TTAB Weighs in on Registrability of CBD Trademarks

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In a precedential decision earlier this year, the Trademark Trial and Appeal Board thinned some of the haze surrounding the registrability of trademarks for hemp-derived CBD products. In line with the U.S. Patent and Trademark Office guidelines issued last year, the Board confirmed that marks covering food and dietary supplements containing

hemp-derived CBD are not currently registrable.

The decision involved an application for the mark CW covering “hemp oil extracts sold as an integral component of dietary and nutritional supplements” owned by the company behind the “Charlotte’s Web” strain of cannabis, which some may recognize due to national news coverage of its efficacy in treating seizure disorders. The record contained evidence that the applicant sold versions of the goods containing both CBD derived from marijuana (defined as cannabis containing more than 0.3% THC and which is illegal under the Controlled Substance Act (“CSA”)) and from hemp (defined as cannabis containing less than 0.3% THC and which is no longer illegal under the CSA). This dual use prompted the examining attorney to refuse the application on the ground the goods cannot be used lawfully in interstate commerce because they constitute foods that are per se illegal under the federal Food Drug and Cosmetics Act (“FDCA”) and on the ground that the goods are illegal under the CSA.

Eschewing the CSA, the Board focused its review on the legality of the goods under the FDCA. Consistent with FDA guidelines, the Board concluded that the CBD oil sold by the applicant qualifies as a food that is subject to the FDCA. The Board further concluded that the CBD oil cannot be a lawful food or dietary supplement under the FDCA because CBD is an active ingredient in the drug Epidiolex, and the FDA’s general rule is that a biologic (such as CBD) cannot be marketed as food or a dietary supplement if the biologic is part of a clinical investigation. In response, the applicant attempted to invoke an exception to the FDCA by arguing that CBD was marketed as a food/dietary supplement before these clinical investigations were underway. The Board rejected this argument on the ground the evidence submitted, which consisted of conclusory statements from the Hemp Industries Association supporting the position, were self-serving and not probative.

The decision is also notable for what it does *not* say. Specifically, the Board did not outright reject the legality of the mark on the ground it is used with goods deemed unlawful under the CSA, which would have been a much easier needle to thread given the applicant’s use of the mark with marijuana byproducts. This tends to confirm that unlawful use of a mark with one type of product does not necessarily prohibit registration of a mark with another lawful product.

Additionally, the Board did not completely foreclose the possibility of registering marks for hemp-derived CBD in connection with foods or dietary supplements. To the extent there exists evidence that supports invoking the FDCA’s exception based on marketing of CBD prior to clinical trials, registration may be achievable. And the FDA could always change course in how it treats CBD products. Indeed, organizations such as the National Industrial Hemp Council have submitted comments urging the FDA to consider CBD as “generally recognized as safe” for consumption. If the FDA were to take this approach, it would almost certainly clear the path for federal registration of marks for food and dietary supplements containing CBD. We’ll continue to monitor the FDA’s treatment of CBD products and any impact it might have on the registrability of marks in this space.