

Hemp Cos. Should Narrow Filings After TTAB's Stanley Ruling

By **Adam Fox and Joseph Grasser** (July 31, 2020, 3:36 PM EDT)

The Trademark Trial and Appeal Board, or TTAB, is an administrative body that hears and decides adversary proceedings and appeals of decisions regarding trademark applications issued by examining attorneys within the U.S. Patent and Trademark Office.

It recently rejected a trademark application by Stanley Brothers Social Enterprises LLC, a Colorado-based company that makes, among other things, food products and dietary supplements that contain CBD, a nonpsychoactive compound derived from industrial hemp, a variety of the cannabis sativa plant.[1]

The TTAB rejected the application because it found the CBD products that were the subject of the application to be unlawful under both the Controlled Substances Act and the Federal Food, Drug and Cosmetic Act, or FDCA, in a decision that surprised many observers.

By way of background, in the 2014 Farm Bill, Congress exempted industrial hemp from the Controlled Substances Act, or CSA, in certain circumstances, authorizing, among other things, institutions of higher education and state agriculture departments to grow hemp under a pilot program if consistent with state law, and defining hemp to include up to 0.3% of the psychoactive cannabinoid THC on a dry weight basis.

The 2018 Farm Bill expanded the legality of hemp in certain important ways, namely legalizing its production as an agricultural commodity, and removing it from the list of controlled substances along with all derivatives, extracts and cannabinoids among other compounds with a similarly low amount of THC.

The reversal of the CSA on the legality of hemp and its derivatives has led to a recent explosion in investment and growth in the industry. Among other areas, the market for products containing CBD, a compound that may effectively serve as a balm for a variety of ailments according to numerous published, peer-reviewed scientific studies, has enjoyed particularly strong growth.

One report forecasts a 34% compound annual growth rate for the hemp industry, estimating that the global market will grow from \$4.6 billion in 2019 to \$26.6 billion by 2025.[2] With such explosive growth, companies are making bigger investments throughout the industry and, not surprisingly, taking steps to build and protect their brand equity of which trademarks are an integral component.

Stanley Brothers is one of those companies. Relying on the 2018 Farm Bill's provisions removing industrial hemp derivatives from the CSA, Stanley sought to register a trademark for its CBD products, sold as food supplements.

Notably, in rejecting Stanley's application, the TTAB explained its ruling without passing on the referenced Farm Bills' impact on the legality of CBD products by amending the CSA,



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except by way of a discussion of the case background.

The TTAB expressed its opinion that Stanley's use of CBD in food products — in the form of tinctures droplets of which are intended to be added to foods or beverages — rendered those goods subject to the FDCA. The TTAB specifically noted that the FDCA prohibits

[t]he introduction or delivery for introduction into interstate commerce of any 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.[3]

In other words, even though the CBD and the hemp from which it was derived were legal, the TTAB found the intended use as a food supplement to be unlawful based on its reading of the FDCA. Notably, no other reported case relies on this provision.

This case presents a number of lessons for participants in the hemp and CBD industries who are looking to protect their intellectual property rights.

That is, even though the sale of CBD derived from industrial hemp is no longer criminalized under the CSA — as long as it complies with the provisions of the 2014 and 2018 Farm Bills regarding its cultivation, the TTAB, so far uniquely, regards any food product containing CBD to remain unlawful and therefore not subject to the branding protections afforded by a federal trademark. This should impact the protections sought by hemp and CBD companies.

For example, when looking to protect trademark rights, the normal inclination is to go as broad as possible in describing one's goods and services to maximize the scope of protection afforded by the registered mark. Now, more than ever, the better strategy may lie in being strategically narrow.

Perhaps if Stanley had sought to protect a CBD-only product — as opposed to dietary supplements infused with CBD, it may well have obtained a registration. Although the protection would not be as robust as that sought by Stanley, a CBD-only registration would still provide protection against third parties attempting to use a confusingly similar name in the CBD space.

In fact, Stanley might also have had broader success had it not been as descriptive as it was in its application. Stanley described its products as "[h]emp oil extracts sold as an integral component of dietary and nutritional supplements." The TTAB pounced on the dietary and nutritional supplement as the basis to find the proposed use unlawful.

Had Stanley limited its description to "hemp oil extracts" or even "hemp oil extracts for human consumption" it may have avoided the unlawfulness finding reached by the TTAB. Not only would this description have avoided the pitfalls of the FDCA but it would also have provided roughly the same protection.

An important point to take away from the decision is that the TTAB will likely continue to take a hostile view toward cannabis-related trademark applications based on the intended use of CBD products, even if those products are produced in a lawful manner.

Aside from mustering further challenges to this interpretation of the FDCA, a good trademark strategy should consider marketing of CBD products that do not invoke use in food or other FDCA prohibitions and considering when a more narrow trademark application might result in better outcomes.

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[1] In re: Stanley Brothers Social Enterprises LLC, Case No. 86568478 (TTAB 2020).

[2] See <https://www.marketsandmarkets.com/Market-Reports/industrial-hemp-market-84188417.html#:~:text=The%20industrial%20hemp%20market%20is,USD%2026.6%20billion%20by%202025>, last accessed July 30, 2020.

[3] 21 U.S.C. § 331(II).