

2024 Cannabis Trademarks and Branding

January 31, 2024



Based on [recent events](#), it seems likely [marijuana will be rescheduled](#) under the Controlled Substances Act (CSA) sometime this year. While many industry experts have discussed the impacts in recent months, many questions still remain with respect to how the rescheduling of marijuana could impact federal trademarks and state trademarks throughout both the cannabis industry and traditional industries. Despite this uncertainty, one thing is clear: many cannabis brands currently operating in the space need not wait for federal rescheduling of marijuana to take advantage of protections under federal and state trademarks.

Federal Trademark Protection for Cannabis Trademarks

Today, marijuana is categorized as a Schedule 1 prohibited substance under the CSA. Registering trademarks for cannabis brands on a federal level requires registration with the U.S. Patent and Trademark Office (USPTO), which is problematic given marijuana's illegal status under federal law.

Despite this apparent conflict, some trademark classifications may be available now to protect a cannabis company's intellectual property, including its brand name, logo, trade dress, and more. With a little creativity and strategic language, brands in the cannabis industry may secure registrations with the USPTO and avail themselves of federal trademark protection.

One of the primary considerations when registering a trademark at either the federal or state level is the "trademark class" or "trademark classes" in which to register a mark. The list below is a sample of categories in which cannabis brands have successfully registered their marks (in USPTO numerical order):

Class #5: Gummies and Candies

For example, CBD gummies can be included here, but the applicant must include language indicating "Nutritional supplements in the form of oils and gummies, *all containing CBD solely derived from hemp with a delta-9 THC content of less than 0.3 percent on a dry weight basis.*" However, if this is not the actual use, consideration might be given to not listing a CBD product.

Class #25: Branded Clothing and Apparel

Class #29: Nutritional Supplements

For example, CBD supplements may be included with limiting language such as "*containing CBD solely derived from hemp with a delta-9 THC content of less than 0.3 percent on a dry weight basis*". However, if this is not the actual use, consideration might be given to not listing a CBD product.

Class #30: Beverages, Namely Fruit Juices and Teas

For example, CBD teas may be included with limiting language such as "*containing CBD solely derived from hemp with a delta-9 THC content of less than 0.3 percent on a dry weight basis*". However, if this is not the actual use, consideration might be given to not listing a CBD product.

Class #32; IC 032: Beverages, Namely Soft Drinks, Carbonated and Non-carbonated Beverages

May be included with limiting the language. However, if this is not the actual use, consideration might be given to not listing a CBD product.

Class #34: Smoking Materials and Vapes

For example, smokers' articles and accessories, namely, lighters, smoking pipes, cigarette papers, etc.

Class #35: Retail Store and Online Retail Store Services

Class #43: Restaurant and Bar Services

Includes carry-out services for cannabis lounges and cafes as well as deliveries.

Deciding which and how many classes to register a mark for is a strategic decision, and multiple class applications can quickly increase costs. Nevertheless, the classes registered are central to protecting a brand. For example, "Dove" is a well-known, federally registered trademark for soaps, but it is also a well-known, federally registered trademark for chocolate. Both of these federal registrations exist largely due to their specific trademark class registration.

State Trademark Protection for Cannabis Trademarks

Cannabis companies also need not wait for federal rescheduling of marijuana to obtain and benefit from state trademark protections in states that have legalized medical or recreational marijuana.

State registration does not provide the broad protection of filing with USPTO but does offer legal protections with respect to the use of a trademark in that state. The filing requirements differ from state to state, but generally speaking, state-level protections are available as long as the mark is actually being used in that state. Registering in a given state may also create a prima facie argument for trademark protection for use in connection with marijuana in a given region. Registering also establishes the date of first use in connection with legal marijuana if and when the USPTO begins to register federal trademarks for that use.

A Recent Tale of a Trademark Application Rejection

Businesses are well advised to act strategically when seeking trademark registration, regardless of whether the company is plant-touching or ancillary.

In a recent case, the [Trademark Trial and Appeal Board](#) (TTAB) denied registration for an "oil dispenser" after concluding the item was illegal drug paraphernalia. The TTAB looked beyond the company's trademark application and expressly relied on "extrinsic evidence [...] show[ing] a [CSA] violation." The evidence the board reviewed, among other things, included the company's website, marketing materials, and even product listings on third-party websites and an article published on High Times (titled "The Official Dab Dictionary"), which all promoted the use of the product in connection with dabbing. The company's arguments that the product was "not unlawful as identified in the application" and that, even if it was for use in dabbing, it was not a violation of Colorado state law were rejected. The TTAB made clear the CSA's exception for products that are legal under state law was inapplicable to federal trademarks.[1]

The Takeaway

Cannabis brands currently operating in the space need not wait for federal rescheduling of marijuana to take advantage of federal and state trademark protections for cannabis trademarks. If and when the USPTO changes its position on marijuana, there will likely be a race to obtain federal protection, and obtaining state-level protection may lay the groundwork for protection at the federal level.

[1] *In Re Nat'l Concessions Grp., Inc.*, No. 87168058, 2023 WL 3244416, at 2 (May 3, 2023).

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