

Ben & Jerry's Opposes Marijuana Company's Pending Applications for HALF-BAKED Trademark

Article By:

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Last month, Ben & Jerry's filed a notice of opposition with the Trademark Trial and Appeal Board ("TTAB") against two applications seeking to register the trademark HALF-BAKED for bakery items that include cookies, brownies, and cakes, among other treats, as well as dessert beverages infused with coffee and chocolate. The owner of the pending applications is a marijuana company MJ Munchies, Inc. ("MJ"), which filed the challenged applications on an intent-to-use basis, meaning goods bearing the applied-for HALF-BAKED trademarks are not yet available on the market.

Ben & Jerry's cites its ~20-year-old registrations for HALF BAKED, which cover ice cream, frozen yogurt, and frozen yogurt confections. Ben & Jerry's objects to the marijuana company's applications on several grounds, including that allowing the applications to mature to registration would bring Ben & Jerry's into "contempt, or disrepute."

Likelihood of Confusion with Ben & Jerry's Famous Half Baked Flavor

Ben & Jerry's draws the TTAB's attention to the fact that MJ's proposed mark HALF-BAKED is essentially identical to the HALF BAKED mark covered by its existing registrations. Moreover, Ben & Jerry's takes issue with the fact that bakery and dessert items, such as cookies, cakes, and chocolate beverages, are highly related to its Half Baked-flavored ice cream products.

As a result, Ben & Jerry's alleges that MJ's planned use of HALF-BAKED will cause confusion in the marketplace, namely, that such use will deceive and mislead the purchasing public into believing that Ben & Jerry's is the source of MJ's dessert products. There is a classic likelihood of confusion argument in opposition to the new marks.

Dilution by Blurring

Ben & Jerry's also argues that allowing registration of MJ's HALF-BAKED applications will cause dilution by blurring and harm the reputation of its famed Half-Baked ice cream flavor. Dilution by blurring occurs when a famous mark becomes identified with other unrelated goods.

In this instance, even if MJ plans to use HALF-BAKED in relation to dessert items that are not infused with cannabis, Ben & Jerry's claims it will nevertheless be harmed by the confusingly similar mark's

association with confectionary other than ice cream. That is, MJ's use of HALF-BAKED on dessert products that are unaffiliated with Ben & Jerry's will lessen the uniqueness of its own Half Baked-flavored ice cream in a way that "blurs" the mark from association with only Ben & Jerry's dessert products to those products offered by MJ. Again, this is a standard argument against the registration of a new mark similar to an already-registered mark.

Tarnishment, Disparagement, and "Disrepute"

The somewhat unusual arguments in the Notice of Opposition are that registration of the HALF-BAKED marks could dilute Ben & Jerry's existing marks by tarnishment, "disparage" them, or bring them into "disrepute," without stating what about the pending applications are tarnishing, disparaging, or disreputable. Although the identification of goods covered by the challenged applications includes the limitation, "none of the aforementioned goods containing cannabis or cannabis extracts," a November 2018 [press release](#) describes MJ as the "owner of HalfBaked.com and the Half-Baked brand of marijuana infused edibles and drinks." While Ben & Jerry's does not explicitly allege that the association with marijuana is tarnishing or may "disparage" Ben & Jerry's marks or bring them into "disrepute," it appears that at least some of their objection to the registration of these new HALF-BAKED marks is that they might cause consumers to associate Ben & Jerry's HALF BAKED products with marijuana.

Marijuana Legalization

While the stigma associated with marijuana has waned in recent years, with 18 states having legalized recreational use (including the District of Columbia) and 36 states approving medical use, it still remains illegal for recreational use in a majority of states and under Federal law and retains disreputable connotations in much of society and with many consumers. However, in contrast to these objections, Ben & Jerry's, in a May 2019 [statement](#), publicized its plans to offer cannabis-infused ice cream that contains cannabidiol ("CBD"), an active ingredient in marijuana. Like many companies, Ben & Jerry's is finding itself balancing the opportunities of legalization with the aggressive branding of some new marijuana and cannabis companies.

As cannabis apparently moves inexorably towards legalization, both state-by-state and at the Federal level, businesses need to assess the potential opportunities in the new market, still-existing restrictions (such as the continuing bar to registration of trademarks for products containing THC or CBD), and potential infringements by companies in this new space.

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