

HAYNES BOONE

Branding CBD and Hemp Products

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Introduction

- Legal status of CBD/hemp products
- Trademark Rights in CBD/hemp brands
 - Federal and state registrations
 - Practical strategies for protection
 - Recent cases
- Marketing Your Brand
 - FTC & FDA guidelines
 - State restrictions on CBD/hemp
 - Social Media
 - Co-branding and Partnership
- Enforcement of Trademark Rights

Destiny Childs x Queen Bey Beauty: a new CBD line

- **Queen Bey Beauty**, a health and beauty company, is launching a new CBD line of products with Destiny, including
 - SINGLE LA-CBD-IES face cream
 - LEMON-AID sparkling water
 - CRAZY IN BUD (FEATURING JAY-Z) beauty cream
- **Destiny Childs** is a musician, designer, and influencer with millions of fans

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Cannabis, CBD, Hemp— what's the difference?

- **Cannabis:** 3 plant varieties with psychoactive properties: *C. indica*, ***C. sativa***, and *C. ruderalis*. Primary psychoactive compound is **THC**.
- **Hemp:** 2018 Farm Bill considers hemp to be the parts of the ***C. sativa*** plants with <0.3% THC by dry weight
- **CBD:** CBD, or cannabidiol, is one of more than 540 phytochemicals found in the *C. sativa* plant; does not produce a “high” like cannabis.
- **Delta-8 THC:** another cannabinoid that, unlike CBD, may produce a high.

CBD and Hemp Products

- CBD oil products use the stalks, leaves, and flowers of the hemp plant
 - Higher concentration of CBD
- Hemp oil products come from the seeds of the plant.
 - Little to no CBD



CBD Is Legal, but...

- Under Farm Bill, most hemp-derived CBD products are legal
 - Must contain less than 0.3% THC
- CBD-infused food and drink still illegal
 - E.g., edibles, dietary supplements
- CBD is not federally regulated
 - FDA has not issued CBD regulations
 - FDA has issued warning letters
 - Some states have issued their own regulations

CBD Is Legal, but...

- Hemp-based CBD laws vary greatly from state to state:
 - All products legal (e.g., SC, TN, TX)
 - No products legal (e.g., ID, SD)
 - No consumables (majority of states)
 - CA recently passed bill regulating CBD dietary supplements
 - VT—allowed except if combined with meat or dairy (special labeling rules for maple syrup)
 - Purity testing (MA) or seller registration (UT) required
 - Age requirements also differ

Clearing a CBD/Hemp Mark

- Queen Bey x Destiny Childs CBD products
 - SINGLE LA-CBD-IES face cream
 - LEMON-AID sparkling water
 - CRAZY IN BUD (FEATURING JAY-Z) beauty cream

Clearing a CBD/Hemp Mark

- Clearance of CBD and hemp trademarks is likely even more important than ever
 - Thousands of pending applications for “CBD” products
 - Priority claims (December 2018)
- Look beyond CBD/hemp products and don’t be cute
 - Established brands have successfully sued CBD and hemp brands for infringement

Restaurant vs Hemp

- Hard Rock Café Int'l, Inc. vs. Hard Rock Hemp, LLC., No. 21-cv-61395 (S.D. Fla. 2021)



Candy vs Hemp

- Wm. Wrigley Jr. Company vs Terphogz, LLC, No. 1:21-cv-02357 (N.D. Ill 2021)



Liqueur vs CBD

- Cointreau Corp. v. Canopy Growth USA, LLC, No. 1:21-cv-05921 (S.D.N.Y. 2021)



Art vs Hemp

- Museum of Mod. Art v. MOMACHA IP LLC, 339 F. Supp. 3d 361, 382 (S.D.N.Y. 2018)



CBD/Hemp and Trademark Office

- USPTO examination guide for CBD and Hemp products

Examination Guide 1-19

Examination of Marks for Cannabis and Cannabis-Related Goods and Services after Enactment of the 2018 Farm Bill

May 2, 2019

I. Introduction

Use of a mark in commerce must be lawful under federal law to be the basis for federal registration under the U.S. Trademark Act. **See generally** Trademark Manual of Examining Procedure (TMEP) §907. The United States Patent and Trademark Office (USPTO) refuses to register marks for goods and/or services that show a clear violation of federal law.

CBD/Hemp and Trademark Office

- CBD and hemp products must meet 2018 Farm Bill requirements
- Cosmetics, topicals containing CBD and hemp oil are generally accepted if the product is derived from hemp with THC concentration of not more than 0.3 percent on a dry weight basis
- Applications for ingestible products (food, supplements, etc) will be denied as unlawful use
 - In re Stanley Bros. Soc. Enters., LLC, Serial No. 86568478 (TTAB June 16, 2020)

Trademark Application Details

- Description must specify CBD items are hemp-derived
 - “all of the foregoing containing cannabidiol solely derived from hemp with a delta-9 tetrahydrocannabinol (THC) concentration of not more than 0.3 percent on a dry weight basis”
 - “none of the aforementioned goods containing cannabis or cannabis extracts”
 - “all of the foregoing goods being lawful under state and federal law”

Trademark Application Details

- Provide written responses to questions such as:
 - Do or will any of the identified goods include or contain CBD?
 - Do or will any of applicant's identified goods include CBD which is derived from, oils, extracts or ingredients from plants other than Cannabis sativa?
 - Upon information and belief, do applicant's goods comply with the Federal Food, Drug and Cosmetic Act (FDCA)?

Filing Strategies

	Pros	Cons
Federal Registration	<ul style="list-style-type: none">• CBD/hemp marks eligible for registration under Farm Bill• Presumptions of validity and ownership• More enforcement options	<ul style="list-style-type: none">• Not all CBD products can be registered (e.g., consumables not allowed)• Applications face more scrutiny / longer processing times
State Registration	<ul style="list-style-type: none">• May be more CBD/hemp friendly, depending on state• Typically, lower bar for registrability	<ul style="list-style-type: none">• Only provides protection for that state; several states can become costly• Contingent on state laws on CBD/hemp

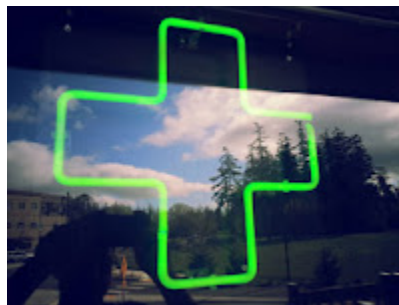
Filing Strategies— Cross Products

- Create a cosmetic product line alongside ingestible CBD foods or supplements with the same name
- Create a non-CBD version of an edible product or supplement
- Create blog or informational website
- Create apparel/lifestyle brand



Filing Strategies—Existing Brands

- Expand an established non-CBD brand with care
- Concurrent lawful and unlawful use may not support an application
 - In re Morgan Brown, 119 USPQ2d 1350 (TTAB 2016)
 - HERBAL ACCESS for *retail store services featuring herbs*



Marketing CBD Products

- CBD marketing must comply with federal and state laws
- Must comply with FTC rules on unfair and deceptive advertising
- Unlawful to add CBD to food, dietary supplements, and pet foods (FDCA)
- Cannot claim to prevent, diagnose, treat, or cure diseases
- *Operation CBDeceit*
 - FTC sweep of CBD companies promoting gummies, lozenges, oils, balms, and other products containing CBD to prevent or treat serious diseases and health conditions like cancer, Alzheimer's, and more
- State requirements vary
 - Restrictions such as age and location

Queen Bey Tagline

- Feel ***OKAAAY*** with Queen Bey
CBD

Examples of FDA/FTC Pitfalls

“...the other health benefits you can experience from incorporating Canna Bees into your diet. . . reducing pain from diseases like multiple sclerosis and rheumatoid arthritis and reducing anxiety and depression.”



“...[c]linical trials and other scientific research illustrate CBD’s usefulness in treating pain, anxiety, inflammation, depression, addiction and many other conditions.”

CLE Code Word

- The code word for this Webinar is: **928 CBD**
- Please email Shana Sanders with the following:
 - **code word (928 CBD)**
 - **your licensing information (State and Bar No.)**
- **Shana.Sanders@haynesboone.com**

CBD and Digital Marketing



marthastewartcbd • Follow



marthastewartcbd New
#MarthaStewartCBD has arrived!

Add a sense of calm in chaotic moments - just like Martha. The one and only @MarthaStewart partnered with Canopy Growth to create a family of flavorful CBD products. Truly a perfect complement to your everyday needs. #FindYourInnerMartha #MarthaStewart #CBD #wellness



83 likes

1 DAY AGO

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CBD and Digital Marketing



DWiiNK
Not Your Average DWiiNK.



DWiiNK.com



Snapchat



- Appears to be most liberal platform for CBD advertising
- No official guidelines/policy for CBD ads
- General rules to follow:
 - Target ads to 18+ audience
 - Make sure the products have THC level below 0.3%
 - Avoid any medical claims

TikTok



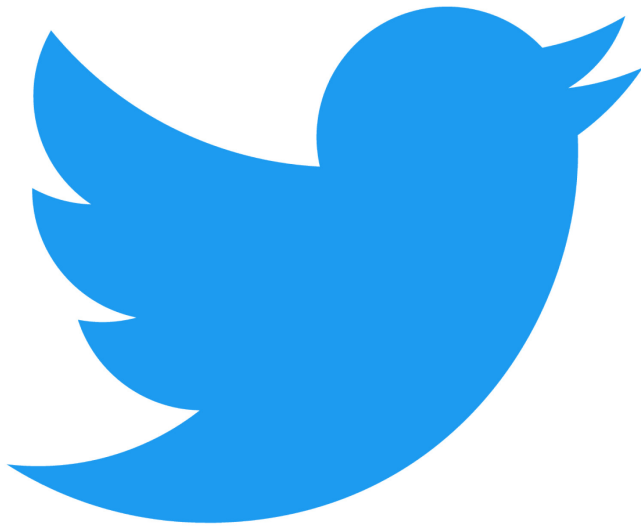
- Appears to be prohibited as “Regulated Goods” in TikTok’s Community Guidelines
 - “Content may be removed if it relates to activities or goods that are illegal or regulated...even if the activities or goods in question are legal in the jurisdiction posting.”
- But CBD companies heavily advertise on the platform
 - <https://www.tiktok.com/@cannabombz/video/6935228204986764550>
 - <https://www.tiktok.com/@cannabombz/video/6948151979306798341>

Facebook/Instagram



- Generally banned under “Illegal Products or Services.”
- Some products/advertising allowed:
 - Topical hemp in ads
 - Ingestible hemp and topical CBD in landing pages
- Ingestible CBD products prohibited

Twitter



- Advertisers must be pre-authorized by Twitter
- Advertisers may only promote non-ingestible, legally derived CBD topical products
- Advertisers may not target certain states (e.g., ID, IA, NE, SD)
- Advertisers may not target customers under the age of 21

Protecting and Defending the Brand

- Seemingly protectible CBD brands can be invalidated by the “grey area” of legality surrounding CBD marks
 - CBD Industries LLC v. Majik Medicine LLC, No. 3:21-cv-00069 (W.D.N.C. 2021)



- Prior use defense may not be available
 - Kiva Health Brands LLC v. Kiva Brands Inc., No. 3:19-cv-03459 (N.D. Cal. 2018)
- Express disavowal at the USPTO may be problematic
 - Woodstock Ventures LC v. Woodstock Roots, LLC, No. 1:18-cv-01840 (.W.D.N.Y. 2018)

Takeaways

- Check state laws where we'll ship to – and from
- We can only sell LEMON-AID with CBD in a few states
- Search TMs in at least the fields of CBD products, beverages, and skincare/beauty
- Could file for LEMON-AID sparkling water (without CBD mention), but it could be refused anyway

Takeaways

- Consider state TM applications for LEMON-AID
- Consider other products or blog/podcast under LEMON-AID brand
- In federal TM applications, describe products with particularity to make clear their legality
- Keep in mind each social media platform's rules

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