Cannabis intellectual property rights: Workarounds to cannabis export and import restrictions

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Many countries are contemplating or moving forward with legalizing adult-use cannabis, including the U.S., whose Congress recently passed the *Marijuana Opportunity Reinvestment and Expungement Act* in early 2022.

Current Canadian regulations restrict importation and exportation of cannabis to medical and scientific purposes. Importing and exporting cannabis that is intended for the adult-use market is prohibited. An important question, then, is how to enter foreign adult-use markets.

The key to complying with Canadian import and export restrictions is to export your intellectual property, not your cannabis. In this article, we show you how, including different types of cannabis intellectual property rights that may be available and when they are appropriate.

Cannabis products are a commodity with intellectual property

Cannabis products are, fundamentally, a plant-derived commodity with intellectual property applied to it, typically in the form of branding. In addition, the cannabis component of a cannabis product is present in a jurisdiction that has a legal adult-use market.

For these reasons, it may be possible to sell your cannabis product in a foreign jurisdiction without exporting cannabis itself by “exporting” the associated intellectual property to a licenced producer in the foreign jurisdiction.

“Exportation” of the underlying intellectual property is performed by way of an intellectual property license agreement that provides the foreign licenced producer with rights to use intellectual property to produce, market, and sell the cannabis product in the foreign jurisdiction.

The terms of the intellectual property license may be included within a broader agreement, sometimes referred to as a “white label agreement” that, in addition to providing intellectual property rights, may also set out the services to be performed by the licenced producer, which may include procuring cannabis for the cannabis products, processing the cannabis into the cannabis products, marketing and selling the cannabis products in the foreign jurisdiction, and collecting revenue.

Types of intellectual property rights related to cannabis

There are five types of intellectual property that are typically most relevant to cannabis products, and may form the subject of an intellectual property license agreement.

1. Trademarks

A trademark is a word, symbol, or design – or a combination of these features – used to distinguish the wares or services of one person or organization from those of others in the marketplace. Branding elements utilized in selling and marketing cannabis products are trademarks.

Because branding is often a primary differentiator between cannabis products in the marketplace, trademarks are among the most valuable forms of intellectual property associated with a cannabis product.

Although trademark rights may be obtained without registration in some jurisdictions, such rights are typically more limited than registered trademark rights and it is strongly recommended that registration of trademarks be performed in the jurisdictions that you intend to sell the cannabis product. Although federal registration in the U.S. for cannabis-related trademarks is currently challenging due to cannabis remaining federally illegal, there may be workarounds available including registering trademarks in U.S. states in which cannabis is legal.

2. Patents

Patents are granted for “inventions”, which may be processes, machines, articles of manufacture or compositions of matter. Once granted, patents provide the patent holder the right to exclude others from making, using and selling inventions covered by the patent for a period of 20 years from the filing date.

In the context of cannabis, patent protection may be pursued for machines, equipment, and methods and processes used to cultivate cannabis and process cannabis into derivatives, as well as protecting new devices such as new cannabis accessories.

It is noted that while a cannabis plant is not, itself, patentable in Canada and many other jurisdictions because of patent ineligibility of “higher life forms”, protection may be obtained for a cell of the plant, methods of making the plant. Higher life forms, including plants, are patent-eligible subject matter in the U.S.

Obtaining patent protection requires filing patent applications and obtaining a granted patent in each jurisdiction in which protection is desired.The patent application must fully describe the invention in order for any granted patent to be valid.

Because of the disclosure requirement, and that it can often be difficult to determine if a competitor is infringing your patent, particularly in the case of inventions related to processes, some inventions may be better protected as trade secrets.

3. Trade secrets

A trade secret can be any information that is confidential. Trade secrets are typically protected by limiting who has access to the information and, when disclosed, limiting the use and further disclosure of the information through a confidentiality and non-disclosure agreement.

Trade secrets may be utilized to protect intellectual property that is not protectable by other means, such as patent protection, or to protect patentable inventions that, by their nature, can be kept secret, such as inventions that cannot readily be reverse-engineered.

The benefit of trade secret compared to patent protection is that trade secret protection has no time limit; the protection exists as long as the information is kept secret. A disadvantage of trade secret is that there may be no recourse if a competitor independently develops the trade secreted information. Further, a competitor may be able to prevent you from practicing the trade secret if they independently develop the trade secret and obtain patent protection for it.

4. Industrial Design

Industrial designs, called design patents in the U.S., protect the aesthetic design features of a product. In a cannabis context, industrial designs may be utilized to protect distinctive aesthetic features of a cannabis-containing product, such as a vape cartridge or the packaging that the cannabis product is sold in.

Similar to patents, industrial design applications must be separately filed and registered in each jurisdiction in which protection is sought to obtain protection.

5. Plant breeders rights

Plant breeders rights, also known as plant variety rights, give an exclusive right to sell, produce and reproduce, import and export propagating material of a new plant variety. Plant breeders rights may be utilized to protect new varieties of cannabis plant provided that the new variety is clearly distinguishable from other known varieties and is essential stable in its distinctive essential characteristics.

Similar to patents and industrial designs, plant breeder rights must be separately obtained in each jurisdiction in which protection is desired.

More information

If you are looking for more information on cannabis-related intellectual property rights or intellectual property licensing, please connect with Todd Keeler or any of the key contacts listed below.

By

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