

Blog Post

Cannabis Trademarks Redux

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In a case affecting the fast-growing legal cannabis industry, the Trademark Trial and Appeal Board (TTAB or Board) affirmed the United States Patent and Trademark Office's (USPTO) refusal to register two trademarks for smokeless cannabis vaporizers because the goods were seen as unlawful drug paraphernalia under federal law. *In re Canopy Growth Corporation by assignment from JJ206, LLC*, Serial Nos. 86475885 & 86475899 (TTAB, July 16, 2019).

Applicant Canopy Growth Corporation applied to register the marks JUJU RX and JUJU HYBRID for "oral smokeless cannabis vaporizing apparatus for smoke purposes," and similar goods. The examining attorney in each case refused registration based on the absence of a *bona fide* intent to use the mark in lawful commerce because, as the USPTO Examining Attorney saw it, the identified goods constituted unlawful drug paraphernalia under the federal Controlled Substances Act (CSA).

The Board's opinion closely resembles that of a prior decision for the Applicant's predecessor in interest application for similar marks on identical goods. *In re JJ206, LLC*, 120 USPQ2d 1568 (TTAB 2016). Indeed, the Board quickly noted that "[a]pplicant's arguments in these cases mirror the unsuccessful arguments its predecessor made in the appeals of other applications identifying essentially the same goods, for which [the Board] affirmed unlawfulness refusals."

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The Board reasoned that the CSA makes it unlawful to sell, offer for sale, or use any facility of interstate commerce to transport drug paraphernalia. The CSA identifies marijuana as a controlled substance that is unlawful to possess. “Based on this definition and the evidence of record, we find that Applicant’s references to ‘cannabis’ in its identification are to marijuana, as defined in the CSA. Thus equipment primarily intended or designed for use in ingesting, inhaling, or otherwise introducing cannabis or marijuana into the human body constitutes unlawful drug paraphernalia under the CSA.” Since the identified goods were illegal under the CSA, the Applicant could not have had a *bona fide* intent to use the mark in interstate commerce.

Applicant’s main assertion was that it was relying on state marijuana laws to claim that its intended use was lawful. The Board rejected this argument: “[T]he federal CSA is conclusive on the lawfulness issue for purposes of obtaining a federal trademark registration.” *JJ206*, 120 USPQ2d at 1571; *In re Brown*, 119 USPQ2d 1350, 1351 (TTAB 2016).

This opinion clarifies the parameters of the USPTO’s new Examination Guide relating to trademarks for cannabis and cannabis-related goods and services, which was drafted in response to the passage of the 2018 Farm Bill. (Blogged [here](#)). The Examination Guide relaxed examination of trademarks for hemp-based goods, that is, goods derived from cannabis plants and derivatives that contain no more than 0.3% delta-9 tetrahydrocannabinol [THC] on a dry-weight basis. Cannabidiol (CBD) products can sometimes be legal under the Farm Bill. This case shows that the USPTO is monitoring new trademarks in this industry very carefully, and will not approve them if there is any hint that they will be used on cannabis not explicitly approved in the Farm Bill.

Query whether this is good trademark policy? A mark can be used in interstate commerce on cannabis products prohibited by the CSA but

permitted by state law under normal definitions of use in commerce, such as advertising on the internet. It may be time to revisit whether the CSA should be dispositive on the issue of registration, putting aside the issue of whether a lawful local cannabis sale will be challenged by the federal government.

Disclaimer:

Possessing, using, distributing, and/or selling marijuana or marijuana-based products is illegal under federal law, regardless of any state law that may decriminalize such activity under certain circumstances. Although federal enforcement policy may at times defer to states' laws and not enforce conflicting federal laws, interested businesses and individuals should be aware that compliance with state law in no way assures compliance with federal law, and there is a risk that conflicting federal laws may be enforced in the future. No legal advice we give is intended to provide any guidance or assistance in violating federal law.

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