

CBD Products in the Time of COVID-19: Best Practices for Making Your (Trade)mark

Article By:

Alva C. Mather

In the midst of an unprecedented and unsettling global pandemic, one constant remains: certain entrepreneurial-minded folks will not miss the opportunity to file trademark applications for new “brands” that align with the latest news cycle. COVID-19 is no different. The United States Patent and Trademark Office (USPTO) has experienced a swell of new US trademark applications for COVID-related trademarks, with many of the marks using descriptive terms or phrases that have become commonplace in a shelter-in-place, #wfh and social distancing world.

Unfortunately for the applicants of these pandemic-related trademarks, very few are likely to achieve registration. In many cases, applicants of “news cycle” trademarks are unable to demonstrate the requisite *bona fide* intent to use a trademark, or they never get around to actually using the mark in commerce. In other cases, the USPTO might find a COVID-related trademark to be “merely descriptive” of the applied-for goods and services, or fail to function as a source-identifying trademark. Additionally, when a slew of similar trademarks are filed at the same time, priority and confusion issues are likely arise.

Given the inevitable uphill battle for the registration of pandemic-related trademarks, an interesting test case arises when one of those new trademark applications is filed for use in relation to goods containing cannabidiol (also known as “CBD,” a non-psychoactive derivative of cannabis). Not only would a COVID-themed trademark for CBD products likely face the registration hurdles mentioned above, the USPTO’s latest guidelines ([USPTO Examination Guide 1-19](#)) pertaining to the review of trademark applications listing CBD-related goods and services may present further registration limitations.

With the passage of the 2018 Farm Bill, the federal government removed hemp (and thus, qualifying CBD) from the definition of a controlled substance. As such, the USPTO may no longer refuse registration of trademarks for *certain* CBD goods based on unlawful use in commerce. Nevertheless, under the USPTO’s updated guidelines, other categories of CBD-related goods and services will still cause a trademark application to receive an unlawful use refusal from the USPTO, since federal laws, such as the Food Drug & Cosmetic Act (FDCA), continue to ban foods or dietary supplements containing added CBD. Therefore, trademark applications listing ingestible CBD products such as tinctures, gummies or beverages will still receive “unlawful use” registration refusals from the USPTO.

In short, if you're looking to register a new trademark for your CBD brand: (1) resist the urge to capitalize on the pandemic theme and (2) consult legal counsel to help you navigate the complex grid of state and federal laws that dictate the metes and bounds of trademark protection.

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