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From Seed to Strategy: Intellectual Property Protection for Cannabis Brands

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The cannabis industry has experienced consistent growth over recent years, leading to substantial investment and an increase in the industry's commercial relevance. This momentum shows no signs of slowing down, as states across the country continue to develop medical and recreational use programs, and brands find innovative ways to navigate and thrive in a constantly evolving market and legal landscape. Given these trends, it seems clear that the cannabis industry is poised to expand further, becoming an even more significant economic force and driving additional innovation and investment in the years to come.

On any given day, cannabis brands are navigating a complex web of state and local laws, health and safety regulations, consumer protection risks, and the harsh reality that cannabis remains federally illegal. Under these circumstances, it is understandable that intellectual property (IP) protection is often overlooked. Additionally, the various types of IP assets and the complexities of obtaining and protecting those assets under current state and federal laws can make this area daunting for brands. Nonetheless, IP should be prioritized, as cannabis brands with established IP portfolios, like those in any other industry, are more likely to attract greater investment and gain a competitive edge in the market.

The most relevant types of IP protections for a brand will be determined by its role in the industry, with most brand portfolios comprising one or more of the following IP assets:

Patents

In the cannabis industry, patents are crucial for protecting new innovations. Cannabis cultivators, producers, processors, and medical researchers are actively seeking patents for their discoveries and applications of novel strains, manufacturing processes, and cultivation techniques. One of the key benefits of patent protection is that it grants inventors exclusive rights for a limited period, preventing others from making, using, or selling the patented inventions without

permission. As such, this protection plays a significant role in the competitive cannabis industry, as investments in the creation of unique products, processes, and methods provide successful patent applicants with a competitive edge and an opportunity to maximize the return on their research investments. Notably, the federal prohibition on cannabis does not affect the ability to secure patent protection.

Trademarks

New cannabis brands are emerging daily, and the unique signs, symbols, words, or phrases they use can be protected under state and federal trademark laws. Unlike patents, the federal prohibition on cannabis can affect a brand's ability to secure federal trademark protection, which is national in scope, as such protection is only available for marks associated with lawful products and services. As a result, some brands develop IP strategies that include seeking federal trademark protection for ancillary products and services that do not involve the direct sale of cannabis. When federal trademark protection isn't a viable option, brands may turn to state trademark law as an alternative avenue for IP development and protection.

Trademarks are a significant part of any brand's identity, making their creation and maintenance important. Given the differences between federal and state laws, it is essential for brands to ensure that the marks they develop and adopt are protectable and add value, while also avoiding legal liability. It is worth noting that filing a federal trademark application for services involving cannabis could inadvertently implicate the applicant in criminal activity, highlighting the importance of implementing trademark strategies that align with current laws, rules, and regulations.

Trade Secrets

Brands can protect the proprietary information that gives them a competitive edge by classifying and treating such information as a trade secret. A fundamental aspect of maintaining this protection is ensuring that the information remains secret. To achieve this, brands may implement various practices, including limiting access to the information, employing security measures to safeguard it, and requiring those who access the information to be legally bound to secrecy.

Trade secrets and the cannabis industry are intrinsically linked, as brands use trade secret protection measures to guard the confidential information behind their unique cultivation techniques, extraction processes, and recipes for cannabis-infused products. In the relatively short legal cannabis era, the competitive advantage derived from proprietary details such as specific soil compositions, nutrient mixes, breeding techniques, lighting schedules, and climate control methods has proven to be and will surely continue to be extremely valuable for brands. These assets, combined with traditional trade secrets such as business strategies, marketing plans, customer lists, and supplier agreements, which are just as important in the cannabis industry as they are in any other sector, help ensure that brands maintain their market position and can thrive.

Copyrights

Copyrights protect creative works and are particularly relevant in the cannabis industry, where they can be used to protect logos, packaging designs, and digital content from unauthorized use or reproduction.

Importantly, since copyrights cover creative expression, the federal illegality of cannabis does not impact copyright protection. This distinction means that even if a creative work cannot be trademarked for use with cannabis-related products or services, a brand can still prevent others from reproducing, distributing, or displaying that work or any derivatives under copyright law.

In addition to protecting logos, packaging, and digital content, copyrights also cover written content such as educational materials, product descriptions, and promotional campaigns, which brands utilize to build their identity and engage with their customers. By strategically managing and enforcing copyrights, cannabis brands can ensure that their unique content remains exclusive and isn't copied by competitors without consequence. This involves registering copyrights for original content, monitoring for potential infringements, and taking legal action when necessary.

Various forms of IP protection are accessible to cannabis brands and can be strategically utilized to protect their interests, with each type of IP asset covering a different facet of the brand and contributing its own distinct value. While no single type of protection can secure every aspect of a cannabis brand, a thoughtfully developed IP strategy can serve as a foundation for long-term success. By understanding the IP tools available and tailoring them to fit their products, services, and market position, cannabis businesses can protect their innovation, strengthen their brand, and help ensure sustainable growth in a high-risk, high-reward industry. Therefore, cannabis brands should consider all possible IP protection strategies as they aim to build a well-rounded IP portfolio.