods and/or services that show a clear violation of federal law, regardless of the legality of the activities under state law.”
- Recognized how the 2018 Farm Bill changed the definition for the drug class marijuana, namely the removal of “hemp” from the CSA’s definition of marijuana. Thus, “cannabis plants and derivatives such as CBD that contain no more than 0.3% THC (*tetrahydrocannabinol*, a chemical responsible for much of marijuana’s psychoactive effects) on a dry-weight basis are no longer considered controlled substances under the CSA.”
- Clarified that for applications filed on or after December 20, 2018 (the date the 2018 Farm Bill was enacted), the CSA is “potentially” removed as grounds for refusal of registration, but only if the goods are derived from hemp (as defined).
- Stated that it will continue to refuse applications filed before December 20, 2018 because such applications did not have a valid basis to support registration at the time of filing because the goods (at the time) violated federal law. However, applicants will have the option of amending their filing dates and filing basis to overcome the CSA as grounds for refusal.

Additional Restrictions May Apply

While hemp, as defined by the 2018 Farm Bill, is no longer considered in violation of federal law, there *remain other restrictions* on hemp and hemp-related goods, mainly those items intended for human or animal consumption. Such items are regulated by the Federal Food Drug and Cosmetic Act (FDCA) and are subject to the approval of the Food and Drug Administration (FDA). Examples include hemp-derived foods, beverages, dietary supplements, and pet treats.

“For years, the USPTO has rejected any and all applications for cannabis and cannabis-related intellectual property,” explains Ludwig. “With passage of the 2018 Farm Bill, that stance has softened, but much uncertainty remains. At Ludwig APC, we are well-acquainted with the efforts of the Department of Homeland Security, Department of Justice, and the Drug Enforcement Agency to develop protocols and regulations for the sale and transport of qualifying hemp and CBD products. We recommend that any businesses or individuals operating in this space work with competent legal counsel to help them navigate this complex area of IP law.”

**Protect Your Product. Your Business.
Your Dreams.**

Contact *Eric Ludwig* today for a free, one-hour consultation to discuss whether you need to apply for copyright, patent, and/or trademark protection . . . and how to do it.

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