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Protecting Cannabis Strains

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July 5, 2016

Introduction.

Cannabis is a multi-billion dollar industry in the United States, and the cannabis plant is characterized by some as its most valuable asset. Some strains of cannabis stand out as superior based on a number of factors including yield of seed, fiber and cannabinoid content. Various strains are adapted for particular regions and cultivation environments. Other strains possess unique characteristics including unique aromas, desirable growth characteristics and other attributes.

Exclusivity in the marketplace can reward a grower/entrepreneur. This article illustrates a number of possible ways to protect your strain in the marketplace. Protection can be afforded through the strategic use of Patents, Trademarks, Copyrights, Contracts and Plant Variety Protection Certificates.

No single form of intellectual protection is comprehensive. Each form has its advantages, limitations and associated costs. The best protection includes an array of strategically considered hurdles that limit a competitors use of the protected strain.

Different Strategies for Protecting a Cannabis Strain in the Marketplace

Utility patents are regularly issued for plants, extraction methods, formulation methods, nutraceutical compositions, growing techniques and hardware. There is no express prohibition that would limit patentability of a particular cannabis strain. Many cannabis-patents have been issued.

For example, GW Pharma Limited, from the UK, has hundreds of published patent applications and many issued patents covering aspects of cannabis. One interesting [example](#) covers particular genotypes that result in the high production of cannabichromenic acid and its decarboxylated



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form. Utility patents can pose a hurdle to those that may wish to use a proprietary cannabis strain.

Plant patents covering asexually reproducible varieties (clones). Plant patents are relatively inexpensive compared to a utility patent for the genetics. A plant patent is essentially a design patent covering any novel and visually perceived attributes of the plant. Coverage is narrow. While plant patents are quite useful in covering clones, they do not cover sexual reproduction of the variety e.g. using a cannabis clone to create hybrid seeds for distribution.

Contracts restricting the use of seeds and clones may be achieved through a material use agreement, a trade secret agreement or a technology use agreement. A clone supply agreement should include terms that enable the strain owner to protect the strain. However, one should appreciate that contracts typically bind only the parties. If a third party appears with the strain, and it can't be traced back to the contracting parties, the contract likely adds little protection. Smart contracting can be a valuable and inexpensive way of protecting your strain.

Trademarks: the strain name can be protected by State and Federal Trademark Law. Those holding or owning special strains of cannabis see value in the strain name. Customers recognize the name and it may be difficult for a third party to distribute the strain without using the name. Trademarks are a way of creating a hurdle for competitors.

There are challenges to Trademark Protection. The U.S. Patent and Trademark Office is notorious for rejecting trademarks for marijuana and related products. In order to obtain a federal trademark registration, actual use in interstate commerce is required. The Controlled Substances Act under federal law arguably makes the interstate distribution of marijuana illegal.

Solutions are available. Legal hemp products are distributed in interstate commerce. Marijuana could become legal under Federal Law in the future. Early trademark rights can be developed through use in conjunction with hemp products distributed via interstate commerce. These early trademark rights can encompass the later use in conjunction with other similar (legal) products, including Marijuana when it becomes legal.

Further, state law trademark registration is available for each individual state. Some find this cumbersome, but it is possible. Lastly, federal copyright law can protect a logo such as an image or fanciful font expressing the strain name. Protecting trademarks is another useful hurdle that can be erected to protect your strain.



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Plant Variety Protection: The Plant Variety Protection Act (the “PVPA”) provides an option along with patent law as a way to protect and encourage the development of new seed varieties. PVPA creates a voluntary program to provide patent-like rights to developers, breeders, and owners of plant varieties. Similar to patent protection, the PVPA provides intellectual property protection to breeders of varieties of seed and tuber (potatoes) propagated plants that are new, distinct, uniform, and stable it allows for protections for a term of up to 20 years. It is important to note that PVPA does not limit the scope of patent law when looking to protect new seed variety. One can obtain both a plant patent and a PVPA certificate for the same strain.

PVPA provides similar protections as a patent provides. Unlike a plant patent, which does not cover seed propagation, the PVPA affords protection to those using seed to propagate the protected variety and hybrids thereof.

For example, it is unlawful to sell or grow a PVPA protected variety without the permission of the PVPA certificate holder; and the PVPA certificate holder can bring civil actions against persons violating/infringing on the holder’s rights. Damages may include attorney’s fees and up to triple the damages where willful infringement is found. In addition to patent like protection, the certificate holder may bring federal or state enforcement in some circumstances. Penalties for willful infringement under Federal law have been awarded in the six-figure range.

Under the PVPA infringing acts may include: using seed marketed as “unauthorized propagation prohibited” to produce seed of the variety to market for growing purposes; Selling, offering, delivering, consigning, exchanging or advertising for sale a protected variety; Dispensing the variety to another person without informing that person that the variety is protected; Importing the variety into the United States or exporting the variety from the United States; or Inducing a third party to commit any of the above acts.

Obtaining a PVPA certificate requires deposit of seed in an authorized repository. As of yet, there is no known court case where a PVPA certificate has been enforced against a marijuana cultivator. Like patents and other types of intellectual property protections, the PVPA is a useful tool in protecting plant species.

Conclusion

Establishing a variety of legal strategies is essential to enjoy protection of cannabis strains in the marketplace.