HIGH HOPES: CANNABIS TRADEMARKS AT THE USPTO

RACHAEL DICKSON[†]

Much has changed in the cannabis market and legal landscape since California first "legalized" marijuana in 1996 in defiance of the plant's Schedule I status under the Controlled Substances Act. Almost three decades later, the U.S. cannabis industry is estimated to reach a market size of over $45.35 billion in 2025. Although the federal government has backed away from enforcing its drug laws against those following state marijuana laws in recent years, the U.S. Patent and Trademark Office ("USPTO") continues to refuse applications to register federal trademarks with many cannabis goods and services on the basis of "unlawful use in commerce."

This Article seeks to understand how legal and policy changes at the state and federal level have affected the cannabis industry's trademark filing activities at the USPTO. My conclusions are based on an empirical analysis of over 23,000 applications to register trademarks with cannabis goods and services filed from 1996 through today.

This study finds that filing numbers, though largely unaffected by state regime growth alone, increase at any sign of federal recognition. These results paint a portrait of a relentlessly hopeful industry, craving both legitimacy and the ability to protect their companies and consumers with the benefits of federal trademarks.

[†] Rachael Dickson was a Visiting Assistant Professor at the Intellectual Property and Entrepreneurship Clinic at Suffolk University Law School from 08/2022–06/2024. She was a trademark examining attorney at the USPTO from January 2017–March 2021 and served as part of a special work project group that examined applications to register trademarks with cannabis and other controlled substances from May 2019–March 2021. Rachael can be reached at Rachael.M.Dickson@gmail.com. My thanks to Alexandra Roberts, Michael Grynberg, Sarah Burstein, Brian Frye, Hannah Stitt, Luke Zimmerman, Sarah Schendel, Christina Miller, Zvi Rosen, Amanda Levendowski, Lucy Xiaolu Wang, Mary Shapiro, participants at the 7th Annual Texas A&M School of Law IP Scholars Roundtable, participants at Suffolk University Law School Faculty Scholarship Committee events, and participants at the 4th and 5th Annual Suffolk University Law School IP and Innovation Conferences. Special thanks to Robert Mikos for sharing his lawful use TTAB case data with me. I'd also like to thank Nehal Madhani and Bri Van Til of Alt Legal for initially inviting me to speak about cannabis trademarks back in summer 2022 and starting me on the long path which led to this article. Finally, thanks are due to Emily Howard, Alexander Greenberg, Matthew Merolla, Annabelle Hentz, Samuel Alen, and Christopher Van Hoy for their research and citation assistance with various aspects of this article.

INTRODUCTION

On April 1, 2010, medical marijuana was added to the U.S. Patent and Trademark Office's ("USPTO") Trademark ID Manual.[1] This addition of a federally unlawful substance to the manual, which lists acceptable identifications of goods and services for applications to register federal trademarks,[2] thrilled a "state-legal" cannabis industry eager for any sign of federal acceptance, and many raced to file applications to register their trademarks with marijuana goods and services.[3]

Unfortunately, their joy was short-lived. After a journalist asked a USPTO spokesperson about the medical marijuana identifications, they were quickly removed from the manual.[4] At least 86 applications with cannabis or marijuana-related identifications were

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[1] *See* U.S. Trademark Application Serial No. 76703884 (filed June 6, 2011); *see also* TMEP (5th ed. Sept. 2007).

[2] *See* 15 U.S.C. § 1127 (2023) (explaining a trademark is any text or symbol used in connection with goods or services to indicate source or distinguish a user's products from those of its competitors); 74 AM. JUR. 2D *Trademarks & Tradenames* § 1 (2012) (establishing the prerequisites for obtaining trademark rights under the USPTO) ("You become a trademark owner as soon as you start using your trademark with your goods or services. You establish rights in your trademark by using it, but those rights are limited, and they only apply to the geographic area in which you're providing your goods or services. If you want stronger, nationwide rights, you'll need to apply to register your trademark with us. You're not required to register your trademark. However, a registered trademark provides broader rights and protections than an unregistered one."); *see generally What is a trademark?*, USPTO (Aug. 11, 2023), https://www.uspto.gov/trademarks/basics/what-trademark [https://perma.cc/25RE-7XZM].

[3] *See* Trey Malone & Brandon R. McFadden, *CBD, Marijuana and Hemp: What is the Difference Among These Cannabis Products, and Which are Legal?*, THE CONVERSATION (Apr. 1, 2021), [https://perma.cc/H2HD-CNDA] (defining the terms cannabis, marijuana, and hemp according to current US federal law). While the terminology of these terms has evolved throughout history, cannabis is the name for a plant; marijuana is a type of cannabis with a tetrahydrocannabinol (THC) content of more than 0.3% on a dry weight basis; and hemp is a type of cannabis with a THC content of less than 0.3% on a dry weight basis. These definitions themselves are overly simplistic, as cannabis's genetic makeup and changeability when exposed to different variables make the THC levels of any particular plant less predictable and "a lot more nuanced than that" but alas, these are the laws we have to work with.

[4] *See* Justin Scheck, Editorial, *Patent Office Raises High Hopes, Then Snuffs Them Out*, WALL ST. J., July 19, 2010.

filed in this brief three-month window.[5] Shortly thereafter, the USPTO sent out letters offering to refund the filing fees for each application based on these "mistaken ID Manual entries" in exchange for the express abandonment of the applications within 30 days; most of the applicants accepted this offer.[6] No explanation for how or why the medical marijuana identifications were added to the manual has ever been provided by the USPTO.

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[5] *See* USPTO TESS (indicating the results of a search string run on 10/17/2023 for: (marijuana cannabis cbd cannabidiol THC tetrahydrocannabinol)[gs] and `FD > 20100304 < 20100719). This searches for any trademark applications filed between March 4, 2010 (when the medical marijuana procurement services identification was added to the USPTO ID manual) and July 19, 2010 (when the *Wall Street Journal* article on the incident, which mentioned the IDs' removal from the manual, was published) that contained any of the terms marijuana, cannabis, cbd, cannabidiol, THC, or tetrahydrocannabinol. This search only reflects the identifications in these applications as of the date of the search and does not reflect the original IDs the applications might have been filed with; *Compare* USPTO Tess search results, *with* Scheck, *supra* note 4 ("[T]he patent office received more than 250 pot-related trademark applications in the three months after it created the new trademark category.") (I have not been able to verify the 250 number in the Wall Street Journal article with my searches of the US Trademark Register; I have left "hemp" out of my cannabis trademark searches throughout this paper unless otherwise stated, as this generally pulls in hemp fabric or hemp seed milk identifications that are made from non-cannabinoid containing hemp stalks or seeds *See also What is Hemp Fabric: Properties, How its Made and Where*, SEWPORT (Aug. 11, 2023), https://sewport.com/fabrics-directory/hemp-fabric [https://perma.cc/VWN7-2ZLG] (defining "hemp fabric" as a type of textile that is made using fibers from the stalks of the Cannabis sativa plant). These are not controlled substances under U.S. law and are outside the scope of this paper. *See, e.g.*, *Are There Health Benefits to Drinking Hemp Milk?*, WEBMD (Aug. 12, 2023), [https://perma.cc/7TXS-YT7C] (defining hemp milk as "a non-dairy beverage made by blending water and seeds from the hemp [Cannabis sativa] plant."). *See also* TMEP (5th ed. Sept. 2007). As of 01/08/2024, there are thirty-two active hemp IDs in the Trademark ID Manual that have nothing to do with controlled substances, including hemp fabric, netting, and yarn goods, as well as loose hemp for animal bedding and hemp wicks for lighting; *see* Trademark ID Manual (the search results for all identifications containing the word "hemp" are available on Google Drive at https://docs.google.com/spreadsheets/d/1mcOswpDnWHDC1fpGVky4xL4ZoMYEWs5U/edit?usp=sharing&ouid=115780756213216361239&rtpof=true&sd=true [https://perma.cc/NP8H-WCP6]

[6] *See* Letter from Commissioner of Trademarks to Attorney of Record in Trademark Application Serial No. 85049737, USPTO (Sept. 24, 2010) https://tsdr.uspto.gov/documentviewer?caseId=sn85049737&docId=OPC20100924122028&linkId=4#docIndex=3&page=1 [https://perma.cc/Y7A5-FXW2].

Although applications to register trademarks with cannabis goods and services initially declined after this incident, the optimism of cannabis businesses could not be held back for long. Over the next decade, over 16,000 cannabis-related or cannabis-suspected trademark applications would be filed at the USPTO.[7]

This Article seeks to understand how legal and policy changes at the state and federal level have affected the cannabis industry's trademark filing activities at the USPTO. My conclusions are based on an empirical analysis of over 25,000 cannabis trademark applications filed from 1996 through today. [8]

Part I: "Dazed and Confused: Current Federal Law and Policy Pertaining to Cannabis" provides an overview of the current federal laws pertaining to cannabis in the United States and the "state-legal" marijuana regimes that have risen in some form in forty states and the District of Columbia.

Part II: "In the Weeds: The Lawful Use Requirement in Trademark Law" examines the current interpretation of the Lanham Act by both the USPTO and courts to impose a lawful use requirement on trademark applications.

Part III: "High Demand: Trends in Cannabis Application Filings" looks at trends in applications to register federal trademarks with cannabis goods and services over the last three decades. These numbers are compared to historic events in the development of cannabis law in the United States, at both the state and federal levels. This Part also examines the "success" rates of cannabis trademarks with and without attorney representation.

Part IV: "Up in Smoke: The Impact of the USPTO's Approach on a Budding Industry" examines the harms of the USPTO's current cannabis trademark policies on the cannabis industry and cannabis consumers.

I. DAZED AND CONFUSED: CURRENT FEDERAL LAW AND POLICY PERTAINING TO CANNABIS

The marijuana industry in the United States is currently one of the most baffling systems in existence, completely inconsistent with the tenets of federalism and the rule of law. As it stands currently, the possession, manufacture, distribution, and dispensation of marijuana, defined as cannabis with a delta-9 tetrahydrocannabinol ("THC") concentration of more than 0.3% on a dry weight basis, is federally unlawful under the Controlled Substance Act.[9]

Despite this fact, statutes "legalizing" the possession, cultivation, retail sale, and private consumption of marijuana for medical purposes have passed in forty states, four territories, and the

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[7] *See* USPTO TESS, *supra* note 5 (indicating the results of a search string run on 10/17/2023 for: (marijuana cannabis cbd cannabidiol THC tetrahydrocannabinol)[gs] and `FD > 20100304 < 20100719). The use of "cannabis-related or cannabis-suspected" to describe these applications refers to the fact that many identifications containing cannabis terminology have been amended to state that the goods/services do *not* contain or relate to cannabis; the USPTO only requires such a clarification in an identification if the examiner genuinely suspects the goods/services of having some connection to cannabis.

[8] The over "25,000" number refers to a search run on March 2, 2025 on the USPTO's Trademark Search tool using the string GS:(marijuana cannabis cbd cannabidiol THC tetrahydrocannabinol tetrahyrocannabinol) AND FD:[2010-07-01 TO 2025-03-02]. This string searches for any trademark applications with goods/service identifications containing the terms marijuana, cannabis, CBD, cannabidiol, THC, tetrahydrocannabinol, or "tetrahyrocannabinol" filed between July 20, 2010 (the day after the publication of the *Wall Street Journal* article covering the medical marijuana in the ID Manual incident) and March 2, 2025. The actual number of applications retrieved using these search parameters was 25,768. The incorrectly spelled "tetrahyrocannabinol" in the search is included to allow for 315 applications (including 69 registrations) which contain this wording due to a typo in a cannabis trademark form paragraph used by the USPTO.
Note to readers: Since "applications to register trademarks with cannabis/marijuana goods or services" is very wordy, this article will commonly use the less accurate, but pithier "cannabis/marijuana trademark applications" to refer to these applications. I can only hope that this footnote will keep me from getting a lightly pedantic correction from Ed Timberlake of Timberlake Law, who has been dying on this hill for the entire decade plus I've known him.

[9] *FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD)*, FDA (July 16, 2024)
https://www.uspto.gov/trademarks/basics/what-trademark [https://perma.cc/R56A-8FX3]

District of Columbia.[10] Statutes legalizing marijuana possession, cultivation, retail sale, and private consumption for adult-use without requiring proof of medical need have been put into place in twenty-four states, two territories, and the District of Columbia.[11] Marijuana possession and private consumption has also been decriminalized in another ten states.[12]Under the standards of federalism, this situation should not exist. The Supremacy Clause of the U.S. Constitution states the laws of the United States "shall be the supreme Law of the Land," which establishes that federal law takes precedence over state law.[13] However, the federal government, due to a lack of resources and disinclination to prosecute otherwise law-abiding marijuana companies and consumers, has effectively given up trying to preempt states on this issue. The popular movement for marijuana legalization at the state level, based on both disdain for anti-marijuana laws and belief in the health benefits of marijuana, has shown itself to be significantly stronger than the federal government's desire to enforce marijuana bans. Nevertheless, this is a fragile state of affairs, as there are no laws providing enforceable rights or legal defenses to marijuana businesses; a new president or agency head could conceivably change federal policies on cannabis to align with the wording of the Controlled Substance Act, regardless of the size of the cannabis industry.

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[10] *See Where Marijuana Is Legal in the United States*, MJBIZDAILY, https://mjbizdaily.com/map-of-us-marijuana-legalization-by-state/ [https://perma.cc/D4PE-6MMG] (last updated Nov. 4, 2024) (listing the states' legalization of marijuana by year). Note: due to the ever-changing nature of cannabis law, the exact number of states and territories with statues legalizing various uses and sales of marijuana may have changed after the 2024 election and by the time this article is published.

[11] *See id.* Although "recreational use" was used to describe generally available state marijuana regimes for years, in recent years, the cannabis industry has moved toward using "adult-use" to describe non-medical regimes. This term acknowledges that many people who purchase "state-legal" marijuana without a medical license may use it for therapeutic reasons, but do not want to apply for a medical license for one reason or another. For example, current federal laws ban medical marijuana license owners from owning a firearm.

[12] It should be noted that even if a state has statutes legalizing adult-use marijuana, non-medical marijuana may not actually be available for legal purchase. *See, e.g.,* Chris Roberts, *Virginia's adult-use cannabis market stalled indefinitel*y, MJBIZDAILY (Feb. 27, 2023), https://mjbizdaily.com/virginias-recreational-marijuana-market-stalled-indefinitely/ [https://perma.cc/BP7K-ZNXV] (discussing the uncertainty amongst marijuana legalization in Virginia after adult-use marijuana statutes were passed in 2021 but implementing regulation has yet to pass).

[13] *See* U.S. CONST. art. VI, § 2.

1. *Marijuana and The Controlled Substances Act*

The Controlled Substances Act ("CSA"), originally enacted in 1970, created a unified legal framework federally to regulate medical and recreational drugs, whether legally or illegally distributed.[14] Under the CSA, the possession, manufacture, distribution, and dispensation of "marihuana" was criminalized.[15] Before the Farm Bill of 2018, this term included all varieties of cannabis except for some aspects of the cannabis seeds and stalks, which naturally do not contain statistically significant portions of tetrahydrocannabinol or cannabidiol.[16]

The CSA established five schedules of controlled substances. Schedule I substances, according to the Department of Justice ("DOJ"), "have no currently accepted medical use in the United States, a lack of

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[14] *See* 21 U.S.C. § 802.

[15] *See generally* Christopher Ingraham, *'Marijuana' or 'marihuana'? It's all weed to the DEA*, WASH. POST (Dec. 16, 2016, 7:00 AM), [https://perma.cc/D9HM-2KM3] (describing the history of the spelling of "marijuana.") The spelling of marijuana as "marihuana," with an "h," is an archaic version that unfortunately continues to appear in numerous federal regulations. Though the plant and its derivative drugs were called "cannabis" throughout most of history, in the 1930s, advocates for banning the drug began using the colloquial Spanish terms "marijuana" or "marihuana" to exploit prejudice against Mexican immigrants to their own ends. The "h" variant was the terminology used first in the Marihuana Tax Act of the 1930s and the Controlled Substances Act of 1970. *See* Jocelyn Bosse, *Before the High Court: the Legal Systematics of Cannabis*, 29 GRIFFITH L. REV. 302, 302–29 (2020) (providing more detail about the naming of cannabis in the aforementioned context); Angela Chen, *Why it can be okay to call it 'marijuana' instead of 'cannabis,'* THE VERGE (Apr. 19, 2018, 2:54 PM), https://www.theverge.com/2018/4/19/17253446/marijuana-cannabis-drugs-racist-language-history [https://perma.cc/YB3Y-YB5P] (discussing that although "marijuana" has been part of a reclamation movement over the last few years, "marihuana" is rarely used at this point except in direct quotations to laws still containing the spelling); David Hyde, *Stop saying 'marijuana'? Lawmakers say it's racist*, KUOW (Mar. 31, 2022), https://www.kuow.org/stories/stop-using-the-word-marijuana-some-lawmakers-think-so [https://perma.cc/L8FG-C25J] (referring to Washington state's removal of "marijuana" from state law in 2022). Of course, as with many terms with a complicated history, there is some disagreement about how to handle the situation.

[16] *See* 21 U.S.C. § 802(16) (amended in 2014) ("The term 'marihuana' means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.").

accepted safety for use under medical supervision, and a high potential for abuse."[17] Schedule I includes heroin, lysergic acid diethylamide ("LSD"), 4-methylenedioxymethamphetamine ("Ecstasy"), and marijuana. The reasons for marijuana's inclusion in Schedule I, despite contemporary evidence indicating that marijuana was safe and non-addictive,[18] are numerous and complicated.[19]

Schedule II substances are deemed to have a high potential for abuse which may lead to severe psychological or physical dependence but have a currently accepted medical use in treatment in the U.S. Schedule II includes morphine, codeine, hydrocodone, and amphetamine.[20]

Schedule III–V substances are deemed to have a low abuse risk and accepted medical uses in the U.S. This category includes medicines such as ketamine (Schedule III), diazepam, sold under the brand name Valium® (Schedule IV), and cough preparations with low levels of codeine, sold under the brand name Robitussin AC® (Schedule V).[21] The CSA makes it unlawful to manufacture, distribute, dispense, or possess with the intent to manufacture, distribute, or dispense, a

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[17] *Drug Scheduling*, DEA, https://www.dea.gov/drug-information/drug-scheduling#:~:text=Schedule%20I%20drugs%2C%20substances%2C%20or,a%20high%20potential%20for%20abuse (last visited Apr. 12, 2025) [https://perma.cc/T5D4-A6KA].

[18] *See* Mayor's Comm. on Marihuana, *The La Guardia Committee Report: The Marihuana Problem in the City of New York*, N.Y. ACAD. OF MED. (1944), [https://perma.cc/YMY3-QR62] (findings of marijuana usage). In 1944, the Laguardia Committee Report made numerous findings related to marijuana, notably, that the practice of smoking marijuana does not lead to medical addiction, marijuana was not the determining factor in the commission of major crimes, marijuana smoking was not widespread among school children, juvenile delinquency was not associated with smoking marijuana, and in general, the contemporaneous bad publicity over the catastrophic effects of marijuana smoking in New York City was unfounded.

[19] *See* MARTIN A. LEE, SMOKE SIGNALS: A SOCIAL HISTORY OF MARIJUANA 85 (2012) (ebook) (providing a resource on the history of marijuana demonization and how marijuana became so demonized). As is often the case in inequitable and illogical situations, those reasons include racism and bad actors who want more power.

[20] *See* U.S. DEA Diversion Control Div., Controlled Substances by CSA Schedule (2022), [https://perma.cc/XY8X-R3YC] (table showing controlled substances by CSA schedule).

[21] *See* U.S. DEA Diversion Control Div., Controlled Substance Schedules: Marijuana (July 30, 2022), [https://perma.cc/2LAK-2D5Z] (list of controlled substances); *see also id.*

controlled substance.[22] It also lists the potential criminal penalties for violators of the law.[23]

The CSA also applies to "drug paraphernalia," which is defined as "any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing in the human body a controlled substance."[24] The sale, offer for sale, or use of any facility of interstate commerce to transport "drug paraphernalia" is unlawful under the CSA.[25]

2. *The Rise of "State-Legal" Marijuana*

Notwithstanding the lack of legal status for cannabis at the federal level, the "state-legal" medical marijuana movement began in California when a 1996 campaign to put a medical marijuana measure on the state ballot collected over 750,000 signatures.[26] "Proposition 215," as the measure was called, passed with 55.58% of the votes.[27] The campaign to pass Proposition 215 was largely successful because of its focus on patients' rights and compassion, relying on testimonials from patients who used marijuana to alleviate their symptoms and their loved ones who saw the way marijuana helped them.[28]

Despite a few rocky years of medical marijuana in California,[29] by the time the U.S. Supreme Court took up the issue of state-legal, but federally unlawful marijuana in the 2005 case of *Gonzales v. Raich*, nine more states had legalized medical marijuana.[30] In *Raich*, a group

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[22] 21 U.S.C. § 841(1)(a).
[23] 21 U.S.C. § 841(1)(b).
[24] 21 U.S.C. § 863.
[25] *See id.*
[26] LEE, *supra* note 19.
[27] *See California Proposition 215, Medical Marijuana Initiative (1996)*, BALLOTPEDIA (Jan. 17, 2023, 4:54 PM), [https://perma.cc/72HA-KAMB] (defining California Proposition 215).
[28] *See* LEE, *supra* note 19, Ch. 6.
[29] *See supra* note 27 (opining discrepancies in California Proposition 215). A confusing statement in proposition 215 stated that police officers could still arrest marijuana users, but that 215 served as an affirmative defense in court. This led to some thoroughly foreseeable problems.
[30] *See* Gonzales v. Raich, 545 U.S. 1 (2005) (holding state laws permitting marijuana do not prevent federal prohibition); *see also* Avery Koop, *Timeline: Cannabis Legislation in the U.S.*, VISUAL CAPITALIST (Mar. 27, 2023), https://www.visualcapitalist.com/us-cannabis-legislation-timeline-2023/

of medical marijuana users sued the Drug Enforcement Administration ("DEA") after the DEA seized marijuana from a patient's home. The group's argument was that the CSA, as applied to intrastate medical marijuana use, exceeded Congress's commerce clause power. The Supreme Court ruled against the patients, concluding that Congress did, in fact, have the constitutional authority to prohibit the intrastate cultivation and use of marijuana.[31]

Despite this ruling, marijuana legalization continued steadily on, state by state. Ten years after *Raich*, in 2015, 14 more states and the District of Columbia had legalized medical marijuana, bringing the total number of jurisdictions with "state-legal" medical marijuana sales up to 25.[32] In addition, four states had legalized the cultivation and sale of what was then called "recreational" marijuana, but is now generally referred to as "Adult-Use" marijuana.[33]

This increase in "state-legal" marijuana jurisdictions could likely be at least partly attributed to the federal government's decision to pivot away from strictly enforcing federal marijuana laws a few years earlier. In October 2009, Deputy Attorney General David Ogden released a memorandum to US Attorneys noting that the DOJ's main priorities were in prosecuting "significant trackers of illegal drugs, including marijuana," and "[a]s a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance

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[https://perma.cc/V8XU-6CNM] (providing a timeline of cannabis legislation in the U.S.). The nine states that legalized medical marijuana between 1996 and 2005 were: Alaska, Oregon, and Washington in 1998; Maine in 1999; Colorado, Hawaii, and Nevada in 2000; and Montana and Vermont in 2004.

[31] Gonzales v. Raich, 545 U.S. at 9.

[32] Koop, *supra* note 30 (indicating increased state legalization statistics). The 14 states that had legalized medical marijuana between 2005 and 2015 are: Rhode Island in 2006; New Mexico in 2007; Michigan in 2008; Arizona and New Jersey in 2010; Delaware in 2011; Connecticut and Massachusetts in 2012; Illinois and New Hampshire in 2013; Maryland, Minnesota, and New York in 2014; and Louisiana in 2015. The District of Columbia legalized medical marijuana in 2009. *Id*.

[33] *See id.* The four states that legalized recreational, or adult-use marijuana, by 2015 are: Washington and Colorado in 2012; Alaska and Oregon in 2015. The District of Columbia legalized adult-use in 2015 *also* Sophia Solano, *Keychains, QR codes and other 'gifts' people buy to get pot in D.C.*, THE WASHINGTON POST (Apr. 19, 2023), https://www.washingtonpost.com/dc-md-va/2023/04/19/i-71-cannabis-gifting-washington-dc/ [https://perma.cc/2WSC-V3GQ] (discussing Congress's authority over marijuana legalization). However, due to some quirks of the laws in DC, in which Congress has final say over any laws the district passes, it has not actually been able to officially legalize sale of adult-use marijuana. *Id.* Instead, a unique gifting system has developed in DC. *Id.*

with existing state laws providing for the medical use of marijuana."[34] Although this memo emphasized that prosecution of marijuana-producing *companies* (as opposed to individuals) remained an enforcement priority, this was still a step away from the prior decade's strict enforcement of federal marijuana laws.[35]

In 2013, Deputy Attorney General James M. Cole issued a more comprehensive and impactful memorandum that instructed DOJ attorneys and law enforcement to focus their enforcement resources and efforts on people or organizations whose conduct interferes with a number of listed priorities.[36] These priorities included preventing the distribution of marijuana to minors, preventing state-authorized marijuana activity from being used to traffic illegal drugs or conduct other illegal activity, and preventing the diversion of marijuana from states where it is legal under state law to other states. The carefully written memorandum stated that the DOJ has traditionally relied on states and local law enforcement to address marijuana activity through enforcement of their own narcotics laws, and suggested that the DOJ should not focus on states with strong and effective regulatory and enforcement systems addressing the potential threats to public safety, public health, and illegal activity.[37]

Although the Cole Memo did not create any enforceable rights or create any legal defenses to a violation of law (and very specifically said that it did not create these things), it was read by the cannabis industry at large as creating guidelines by which states and companies should abide. It was believed that if companies effectively addressed the DOJ's priorities and abided by state laws addressing those priorities, the DOJ would leave the companies alone to run their own businesses—regardless of federal law.[38] In addition, many state legislators began to use the Cole Memo's priorities as a template for creating their own state-legal cannabis regimes. Although the Cole Memo was formally

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[34] *See* Memorandum from David W. Ogden to Selected U.S. Att'ys (Oct. 19, 2009) (commonly known as the Ogden Memo; providing clarification and guidance to federal State prosecutors regarding authorized medical marijuana usage).
[35] *See id.*
[36] *See* Memorandum from James M. Cole to All U.S. Att'ys (Aug. 29, 2013) (commonly known as the Cole Memo; listing U.S. DOJ measures for federal enforcement of marijuana activity).
[37] *Id.*
[38] *See AG Sessions Rescinds Cole Memo, Roiling Marijuana Industry*, MJBIZDAILY (Jan. 4, 2018), https://mjbizdaily.com/report-sessions-rescind-cole-memo-creating-cloud-uncertainty-marijuana-businesses/ [https://perma.cc/5FVR-UB8N] (breakdown of 2018 congressional session).

rescinded in 2018 by Attorney General Jeff Sessions, federal marijuana prosecution numbers have not significantly changed since its rescission.[39]

The next step in federal acceptance of state cannabis laws was the passage of the first Rohrbacher-Farr Amendment. The 2014 provision in the Consolidated Appropriations Act (often called the "Cromnibus" spending bill) provided that "[n]one of the funds made available under this Act to the Department of Justice may be used, with respect to [states with legal medical marijuana regimes], to prevent such states from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana."[40] Although that Amendment only lasted for the fiscal year, Congress has renewed it every year since its first passage.[41]

3. *The Legalization of Hemp CBD*

In 2018, hemp (cannabis with a delta-9 THC concentration of *less than* 0.3% on a dry weight basis) was removed from the definition of marijuana in the Controlled Substances Act in the 2018 Farm Bill.[42] The impact of this bill was huge, and caused companies to pivot away from a years-long trend focusing on high-CBD marijuana strains (considered particularly helpful for childhood epilepsy and other conditions) toward hemp and hemp products. Naturally non-

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[39] *See id; see also* Chris Roberts, *Justice Department Could Help Marijuana Industry Via Cole Memo 2.0—or Hurt Reform*, MJBIZDAILY (Mar. 28, 2023), https://mjbizdaily.com/justice-department-could-help-marijuana-industry-via-new-cole-memo/ [https://perma.cc/248K-FT4K] (summarizing a congressional session regarding marijuana reform).

[40] *See* Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-235, § 538 (2014). A bill serving the same purpose had previously been introduced in the House of Representatives in 2001 by Rep. Maurice Hinchey, who, knowing the bill would lose the vote, withdrew his bill after a passionate debate on the subject; *see also* Tom Angell, *Federal Medical Marijuana Amendment Author Dies at 79*, MARIJUANA MOMENT (Nov. 24, 2017), https://www.marijuanamoment.net/federal-medical-marijuana-amendment-author-dies-79/ [https://perma.cc/5W9X-BQ7Y] (discussing Maurice Hinchey's life and the significance of his death to the legalization movement). Similar measures were put forward in the House of Representatives six times between 2003 and 2013 before it finally passed as an amendment to other spending bills in 2014 for fiscal year 2015. *Id.*

[41] *See* Tess A. Chaffee, *We[ed] The People: How a Broader Interpretation of the Rohrabacher-Farr Amendment Effectuates the Changing Social Policy Surrounding Medical Marijuana*, 91 U. Cin. L. Rev. 856, 872 (2023).

[42] Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (commonly known as the 2018 Farm Bill).

psychoactive hemp can be bred to have large amounts of the coveted cannabinoid cannabidiol.[43]

Cannabidiol ("CBD") is one of the most prevalent active ingredients in cannabis, second only to delta-9 THC.[44] It has become popular in recent years due to its many alleged health benefits, including assistance with epilepsy, insomnia, inflammation, and chronic pain.[45] As a result, hemp-derived CBD is now available in cosmetics, lotions, food, and smokable products.[46]

However, despite the hopes of many in the cannabis industry, the change of hemp's classification in 2018 has not had any effect on the US Food and Drug Administration's ("FDA") interpretation of the Federal Food, Drug, and Cosmetic Act ("FDCA") as it applies to the inclusion of hemp cannabidiol in consumable or therapeutic substances.

The FDCA prohibits the introduction or delivery for introduction into interstate commerce of (1) a food which contains (2) a drug approved under Section 355 of the Act or a biological product licensed under 42 U.S.C. § 262 (3) for which substantial clinical investigations have been instituted and (4) for which the existence of such investigations has been made public.[47] These rules also apply to drugs added to animal food.[48] Notably, the FDCA defines a drug as any product intended to have a therapeutic or medical use, and any product (other than a food) that is intended to affect the structure or function of the body of humans or animals.[49] An unapproved new drug cannot be distributed or sold in interstate commerce unless it is the subject of an FDA-approved new drug application ("NDA") or abbreviated new drug

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[43] *See generally* LUKE S. ZIMMERMAN, CURING THE NICE CLASSIFICATION: EXPANDING TRADEMARK CLASSES TO INCLUDE HEMP & CANNABIS GOODS AND SERVICES (Aug. 8, 2020 (addressing the challenges of categorizing cannabis, hemp, and marijuana in the Nice Classification System).

[44] *See* Peter Grinspoon, *Cannabidiol (CBD): What We Know and What We Don't*, HARV. HEALTH PUBL'G (Sept. 24, 2021), https://www.health.harvard.edu/blog/cannabidiol-cbd-what-we-know-and-what-we-dont-2018082414476 [https://perma.cc/8YK5-Q8L4] (articulating the differences between CBD and marijuana).

[45] *See id.*

[46] *See* ZIMMERMAN, *supra* note 43, at 10.

[47] *See In re* Harbor Hemp Co., 2022 WL 306451 (Trademark Tr. & App. Bd. Jan. 27, 2022) (citing 21 U.S.C. § 331(ll *also* 21 U.S.C. § 321(ff) (indicating that, under the FDCA, a dietary supplement is deemed to be a food and does not include an article that is approved as a new drug under 21 U.S.C. § 355).

[48] 21 U.S.C. § 331(a) (prohibiting the introduction of an adulterated animal food into interstate commerce).

[49] 21 U.S.C. § 321(g)(1).

application ("ANDA").[50] Since CBD is an active ingredient in an FDA-approved drug (Epidiolex, which is used to treat seizures), was the subject of substantial clinical investigations before it was marketed, and those investigations are public knowledge, the FDA interprets the law as banning the use of hemp CBD in ingestible goods or in medicinal or therapeutic goods (even if those goods are topical).[51]

Therefore, the federally lawful uses of hemp CBD remain very narrow, and are essentially limited to strictly topical, cosmetic goods that make no claims of any therapeutic or medicinal effect. Smokable hemp is also lawful, as it likely falls outside the purview of the FDCA.[52]

The FDA still has not budged on the application of the FDCA to hemp CBD in the four and one-half years since. However, in January 2023, the FDA released a statement admitting that "a new regulatory pathway" was required for handling CBD products and that the agency was preparing to work with Congress to examine such a pathway.[53] The formal legalization of hemp also led to the rise in demand and production of other hemp-derived cannabinoids (substances found in the cannabis plant),[54] such as delta-8 tetrahydrocannabinol.[55] Delta-8 THC occurs naturally in low concentrations in the cannabis plant and can be extracted through a chemical process in order to produce

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[50] 21 U.S.C. §§ 331(d), 355(a), (b), (j).

[51] *See FDA Regulation of Cannabis and Cannabis Derived Products, supra* note 10.

[52] *See id.*

[53] Press Release from Janet Woodcock, Principal Deputy Comm'r, U.S. Food and Drug Admin, FDA Concludes that Existing Regulatory Frameworks for Foods and Supplements are Not Appropriate for Cannabidiol, Will Work with Congress on a New Way Forward (Jan. 26, 2023), https://www.fda.gov/news-events/press-announcements/fda-concludes-existing-regulatory-frameworks-foods-and-supplements-are-not-appropriate-cannabidiol.

[54] *See Cannabis (Marijuana) and Cannabinoids: What You Need to Know*, NAT'L CTR. FOR COMPLEMENTARY AND INTEGRATIVE HEALTH (Aug. 12, 2023), https://www.nccih.nih.gov/health/cannabis-marijuana-and-cannabinoids-what-you-need-to-know [https://perma.cc/PPX6-QF9H] (highlighting the differences between "marijuana" and "cannabis" as well as the safety of cannabinoid usage).

[55] *See* W. Michael Schuster, *Cannabis Derivatives and Trademark Registration: The Case of Delta-8-THC*, 98 IND. L. J. 177, 185 (2022) (citations omitted) ("This variant has the same chemical formula as the more common delta-9 variety, one carbon-carbon double bond is located at a different place in its structure. . . ."); AK Futures v. Boyd Street Distro, LLC, 35 F.4th 682, 686 (9th Cir. 2022). The market impact of delta-8 THC can be shown in the evidence given in AK Futures, in which AK Futures stated that its Cake delta-8 THC products had generated $60 million in revenue over one nine month period in 2020–2021. *Id.*

commercially viable quantities.[56] The legality and safety of delta-8 THC and other novel, highly processed cannabinoids are still being debated, with some courts stating that under the plain and unambiguous text of the Farm Bill, delta-8 THC derived from hemp is lawful.[57] However, the DEA is now proposing changes to the law that formally ban delta-8 THC products by closing a loophole in the law that has previously allowed synthetically manufactured THC products to be produced and sold semi-lawfully.[58]

4. *The Future of Federal Regulation*

The future may hold even more changes in the federal government's approach to cannabis. In October 2022, President Joe Biden asked the Secretary of Health and Human Services ("HHS") and the Attorney General to initiate an administrative process to review the scheduling of marijuana as a Schedule I drug.[59] In August 2023, the news broke that HHS had formally recommended that cannabis be moved from Schedule I of the CSA to Schedule III.[60] In May 2024, the Attorney General submitted a notice of proposed rulemaking to the

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[56] *See* Eric C. Leas, *The Hemp Loophole: A Need to Clarify the Legality of Delta-8-THC and Other Hemp-Derived Tetrahydrocannabinol Compounds*, 111 AM. J. PUB. HEALTH 1927, 1927 (2021) (citations omitted) ("Because CBD isomers are similar in structure to THC isomers they can be converted to THC isomers, through a relatively simple series of chemical reactions.").

[57] AK Futures, 35 F.4th at 690.

[58] *See* Chris Roberts, *DEA Considers Ban on Delta-8 THC, Severe CBD Restrictions*, MJBIZDAILY (June 15, 2023), https://mjbizdaily.com/dea-mulling-delta-8-thc-ban/ [https://perma.cc/7Q8E-T94G] (profiling a potential DEA ban on delta-8 THC).

[59] *See* ADMINISTRATION OF JOSEPH R. BIDEN, JR., 2022, STATEMENT ON MARIJUANA REFORM (Oct. 6, 2022) (available at https://www.govinfo.gov/content/pkg/DCPD-202200883/pdf/DCPD-202200883.pdf) (denouncing harsh federal marijuana regulations). Biden also simultaneously pardoned all prior federal offenses for simple possession of marijuana and suggested that all U.S. governors pardon simple possession offenses at the state level.)

[60] *See* Kyle Jaeger*, Top Federal Health Agency Says Marijuana Should be Moved to Schedule III in Historic Recommendation to DEA*, MARIJUANA MOMENT (Aug. 30, 2023), https://www.marijuanamoment.net/top-federal-health-agency-says-marijuana-should-be-moved-to-schedule-iii-in-historic-recommendation-to-dea/ [https://perma.cc/J4PV-5QDU] (detailing the desire of the U.S. Department Health and Human Services to change marijuana from a Schedule I drug to Schedule III under federal law). This statement is truly historic, as it is the first time a federal agency has formally acknowledged that marijuana is far safer than its current classification as a Schedule I drug may indicate. *Id.*

Federal Register initiating a formal rulemaking process to consider moving marijuana from Schedule I to Schedule III.[61]

In the meantime, as the law currently stands, marijuana is a federally unlawful Schedule I substance that is widely available in 80% of the states. As of January 2025, 40 states have laws authorizing medical marijuana regimes, and 24 states and the District of Columbia have laws authorizing adult-use marijuana regimes.[62] New markets are opening almost every year; in 2022 alone, six adult-use markets and one medical market began sales.[63] And although United States cannabis market size estimates vary widely, one source estimates that the market will reach over $45.35 billion in annual sales by the end of 2025.[64]

II. IN THE WEEDS: THE LAWFUL USE REQUIREMENT IN TRADEMARK LAW

1. *The Lanham Act and the Benefits of Trademark Registration*

Modern trademark law is based on the Lanham Act of 1946, which, when it passed on July 5, 1946, repealed and replaced the

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[61] Press Release, U.S. Dep't Just., Justice Department Submits Proposed Regulation to Reschedule Marijuana (May 16, 2024), https://www.justice.gov/archives/opa/pr/justice-department-submits-proposed-regulation-reschedule-marijuana#:~:text=The%20Justice%20Department%20today%20announced,Controlled%20Substances%20Act%20(CSA) [https://perma.cc/2SS7-YRBB].

[62] *See Where Marijuana Is Legal, supra* note 10; s*ee also U.S. Territory Policy*, MARIJUANA POL'Y PROJECT (Jan. 4, 2023), https://www.mpp.org/policy/us-territories/ [https://perma.cc/JW46-FGBU] (detailing the marijuana policies of U.S. territories). U.S. Territories having some form of laws authorizing the sale of medical or adult use marijuana include Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands. *Id.*

[63] *See* Matt Zehner, *Brightfield's 2023 U.S. Cannabis Market Forecast*, BRIGHTFIELD GROUP (Feb. 21, 2023), https://blog.brightfieldgroup.com/brightfields-2023-us-cannabis-market-forecast#:~:text=What%20is%20the%20U.S.%20cannabis,to%20be%20worth%20%2450.7%20billion [https://perma.cc/84AW-VG5J] (cannabis market forecast).

[64] *See Cannabis—United States*, STATISTA, https://www.statista.com/outlook/hmo/cannabis/united-states [https://perma.cc/5LBC-RHUG] (last visited Jan. 3, 2025). For comparison, the tobacco products market, an old and established market for goods that are widely available in every state, has a market size of $106.40 billion *also Tobacco Products—United States*, STATISTA, https://www.statista.com/outlook/cmo/tobacco-products/united-states [https://perma.cc/2H3B-L5JG] (last visited July 21, 2023) (providing the market size of the tobacco industry).

Trademark Act of 1905 and its 1920 supplemental.[65] The Lanham Act provides the foundation of modern trademark law and provides for the continuation of the existing federal trademark registration system in a more standardized, clear setting.

Although very early federal trademark laws were based on the Intellectual Property Clause of the U.S. Constitution, the Supreme Court held that Congress did not hold the constitutional authority to regulate trademarks under this clause in *The Trade-Mark Cases of 1879.*[66] Later laws, including the Lanham Act, were instead based on the Constitution's Commerce Clause, which gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[67]

More comprehensive federal trademark laws were brought about by necessity as business and interstate commerce in the United States grew and flourished throughout the 1800s, bringing with it new conflicts and an increased need to protect consumers from confusion.[68] As *McCarthy on Trademarks* notes, "[t]he policies of consumer protection, property rights, economic efficiency and universal concepts of justice underlie the law of trademarks."[69]

Although the Lanham Act also protects unregistered trademarks used in common law (allowing owners of common law trademarks to benefit from federal causes of action for trademark infringement under Section 43(a)),[70] companies generally prefer to register their trademarks

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[65] *See* Lanham Act, 15 U.S.C. §§ 1051–1141 (2020).

[66] *See* Trademark Cases, 100 U.S. 82, 93–94 (1879) (governing trademark cases *also* U.S. CONST. art. I, § 8, cl. 8. (stating Congress's power). The Intellectual Property Clause (or Patents and Copyrights Clause) gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*

[67] ANNE GILSON LALONDE, JEROME GILSON, 1 GILSON ON TRADEMARKS § 1.04 (2024).

[68] "The [post-1890] increase of litigation is the result of the increased use of trade marks, brands and other identifying indicia in present day business, which is directly traceable to the more extended distribution of products and this in turn is either the cause or the effect of modern advertising." Edward S. Rogers, *Some Historical Matter Concerning Trade-Marks*, 9 MICH. L. REV. 29, 43 (1910).

[69] J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2.2, at 2–3 (4th ed. 2008).

[70] *See* Matal v. Tam, 582 U.S. 218, 225 (2017) (citing Two Pesos v. Taco Cabana, 505 U.S. 763, 768 (1992)). ("Section 43(a) prohibits a broader range of practices than does §32, which applies to registered marks, but it is common ground that §43(a) protects qualifying unregistered trademarks") (internal quotation marks and citation omitted). *Id.*

federally at the USPTO due to its many benefits.[71] These benefits include constructive notice of the registrant's claim of ownership of the mark; the ability to serve as prima facie evidence of the validity of the registered mark, the owner's ownership of the mark, and the owner's exclusive right to use the registered mark in commerce with the goods or services specified in the certificate; and the ability to use the federal trademark registration symbol (®) with a trademark.[72] These protections can be tremendously valuable both to businesses working to protect their brands and third parties trying to develop their own brands without stepping on the rights of others.

Federal registration of marks in commerce in the U.S. also benefits consumers by allowing them to distinguish the goods and services of competing producers from each other.[73] This reduces consumer search costs, making it easier for them to find the goods and services that satisfy their preferences without overly restricting marketplace competition.[74]

When applying for a trademark registration, an applicant has to provide a drawing depicting the mark, the applicant's domicile and citizenship, identifications of the goods or services with which the mark is used, specimens showing the mark's use in commerce with the goods or services (for most application filing bases, in any case),[75] and various

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[71] *See* Boston Pro. Hockey Ass'n v. Dallas Cap & Emblem Mfg., Inc., 510 F.2d 1004, 1010 (5th Cir.), *cert. denied*, 423 U.S. 868 (1975) ("Under [section 43(a)], the registration of a mark is not a prerequisite of recovery . . . .").

[72] *See* B&B Hardware v. Hargis Indus., Inc., 575 U. S. 138, 142–43 (2015) (citing 15 U.S.C. § 1072); *see also Why Register Your Trademark?*, USPTO (Aug. 1, 2023), https://www.uspto.gov/trademarks/basics/why-register-your-trademarkv [https://perma.cc/WYV5-MEED] (outlining the protections resulting from registering a trademark).

[73] Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 198 (1985).

[74] *See, e.g.,* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 167 (2003).

[75] *See* USPTO TESS, https://tmsearch.uspto.gov/search/search-information (last visited Feb. 18, 2025) (indicating a TESS search of 09/14/2023 for search string: [1a/1b/44d/44e/66a/"no filing basis"][cb] and `FD > 20230101 < 20230914). A trademark application can be filed under one of five filing bases. A Section 1(a) use in commerce basis is for applicants who are already using their mark in commerce with their goods and/or services. *Id*. A Section 1(b) intent-to-use basis is for applicants who have a bona fide intention to use their mark in commerce with their goods and/or services in the near future. *Id*. Both of these filing bases will require a specimen showing use of the trademark with the goods/services before the application can mature to registration. *Id*. Although there are three other bases under which an application can be filed, these are filed in much fewer numbers than 1(a) and 1(b) applications. *Id*. A search I ran on September 14, 2023 showed that of the

statements and declarations attesting to the applicant's exclusive right to use the mark in commerce as the owner of the mark.[76] The rest of this Part will focus solely on this "use in commerce" requirement and how that has been interpreted in modern trademark policy and law.[77]

2. *"Use in Commerce" in the Lanham Act, Rule 100.141, and Rule 2.69*

"Use in commerce" was defined in Section 45 of the Lanham Act as "the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark."[78] This was expanded in 1988 when Congress amended the Lanham Act to allow applications for registration based on a "bona fide intention . . . to use a [trade]mark in commerce."[79] Additional modifying provisions state that a mark is deemed to be in use in commerce on goods when the mark "is placed in any manner on the goods or their containers" or associated displays, tags, labels, or, if placement on/near the goods is impracticable (such as in the case of bulk grain goods), on documents associated with the goods or sale, and the goods are then "sold or transported in commerce."[80]

386,456 trademark applications filed at the USPTO in 2023 thus far, 48.66% were 1(a) use based, and 44.35% were 1(b) intent to use based. *Id*. The remaining bases and applications filed accidentally with no bases comprised 6.99% of the applications filed in 2023. *Id*.; *see also Basis*, USPTO (Aug. 11, 2023), https://www.uspto.gov/trademarks/apply/basis [https://perma.cc/D8BZ-GLJM]. A Section 44(e) foreign registration basis is for applicants who own a foreign registration of the same mark for the same goods and/or services. *Id*. A section 44(d) foreign application basis is for applicants who own an earlier-filed foreign application that is for the same mark and the same goods and/or services. *Id*. A Section 66(a) filing basis is based on a request for extension of protection of an international registration to the United States sent from the International Bureau of the World Intellectual Property Organization. *Id*.

[76] 15 U.S.C. § 1051(a)–(d).

[77] *See* Robert Mikos, *Unauthorized and Unwise: The Lawful Use Requirement in Trademark Law*, 75 VAND. L. R. 161, 161 (2022) (providing an in-depth look at the history of the modern lawful use requirement). My own summary is a rather short introduction to the history of the modern lawful use requirement. For a more detailed examination, I recommend reading Mikos's article. *Id*.

[78] 15 U.S.C. § 1127.

[79] *See* Trademark Law Revision Act of 1988, Pub. L. No. 100-667, § 103 1(1)(b), 102 Stat. 3935, 3935–36 (1988) (codified as amended at 15 U.S.C. § 1051(b)). This amendment allowed businesses to protect their rights in advance while their goods or services were still in development. *Id*.

[80] 15 U.S.C. § 1127 (as amended in the Trademark Law Revision Act of 1988, Pub. L. No. 100-667, § 134[8].

"Commerce" is further defined in the Lanham Act as "all commerce which may lawfully be regulated by Congress."[81] Based on judicial and legislative history, and statutory construction, this Section is most properly read as jurisdictional, intended to ensure the Lanham Act was within Congress's power conferred by the Commerce Clause of the Constitution.[82] After *The Trade-Mark Cases of 1879*, in which the Supreme Court held that Congress did not hold the constitutional authority to regulate trademarks under the Intellectual Property Clause of the U.S. Constitution,[83] it follows that Congress would want to solidly state its proper jurisdictional authority for all successive trademark legislation.[84]

The presence of an explicit lawful use requirement in prior trademark laws and the lack of such a requirement in the Lanham Act seems to clearly indicate the lack of congressional intent for a lawful use requirement. However, despite the clear jurisdictional nature of this clause, for decades, the USPTO and courts in turn have interpreted "all commerce which may lawfully be regulated by Congress" as imposing a lawful use requirement on applications to register trademarks.[85]

In contrast, there is significant evidence that the U.S. Patent Office ("USPO") (the agency would not gain the "Trademark" in its name until 1975) did not even interpret the lawful use requirement that was in its laws at the time in the same way that the USPTO does today. My own extensive examination of USPO Official Gazettes published during the national prohibition of alcoholic beverages above 0.5%

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[81] *Id*.

[82] Mikos, *supra* note 77.

[83] *See Trademark Cases*, 100 U.S. at 93–94 (governing trademark cases); *see also* U.S. CONST. art. I, § 8, cl. 8. (stating Congress's power). The Intellectual Property Clause (or Patents and Copyrights Clause) gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id*.

[84] *See* Trademark Law of 1881, Pub. L. No. 46-138, § 2, 21 Stat. 502, 503 (1881) (allowing for registration of marks "used in commerce with foreign nations or Indian tribes"). This has, in fact, taken place: a "use in commerce" requirement has been included in every trademark law since; *see, e.g.*, *id*.; *see also* Trademark Law of 1905, Pub. L. No. 58-84, § 2, 33 Stat. 724, 724 (1905) (including the same language); Trademark Law of 1920, Pub. L. No. 66-163, 41 Stat. 533, 534 (1920) (providing for the implementation of a 1910 treaty by allowing for registration of marks, "which have been in bona fide use for not less than one year in interstate or foreign commerce, or commerce with the Indian tribes.").

[85] *See* Fray v. Daffy Dan's Bargaintown, 823 F.2d 522, 526 (Fed. Cir. 1987).

alcohol (1920–1934) indicates that the office approved, published, and registered federal trademarks with alcohol throughout.[86]

It wasn't always this way. In 1947, shortly after the passage of the Lanham Act, the USPO promulgated Rule 100.14.[87] This rule states that when a trademark application is associated with a product that cannot be lawfully sold in commerce without prior approval of the label by a government agency, a copy of such label and its certification must be made of record in the application.[88]

This rule notably applied only to labels for meat products (which had to be approved by the Meat Inspection Division in the Bureau of Animal Industry, Department of Agriculture) and labels for wines and distilled alcoholic liquors (which had to be approved by the Federal Alcohol Administration).[89] The narrowness of this rule was emphasized by the fact that both registration regimes applied nearly identical rules, barring the use of disparaging, indecent, or deceptive names, including those that falsely implied the endorsement of a living prominent person.[90]

We do not have legislative history for this rule and thus do not know why Rule 100.14 was enacted. However, the very narrowness of Rule 100.14, written and approved by USPO leadership who must have been incredibly well-versed in the Lanham Act's wording and intent, indicates that they did not believe that Congress intended for all federal trademark registrations to be subject to a lawful use requirement.

A decade later, in 1955, the USPTO replaced Rule 100.141 with Rule 2.69.[91] This much broader rule, the only rule that has ever been made specifically pertaining to the lawful use of a trademark application's goods/services in commerce, remains in place today. As it stands today, it says:

> When the sale or transportation of any product for which registration of a trademark is sought is regulated under an Act of Congress, the Patent and Trademark Office

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[86] Prohibition Era (1920–1935) Alcohol Trademarks Dataset (on file with author). Full data and analysis of the USPO's treatment of Prohibition era alcohol trademarks (1920–1935) compared to the USPTO's modern treatment of cannabis trademarks will be forthcoming in a future paper.

[87] 12 Fed. Reg. 3956, 3962 (Jun. 19, 1947) (originally codified at 37 C.F.R. § 100.141)

[88] *Id.*

[89] *See* Alcohol Administration Act of 1935, 27 U.S.C. § 206. *See generally*, Meat Inspection Act of 1906, Pub. L. No. 59-382, 34 Stat. 669 (1906).

[90] *See* Alcohol Administration Act of 1935, 27 U.S.C. § 206.

[91] Mikos, *supra* note 77, at 177.

> may make appropriate inquiry as to compliance with such Act for the sole purpose of determining *lawfulness of the commerce* recited in the application.[92]

This rule broadened the scope of Rule 100.141 to now imply that goods/services in a trademark application must now comply with all federal laws. This rule is what all unlawful use refusals in USPTO ex parte examination proceedings have been based on since.

3. *Rulings on the Lawful Use Requirement*

Since then, the USPTO's appealing authority (first the Assistant Commissioner of Patents, then the Trademark Trial and Appeal Board ("TTAB")) has made ruling after ruling for decades requiring lawful use for a trademark's federal registration, even though such a requirement puts the USPTO in the shoes of determining a company's compliance with laws and regulations far outside its purview.

The USPO's first ruling on the lawful use requirement occurred in 1957, 10 years after the passage of the Lanham Act and two years after the passage of Rule 2.69. In *Coahoma Chemical Co. v. Smith*, a company producing insecticides under the name RED PANTHER successfully petitioned for the cancellation of a competitor's BLACK PANTHER mark, also used on insecticides, on several grounds, including that the registrant had not complied with the label requirements for insecticides under the Federal Economic Poisons Act.[93]

This pre-TTAB decision was written by the appealing authority of the time, the Assistant Commissioner of Patents.[94] This decision concluded that the user of a trademark on goods that could not be lawfully shipped in interstate commerce could not acquire rights superior to those of a later user whose goods were lawfully shipped in interstate commerce.[95]

The Assistant Commissioner of Patents reasoned:

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[92] *See* 37 C.F.R. § 2.69 (1989) (emphasis added). The original rule only referred to the USPO, but the rule was later updated in 1989 to include the agency's new name of the USPTO. *Id*.

[93] *See* Coahoma Chemical Co. v. Smith, 113 U.S.P.Q. (BL) 413, 417–18 (Dec. Comm'r Pat. 1957) (referring to the Federal Economic Poisons Act, 7 U.S.C. § 135 *et seq*.).

[94] *Id*. at 414.

[95] *See id*. at 418.

> May property rights be acquired as a result of unlawful acts? The obvious answer to the question in its simplified form is in the negative. No decision in a trademark case has been found which is directly in point; but in other fields of the law which might reasonably be analogous, i.e. real property and personal property, where claimed ownership was based on acquisition by unlawful means, the principle is so well-established that citation of authorities is unnecessary. Expressed in its most concise form, the conclusion reached herein is that use of a mark in connection with unlawful shipments in interstate commerce is not use of a mark in commerce which the Patent Office may recognize.[96]

Notably, neither the assistant commissioner's decision nor the final decision in the case, made at the U.S. Court of Customs and Patent Appeals ("CCPA") (which ultimately relied on other grounds to decide the case and avoided reaching the lawful use issue), make any mention of Rule 2.69.

Since that first decision, the "lawful use" requirement has been applied to applications to register trademarks with goods/services affected by a wide array of federal laws and regulations, including import statutes,[97] the Federal Meat Inspecting Act,[98] the Clean Air Act,[99] state laws relating to the assumption of fictitious business names,[100] a Marine Statute,[101] the Communications Act of 1934,[102] and even federal traffic guidelines.[103]

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[96] *See id.* at 418 (explaining the reasoning for not addressing questions of lawful use). Notably, when this case was appealed to the Court of Customs and Patent Appeals, that court did not reach the lawful use question, but ruled that, because the BLACK PANTHER mark could be canceled on other grounds, it need not address the issue. *Id.* at 420.

[97] *See* Humble Oil & Refin. Co. v. Sekisui Chem. Co. Ltd. Japan, 165 U.S.P.Q.2d 597 (T.T.A.B. 1970).

[98] *See In re* Cook, United, Inc., 188 U.S.P.Q.2d 284 (T.T.A.B. 1975).

[99] *See* Geraghty Dyno-Tuned Prods., Inc. v. Clayton Mfg. Co., 190 U.S.P.Q.2d 508 (T.T.A.B. 1976).

[100] *See* Pet Inc. v. Bassetti, 219 U.S.P.Q.2d 911 (T.T.A.B. 1983).

[101] *See* U.S. Marine Corps v. Peter J. Healy, No. 91215087, 2017 WL 2297909 (T.T.A.B. 2017).

[102] *See In re* Wsm, Inc., 225 U.S.P.Q.2d 883 (T.T.A.B. 1985).

[103] *See* Michigan v. M22, LLC., No. 92058315, 2019 WL 316152 (T.T.A.B. 2019). Many thanks to Robert Mikos, Professor at Vanderbilt Law, for allowing me to access his dataset of lawful use TTAB cases.

However, the first attempt to justify the lawful use requirement based on the actual text of the Lanham Act was not made until 1981 in *Satinine v. P.A.B.*, which related to a cancellation action over a cosmetics company's compliance with the Federal Food Drugs and Cosmetics Act and the Fair Packaging and Labeling Act.[104]

In a single footnote to the opinion, Member Rice, writing for the TTAB, expressed doubts over the propriety of the lawful use requirement.

> Inasmuch as the term "lawful" is specifically used in certain sections of the Statute, *the suggestion that this term should be read into those sections where it is not used would appear to be a violation of the basic rules of statutory construction.* Nor can any justification for the practice of refusing a party the right to obtain or maintain a registration on the grounds of "unlawful use" be found in the definition of the phrase "Intent of Act" set forth in Section 45. While one of the purposes included therein is "to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce", the fact that a product label, for example, is not in compliance with a regulatory statute pertaining thereto does not mean that the mark applied to the goods is being used in a deceptive or misleading manner but rather only that the label may be deceptive or misleading.[105]

Despite these concerns, the footnote ultimately concluded that since the CCPA in *Coahoma* indicated that it need not rule on the lawful use issue and did not discuss the propriety of the lawful use doctrine set forth by the Assistant Commissioner, it appeared that the CCPA approved of it.[106]

However, the opinion also expressed some concern about the TTAB's ability to interpret "an almost endless number of [federal regulatory acts]" in future lawful use in commerce cases: "Inasmuch as we have little or no familiarity with most of these acts, there is a serious question as to the advisability of our attempting to adjudicate whether a

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[104] *See* Satinine Societa in Nome Collettivo di S.A. e M. Usellini v. P.A.B. Produits et Appareils de Beaute, 209 U.S.P.Q.2d 958, No. 11, 989 (T.T.A.B. 1981) (emphasis added) [hereinafter cited as "Satinine"].
[105] *Id.* at 21 n.2 (emphasis added).
[106] *Id.*

party's use in commerce is in compliance with the particular regulatory act or acts which may be applicable thereto."[107]

The opinion proposed limitations on the application of the lawful use requirement to address these concerns.[108]

> [I]t seems that the better practice would be to hold that a use in commerce is unlawful only when the issue of compliance has previously been determined (with a finding of noncompliance) by an entity, such as a court or government agency, having competent jurisdiction under the statute in question, or when there has been a per se violation of a statute regulating the sale of a party's goods, or the rendering of his services, in commerce . . . .[109]

Another member of the *Satinine* panel, Member Kera, contributed the first textually based argument for the lawful use requirement.[110] Kera echoed Member Rice's point about "lawful" appearing in only some parts of the Lanham Act, but used this to make a different argument in favor of the lawful use requirement. Kera reasoned that since Section 23 of the Lanham Act explicitly requires "lawful" use in commerce for inclusion on the Supplementary Register (which provides some minor protections and rights to marks that do not qualify for inclusion on the Principal Register), "lawful use" must necessarily be required for registration of a mark on the Principal Register (which confers much greater rights to the registrant).[111]

In the years since the *Satinine* decision, the legitimacy of the lawful use requirement has not received much scrutiny. Only six TTAB lawful use decisions have been appealed up to and heard by a higher court, and none of these cases have ever involved cannabis.[112] The U.S.

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[107] *Id.* at 20.
[108] *Id.* at 21.
[109] *Id.*
[110] *Id.*
[111] *Id.* at 30.
[112] *See* Smith v. Coahoma Chem. Co., 264 F.2d 916, 920 (C.C.P.A. 1959) (affirming cancellation on other grounds); *In re* Application of Silenus Wines, Inc., 557 F.2d 806, 812 (C.C.P.A. 1977) (articulating a similar holding); Weight Watchers Int'l, Inc. v. I. Rokeach & Sons, Inc., 546 F. Supp. 841, 843–44 (S.D.N.Y. 1982) (dismissing challenge to requirement because it was not timely pleaded); Johnson & Johnson v. Jack Frost Lab'ys Inc., No. 89-1291, 1990 WL 488871, at *1 (Fed. Cir. Mar. 6, 1990) (failing to raise lawful use on appeal); O-M Bread, Inc. v. U.S. Olympic Comm., 65 F.3d 933, 936 n.2 (Fed. Cir. 1995) (articulating TTAB's

Court of Appeals for the Federal Circuit (and its predecessor, the CCPA) has yet to rule on the authority of the TTAB to enforce the lawful use requirement.

4. *Cannabis Trademark Cases at the TTAB*

Thus far, every time the TTAB has ruled substantively on an unlawful use refusal for a cannabis trademark, the refusal has been upheld clearly and decisively.

Several early cannabis trademark cases at the TTAB involved marijuana and drug paraphernalia violations of the CSA. In *In re Morgan Brown*, the very first TTAB appeal relating to cannabis trademarks, the TTAB stated "the fact that the provision of a product or service may be lawful within a state is irrelevant to the question of federal registration when it is unlawful under federal law."[113]

The TTAB held firm to this holding under numerous avenues of attack by applicants. In the two nearly identical *Juju Joints* cases, the applicant argued that its drug paraphernalia goods were lawful under the Cole Memo.[114] The TTAB refuted this, stating,

> We reject Applicant's arguments that its use and intended use of the mark are lawful based on the memorandum, as the memorandum does not and cannot override the CSA, and in fact, explicitly underscores that "marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime."[115]

The TTAB held similarly in 2019's *In re Canopy Growth Corporation by assignment from JJ206, LLC*, with the quick caveat that given the recission of the Cole Memo in January 2018, this argument was even more moot than it had been previously.[116]

One of the more persuasive, if still ultimately unsuccessful, arguments against the USPTO's cannabis trademarks policy was raised

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"authority" to demand lawful use not challenged on appeal); Vosk Int'l Co. v. Zao Gruppa Predpriyatij Ost, No. C11-1488RSL, 2013 WL 5588296, at *7 (W.D. Wash. Oct. 9, 2013) (failing to raise lawful use on appeal).

[113] *See In re* Morgan Brown, 119 U.S.P.Q.2d 1350, 1351 (T.T.A.B. 2016).

[114] *See* JJ206, LLC, DBA Juju Joints, 2016 WL 7010624 (T.T.A.B. 2016); JJ206, LLC, No. 86532274, 2016 WL 7010634 (T.T.A.B. 2016).

[115] *See* JJ206, LLC, DBA Juju Joints, Nos. 86474701 & 86236122, 2016 WL 7010624 (T.T.A.B. 2016).

[116] Canopy Growth Corp., Nos. 86475884 & 86475899, 2019 WL 3297396 (T.T.A.B. 2019).

in *In re Pharmacann*.[117] There, the Applicant argued that, given the DOJ's decision not to treat medical marijuana as a violation of the CSA and Congress's decision not to fund DOJ enforcement against medical marijuana,[118] the USPTO's decision to refuse to register the Applicant's trademark as a violation of the CSA served no purpose. However, the TTAB, although acknowledging the novelty of the Applicant's Appropriations Act argument, ultimately upheld the unlawful use refusal, reasoning:

> We must determine the eligibility of marijuana-related marks for federal registration by reference to the CSA as it is written, not as it might be enforced at any point in time by any particular Justice Department. The CSA in its current form makes Applicant's intended uses of its marks unlawful, and its marks are thus ineligible for federal registration.[119]

The TTAB specifically noted that extrinsic evidence could be used to show an unlawful violation in another drug paraphernalia case, *In re Ultra Trimmer*.[120] Such extrinsic evidence came back to haunt another applicant in *In re National Concessions Group*. There, the Applicant attempted (and failed) to persuade the USPTO that drug paraphernalia in violation of the CSA sold online as "THE ALL-IN-ONE TOOL FOR DABBING" was actually a lawful "essential oil dispenser, sold empty, for domestic use" also failed at the TTAB.[121]

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[117] PharmaCann L.L.C., Nos. 86520135; 86520138, 2017 WL 2876812 (T.T.A.B. 2017). Note: I worked with and for PharmaCann L.L.C. on and off between August 2015 and January 2017. However, I never worked on the company's trademarks and had nothing to do with this case.

[118] *See* Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113–235, § 538, 128 Stat. 2130 (2014). As discussed in Part I, Congress ensured that the DOJ did not prosecute companies and individuals operating under state medical marijuana laws through the mechanism of the Rohrbacher-Farr Amendment to the Consolidated Appropriations Act. *See* Chaffee, *supra* note 41, at 872.

[119] PharmaCann L.L.C., Nos. 86520135; 86520138, 2017 WL 2876812 (T.T.A.B. 2017).

[120] Ultra Trimmer, L.L.C., No. 86479070, 2016 WL 7385764 (T.T.A.B. 2016).

[121] National Concessions Group, Inc., No. 8716058 & 87183434, 2023 WL 3244416 (T.T.A.B. 2023) (BAKKED for "essential oil dispenser, sold empty, for domestic use") (defining "dabbing" as "a means or method of inhaling superheated cannabis concentrates to produce a quicker 'high' than by smoking marijuana in herb or flower form, or by consuming it in an edible product."). *Id.*

Hemp CBD was first addressed, pre-legalization of hemp in the 2018 Farm Bill, at the TTAB in 2016.[122] However, most of the TTAB's hemp CBD unlawful use cases have arisen under the FDCA, which still bans hemp CBD from use in ingestible, medicinal, or therapeutic goods.[123]

The first FDCA based hemp CBD TTAB case came down in 2020 in *In re NL* ("although a state may de-criminalize the sale of a product containing CBD, the applicant cannot use its mark in lawful commerce where, as here, the identified goods are per se illegal under the FDCA").[124] Later, the TTAB upheld an FDCA unlawful refusal for CBD supplements for animals in *In re Ellevet Svcs*.[125]

Numerous trademark applicants have argued that their 1(b) intent to use applications are based on a bona fide intent to use their marks with hemp CBD goods when they are federally lawful in the future. The CBD goods/services at issue in these 1(b) cases include tea-based beverages,[126] beverage supplements,[127] and dietary supplements.[128]

These "intent to use lawfully in the future" arguments have not worked with the TTAB, which has made numerous holdings that echo its holding in *In re Stanley Bros*: "To repeat, because at the time of Applicant's filing date the identified goods could not be lawfully

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[122] *See* Heather Harley and Carolyn Jones, 119 U.S.P.Q.2d 1755 (T.T.A.B. 2016). This hemp CBD holding at the TTAB is one of the only cases held unlawful under the CSA, as opposed to the FDCA.

[123] *FDA Regulation of Cannabis and Cannabis Derived Products*, *supra* note 10.

[124] *In re* NL L.L.C., No. 87864999, 2020 WL 6145401 (T.T.A.B. 2020).

[125] Ellevet Svcs., L.L.C., 2022 WL 1155016 (T.T.A.B. 2022) (ELLEVET for "dietary animal supplements derived in part from hemp, containing or derived from cannabis with a delta-9 THC concentration of not more than 0.3% on a dry weight basis and not containing added CBD").

[126] *In re* Joy Tea Inc., No. 88640009, 2021 WL 4129794 (T.T.A.B. 2021) (Although this case was appealed up to the Federal Circuit, the parties agreed to its dismissal (dismissal order entered Sept. 21, 2022)).

[127] *In re* Blue Water Wellness, L.L.C.,No. 87893655-EXA. (T.T.A.B. filed 2020).

[128] *In re* Harbor Hemp Company L.L.C., Nos. 88377702 & 88377730, 2022 WL 306451 (T.T.A.B 2022Notably, this case was won by the USPTO based solely off of trademark office actions that I wrote while an examining attorney. The case went up on appeal after I had left the USPTO and I did not even know that the holding was based on my work until 5 months later, when I was researching for a CLE presentation on Cannabis Trademarks which ultimately, in a roundabout way, led to this article

introduced into interstate commerce, Applicant did not have the required bona fide intent to use the mark in lawful commerce."[129]

The TTAB has held its ground on this issue even when applicants claimed that the CBD in its plant extracts and supplements was derived from hemp seed and stalk products held generally recognized as safe ("GRAS")[130] or when applicants were actively seeking approval from the FDA to hold clinical trials.[131]

The TTAB has also avoided reaching the unlawful use issue with cannabis related goods in several other cases by ruling on other grounds.[132]

III. HIGH DEMAND: TRENDS IN CANNABIS APPLICATION FILINGS

Just as the number of "state-legal" cannabis regimes in the U.S. has grown over the last three decades, so too has the demand for trademark protection for the cannabis businesses opening under these regimes. Although growth in these filings was slow for the first two decades of state-legal regimes, likely due to cannabis business owners' general reluctance to do anything to attract the attention of the feds, application numbers began to accelerate after the ID Manual Incident of 2010 mentioned in the introduction. Once cannabis trademark application filings jumped over 300 in 2013, filing numbers increased rapidly until they reached their overall high of over 6,000 filings in

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[129] *See* Stanley Bros. Social Enters., L.L.C., 2020 U.S.P.Q.2d 10658, at *9 (T.T.A.B. 2020) (determining that when the identified goods are illegal under the FDCA, the applicant's use is not in lawful commerce).

[130] *See In re* Agrotechemp Corp., No. 88979905, 2022 WL 612591 (T.T.A.B. 2022). And also, the same company back again with a different argument but similar goods in *In re Agrotechemp Corp.*, No. 88673708, 2022 WL 2752974 (T.T.A.B. 2022

[131] *See In re* Ananda Scientific Inc., Nos. 87428295 & 87428300,2022 WL 17370210 (T.T.A.B.2022).

[132] *See In re* CBH International, L.L.C., No. 88141696, 2021 WL 2660529 (T.T.A.B.2021) (in which the TTAB upheld an examiner's Section 2(d) Likelihood of Confusion refusal and chose not to rule on the Section 1 and 45 Unlawful Use Refusal); *see also In re* Charlie's Chalk Dust, L.L.C., No. 88417905, 2022 WL 486614 (T.T.A.B. 2022) (lawful use issue was obviated when the application was amended on remand to delete out the concerning goods); *see also In re* Pioneer IP Interests L.L.C., No. 88637739, 2023 WL 4044954 (T.T.A.B. 2023) (in this 2(d) Likelihood of Confusion decision, it was noted that since the products at issue were from hemp seeds and stalks, which were lawful both before and after the Farm Bill of 2018, there was no real lawful use issue at hand); Shenzhen IVPS Technology Co. v. Fancy Pants Products, L.L.C., No. 91263919, 2022 WL 16646840 (T.T.A.B. 2022) (the lawful use issue with the applicant's hemp CBD cigarette goods was obviated when the applicant amended its filing date to Dec. 20, 2018).

2019. These numbers seem to be most impacted by any sign of federal recognition.

This Section first qualifies the data presented here by discussing the obstacles presented in searching trademark application data relating to cannabis goods/services identifications. Next, Table 1 presents a detailed look at cannabis trademark applications filed at the USPTO from the first year of state cannabis legalization (1996) through today, looking both at trends in filing and the "success" rates of such applications (in which "success" is defined as a trademark which is currently live and registered at the time of searching). Finally, Charts 1–3 compare a cannabis trademark application's likelihood of success with that of trademark applications at the USPTO generally, both with and without attorney representation.[133]

1. Methodology

Table 1 (below) compares cannabis trademark application filing data with relevant historical events in cannabis law. The "success" rate by filing year of cannabis trademark filings (the number of Trademark Applications that, at the time of searching, have Cannabis Goods/Services and are live and registered) is included in Charts 1–3. This data is the result of extensive searches of the USPTO's trademark search tool for trademark applications containing identifications with terms relating to cannabis.[134]

Due to the limitations of the trademark search tool and this project's own resource limitations, it is likely that this method of searching both excludes some relevant trademark applications and includes some less relevant trademark applications:

1. ***Likely exclusions of trademark applications filed by cannabis companies that do not include cannabis terms in their identifications*:**

   Because of the lawful use requirement and the known issues with it, it is very common for cannabis companies to file

[133] A full table showing the numbers behind these charts is available in the Appendix.

[134] Note: TESS (Trademark Electronic Search System) was retired by the USPTO on November 1, 2023 and replaced by a tool called Trademark Search. However, the USPTO has stated that both tools search the same database, so results performed prior to this tool's launch should be identical to new results when date ranges are taken into account.

trademark applications with identifications of goods or services that do not include any specific reference to cannabis or marijuana at all. One 2023 cannabis paraphernalia case before the TTAB, in fact, focused on an application filed for "Essential oil dispenser, sold empty, for domestic use," in Class 21.[135]

Although the searches run for Table 1 pulled up trademark applications in this category that later added cannabis terms to their identifications in response to examiner inquiries, the search results do not include applications whose identifications were never amended.

In addition, the exclusion of "hemp" from these searches so as not to include non-controlled substance hemp goods such as fabric and milk could potentially have left out relevant applications as well. However, this exclusion is less likely due to the USPTO's standard practice of requiring hemp to be chemically defined in identifications (the chemical definition of hemp commonly includes the terms cannabis, THC, and/or tetrahydrocannabinol, which were all included in the search criteria for Table 1).

2. *Likely Overinclusion of cannabis-suspected trademark applications*:

The searches used for Table 1 are also likely to include results that are not actually for goods relating to cannabis or hemp.

In situations in which an examiner suspects a trademark application might have something to do with cannabis, it is common for them to require the insertion of disclaiming language in the identification for the application to proceed to registration. Even if the applicant truly has nothing to do with cannabis goods or services, they often will approve the insertion of the disclaimer simply to gain the registration.

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[135] *See* National Concessions Group, Inc., No. 8716058 & 87183434, 2023 WL 3244416, *supra* note 116; (BAKKED for "Essential oil dispenser, sold empty, for domestic use."). This T.T.A.B. opinion defines "dabbing" as "a means or method of inhaling superheated cannabis concentrates to produce a quicker 'high' than by smoking marijuana in herb or flower form, or by consuming it in an edible product." *Id.*

> Identification wording in trademark applications is not standardized; although applications which use pre-approved identifications from the Trademark Identification Manual get access to lower fees, they may also write their own identifications.[136] Due to this lack of standardization, I know of no way to exclude non-cannabis related applications whose identifications have been amended in this way without application by application review (which is beyond the author's resources at this time). Thus, a search for "cannabis" in the goods/services of a trademark application is just as likely to pull up an identification that specifies that it does *not* contain cannabis as one that states that it *does* contain cannabis.[137]

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[136] *See Goods and Services*, USPTO, https://www.uspto.gov/trademarks/basics/goods-and-services [https://perma.cc/KE7K-GQMP] (last visited March 2, 2025).

[137] In addition, it is only possible to search the identification of goods/services in applications as they appear at the time of searching; there is no known methodology of searching for the identifications of goods/services as they appeared at the time of filing, before they were amended.

Table 1: Cannabis Trademark Applications at the USPTO, 1996-2023

(as of 01/05/2025)

Application Filing Year	**Trademark Applications that, at the time of searching, have Cannabis Goods/Services**[138]	**Number of State-Legal Regimes**	**Relevant Historical Events**[139]
1996	8	States with Medical Marijuana (MMJ): 1	Medical Marijuana is legalized in California.
1997	10	MMJ: 1	

[138] New Trademark Search Tool Search Strings: GS: (cannabis marijuana marihuana THC tetrahydrocannabinol tetrahyrocannabinol CBD cannabidiol cannabigerol CBG) AND FD:[1996-01-01 TO 1996-12-31]. (searched year by year). All search numbers are accurate as of 01/05/2025. All numbers involving cannabis trademark applications filed at the USPTO in this article are taken from the author's own searches of the Trademark Register. These searches are imperfect, as a search for "hemp" or "cannabis" in the goods/services of a trademark application are just as likely to pull up an identification that specifies that it does not contain cannabis as one that does. However, due to the lack of standardization in identification wording, these are likely the best search results possible without the financial resources to have someone go through each record individually. Plus, if an application states that it does not have cannabis or hemp in it or is not for use with cannabis, it was likely suspected of containing or being related to cannabis at some point and the USPTO required the applicant to amend the identifications to specifically disavow its connection to cannabis (which can be a useful metric in and of itself). I also chose not to limit these searches by class, as due to the federal prohibition on marijuana, many cannabis companies are likely to apply for information services or merchandise goods like clothing to get some protection for their marks. Thus, it is also possible that some cannabis companies' applications for merchandise have been left out of these numbers.

[139] *See Where Marijuana Is Legal*, *supra* note 10 (listing specifically the year in which medical marijuana and adult use marijuana were legalized in each state. All years of legalization in this chart are taken directly from this webpage).

1998	4	MMJ: 5	Medical Marijuana is legalized in Alaska, Nevada, Oregon, and Washington.
1999	6	MMJ: 6	Medical Marijuana is legalized in Maine.
2000	26	MMJ: 8	Medical Marijuana is legalized in Colorado and Hawaii.
2001	5	MMJ: 8	
2002	4	MMJ: 8	
2003	5	MMJ: 8	
2004	2	MMJ: 10	Medical Marijuana is legalized in Montana and Vermont.
2005	9	MMJ: 10	The U.S. Supreme Court rules in Gonzales v. Raich that Congress has the power to prohibit intrastate manufacture and possession of marijuana.[140]
2006	5	MMJ: 11	Medical Marijuana is legalized in Rhode Island.
2007	9	MMJ: 12	Medical Marijuana is legalized in New Mexico.

[140] *See* Gonzales v. Raich, 545 U.S. 1 (2005) (holding state laws permitting marijuana do not prevent federal prohibition).

2008	7	MMJ: 13	Medical Marijuana is legalized in Michigan.
2009	47	MMJ: 13	Deputy Attorney General David Ogden releases a memorandum stating that DOJ employees should prioritize prosecution of significant trackers of illegal drugs and not focus on individuals complying with state medical marijuana laws.[141]
2010	161	MMJ: 15	Three medical marijuana goods and services identifications are briefly added to the USPTO Trademark ID Manual, sparking a temporary surge in cannabis-related trademark applications.[142] Medical Marijuana is legalized in Arizona and New Jersey.
2011	73	MMJ: 16	Medical Marijuana is legalized in Delaware and in Washington, D.C.
2012	37	MMJ: 18 States with Adult-Use Marijuana (AUMJ): 2	Medical Marijuana is legalized in Connecticut and Massachusetts. Adult-Use Marijuana is legalized in Colorado and Washington.

[141] Memorandum from David W. Ogden, *supra* note 34.
[142] Scheck, *supra* note 4.

2013	90	MMJ: 21 AUMJ: 2	Deputy Attorney General James Cole issues a comprehensive memorandum that lists specific DOJ priorities regarding marijuana. Many states use this memo as a template in crafting their marijuana laws.[143] Medical Marijuana is legalized in Illinois, Maryland, and New Hampshire.
2014	395	MMJ: 23 AUMJ: 4	The first Rohrbacher-Farr Amendment to the Consolidated Appropriations Act passes Congress, preventing DOJ funds from being used to prevent states from implementing their own medical marijuana laws.[144] Medical Marijuana is legalized in Minnesota and New York. Adult-Use Marijuana is legalized in Alaska and Oregon.

[143] Memorandum from James M. Cole, *supra* note 36.
[144] Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-235, § 538 (2014).

2015	592	MMJ: 25 AUMJ: 4	The Adult-Use Marijuana gifting system is set up in Washington D.C. Medical Marijuana is legalized in Georgia and Louisiana.
2016	645	MMJ: 30 AUMJ: 8	Medical Marijuana is legalized in Arkansas, Florida, North Dakota, Ohio, and Pennsylvania. Adult Use Marijuana is legalized in California, Maine, Massachusetts, and Nevada.
2017	1,059	MMJ: 32 AUMJ: 8	Medical Marijuana is legalized in Iowa and West Virginia.
2018	2,774	MMJ: 35 AUMJ: 9	On Dec. 20, 2018, hemp is removed from the definition of marijuana in the CSA in the 2018 Farm Bill.[145] Medical Marijuana is legalized in Missouri, Oklahoma, and Utah. Adult-Use Marijuana is legalized in Michigan.
2019	6,323	MMJ: 35 AUMJ: 10	Adult-Use Marijuana is legalized in Illinois.

[145] Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490.

2020	4,185	MMJ: 37 AUMJ: 14	Medical Marijuana is legalized in Arizona, Montana, New Jersey, and Vermont. Adult-Use Marijuana is legalized in Arizona.
2021	3,669	MMJ: 38 AUMJ: 18	Medical Marijuana is legalized in Alabama. Adult-Use Marijuana is legalized in Connecticut, New Mexico, New York, and Virginia.
2022	2,560	MMJ: 39 AUMJ: 21	October 2022: President Joe Biden requests the initiation of an administrative process reviewing the scheduling of marijuana and pardons all prior Federal offenses for simple possession of marijuana.[146] Medical Marijuana is legalized in Mississippi. Adult-Use Marijuana is legalized in Maryland, Missouri, and Rhode Island.

[146] ADMINISTRATION OF JOSEPH R. BIDEN, JR., 2022, STATEMENT ON MARIJUANA REFORM, *supra* note 59. Biden also simultaneously pardoned all prior federal offenses for simple possession of marijuana and suggested that all U.S. governors pardon simple possession offenses at the state level. *Id.*

2023	1,809	MMJ: 40 AUMJ: 24	January 2023: The FDA released a statement that a new regulatory pathway was required for handling CBD products.[147] Medical Marijuana is legalized in Kentucky. Adult Use Marijuana is legalized in Delaware, Minnesota, and Ohio.
2024	1,216	MMJ: 40 AUMJ: 25	May 2024: The Attorney General submitted a notice of proposed rulemaking to the Federal Register initiating a formal rulemaking procedure to consider moving marijuana from a Schedule I to a Schedule III drug under the Controlled Substances Act.[148] Medical Marijuana is legalized in Nebraska.

2. General Trends

With those caveats, this table provides valuable data and context as to the number of cannabis trademark applications filed at the USPTO since 1996. I have observed a few notable trends:

1. The increase of "state-legal" medical marijuana regimes alone did not noticeably increase filings.

Although the number of states with medical marijuana regimes jumped from 1 to 13 between 1996 and 2008, the number of

[147] Press Release from Janet Woodcock, *supra* note 53.
[148] U.S. Dept. of Justice, *supra* note 61.

cannabis trademark applications filed at the USPTO stayed below 30 for this entire time.

This seems to be an abnormally low number of filings for the first decade of a new industry. In comparison, since the first non-fungible token ("NFT") was invented less than 10 years ago in 2014,[149] over 13,000 applications to register trademarks with NFT goods and services have been filed at the USPTO.[150]

In a time when cannabis businesses and patients in "state-legal" medical marijuana jurisdictions were regularly being arrested and prosecuted by the DOJ for violations of the CSA, business owners may have preferred to avoid any scrutiny from the federal government, even from the USPTO, an agency very unlikely to engage in prosecuting drug crimes. A trademark registration may also have just been a low priority for purely intrastate businesses operating in such a new industry.

2. Any sign of federal recognition of the cannabis industry has led to an increase in filings.

This trend first became noticeable when cannabis trademark applications jumped from seven in 2008 to 47 in 2009, the year in which the Ogden Memo was released. This non-binding policy memo from the Deputy Attorney General David Ogden noted that the DOJ should generally not focus federal resources on individuals in compliance with state medical marijuana laws.[151]

This happened again when medical marijuana IDs were "mistakenly" added to the USPTO trademark ID manual in 2010 (47 applications in 2009 versus 161 in 2010), the Cole Memo was released in 2013 (37 applications in 2012 jumped to 90 in 2013), and the first Rohrabacher-Farr Amendment passed in

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[149] *See* Jolene Creighton, *NFT Timeline: The Beginnings and History of NFTs*, NFTNOW (Dec. 15, 2022), https://nftnow.com/guides/nft-timeline-the-beginnings-and-history-of-nfts/ [https://perma.cc/9KXB-K6XL].
[150] *See* Screenshot Proof of a Search for "NFT" in the Trademark ID Manual, run March 2, 2025, https://drive.google.com/file/d/10K0c5SU1Nru-D2Uui1Sbt8bYOzoYR4vW/view?usp=sharing [https://perma.cc/2TSP-7KKS].
[151] *See supra* Table 1.

2014 (90 applications in 2013 jumped to 395 in 2014).[152] After this, applications with cannabis identifications increased for several years, peaking at a high of 6,323 applications in 2019, right after hemp CBD was legalized in December 2018. [153]

3. Cannabis trademark filings often decrease in response to the USPTO's negative treatment of cannabis applications.

Just as federal recognition initially drives up filings of cannabis trademark applications, so too, does the USPTO's negative treatment of these applications inevitably drive down filings in the following years.

After applications jumped from seven in 2008 to forty-seven in 2009 (the year the Ogden Memo was released) and 161 in 2010 (the year medical marijuana IDs were "mistakenly" added to the manual), applications plummeted to 73 in 2011 and 37 in 2012.[154] And although applications increased from 2013-2019, filings have decreased drastically every year since then, from 4,185 in 2020, to 3,669 in 2021, 2,560 in 2022, 1,809 in 2023, and 1,216 in 2024.[155]

Given the Attorney General's submission of a notice of proposed rulemaking initiating a formal rulemaking procedure to consider moving marijuana from a Schedule I to a Schedule III drug under the CSA in 2024, this continuing trend downward is a bit unexpected. It is possible that businesses in the cannabis industry, jaded after decades of hoping for rescheduling, are biding their time and saving their money for the day that the federal government announces something more solid than just a plan or a recommendation.

3. Likelihood of "Success" of Cannabis Trademarks vs. All Trademark Filings

Due to the USPTO's continued application of the lawful use requirement to cannabis trademark applications, "success" rates for these types of trademarks (when "success" for a trademark is defined as

[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.*

being live and registered at the time of searching) are still quite low. Since the Farm Bill of 2018 legalized hemp, "success" rates of cannabis trademark applications registering and remaining live at the time of search have ranged between 12.10% (2023, which likely reflects the fact that many applications filed during 2023 are still in the prosecution process) and 36.20% (2020), much lower than the compared general population "success" rate of 40.20% in 2023 and 62.49% in 2020.[156]

4. Reasons for Low Success Rates

Low "success" rates can likely be attributed to the fact that cannabis trademark applications are subjected to far stricter scrutiny than most trademark applications. In addition to all the usual refusals a trademark application might receive, these applications are also often refused registration on the basis of unlawfulness under the CSA or the FDCA. Such a refusal may issue even if the goods or services are or relate to lawful, topically used, non-therapeutic hemp products, if the identification of goods or services in the application does not contain the chemical definition of hemp.

On top of this, the USPTO has done little to educate trademark applicants and attorneys about their requirements. Although many types of federally lawful cannabis goods and services have been federally registrable since December 20, 2018, the USPTO has not made any public efforts to add cannabis identifications to the USPTO Trademark Identification Manual. The only cannabis identifications in the manual relate to long federally lawful hemp seed and stalk derived products such as hemp milk and hemp fabric.[157] The words "cannabis," "marijuana," "hemp seeds," "hemp stalks," and "THC" do not even appear in the ID Manual.[158]

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[156] *See infra* Chart 1: "Success" Rates of All Trademark Applications vs. Cannabis Trademark Applications, 2010–2023 (based off of data fully laid out in Table A1 in Appendix A).

[157] *See* Trademark ID Manual for Identifications Containing the Word "Hemp" (run Jan. 8, 2024), https://docs.google.com/spreadsheets/d/1mcOswpDnWHDC1fpGVky4xL4ZoMYEWs5U/edit?usp=sharing&ouid=115780756213216361239&rtpof=true&sd=true [https://perma.cc/5KRK-XD4S]

[158] *See* Screenshot Proof of Searches of the Trademark ID Manual for the words "cannabis," "marijuana," "hemp seeds," "hemp stalks," and "THC" from USPTO.GOV (run Mar. 2, 2025), https://drive.google.com/file/d/12V66BUc4nL9wbxU7_iUa8ymaYTgRtzfh/view?usp=sharing [https://perma.cc/V2H2-C2LS].

The USPTO's inaction on cannabis IDs stands in stark contrast to their general willingness to add almost any identification to the ID Manual, including IDs for goods and services such as "toy figures in the form of a potato" (appearing in 296 applications on the Trademark Register), "financial evaluation of alpaca fiber" (appearing in 35 applications), "toilet water containing snake oil" (appearing in 160 applications), and "rental of mops" (appearing in 114 applications).[159]

The ID Manual is clearly capable of handling the addition of a number of IDs for a new industry; 316 identifications for various NFT goods and services have been added since October 2021.[160] This seems reasonable considering the fact that identifications that include "NFT" appear in 13,661 applications filed at the USPTO.[161] However, this stands in sharp contrast to the lack of any identifications in the ID Manual containing many common non-hemp cannabis terms (cannabis, marijuana, marihuana, THC, tetrahydrocannabinol, CBD, cannabidiol, cannabigerol, or CBG), when over 25,000 applications have been filed at the USPTO with identifications containing these same terms.[162]

In addition, although the USPTO contains helpful webpages and videos written in layman's terms explaining common trademark refusals to applicants, it contains no similar resources for unlawful use refusals relating to cannabis. A search on USPTO.gov for "cannabis" brings up discussion of how to handle cannabis-related goods/services in trademarks in various Trademark Public Advisory Committee meetings, statements the USPTO may inquire about compliance with federal law before issuing a registration, a list of precedential TTAB cases regarding cannabis, and a single examination guide from 2019.[163]

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[159] *See* Screenshot Proof of Searches of the Trademark ID Manual and the Trademark Register from USPTO.GOV (run Mar. 2, 2025), https://drive.google.com/file/d/1LyZf_qXylAqdhbLLRvzdV5RzIt40AkZm/view?usp=sharing [https://perma.cc/6U7C-V4QW].

[160] *See* Screenshot Proof of a Search for "NFT" in the Trademark ID Manual from USPTO.GOV (run Mar. 2, 2025), https://drive.google.com/file/d/10K0c5SU1Nru-D2Uui1Sbt8bYOzoYR4vW/view?usp=sharing [https://perma.cc/DLM7-4FVG].

[161] *See* Screenshot Proof of a Search for Applications with Identifications Containing "NFT" on the Trademark Register from USPTO.GOV (run Mar. 3, 2025), https://drive.google.com/file/d/1RyanDLc8wGEN_GZBaDB4INf_wz4cUN1D/view?usp=sharing [https://perma.cc/8T8F-WEM2].

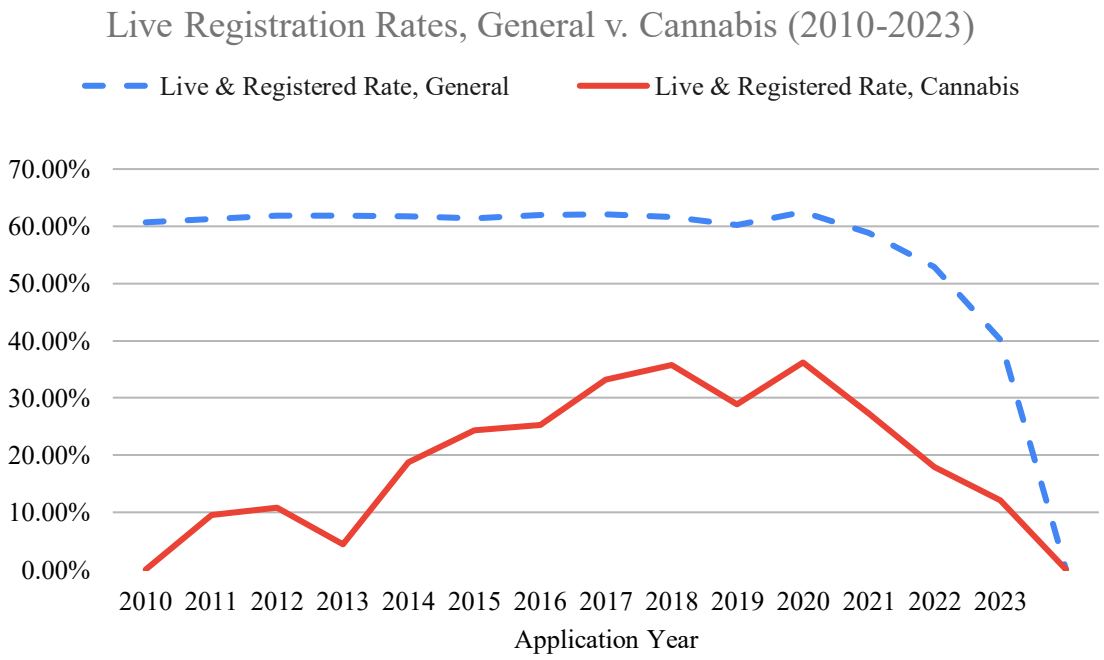
[162] *Supra* note 8.

[163] *See* Screenshot Proof of a Search for "cannabis" from USPTO.GOV (run March 3, 2025), https://drive.google.com/file/d/1CHMIf9153pv9gWEK2Wpclnm9b0Vjyv58/view?usp=sharing [https://perma.cc/FN5C-332B].

This examination guide does not advise applicants of the lawfulness of topical or therapeutic hemp CBD products, and only mentions the rigid ID requirements in passing.[164] The guide does not include any examples of acceptable identifications for cannabis goods, but merely states, "[i]f an applicant's goods are derived from 'hemp' as defined in the 2018 Farm Bill, the identification of goods must specify that they contain less than 0.3% THC." The guide also does not address the USPTO's policies regarding novel cannabinoids such as delta-8 THC, cannabigerol, or cannabinoids derived from non-cannabis sources such as hops or oranges.

If the USPTO were to add cannabis IDs to the Trademark ID Manual and issue an updated examination guide with a list of acceptable and unacceptable identifications that explain its policies regarding novel cannabinoids, it seems likely that the success rates of cannabis trademark applications would increase.

Chart 1: "Success" Rates of All Trademark Applications vs. Cannabis Trademark Applications, 2010–2023



[164] *See* Examination Guide 1-19 Examination of Marks for Cannabis and Cannabis-Related Goods and Services after Enactment of the 2018 Farm Bill, USPTO.gov (May 2, 2019), https://www.uspto.gov/sites/default/files/documents/Exam%20Guide%201-19.pdf.

5. The Effect of Attorney Representation Upon Cannabis Trademark Success Rates

Finally, Charts 2–3 compare a cannabis trademark application's likelihood of success with and without attorney representation.[165]

Attorney representation is one of the most significant factors affecting any single trademark application's likelihood of success. For all applications filed in 2020, an unrepresented trademark application had a 23.59% chance of being live and registered at the time of the search (on January 8, 2025). However, a represented trademark application filed in 2020 had a 76.41% chance of being live and registered at the time of the search. Thus, a trademark application filed in 2020 was more likely to register with attorney representation than without.

Because the USPTO's policies regarding cannabis trademark applications are fairly new (implemented fully in 2019–2020) and complicated, the effect of attorney representation on these applications, while still significant, is lessened from that on the general population of trademarks. An unrepresented cannabis trademark application filed in 2020 had a 25.26% chance of being live and registered at the time of the search (on January 8, 2025). In contrast, a represented cannabis trademark application filed in 2020 had a 39.08% chance of being live and registered at the time of the search. Thus, a cannabis trademark application filed in 2020 was slightly more likely to register with attorney representation than without.

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[165] *See infra* Appendix A for a full table showing the numbers behind these charts.

Chart 2: "Success" Rates of Cannabis Trademarks With and Without Attorney Representation, 2010–2023

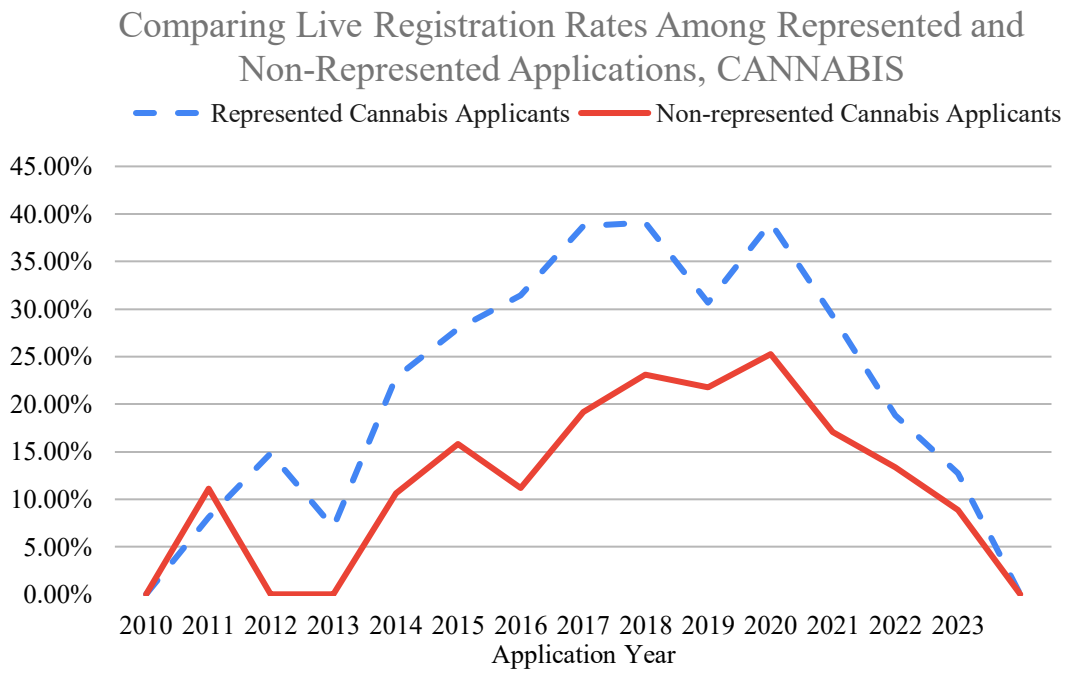
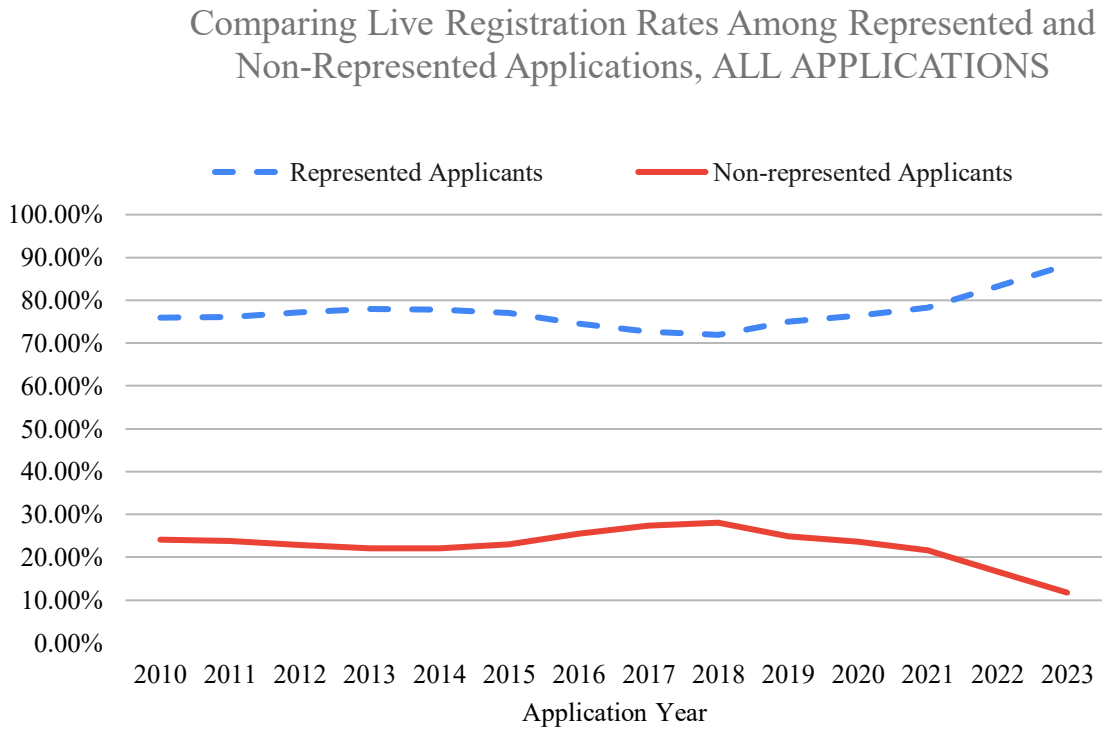


Chart 3: "Success" Rates of All Trademark Filings With and Without Attorney Representation, 2010-2023



IV. UP IN SMOKE: THE IMPACT OF THE USPTO'S APPROACH ON A BUDDING INDUSTRY

The impact of the USPTO's application of the lawful use requirement has become more apparent in recent years. In practice, the implementation of this policy directly harms American businesses and innovation, slows down the delivery of trademark rights, and reduces the reliability of trademark rights.

1. *Consumer Harms*

Consumers are often the ones harmed when cannabis companies cannot rely on federal trademark protection to enforce their brands against others. After CW Botanicals' low-THC, high-CBD cannabis strain "Charlotte's Web" (reputed to help with childhood seizures) gained fame in 2013, companies in other states began selling fake products under the same name. Some of these imposter products were

found to contain high levels of THC, pesticides, and other contaminants.[166]

Such incidents can cause consumers to avoid purchasing any cannabis whatsoever, even if they are in a class of patients who could likely greatly benefit from the use of cannabis. Cannabis experts have stated that lack of knowledge regarding the identity and quality of a product is a key concern of cannabis users. One doctor said, in regard to legalization efforts,

> You're taking [cannabis] out of the illegal market and giving it to legitimate businesses where there is going to be oversight and testing of products, so you know what you're getting. And these products undergo quality control and are labeled. Those labels so far are a bit variable, but at least we're getting there. If you're picking up cannabis at the street corner, you have no idea what's in it.[167]

This is a situation in which reliable trademark registrations would come in great use (revise for clarity). Consumers rely on trademarks to not only decide which goods and services to buy, but which goods and services to avoid, such as when adulterated or otherwise defective products cause harm to consumers. These consumer decisions are possible expressly because of reliable trademark registrations and rights.

For example, after Chipotle was involved in a foodborne illness scandal in 2015, consumers avoided the fast-casual restaurant chain, causing the company's profits to fall 44%.[168] If this were to occur in the absence of reliable trademark rights, consumers might avoid eating food from any restaurants, as it would be difficult to determine what establishment would be affected. However, because we have reliable trademark rights in the fast-food industry, consumers can simply avoid

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[166] *See* John Schroyer, *Trademarks: Some, but not many, protections for cannabis companies*, MJBIZDAILY (Sept. 20, 2016), https://mjbizdaily.com/trademarks-some-but-not-many-protections-for-cannabis-companies/ [https://perma.cc/6ZDA-VHJX].
[167] Lindsay Smith Rogers, *The Evidence—and Lack Thereof—About Cannabis*, JOHN HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Aug. 25, 2023), https://publichealth.jhu.edu/2023/risks-and-benefits-of-legalized-cannabis [https://perma.cc/LLL3-ZY6K].
[168] *See* Kindra Cooper, *How Chipotle Regained Consumer Trust After the E. Coli Outbreak in 2015*, CUSTOMER CONTACT WK. (Oct. 16, 2019), https://www.customercontactweekdigital.com/cx-news-and-trends/articles/chipotle-behind-the-foil [https://perma.cc/7YKV-9HCJ].

a single company and continue to visit other restaurants with a better reputation and track record for food handling and safety.
However, in the cannabis industry, where trademark rights are much shakier and less reliable due to the lack of access to federal trademark registrations, a consumer often cannot know the origin of the product they're purchasing from a dispensary, and thus, cannot make the same informed consumer decisions as they can in other industries.

2. *Deterrence from Application for or Proper Prosecution of Federal Trademark Registrations*

Although it is generally possible for cannabis companies to gain some federal registration protection for lawful information services or ancillary goods, the rules around what the USPTO specifically allows in trademark registrations are complicated enough that pro se applicants tend to struggle with the process. Even many experienced trademark attorneys fail to understand what types of cannabis goods or services the USPTO will allow them to register. As a result, it is quite common for cannabis trademark applications to be abandoned early on in the prosecution process, even in situations where the identification could be amended to satisfy the USPTO.

The known difficulties of this process also deter many companies from even trying to register their trademarks. When I was a speaker at MJBizCon in 2022, I personally surveyed a number of exhibitors at the conference and quickly discovered that a large number of them believed it was impossible for a cannabis or cannabis-related company to obtain any federal trademark registrations whatsoever.
This lack of federal trademark registrations can cause serious problems both for businesses attempting to prevent infringement of their brands and for new third party businesses who are unable to rely on the federal register to predict what trademarks are available.

3. *The Reliance of Cannabis Companies on Common Law and State Trademark Rights*

Many cannabis companies rely on common law trademark rights or state trademark registrations.

Although rights to a trademark are gained through use, the protections of a common law trademark without a federal registration are narrow and limited to the trademark owner's particular geographic

area.[169] Enforcing common law trademark rights often requires expensive litigation, in which the trademark holder must first prove the existence of protectable trademark rights in the mark (a step that the holder of a federal trademark registration can skip).[170]

Many cannabis trademark companies resort to obtaining state trademark registrations for their primary marijuana and/or hemp CBD goods and services. However, state trademark registration protections are often paltry compared to those offered by a federal trademark registration.[171]

A state trademark registration only protects a company's use of the mark within that jurisdiction; in contrast, a federal trademark registration protects a trademark throughout the entire United States and its territories.[172] Thus, marijuana companies operating in multiple states would have to pay several filing fees and go through multiple different state registry application processes in order to achieve a fraction of the protection they could have achieved with one federal trademark registration.

In addition, a state trademark registration often provides no superior rights to a common law trademark. In 31 states, the registration of a mark creates a certificate that may be admissible in a court case involving trademark litigation, but no other specific rights.[173] Six states are entirely silent on the effect of state registration.[174]

Some state government agencies even admit the ineffectiveness of state trademark registrations outright. The Minnesota Department of Employment and Economic Development states on its own website: "For most practical purposes, state registration of a trademark is meaningless. Since this area of law is controlled primarily by federal statute, existing state laws do not provide comprehensive trademark

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[169] *See Why Register Your Trademark*, USPTO (May 17, 2024), https://www.uspto.gov/trademarks/basics/why-register-your-trademark [https://perma.cc/WYV5-MEED].

[170] *See e.g.*, Emergency One, Inc. v. American Fire Eagle Engine Co., 332 F.3d 264, 267–68, 272 (4th Cir. 2003).

[171] In addition, many cannabis companies based within the District of Columbia or United States territories without state trademark registries cannot access state trademark registrations at all. *See* DISTRICT CANNABIS, Registration No. 6240101 (demonstrating the amount of protection that a D.C. only cannabis company can secure via federal trademark registration).

[172] *See Why Register Your Trademark*, *supra* note 169.

[173] *See* Lee Ann W. Lockridge, *Abolishing State Trademark Registrations*, 29 CARDOZO ARTS & ENT. L.J. 597, 618 (2011).

[174] *Id.*

protection, if they provide any protection at all."[175] Precedent in the area of state trademark protection for cannabis goods and services is limited; one practitioner who handles California trademark registrations has stated that he knows of no cannabis trademark infringement cases involving a trademark registration from that state.[176]

Furthermore, searching state trademark registers is significantly more complicated and expensive to search multiple state registers than one single federal register.[177] While it is possible to run a basic, comparatively easy search of the federal trademark register using the USPTO's free Trademark Electronic Search System ("TESS"),[178] there are no free methods of searching all state trademark registers at once. Companies attempting to perform a responsible search of state trademark registries before launching their own brands generally have to resort to using expensive trademark register search companies to obtain efficient search results.

Even then, companies may miss out on important trademark information due to the fact that many of these registry databases are years out of date. A June 2023 State Currency Schedule (commonly issued with Corsearch search results) indicated that Delaware's state trademark registry is only inclusive through July 25, 2022, and Louisiana's is only inclusive through February 4, 2019.[179] The worst offender is Minnesota, whose state trademark registry is dismally behind at being only inclusive through February 27, 2018, over five and a one-half years ago.[180]

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[175] *Trademark Protection*, MINN. DEP'T OF EMPL. AND ECON. DEV., https://mn.gov/deed/business/starting-business/protect/trademark-protection.jsp [https://perma.cc/AY6V-ZX44] (last visited Aug. 13, 2023).
[176] Correspondence with Luke Zimmerman Esq., LLM, in the Law Office of Luke S Zimmerman (Mar. 2, 2025) (notes on file with author).
[177] *See State Trademark Information Links*, USPTO, https://www.uspto.gov/trademarks/basics/state-trademark-information-links [https://perma.cc/H5F4-9EHD] (last visited Mar. 1, 2025).
[178] "Comparatively easy" is quite relative here, as learning to search the US Trademark Register properly to account for different variations of any particular trademark can be quite difficult. However, it is still significantly easier to perform a basic trademark search there than on many of the state trademark registers.
[179] *See* Corsearch State Registry Currency Schedule of 06/28/2023 (on file with author).
[180] *Id.*

4. *The Weak Federal Trademark Registrations of the Top American Cannabis Companies*

Cannabis businesses that do obtain federal trademark registrations often can only manage to acquire these for ancillary goods or services that may not adequately protect their interests. This is true even for some of the largest cannabis companies in the country.

For example, Curaleaf is commonly cited as the cannabis company with the largest market cap in the U.S., estimated at $2.34 billion.[181] This company operates 28 cultivation sites and 152 dispensaries in 19 states, employing over 5,500 people.[182] Curaleaf sells a variety of marijuana goods, including flower, pre-rolls, vaporizers, concentrates, edibles, tinctures, topicals, and accessories.[183]

Curaleaf has filed 27 applications at the USPTO, but only three have actually registered.[184] These are registered with reusable water bottles[185] and clothing.[186] Since the identifications in these registrations do not even mention any cannabis terms, these records would likely not show up in the results of a cannabis-company-focused search of the trademark register.

Although companies should ideally run common law searches in addition to trademark register searches before filing an application at the USPTO, it is fairly common for pro se applicants or inexperienced attorneys to only search the federal trademark register, the most centralized and comprehensive collection of US trademarks. Currently, if such a search were run for a highly similar mark such as "Curaleaves" for use with cannabis goods, Curaleaf's existing registrations could easily be missed. This could result in considerable unneeded expense and time for both the applicant attempting to register a trademark which is already in use and Curaleaf, which would need to oppose the trademark application to defend its rights.

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[181] Team Stash, *The 12 Largest Cannabis Companies*, STASH (Sept. 5, 2023), https://www.stash.com/learn/largest-cannabis-companies/ [https://perma.cc/JQC2-GJGZ].
[182] *See Curaleaf Investor Relations*, CURALEAF (Aug. 10, 2023), https://ir.curaleaf.com [https://perma.cc/67QL-2BPH].
[183] *Curaleaf Products*, CURALEAF (Aug. 10, 2023), https://curaleaf.com/shop/illinois/curaleaf-il-justice [https://perma.cc/GG6W-PXCA].
[184] USPTO TESS (indicating the results of a search string run on 08/10/2023 for: (curaleaf)[o]).
[185] CURALEAF, Registration No. 5956792; UKU, Registration No. 5910147.
[186] CURALEAF, Registration No. 5909701.

5. *Changing Strategies in Cannabis Trademark Protection post-Wunderwerks*

In addition, although obtaining federal trademark protection for ancillary goods and services offered by cannabis companies has been a standard cannabis trademark strategy for the past decade, recent court cases have brought this approach into question.

In December 2021, the Northern District of California stated in *Wunderwerks, Inc. v. Dual Beverage Co*. that a federal trademark for light beverages (not containing cannabis) "is likely to be invalid because plaintiff's [other] products encompass products illegal under federal law, and thus lawful use in commerce cannot be established."[187] This holding seems to imply that there is no way for any cannabis company offering any goods or services unlawful under federal law to obtain federal trademark protection at this time. Although this is only one case in one district court for now, if this view of the law were to spread further, it could decimate the federal trademark portfolios of an entire industry.

CONCLUSION

The American view of marijuana has changed drastically since California first legalized its medical use 27 years ago. In 1996, only 25% of Americans told prominent analytics and polling firm, Gallup, that they thought marijuana should be legalized.[188] This same Gallup poll found that 68% of Americans support legalization each year in 2020, 2021, and 2022.[189]

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[187] Wunderwerks, Inc. v. Dual Beverage Co., No. 21-cv-04980-SI, 2021 WL 5771138 (N.D. Cal. Dec. 6, 2021) (referencing WUNDER, U.S. Trademark Application Serial No. 88667500 (filed Oct. 24, 2019)).

[188] Jeffrey M. Jones, *Marijuana Views Linked to Ideology, Religiosity, Age*, GALLUP (Nov. 15, 2022), https://news.gallup.com/poll/405086/marijuana-views-linked-ideology-religiosity-age.aspx [https://perma.cc/XX5E-Y2ST].

[189] *Id.* Another indicator of changing views toward marijuana use: In 1992, when President Bill Clinton admitted to trying marijuana in his use, he said "When I was in England I experimented with marijuana a time or two, and I didn't like it. I didn't inhale it, and never tried it again." Olivia B. Waxman, *Bill Clinton Said He 'Didn't Inhale' 25 Years Ago—But the History of U.S. Presidents and Drugs Is Much Older*, TIME (Mar. 29, 2017), https://time.com/4711887/bill-clinton-didnt-inhale-marijuana-anniversary/ [https://perma.cc/269A-NZPY]. *See also* Gregory Krieg, *Presidents and Politicians Talk about Smoking Pot*, CNN (Apr. 20, 2016), https://www.cnn.com/2016/04/20/politics/politicians-marijuana-talk-about-getting-

Given this increasing public support for legalization and the Department of Health and Human Services' recent rescheduling recommendation, it seems likely that marijuana will be removed from Schedule I of the CSA and made federally lawful at some point in the next few years. In light of past trends, we can expect cannabis trademark applications at the USPTO to increase drastically at that time. If the USPTO follows the same approach that it took with the legalization of hemp CBD in 2018, they are likely to allow the owners of marijuana trademark applications pending at the time of re-scheduling to update their filing date to the first legal date. Due to the current messy state of cannabis trademark rights in the US, we may also see a rise in cannabis trademark infringement lawsuits, as the issue of figuring out priority of use for a newly lawful substance is sorted out. Eventually though, after several years, we can hope that these disputes will resolve, and the cannabis industry will be able to acquire federal trademark registrations with the same level of difficulty as other industries.

high-420/index.html [https://perma.cc/8JXP-W7ZZ] (quoting President Obama). 24 years later, Barack Obama said, "When I was a kid [smoking marijuana], I inhaled frequently. That was the point." *Id*.

APPENDIX A: "SUCCESS" RATES TABLES

Table A1: Cannabis Trademark Applications "Success" Rates

Cannabis trademark applications which were live and registered at the time of searching.

Cannabis Trademark Applications						
Year Filed	**Applications Total**	**Applications by Non-Represented Applicants**	**Applications by Represented Applicants**	**Live Registrations Total ("success" rate)**	**Live Registrations by Non-Represented Applicants**	**Live Registrations by Represented Applicants**
1996	8	2	6	0	0	0
1997	10	2	8	0	0	0
1998	4	1	3	1	0	1
1999	6	2	4	0	0	0
2000	26	3	23	1	0	1
2001	5	4	1	0	0	0
2002	4	1	3	1	0	1
2003	5	2	3	0	0	0
2004	2	2	0	0	0	0
2005	9	4	5	1	0	1
2006	5	1	4	0	0	0
2007	9	5	4	1	0	1
2008	7	4	3	0	0	0
2009	47	19	28	4	1	3

2010	161	89	72	4	0	4
2011	73	36	37	7	4	3
2012	37	10	27	4	0	4
2013	90	33	57	4	0	4
2014	395	132	263	74	14	60
2015	592	177	415	144	28	116
2016	645	197	448	163	22	141
2017	1,059	303	756	351	58	293
2018	2,774	576	2,198	992	133	859
2019	6,323	1,290	5,033	1,826	281	1,545
2020	4,185	871	3,314	1,515	220	1,295
2021	3,669	714	2,995	998	122	876
2022	2,560	389	2,171	460	52	408
2023	1,810	281	1,529	219	25	194

Table A2: Cannabis Trademark Applications "Success" Rates, broken out by attorney representation

Cannabis trademark applications which were live and registered at the time of searching.

Cannabis Trademark Applications			
Year	**"Success" Rate: All Cannabis Trademark applications**	**"Success" Rate: Non-Represented Cannabis TM Applications**	**"Success" Rate: Represented Cannabis TM Applications**
1996	0.00%	0.00%	0.00%
1997	0.00%	0.00%	0.00%
1998	25.00%	0.00%	33.33%
1999	0.00%	0.00%	0.00%
2000	3.85%	0.00%	4.35%
2001	0.00%	0.00%	0.00%
2002	25.00%	0.00%	33.33%
2003	0.00%	0.00%	0.00%
2004	0.00%	0.00%	N/A
2005	11.11%	0.00%	20.00%
2006	0.00%	0.00%	0.00%

2007	11.11%	0.00%	25.00%
2008	0.00%	0.00%	0.00%
2009	8.51%	5.26%	10.71%
2010	2.48%	0.00%	5.56%
2011	9.59%	11.11%	8.11%
2012	10.81%	0.00%	14.81%
2013	4.44%	0.00%	7.02%
2014	18.73%	10.61%	22.81%
2015	24.32%	15.82%	27.95%
2016	25.27%	11.17%	31.47%
2017	33.14%	19.14%	38.76%
2018	35.76%	23.09%	39.08%
2019	28.88%	21.78%	30.70%
2020	36.20%	25.26%	39.08%
2021	27.20%	17.09%	29.25%
2022	17.97%	13.37%	18.79%
2023	12.10%	8.90%	12.69%

Table A3: All Trademark Applications "Success" Rates

Cannabis trademark applications which were live and registered at the time of searching.

All Trademark Applications						
Year Filed	**Applications Total**	**Applications by Non-Represented Applicants**	**Applications by Represented Applicants**	**Registrations Total**	**Registrations by Non-Represented Applicants**	**Registrations by Represented Applicants**
1996	178,312	26,633	151,679	99,778	13,600	86,178
1997	190,563	27,621	162,942	104,982	13,656	91,326
1998	198,669	29,768	168,901	107,273	13,707	93,566
1999	263,858	54,017	209,841	127,073	17,781	109,292
2000	285,835	54,459	231,376	129,933	16,821	113,112
2001	218,198	44,412	173,786	116,030	16,160	99,870
2002	214,319	49,391	164,928	119,402	17,953	101,449
2003	225,180	57,488	167,692	122,204	20,319	101,885
2004	251,374	68,771	182,603	133,265	25,123	108,142
2005	266,768	74,163	192,605	142,429	27,913	114,516
2006	280,774	79,726	201,048	151,994	32,031	119,963
2007	306,598	90,792	215,806	168,694	37,458	131,236
2008	294,313	91,482	202,831	165,996	39,142	126,854
2009	269,397	84,744	184,653	158,711	39,245	119,466
2010	284,562	84,929	199,633	172,818	41,590	131,228

2011	308,767	90,127	218,640	189,325	45,112	144,213
2012	317,034	89,313	227,721	196,205	44,828	151,377
2013	328,200	89,768	238,432	203,065	44,720	158,345
2014	346,973	94,844	252,129	214,357	47,480	166,877
2015	380,297	107,684	272,613	233,658	53,758	179,900
2016	401,637	124,449	277,188	248,677	63,311	185,366
2017	452,818	148,312	304,506	281,144	76,916	204,228
2018	472,113	156,373	315,740	291,074	81,713	209,361
2019	497,934	156,649	341,285	300,132	74,769	225,363
2020	665,636	207,107	458,529	415,951	98,125	317,826
2021	673,130	188,620	484,510	395,935	85,763	310,172
2022	550,068	132,713	417,355	290,852	48,610	242,242
2023	546,005	113,271	432,734	219,468	25,771	193,697

Table A4: All Trademark Application "Success" Rates, broken out by attorney representation

Cannabis trademark applications which were live and registered at the time of searching.

Year	"Success" Rates: All TM Applicants	"Success" Rates: Non-represented TM Applications	"Success" Rates: Represented TM Applications
1996	55.96%	13.63%	86.37%
1997	55.09%	13.01%	86.99%
1998	54.00%	12.78%	87.22%
1999	48.16%	13.99%	86.01%
2000	45.46%	12.95%	87.05%
2001	53.18%	13.93%	86.07%
2002	55.71%	15.04%	84.96%
2003	54.27%	16.63%	83.37%
2004	53.01%	18.85%	81.15%
2005	53.39%	19.60%	80.40%
2006	54.13%	21.07%	78.93%
2007	55.02%	22.20%	77.80%
2008	56.40%	23.58%	76.42%
2009	58.91%	24.73%	75.27%
2010	60.73%	24.07%	75.93%
2011	61.32%	23.83%	76.17%
2012	61.89%	22.85%	77.15%

2013	61.87%	22.02%	77.98%
2014	61.78%	22.15%	77.85%
2015	61.44%	23.01%	76.99%
2016	61.92%	25.46%	74.54%
2017	62.09%	27.36%	72.64%
2018	61.65%	28.07%	71.93%
2019	60.28%	24.91%	75.09%
2020	62.49%	23.59%	76.41%
2021	58.82%	21.66%	78.34%
2022	52.88%	16.71%	83.29%
2023	40.20%	11.74%	88.26%

APPENDIX B: REQUEST FOR INFORMATION REQUIREMENT EXAMPLES

1. Trademark App. No. 88056443 - DR. JEKYLL CANNABIS

This RFI can be found in the Office Action of Feb. 08, 2019.

POTENTIAL UNLAWFUL USE REFUSAL – CSA & FDCA INQUIRIES - PARTIAL

The following applies to the applicant's International Classes 3, 5, 29, 31, 34, 35, 36, 41, 42 and 44 only.

Registration is also refused because the applied-for mark may not have a bona fide intent to use the mark lawfully in commerce. Trademark Act Sections 1 and 45, 15 U.S.C. §§1051, 1127; *see* TMEP §907.

To qualify for federal trademark mark registration, the use of a mark in commerce must be lawful. *Gray v. Daffy Dan's Bargaintown*, 823 F.2d 522, 526, 3 USPQ2d 1306, 1308 (Fed. Cir. 1987) (stating that "[a] valid application cannot be filed at all for registration of a mark without 'lawful use in commerce'"); TMEP §907; *see In re Stellar Int'l, Inc.*, 159 USPQ 48, 50–51 (TTAB 1968); *Coahoma Chemical Co., Inc. v. Smith*, 113 USPQ 413 (Com'r Pat. & Trademarks 1957) (concluding that "use of a mark in connection with unlawful shipments in interstate commerce is not use of a mark in commerce which the [Office] may recognize."). Thus, the goods and/or services to which the mark is applied must comply with all applicable federal laws. *See In re Brown*, 119 USPQ2d 1350, 1351 (TTAB 2016) (citing *In re Midwest Tennis & Track Co.*, 29 USPQ2d 1386, 1386 n.2 (TTAB 1993) (noting that "[i]t is settled that the Trademark Act's requirement of 'use in commerce,' means a 'lawful use in commerce'")); *In re Pepcom Indus., Inc.*, 192 USPQ 400, 401 (TTAB 1976); TMEP §907.

Here, the items or activities to which the proposed mark will be applied may be unlawful under the federal Controlled Substances Act (CSA), 21 U.S.C. §§ 801–971 and the Federal Food, Drug, and Cosmetic Act 21 U.S.C. §331(ll); see also 21 U.S.C. §321(ff) (indicating that a dietary supplement is deemed to be a food within the meaning of the Federal Food, Drug and Cosmetic Act).

First, the CSA makes it unlawful to sell, offer for sale, or use any facility of interstate commerce to transport "drug paraphernalia," which is defined as "any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting,

ingesting, inhaling, or otherwise introducing in the human body a controlled substance." 21 U.S.C. § 863. Under the CSA, marijuana is a controlled substance. 21 U.S.C. §§ 812(a), (c), 841, 844.

The identification of goods includes the following item(s), which appears to identify unlawful substances or products and/or drug paraphernalia: personal care products and pharmaceuticals/supplements; "Hemp seeds, hemp hearts; processed hemp; hemp-based snack foods; processed fruits and vegetables"; "seeds for agricultural purposes; seeds for horticultural purposes; live plants; unprocessed edible hemp seeds", "electronic cigarettes; electronic smoking pipes; herbs for smoking; hookahs; oral vaporizers for smokers; pocket apparatus for rolling cigarettes; smokeless cigarette vaporizer pipe; smoking pipes; tobacco water pipes; lighters" as well as e-commerce related services, investment related services, and technology related services that may enable a consumer to purchase such goods.

Furthermore, The Federal Food, Drug, and Cosmetic Act prohibits the introduction or delivery for introduction into interstate commerce of a food to which has been added a drug or a biological product for which substantial clinical investigations have been instituted and for which the existence of such investigations has been made public. 21 U.S.C. §331(ll); see also 21 U.S.C. §321(ff) (indicating that a dietary supplement is deemed to be a food within the meaning of the Federal Food, Drug and Cosmetic Act). Furthermore, on December 20, 2018 the FDA Commissioner issued a statement prohibiting cannabidiol (CBD) ingredients in consumable and ingestible products, *see* https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm628988.htm.

In determining whether an item is drug paraphernalia or a prohibited substance, relevant evidence may include instructions or descriptive materials provided with the item concerning its use; advertising concerning its use; and the manner in which the item is displayed for sale. *See* 21 U.S.C. §863(e); *In re Brown,* 119 USPQ2d 1350, 1351–52 (TTAB 2016) (relying on applicant's specimen and website to establish that its retail store services included the sale of marijuana).

Here, the applicant's applied for mark includes the term "CANNABIS", which suggests a connection to the cannabis and marijuana industry. Accordingly, because the identified goods consist of or include items or activities that are prohibited under the Controlled Substances Act and

the FDCA, the applied-for mark, as used in connection with such goods and/or services, cannot be in lawful use in commerce. *See In re Brown*, 119 USPQ2d at 1352.

Applicant must also answer the following questions regarding the nature of its applied-for goods:

1. Are any of applicant's identified goods marketed towards or intend to be used in connection with marijuana, cannabis, or any other marijuana or cannabis plant based extracts?

2. Are any of applicant's identified goods marketed towards or intend to be used in connection with hemp, marijuana-based preparations, cannabis-based preparations, hemp-based preparations, extracts or derivatives from marijuana, cannabis or hemp, including tetrahydrocannabinol (THC) or cannabidiol (CBD), synthetic marijuana, or any other controlled substance under the CSA?

3. If the answer to Questions 1 or 2 is "yes," does the hemp used or to be used in applicant's goods contain more than 0.3 percent delta-9 tetrahydrocannabinol (THC) on a dry weight basis?

4. If applicant has any documentation relative to the THC content of the oils, extracts or derivatives used or to be used in the goods, please submit them with the response.

5. If applicant's goods do or will contain oils, extracts, ingredients or derivatives from the plant Cannabis sativa L which has more than 0.3 percent delta-9 tetrahydrocannabinol on a dry weight basis, identify the part or parts of the plant used in obtaining the oils, extracts, ingredients or derivatives.

6. If the "hemp" is grown in the United States of America, was the hemp used in the goods obtained from an authorized grower or supplier of industrial hemp from a hemp growing pilot program set up under the 2014 Farm Bill?

7. Do or will applicant's identified goods include CBD which is derived from, oils, extracts or ingredients from plants other than Cannabis sativa L?

8. Upon information and belief, do applicant's identified goods and services comply with the Controlled Substances Act?

9. Upon information and belief, do applicant's identified goods and services comply with the Food, Drug and Cosmetic Act?

Failure to satisfactorily respond to a requirement for information is a ground for refusing registration. *See In re Cheezwhse.com, Inc.* , 85 USPQ2d 1917, 1919 (TTAB 2008); *In re Garden of Eatin' Inc.* , 216 USPQ 355, 357 (TTAB 1982); TMEP §814. Please note that merely stating that information about the goods and services is available on applicant's website is an inappropriate response to the above requirement and is insufficient to make the relevant information properly of record. *See In re Planalytics, Inc.* , 70 USPQ2d 1453 , 1457–58 (TTAB 2004). Applicant is advised that, upon consideration of the information provided by applicant in response to the above requirement, registration of the applied-for mark may be refused on the ground that the mark, as used in connection with the identified goods and/or services, is not in lawful use in commerce. Trademark Act Sections 1 and 45, 15 U.S.C. §§1051, 1127.

2. Trademark App. No. 97134735 for TEXAS GROWN.

The RFI can be found in the Office Action issued on August 13, 2022.

Finally, applicant must provide written responses to the following questions:

1. Will any of the goods identified within the following entry "extracts for smoking, namely, tinctures, oils, juice, powder, hashish, resins, shatter, wax, concentrate, rosin, live resin rumble, budder; lighters and oral vaporizers for smoking, namely, salves, waxes, concentrates, pastes, extracts, tinctures, hashish, powders, juice, resins, oils, pills, tablets, capsules, oral sprays, skin patches, sublingual doses and dissolvable strips, all a substitute for smoking" include or contain marijuana, cannabis, hemp, marijuana-based preparations, cannabis-based preparations, hempbased preparations, extracts or derivatives from marijuana, cannabis or hemp, including tetrahydrocannabinol (THC), synthetic marijuana, or any other controlled substance under the CSA?

2. Will any of the goods identified within the following entry "extracts for smoking, namely, tinctures, oils, juice, powder, hashish, resins, shatter, wax, concentrate, rosin, live resin

rumble, budder; lighters and oral vaporizers for smoking, namely, salves, waxes, concentrates, pastes, extracts, tinctures, hashish, powders, juice, resins, oils, pills, tablets, capsules, oral sprays, skin patches, sublingual doses and dissolvable strips, all a substitute for smoking;" include or contain hemp, hemp oil, hemp seed oil or any other ingredient or extracts derived specifically from hemp seeds or the mature stalks of the hemp plant?

3. Will these goods contain more than .3% THC?
4. Will these goods include cannabidiol (CBD)?
5. Do or will applicant's identified goods include CBD which is derived from, oils, extracts or ingredients from plants other than Cannabis sativa L (also known as hemp, marijuana or cannabis)?
6. Is applicant currently seeking FDA approval of the marketing of its goods identified in the application?
7. If the answer to Question 6 is "yes," please provide a copy of such application.
8. Are applicant's identified plant seeds sterilized, or are they capable of germinating into plants?
9. If applicant's identified seeds are capable of germinating, will the seeds germinate into a strain of Cannabis Sativa L (also known as cannabis, marijuana or hemp) containing a THC content of more than 0.3 percent on a dry weight basis? If not, please indicate type of plants applicant's seeds will produce.
10. Will applicant's identified seeds be planted for personal use?
11. Will applicant's identified seeds be sold and/or provided to third parties through interstate commerce?
12. Will applicant's identified seeds be imported?
13. If the answer to Question 12 is "yes," please provide supporting documentation including the phytosanitary certificate from the exporting country's national plant protection organization.
14. If the applicant's seeds are the product of Cannabis Sativa L. plants grown by the applicant, is the applicant currently an

authorized hemp producer under a State, Tribal, or USDA Federal plan?

15. If the answer to Question 14 is “yes,” please specify which plan (State, including identifying which State, Tribal, or USDA), and provide the authorization or license number and any supporting documentation. If not currently an authorized hemp producer, please indicate applicant’s intention and activities to secure authorization.

16. To the applicant’s knowledge and belief, has the wording "TEXAS," "GROWN," or "TEXAS GROWN" in the mark has ever been used, or is intended to be used, as a varietal or cultivar (also known as strain) name?

17. To the applicant’s knowledge and belief, has the wording "TEXAS," "GROWN," or "TEXAS GROWN" in the mark has ever been used, or is it intended to be used, in connection with a plant patent, utility patent, or certificate for plant-variety protection?

APPENDIX C: CSA UNLAWFUL USE OR INTENT TO USE REFUSAL EXAMPLES

1. CSA Unlawful Use Refusal (Includes option to change filing date to 12/20/2018)

Trademark App. No. 87893655 - CBD2GO. Office Action of May 25, 2019.

CSA REFUSAL – NO BONA FIDE INTENT TO LAWFULLY USE IN COMMERCE AS OF FILING DATE

Registration is refused because applicant does not have a bona fide intent to lawfully use the applied-for mark in commerce. Trademark Act Sections 1 and 45, 15 U.S.C. §§ 1051, 1127; *see* TMEP § 907.

To qualify for federal trademark/service mark registration, the use of a mark in commerce must be lawful. *Gray v. Daffy Dan's Bargaintown*, 823 F.2d 522, 526, 3 USPQ2d 1306, 1308 (Fed. Cir. 1987) (stating that "[a] valid application cannot be filed at all for registration of a mark without 'lawful use in commerce'"); TMEP §907; *see In re Stellar Int'l, Inc.*, 159 USPQ 48, 50–51 (TTAB 1968); *Coahoma Chemical Co., Inc. v. Smith*, 113 USPQ 413 (Com'r Pat. & Trademarks 1957) (concluding that "use of a mark in connection with unlawful shipments in interstate commerce is not use of a mark in commerce which the [Office] may recognize."). Thus, the goods and/or services to which the mark is applied must comply with all applicable federal laws. *See In re Brown*, 119 USPQ2d 1350, 1351 (TTAB 2016) (citing *In re Midwest Tennis & Track Co.*, 29 USPQ2d 1386, 1386 n.2 (TTAB 1993) (noting that "[i]t is settled that the Trademark Act's requirement of 'use in commerce,' means a 'lawful use in commerce'")); *In re Pepcom Indus., Inc.*, 192 USPQ 400, 401 (TTAB 1976); TMEP § 907.

Here, the items or activities with which the proposed mark will be used were unlawful under the federal Controlled Substances Act (CSA), 21 U.S.C. §§ 801–971, as of April 25, 2018, the date on which the application was filed. Applicant's goods are broad enough to encompass products that consist of, or include, items or activities that are or were prohibited by the CSA, namely, dietary beverage supplements for human consumption in liquid and dry mix form for therapeutic purposes.

As evidenced by the attachments from third party websites, the goods listed above could include goods which contain cannabidiol derived

from industrial hemp which is a member of the Cannabis sativa family of plants. Cannabidiol (CBD) is a chemical constituent of the cannabis plant that is encompassed within the CSA's definition of marijuana. *See* Clarification of the New Drug Code (7350) for Marijuana Extract, https://www.deadiversion.usdoj.gov/schedules/marijuana/m_extract_7350.html, *copy attached; see also,* 21 C.F.R. § 1308.11(d)(58). Applicant's identified goods are broad enough to include products produced from "all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin" (subject to certain exceptions). 21 U.S.C. § 802(16).

In this case, the evidence from https://www.leafly.com/products/details/tinley-beverage-co-hemplify-vitality-elixir, https://www.oleolife.com/, and https://queencityhemp.com/product/cbd-seltzer/?radius=25, establishes that cannabis or CBD infused beverages is an emerging market in which cannabis or ingredients from the marijuana plant are added or infused in dietary supplemental drinks. Therefore based on the applied-for mark and the evidence of record it is not unreasonable to conclude that the applicant's identified goods include items and/or activities that are prohibited by the CSA, namely, marijuana, cannabis or CBD.

In order for an application to have a valid basis that could properly result in a registration, the use of the mark has to be lawful. *See In re Pepcom Indus., Inc.*, 192 USPQ 400, 401 (TTAB 1976) Because use of the applied-for mark in connection with such goods and/or services was not lawful as of the filing date, applicant did not have a bona fide intent to lawfully use the applied-for mark in commerce in connection with such goods and/or services. *See In re JJ206, LLC*, 120 USPQ2d 1568, 1569 (TTAB 2016) ("where the identified goods are illegal under the federal Controlled Substances Act (CSA), the applicant cannot use its mark in lawful commerce, and 'it is a legal impossibility' for the applicant to have the requisite bona fide intent to use the mark."); *see also In re Brown*, 119 USPQ2d, 1351–1352; TMEP § 907.

On December 20, 2018, the CSA was amended to remove hemp from the definition of marijuana and specifically exclude "tetrahydrocannabinols in hemp (as defined under section 297A of the Agricultural Marketing Act of 1946)" from Schedule I, 21 U.S.C. § 812(c)(17). The goods and/or services identified did not potentially comply with applicable federal laws until that date. Because the

identified goods and/or services consist of or include items or activities that are prohibited under the Controlled Substances Act, the applicant did not have a valid basis for filing the application. Nevertheless, to the extent the applicant's goods contain CBD derived from cannabis plants that meet the current statutory definition of hemp, the goods may presently be lawful.

Due to the changed circumstances and the potential lawfulness of certain products and activities that meet the definition of the Agricultural Marketing Act of 1946, as amended (AMA), applicant may request to *amend* the filing date of the current application to be December 20, 2018. *See Examination Guide 1-19 Examination of Marks for Cannabis and Cannabis-Related Goods and Services after Enactment of the 2018 Farm Bill* https://www.uspto.gov/sites/default/files/documents/Exam%20Guide%201-19.pdf.

Applicant must specifically state for the record that such a change to the filing date is being authorized and must establish a valid filing basis under 37 C.F.R. §2.34 by satisfying the relevant requirements. *See* 37 C.F.R. §§2.34 *et seq.*, TMEP §§806 *et seq*. In the event of such an amendment, the undersigned examining attorney will conduct a new search of the USPTO records for conflicting marks based on the later application filing date. TMEP §§206.01, 1102.03 For instructions on how to satisfy basis requirements online using the Trademark Electronic Application System (TEAS) form, please go to the Basis webpage.

In lieu of amending the filing date, applicant may elect to abandon the current application and file a new application with a new fee that will have an application filing date that is later than the enactment of the December 20, 2018 amendments to the AMA. Alternatively, applicant may respond to the stated refusal by submitting evidence and arguments against the refusal. Lastly, the applicant may be required to amend its Identification of Goods to comply with statutory defined meaning of hemp, however, the amendments addressed above may not obviate the FDCA refusal addressed below.

2. CSA Unlawful Use Refusal for CBD Products + Drug Paraphernalia:

Trademark App. No. 90884877 - CHASING MAGIC Office Action of Feb. 16, 2023.

CONTROLLED SUBSTANCES ACT REFUSAL THIS PARTIAL REFUSAL APPLIES ONLY TO THE GOODS AND SERVICES SPECIFIED THEREIN Registration is refused because applicant does not have a bona fide intent to lawfully use the applied for mark in commerce. Trademark Act Sections 1 and 45, 15 U.S.C. §§1051, 1127; see TMEP §907.

To qualify for federal trademark/service mark registration, the use of a mark in commerce must be lawful. Gray v. Daffy Dan's Bargaintown, 823 F.2d 522, 526, 3 USPQ2d 1306, 1308 (Fed. Cir. 1987) (stating that "[a] valid application cannot be filed at all for registration of a mark without 'lawful use in commerce'"); TMEP §907; see In re Stellar Int'l, Inc., 159 USPQ 48, 50–51 (TTAB 1968); Coahoma Chemical Co., Inc. v. Smith, 113 USPQ 413 (Com'r Pat. & Trademarks 1957) (concluding that "use of a mark in connection with unlawful shipments in interstate commerce is not use of a mark in commerce which the [Office] may recognize."). Thus, the goods and/or services to which the mark is applied must comply with all applicable federal laws. See In re Brown, 119 USPQ2d 1350, 1351 (TTAB 2016) (citing In re Midwest Tennis & Track Co., 29 USPQ2d 1386, 1386 n.2 (TTAB 1993) (noting that "[i]t is settled that the Trademark Act's requirement of 'use in commerce,' means a 'lawful use in commerce'")); In re Pepcom Indus., Inc., 192 USPQ 400, 401 (TTAB 1976); TMEP §907.

Here, the items or activities with which the proposed mark will be used include those that are unlawful under the federal Controlled Substances Act (CSA), 21 U.S.C. §§ 801–971.

The application identifies the following cannabidiol goods and/or services:

International Class 003: Cosmetics and non-medicated toiletry preparations, all of the foregoing containing CBD hemp-derived CBD with a delta-9 THC concentration of not more than .3% on a dry weight basis; Cosmetics and non-medicated toiletry preparations, none of the foregoing that are unlawful under federal or state law; non-medicinal preparations for the mouth to be applied in the form of sprays, drops, capsules, tablets, sublinguals, and compressed tablets; all of the foregoing only containing amounts of CBD as permitted by federal, state and local law

IC 005. US 005 006 018 044 046 051 052. G and S: Topical medicated skin care preparations, namely, creams, salves, lotions, balms, gels, and oils, and salt soak for use on skin, all of the foregoing containing CBD

hemp-derived CBD with a delta-9 THC concentration of not more than .3% on a dry weight basis; Topical medicated skin care preparations, namely, creams, salves, lotions, balms, gels, and oils, and salt soak for use on skin; medicinal herbs and herb extracts; Aromatherapy creams, shower balls, lotions, oils other than essential oils, pillows, sprays other than essential oils, and herbal mud packs, all for cannabis related therapies, namely, for treating headaches, relieving stress, and curing insomnia; aromatherapy sticks, other than essential oils, for cannabis related therapies, namely, for treating headaches, relieving stress, and curing insomnia; medicated soap; candy for medical purposes; edible fish oils for medical purposes; food supplements; glaucoma agents; medicated herbal ointments for pets; herbal drinks used to aid in sleep and relaxation; herbal supplements; herbal tinctures for medical purposes; medicinal alcohol; medicinal creams and powders for skin care; medicinal hair growth preparations; medicinal infusions for treating pain, nausea, and discomforts; medicinal oils; medicinal preparations for the mouth to be applied in the form of sprays, drops, capsules, tablets, sublinguals being dissolvable films, and compressed tablets; medicinal preparations for the treatment of infectious diseases and for use in oncology; astringents for medicinal purposes; dietary supplements; dietary supplements for pets; dietetic foods, namely, cannabis infused foods adapted for medical use; health food supplements; prescription and non-prescription medicines, namely, pills, tablets, capsules, caplets, liquid drops, sachets, edible wafers, sublinguals being dissolvable films, and powders for treating headaches, relieving stress, and curing insomnia; transdermal patches featuring infused cannabis for use in the treatment of insomnia; dietetic foods adapted for medical use, namely, cannabis infused foods for the treatment of special medical and health conditions, none of the foregoing that are unlawful under federal or state law; all of the foregoing only containing amounts of CBD as permitted by federal, state and local law

International Class 029: Health foods, namely, fermented vegetables, dried fruit and vegetables; vegetable-based snack foods; fruit-based snack foods; all of the foregoing only containing amounts of CBD as permitted by federal, state and local law

International Class 030: Food seasonings; food flavorings, other than essential oils, and seasonings; herbal infusions; ice cream; sorbet; sherbet; frozen confections; chocolate; chocolate truffles; bonbons; candy; brownies; cookies; snack cakes; mints for breath freshening; tea; tea-based beverages; iced tea; coffee; coffee-based beverages; snack

foods, namely, rice-based snack foods, grain-based snack foods, chocolate-based snack foods; none of the foregoing that are unlawful under federal or state law; all of the foregoing only containing amounts of CBD as permitted by federal, state and local law

International Class 031: Plant seeds, dried flowers, natural plants and flowers; edible pet treats; snack foods, namely, dog food, cat food; none of the foregoing that are unlawful under federal or state law; Hemp flower containing hemp-derived CBD with a delta-9 THC concentration of not more than .3% on a dry weight basis; all of the foregoing only containing amounts of CBD as permitted by federal, state and local law

International Class 032: Soft drinks, namely, sodas; sparkling water; lemonade; fruit juices

International Class 034: Electronic cigarettes, namely, e-pens and vape pens not intended for use with cannabis and marijuana; e-juice in the nature of electronic cigarette liquid and electronic cigarette liquid (e-liquid) comprised of flavorings in liquid form, other than essential oils and not including cannabis and marijuana, used to refill electronic cigarettes; Tobacco and tobacco substitutes; tobacco substitutes not for medical purposes; cartridges sold filled with propylene glycol for electronic cigarettes; cigarettes containing tobacco substitutes not for medical purposes; electronic cigarette refill cartridges sold empty; flavorings for tobacco substitutes, other than essential oils; flavorings for tobacco, other than essential oils; flavorings, other than essential oils, for use in electronic cigarettes; liquid nicotine solutions for use in electronic cigarettes; oral vaporizers for smokers; oral vaporizers for smoking purposes; Cigarettes and liquid nicotine solutions for use in electronic cigarettes containing hemp-derived CBD with a delta-9 THC concentration of not more than .3% on a dry weight basis; Hemp pouches being tobacco pouches containing hemp-derived CBD with a delta-9 THC concentration of not more than .3% on a dry weight basis; Cigarettes and liquid nicotine solutions for use in electronic cigarettes; Lighters for smokers, (not for automobiles); Cigarette rolling papers; Ashtrays; Tobacco pipes; Tobacco water pipes; Smoking pipes; Single use pipe being a smoking pipe containing hemp-derived CBD with a delta-9 THC concentration of not more than .3% on a dry weight basis; Matches; oral vaporizers not for medical purposes containing cannabis; none of the foregoing that are unlawful under federal or state law; all of the foregoing only containing amounts of CBD as permitted by federal, state and local law

International Class 035: Providing employment counseling and business advisory services related to business matters, namely, developing and executing lawful business plans in the cannabis industry; Retail and online retail store services featuring clothing, gardening supplies, and nutrients, equipment, and supplies for growing cannabis; Retail store and online retail store services featuring electronic cigarettes, electronic cigarette cartridges, and liquids being liquid nicotine, terpenes being essential oils, and essential oils used to fill electronic cigarettes; Advertising, promotion, brand development, and marketing in the field of electronic cigarettes, electronic cigarette cartridges, and liquids being liquid nicotine, terpenes being essential oils, and essential oils used to fill electronic cigarettes; On-line customer-based social media brand marketing services; Providing advertising, marketing and promotional services, namely, development of advertising campaigns for television, film, print media, web pages, and social media; Development of marketing strategies and concepts; Development of marketing strategies and concepts; Advertising, marketing and promotion services; Retail and on-line retail store services featuring a wide variety of consumer goods and general consumer merchandise, namely, smoker's articles, vaporizing units, electronic cigarettes, smokeless cigarette vaporizing pipes, cartridges sold empty for use with portable vaporizing units, electronic cigarettes, and smokeless cigarette vaporizing pipes, syringes for electronic cigarettes, and liquids being liquid nicotine, terpenes being essential oils, and essential oils used to fill portable vaporizing units, electronic cigarettes, and smokeless cigarette vaporizing pipes, none of the foregoing that are unlawful under federal or state law; all of the foregoing only containing amounts of CBD as permitted by federal, state and local law

Cannabidiol (CBD) is a nonpsychoactive constituent of the cannabis plant. Applicant's identified goods and/or services are broad enough to include products produced from "all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin" (subject to certain exceptions). 21 U.S.C. §802(16)(definition of "marihuana"—commonly referred to as "marijuana").

The CSA makes it unlawful to sell, offer for sale, or use any facility of interstate commerce to transport "drug paraphernalia," which is defined as "any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding,

converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing in the human body a controlled substance." 21 U.S.C. § 863. Under the CSA, marijuana is a controlled substance. 21 U.S.C. §§ 812(a), (c), 841, 844. The identification of goods/services also includes equipment, product, material for manufacturing, processing, inhaling, introducing to the body marijuana.

In order for an application to have a valid basis that could properly result in a registration, the use of the mark has to be lawful. See In re Pepcom Indus., Inc., 192 USPQ 400, 401 (TTAB 1976) Because use of the applied-for mark in connection with such goods and/or services was not lawful as of the filing date, applicant did not have a bona fide intent to lawfully use the applied-for mark in commerce in connection with such goods and/or services. See In re JJ206, LLC, 120 USPQ2d 1568, 1569 (TTAB 2016) ("where the identified goods are illegal under the federal Controlled Substances Act (CSA), the applicant cannot use its mark in lawful commerce, and 'it is a legal impossibility' for the applicant to have the requisite bona fide intent to use the mark."); see also In re Brown, 119 USPQ2d, 1351–52; TMEP §907.

On December 20, 2018, the CSA was amended to remove hemp from the definition of marijuana and specifically exclude "tetrahydrocannabinols in hemp (as defined under section 297A of the Agricultural Marketing Act of 1946)" from Schedule I, 21 U.S.C. §812(c)(17). The goods and/or services that feature cannabidiol did not potentially comply with applicable federal laws until that date. Because the identified goods and/or services that feature cannabidiol consist of or include items or activities that are still prohibited under the Controlled Substances Act, namely those containing cannabidiol derived from marijuana, the applicant did not have a valid basis for filing the application for such goods. Nevertheless, to the extent the applicant's goods will be derived solely from cannabis plants that meet the current statutory definition of hemp, the goods may presently be lawful.

Therefore, in order to overcome this refusal, applicant must amend the identification of goods and services to specify that all cannabidiol-containing items are "solely derived from hemp with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis", "exclusively for use with CBD products solely derived from hemp with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis" etc.

3. CSA Unlawful Use Refusal: Marijuana

Trademark App. No. 90732834 - WALKER CANNABIS COMPANY

Office Action of Nov. 16, 2022.

CONTROLLED SUBSTANCES ACT REFUSAL

Use of a mark in commerce must be lawful use to be the basis for federal registration of the mark. Gray v. Daffy Dan's Bargaintown, 823 F.2d 522, 526, 3 USPQ2d 1306, 1308 (Fed. Cir. 1987) (stating that "[a] valid application cannot be filed at all for registration of a mark without 'lawful use in commerce'"); TMEP §907. Thus, the goods and/or services to which the mark is applied must comply with all applicable federal laws. See In re Brown, 119 USPQ2d 1350, 1351 (TTAB 2016) (citing In re Midwest Tennis & Track Co., 29 USPQ2d 1386, 1386 n.2 (TTAB 1993) (noting that "[i]t is settled that the Trademark Act's requirement of 'use in commerce,' means a 'lawful use in commerce'")); In re Pepcom Indus., Inc., 192 USPQ 400, 401 (TTAB 1976); TMEP §907.

The application identifies a connection to cannabis and marijuana. CBD is a nonpsychoactive constituent of the cannabis plant. Goods containing CBD derived from cannabis that meets the definition of "marijuana" are illegal under the federal Controlled Substances Act (CSA), 21 U.S.C. §§ 801–971. In addition, on December 20, 2018, the CSA was amended to remove "hemp" from the definition of "marijuana" and specifically exclude "tetrahydrocannabinols in hemp (as defined under section 297A of the Agricultural Marketing Act of 1946)" from Schedule I, 21 U.S.C. §812(c)(17). See the Agriculture Improvement Act of 2018, Pub. L. 115-334 (the 2018 Farm Bill), which amends the Agricultural Marketing Act of 1946 (AMA). Thus, certain goods and/or services containing or involving hemp, CBD derived from hemp, and/or CBD with less than .3% THC that were used in commerce or intend to be used in commerce on or after December 20, 2018 may be lawful under the CSA.

The application is currently refused under the CSA because the application identifies cannabis and marijuana as the goods and/or products which applicant is selling in commerce. Cannabis and marijuana are controlled substances and are therefore unlawful. Thus, the application includes items or activities that are prohibited under the

CSA, and as such applicant currently does not have a valid filing basis for any such items or activities.

To the extent applicant's "cannabis" goods are derived solely from cannabis plants that meet the current statutory definition of "hemp," namely, "hemp with a delta-9 tetrahydrocannabinol (THC) concentration of not more than 0.3 percent on a dry weight basis," and were used or will be used on or after December 20, 2018, such goods may be lawful. However, this CSA refusal cannot be obviated by amendment for the "marijuana" goods identified in the application, as marijuana is always unlawful under the CSA due to the high THC content.