

Cultivating a Better Strain of Trademark Law: Why the Unlawful Uses Doctrine Should Be Modified for State-Legal Marijuana-Related Marks

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I. INTRODUCTION

Within the last five years, numerous individual states legalized the recreational use of marijuana, leading to a booming quasi-legal industry for marijuana and marijuana-related products.¹ These products range from actual leaf cannabis, to cannabis-infused food

1. W. Michael Schuster & Jack Wroldsen, *Entrepreneurship and Legal Uncertainty: Unexpected Federal*

products, to assorted accessory products like lighters and rolling papers.² This industry has been forced to adapt to a host of legal issues arising from its quasi-legal status, many of which arise within the intellectual property field. In particular, industry participants are unable to receive federal trademark protection for their branding efforts, due to the United States Patent and Trademark Office's (USPTO) adherence to the Unlawful Uses Doctrine (UUD).³ This doctrine mandates that the statutory requirement that trademarks be used in commerce must be interpreted as lawful use for purposes of registration.⁴ This doctrine has caused and continues to cause a host of problems for state-legal cannabis industry participants.⁵

This Note argues that the Unlawful Uses Doctrine should be curtailed in the examination of trademarks related to the sale of cannabis and cannabis-related products, much as the Beneficial Uses Doctrine has been phased out in the examination of patents. This Note will first discuss the history of both doctrines, their current status, and how each has been applied to USPTO applications related to cannabis. The next Part will analyze the change in application of each doctrine and assess how the Unlawful Uses Doctrine could be limited in the review of cannabis marks. Finally, this Note will recommend that the federal courts and the USPTO adopt a qualified approach, permitting the registration and defense of cannabis trademarks in select situations based on compliance with state cannabis laws.

II. BACKGROUND

This Part will first briefly examine the legal history and current status of marijuana in the United States. It will then explore the common-law origins of the Unlawful Uses Doctrine in trademark law, and how that doctrine interacts with cannabis. Third, this Part will trace the history and evolution of the Beneficial Uses Doctrine in patent law. Finally, it will address the ways in which the Unlawful Uses Doctrine has been applied to the state-legal marijuana industry and describe the problems that have resulted from that application.

A. Overview of Marijuana Regulation in the United States

Marijuana was first available in the United States in the early 1900s, and could be legally purchased in the form of "Indian Hemp" cigarettes.⁶ Soon after, various states

Trademark Registrations for Marijuana Derivatives, 55 AM. BUS. L.J. 117, 129–30 (2018). Marijuana is legal for recreational use in ten states and Washington, D.C. and is legal for medical use in 33 states, Puerto Rico, and Guam.

2. The marijuana plant is a member of the genus "cannabis." *See id.* at 128. Some individuals in the legal-marijuana industry advocate for using the term "cannabis" instead of "marijuana," given the illicit connotations. *See id.* The two terms will be used interchangeably in this Note.

3. *See generally*, Rebeccah Gan, *Protection for Marijuana Trademarks*, 32 GP SOLO 4, 72 (2018) https://www.americanbar.org/content/dam/aba/publications/gp_solo_magazine/november_december2015/GPSM_v032no6.pdf (describing the "obstacles and potential protection strategies for cannabis brands in the emergency marijuana marketplace").

4. James Rufus Koren, *Marijuana Brands Can Trademark Almost Anything, Except Marijuana*, L.A. TIMES (Jan. 7, 2017, 3:00 AM), <http://www.latimes.com/business/la-fi-marijuana-trademarks-20170104-story.html>.

5. Schuster & Wroldsen, *supra* note 1, at 144–45.

6. Relani Belous, *Opinion: Fear, Vice and Loathing in the Law*, WORLD TRADEMARK REV. (May 1, 2017), <https://www.worldtrademarkreview.com/governmentpolicy/opinion-fear-vice-and-loathing-law> (available

began placing restrictions on the substance.⁷ In 1937, the federal government established a substantial nationwide tax on cannabis sales and production, and ultimately outlawed the substance in 1970 under the Controlled Substances Act (CSA).⁸ Sections 812, 841, and 863 of this legislation explicitly made illegal the sale or use of the substance.⁹

Marijuana remained fully illegal in all state jurisdictions until the California legislature passed the “Compassionate Use Act” in 1996.¹⁰ This act made California the first state to legalize marijuana for medical purposes.¹¹ Numerous states have gone on to pass their own similar laws.¹² In 2012, Washington and Colorado became the first states to legalize cannabis for recreational purposes for adults ages 21 and over.¹³ Since then, six other states have joined in legalizing recreational use for adults.¹⁴ As of this writing, 29 states, Puerto Rico, Guam and the District of Columbia have legalized recreational or medical marijuana usage.¹⁵ It is important to note here that the state-legal marijuana market has recently come into question. On January 4, 2018, Attorney General Jefferson Beauregard Sessions III rescinded the Obama-era Cole Memo, which directed U.S. attorneys in marijuana-legal states to deprioritize the prosecution of marijuana crimes.¹⁶ This action by now former Attorney General Sessions, in theory, opens the door to federal enforcement of marijuana laws in state-legalized jurisdictions. However, public support for legalization remains high,¹⁷ and several U.S. attorneys serving in relevant states have pushed back against now former A.G. Sessions’ actions.¹⁸ Furthermore, Session’s replacement, William Barr, stated during his confirmation hearings that he did not intend to order the Justice Department to prosecute state-legal cannabis businesses.¹⁹

online by subscription).

7. Schuster & Wroldsen, *supra* note 1, at 125–26.

8. *Id.* at 126–27; Controlled Substances Act, Pub. L. No. 91-53, 84 Stat. 1232 (1970) (codified as 21 U.S.C. §§ 801–971 (2012)).

9. 21 U.S.C. §§ 812, 841, 863 (2012).

10. CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996); Sam Kamin & Viva R. Moffat, *Trademark Laundering, Useless Patents, and Other IP Challenges for the Marijuana Industry*, 73 WASH. & LEE L. REV. 217, 223 (2016).

11. Kamin & Moffat, *supra* note 10, at 223.

12. *Medical Marijuana*, NORML, <http://norml.org/laws/medical-marijuana-2> (last visited Sept. 28, 2017 9:21 AM).

13. Sean K. Clancy, Note, *Branded Bud or Generic Ganja? Trademarks for Marijuana in Washington*, 18 LEWIS & CLARK L. REV. 1063, 1064 (2014); *United States*, NORML, <http://norml.org/states/> (last visited Jan. 1, 2019) [hereinafter *U.S.*, NORML].

14. Russell W. Jacobs, *Cannabis Trademarks: A State Registration Consortium Solution*, 74 WASH. & LEE L. REV. ONLINE 159, 160 (2017); *U.S.*, NORML, *supra* note 13.

15. Clancy, *supra* note 13, at 1064.

16. Reid Wilson, *Sessions Will End Policy that Allowed Legalized Marijuana to Prosper*, THE HILL (Jan. 4, 2018, 8:53 AM), <http://thehill.com/homenews/administration/367384-sessions-will-end-policy-that-allowed-marijuana-to-prosper-report>.

17. Public support is at 62%, according to Pew Research. Hannah Hartig & Abigail Geiger, *About Six-in-Ten Americans Support Marijuana Legalization*, PEW RES. CTR. (Oct 8, 2018), <http://www.pewresearch.org/fact-tank/2018/10/08/Americans-Support-Marijuana-Legalization>; Lydia Wheeler, *DOJ’s Pot Memo Creates Big Decision for US Attorneys*, THE HILL (Jan. 7, 2018, 7:30 AM), <http://thehill.com/regulation/administration/367695-doj-pot-memo-creates-big-decision-for-us-attorneys>.

18. Wheeler, *supra* note 17.

19. Jacqueline Thomsen, *Barr: I Wouldn’t Go After Businesses Relying on Obama-Era Marijuana Policy*, THE HILL (Jan. 15, 2019, 2:58 PM), <https://thehill.com/homenews/senate/425466-barr-i-wouldnt-go-after-businesses-relying-on-obama-era-marijuana-policy>.

This trend towards legalization has created a massive market for marijuana in the United States. Forbes Magazine reported that in the year 2016, the legal marijuana industry grew by 30% to reach a value of \$6.7 billion dollars.²⁰ The legal cannabis industry is expected to reach a value of \$21 billion in the year 2021.²¹ Though estimates vary, this industry is comprised of 3300-4300 shops and medical dispensaries and up to 28,000 total businesses when including growers as well as businesses involved in the ancillary aspects of the industry.²²

B. Trademarks and the Unlawful Uses Doctrine

This Subpart examines the Unlawful Uses Doctrine of trademark law through its history, evolution, and modern application. It also discusses the current application of the Unlawful Uses Doctrine to cannabis-related marks and describes the problems that its current application presents.

1. Origins and Evolution of the Doctrine

Trademarks serve a valuable function in the business realm, permitting customers to rapidly identify the source of products and make an informed purchase choice based on past experience.²³ The primary body of law encompassing trademarks is the Lanham Act passed pursuant to the Commerce Clause of the United States Constitution.²⁴ The Lanham Act protects any “word, name, [or] symbol” used to identify goods in commerce.²⁵ This protection comes in many forms, ranging from numerous advantages provided to registered marks²⁶ to numerous avenues for relief against anyone illicitly using claimed marks.²⁷

One of the requirements for registration is that the rights seeker must declare that the mark is being used in interstate commerce.²⁸ This use must be established at the time of filing (or soon after, if the applicant makes use of an intent-to-file application).²⁹ Over the years, the USPTO and the Trademark Trial and Appeal Board (TTAB) have added a qualifier to the use requirement, insisting that use means “lawful use.”³⁰ The concept of

20. Debra Borhardt, *Marijuana Sales Totaled \$6.7 Billion in 2016*, FORBES (Jan. 3, 2017, 9:00 AM), <https://www.forbes.com/sites/debraborhardt/2017/01/03/marijuana-sales-totaled-6-7-billion-in-2016/>.

21. Aaron Smith, *The U.S. Legal Marijuana Industry is Booming*, CNN MONEY (Jan. 31, 2018 4:03 PM), <https://money.cnn.com/2018/01/31/news/marijuana-state-of-the-union/>.

22. *Number of Cannabis Businesses in US as of 2016*, STATISTA, <https://www.statista.com/statistics/596641/us-cannabis-businesses-number/> (last visited Sep. 26, 2017).

23. Schuster & Wroldsen, *supra* note 1, at 136.

24. Clancy, *supra* note 13, at 1078; Louis Ebling & Jesse Jenike-Godshalk, *A Very Low Bar for Use of Trademark ‘In Commerce’*, LAW360 (Dec. 9, 2016, 11:47 AM), <https://www.law360.com/articles/866587>.

25. 15 U.S.C. § 1127 (2006).

26. See Kamin & Moffat, *supra* note 10, at 241–42 (benefits of Federal Registration include: “a presumption of nationwide rights, the right to use the trademark symbol—®—[on products and packaging,] and notice to competitors of the use of the mark”).

27. 15 U.S.C. § 1117 (2008) (Relief for mark owners: infringement suits for registered marks, Section 43(a) unfair competition).

28. Kamin & Moffat, *supra* note 10, at 247.

29. Schuster & Wroldsen, *supra* note 1, at 137.

30. Bethany Rabe, Note, *Adapting the USPTO’s Unlawful Use Doctrine for the Federal Courts*, 17 WAKE FOREST J. BUS. & INTEL. PROP. L. 286, 293 (2017). The Unlawful Uses Doctrine is codified in the Code of Federal Regulations at 37 C.F.R. § 2.69 (1989).

use-in-commerce necessitating “lawful use” first arose in a TTAB case from 1959.³¹ In that case, a shipment of “BLACK PANTHER”—labeled insecticide was shipped across state lines in violation of the Federal Economic Poisons Act.³² The court said this was not use in commerce, and consequently cancelled the registration of the “Black Panther” mark.³³ The doctrine was again applied in 1962 in a TTAB decision entitled *In re Taylor*.³⁴ The applicant’s mark “CHUCK-A-BURGER,” used for his restaurant business was denied registration on account of illegal use, as some mark-bearing shipments of the beef were not in compliance with the Food, Drug and Cosmetics Act.³⁵

The Unlawful Uses Doctrine was formalized for the USPTO in 1965 in the Code of Federal Regulations:

When the sale or transportation of any product for which registration of a trademark is sought is regulated under an Act of Congress, the Patent and Trademark Office may make appropriate inquiry as to compliance with such Act for the sole purpose of determining lawfulness of the commerce recited in the application.³⁶

This doctrine has not substantially changed since 1965.

At the federal court level, the doctrine was most famously applied in a Ninth Circuit opinion, *CreAgri v. USANA Health Services*.³⁷ In that case, the Ninth Circuit held that marks used on dietary supplements not properly labeled in accordance with federal law were not enforceable.³⁸ While a large number of the cases involving the Unlawful Uses Doctrine since *CreAgri* have been in the Ninth Circuit, it has also been applied in federal courts in Michigan and New York.³⁹

2. Application to the Marijuana Industry

The Unlawful Uses Doctrine has been frequently invoked in recent years to deny registration to the marks of marijuana-related businesses.⁴⁰ The USPTO’s formal stance is that, given marijuana’s status as a Schedule I drug under the Controlled Substances Act, any marks related to the sale of marijuana fail for lack of lawful use in commerce.⁴¹ To date, no dispensary or retailer of marijuana has received protection on any of its marks,⁴² and currently, nearly 600 marijuana-related mark applications sit in limbo in the USPTO

31. Rabe, *supra* note 30, at 299.

32. *See generally*, *Coahoma Chem. Co. v. Smith*, 113 U.S.P.Q. BNA 413 (Comm’r Pats. 1957) (describing the case above).

33. *Id.* at 2–3.

34. *In re Taylor*, 133 U.S.P.Q. BNA 490 (T.T.A.B. 1962).

35. Rabe, *supra* note 30, at 299–300.

36. 37 C.F.R. § 2.69 (1989).

37. *See generally* *CreAgri, Inc. v. USANA Health Scis., Inc.*, 474 F.3d 626 (9th Cir. 2007) (applying the Unlawful Uses Doctrine).

38. *Id.* at 630–31.

39. *See generally* *Impulsaria, LLC. v. United Distrib. Grp., LLC*, No. 1:11-CV-1220, 2012 U.S. Dist. LEXIS 149862 (W.D. Mich. Oct. 18, 2012) (applying the Unlawful Uses Doctrine); *Dessert Beauty, Inc. v. Fox*, 617 F. Supp. 2d 185 (S.D.N.Y. 2007) (the same).

40. Schuster & Wroldsen, *supra* note 1, at 142.

41. *Id.* at 117.

42. *Id.* at 143–44.

offices.⁴³

Since the legalization of marijuana by various states, companies seeking protection on their cannabis marks have attempted to circumvent the Unlawful Uses Doctrine via the use of ancillary marks.⁴⁴ However, two recent TTAB decisions have likely eliminated that option.⁴⁵

In *In re Morgan Brown*, the TTAB restated the general rule for rejection of marks based on the Unlawful Uses Doctrine.⁴⁶ The applicant sought to register the mark “HERBAL ACCESS” for a “retail store services featuring herbs.”⁴⁷ In general, lawfulness is to be assumed unless either a violation of federal law is indicated by the trademark application record or “when the applicant’s application-relevant activities involve a *per se* violation of a federal law.”⁴⁸ The Board disregarded the applicant’s assertion that marijuana was legal in the state in which he intended to use the mark, insisting that such quasi-legality was irrelevant.⁴⁹ The Board rejected his mark based on the *per se* violation aspect of the rule, noting the numerous references to marijuana in the application and on the relevant business’s website.⁵⁰

The *Brown* ruling was reaffirmed soon after in *In re JJ206, LLC*.⁵¹ The applicant sought registration for his marks on personal marijuana vaporizers, arguing that his compliance with his home state’s cannabis laws should be taken into account.⁵² The Board, basing its ruling in *Brown* and a 1987 Federal Circuit case,⁵³ rejected that argument and held that an applicant’s marks on marijuana vaporizers were tied to an unlawful use and did not qualify for federal registration.⁵⁴

There are three small complications to the Unlawful Uses Doctrine in the context of marijuana that should be mentioned for the sake of completeness. First, the USPTO frequently offers protection for marijuana-related marks owned by non-marijuana businesses.⁵⁵ Second, in early 2010, the USPTO created a special category for medicinal

43. Trevor Little, *California’s Proposed Cannabis Bill Shines a Light on State Level Trademarks*, WORLD TRADEMARK REV. (Jan. 17, 2017), <https://www.worldtrademarkreview.com/brand-management/californias-proposed-cannabis-bill-shines-light-state-level-trademarks> (available by subscription).

44. Kamin & Moffat, *supra* note 10, at 249. The general technique of using ancillary marks to circumvent the unlawful uses doctrine is referred to as trademark laundering. A would-be mark owner seeks trademark registration for a mark to be applied to legal, marijuana-adjacent products such as lighters, rolling papers, etc. The mark, once issued, is then also used on the owner’s marijuana products. Any use by a competitor is now actionable due to infringement of the mark as issued for use with legal products.

45. *In re Brown*, 119 U.S.P.Q.2d (BNA) 1350 (T.T.A.B. 2016); *In re JJ206, LLC*, 2016 TTAB LEXIS 527 (T.T.A.B. 2016). Please note that there exist two 2016 TTAB decisions entitled “*In re JJ206, LLC*.” These decisions resulted from two separate attempted trademark registrations, but are essentially companion cases that undermine the ability to seek federal protection through trademark laundering.

46. *In re Brown*, 119 U.S.P.Q.2d, at 1351–52.

47. *Id.*

48. *Id.*

49. *Id.* at 1352.

50. *Id.* at 1351.

51. *In re JJ206, LLC*, 120 U.S.P.Q.2d (BNA) 1568, *3, *5 (T.T.A.B. 2016).

52. *Id.* at *7.

53. *Gray v. Daffy Dan’s Bargaintown*, 823 F.2d 522 (Fed. Cir. 1987).

54. *In re JJ206, LLC*, 120 U.S.P.Q.2d (BNA) at *8.

55. Kamin & Moffat, *supra* note 10, at 248–49 (“For example, the mark ‘KITTYJUANA’ was registered by a company selling catnip, as was the phrase ‘NO ONE BELONGS IN JAIL FOR MARIJUANA!’ A company offering ‘cannabis advertising services’ received a registration for the mark ‘MARIJUANA INTERNATIONAL.’”) (citations omitted).

marijuana marks.⁵⁶ The office removed this category three months later, referring to its creation as “a mistake.”⁵⁷ Finally, the USPTO does allow trademarks of cannibidiol (CBD) oil, a medical alternative to traditional THC-containing cannabis.⁵⁸

3. *The Problems Arising from the UUD in the State-Legal Marijuana Industry and Current Methods of Protection*

The USPTO’s application of the Unlawful Uses Doctrine to the marijuana industry has presented numerous problems for those operating in that space.⁵⁹ Most important of these is that it undercuts the primary purpose of trademark law: the prevention of consumer confusion.⁶⁰ Many users select their cannabis products based on the desired effect of use. For example, in 2013, researchers developed a strain of cannabis low in THC but high in CBD, which offered low levels of traditional side effects but worked exceptionally well to reduce the rate and severity of seizures in patients suffering from epilepsy.⁶¹ This strain (and the products made with it) was dubbed “Charlotte’s Web,” in honor of the young epileptic girl for whom it was initially designed to help.⁶² However, without federal mark protection, numerous products bearing the Charlotte’s Web mark began appearing in cannabis markets, frequently with high levels of THC, not CBD, defeating the purpose (and potentially harming users).⁶³ This shows the potential high price of customer confusion in the legal marijuana market.

The lack of federal trademark registration also reduces incentive for investment in a state-legal industry.⁶⁴ The quasi-illicit nature of the industry combined with a lack of federal remedies likely emboldens would-be infringers, creating a lawless legal space in interstate commerce.⁶⁵ This undermines the public’s choice to legalize cannabis at the state level. This bar also works against any opportunities that cannabis companies have to franchise their products across state lines, given the inability to enforce marks in federal court. Knowing that any goodwill built up by a brand in the mind of the public will be subject to misappropriation and infringement makes marijuana investment less attractive for those with capital.⁶⁶

In the absence of federal protection for their marks, cannabis businesses have several potential options available. The most common of these is to seek protection through state trademark systems.⁶⁷ While companies have been willing to enforce their state marijuana

56. Gan, *supra* note 3, at 72.

57. *Id.* (internal quotations omitted).

58. Schuster & Wroldsen, *supra* note 1, at 117. CBD has many of the pain reduction properties of THC in conventional marijuana, but lacks the psychotropic mind-altering properties. Also, it is not illegal under federal law. Teresa C. Hill, *The Difference Between CBD and THC*, J.-ADVOC. (Apr. 1, 2018, 9:08 PM), http://www.journal-advocate.com/columnist_teresahill/ci_31775025/difference-between-cbd-and-thc. This legal status under federal law is likely the reason that the USPTO does not bar CBD-related marks.

59. Kamin & Moffat, *supra* note 10, at 276.

60. Schuster & Wroldsen, *supra* note 1, at 135; Rabe, *supra* note 30, at 291; *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163–64 (1995).

61. Schuster & Wroldsen, *supra* note 1, at 138.

62. *Id.*

63. *Id.*

64. Little, *supra* note 43.

65. Kamin & Moffat, *supra* note 10, at 255.

66. *See id.*

67. *Id.* at 258.

marks, the state systems offer a distinctly inferior level of protection.⁶⁸ State protections only extend to the geographic area in which the mark is being used, and never extend beyond the borders of the state in which they originate.⁶⁹ This requires companies to establish use of their marks throughout the state in order to completely protect their mark, a task which can be difficult or impossible for a small company doing business in a large state like California. State protections also do nothing to protect a company in one marijuana-legal state from infringement of its marks in a separate marijuana-legal state. Though some efforts are being made to improve the state systems to better serve the marijuana industry, state trademark protection remains substantially inferior to its federal counterpart.⁷⁰

A second major option available for protection of marks is the use of ancillary marks, also known as “trademark laundering.”⁷¹ This term describes the practice of acquiring federal mark protection for use on products related to their marijuana business, but not on marijuana products themselves.⁷² Though trademark laundering has offered some protection for cannabis businesses, it appears as if the practice may not be available for much longer.⁷³ The above-described *Brown* and *Morgan* TTAB cases strongly suggest that laundering cannabis trademarks is not a viable option for protection. Though the full legal ramifications of this ruling have yet to be seen, commentators suspect that this ruling signifies the end of trademark laundering for marijuana-related marks.⁷⁴

A final method of protection potentially available to those with marijuana-related trademarks is to seek enforcement pursuant to section 43(a) of the Lanham Act.⁷⁵ This section creates a cause of action for unfair competition, and does not require that marks be registered in order to file suit in federal court.⁷⁶ However, there are no known instances of this strategy being successfully used for mark protection in the marijuana industry.⁷⁷

C. The Beneficial Uses Doctrine

This Subpart examines the history of the Beneficial Uses Doctrine of patent law, its modern application, and how the Beneficial Uses Doctrine is used in the context of cannabis-related patent applications.

68. Schuster & Wroldsen, *supra* note 1, at 138.

69. *Id.*

70. Little, *supra* note 43.

71. Kamin & Moffat, *supra* note 10, at 250–51.

72. *Id.*; see also Koren, *supra* note 4 (noting that common products receiving ancillary marks include t-shirts, and, in the case of noted marijuana comedian and current marijuana entrepreneur Tommy Chong, vaporizers).

73. See *supra* Part II.B.2. In addressing the matter in *in re Brown*, the TTAB felt that this satisfied one of the two grounds for rejection under the Unlawful Uses Doctrine: “when the applicant’s application-relevant activities involve a *per se* violation of the federal law.” *In re Brown*, 119 U.S.P.Q.2d (BNA) 1350, 1351 (T.T.A.B. 2016). In its final ruling, the TTAB affirmed the rejection on the basis that the applicant’s business was too intertwined with violation of federal law. *Id.* at 1353.

74. Gregory Wesner et al., *Cannabis Marks in Jeopardy—Is Your Industry Next?*, WORLD TRADEMARK REV. (Jan. 1, 2017), <http://www.worldtrademarkreview.com/magazine/issue/65/Features/Cannabis-marks-in-jeopardy-is-your-industry-next> (available by subscription).

75. Gan, *supra* note 3, at 73.

76. *Id.* Federal registration is a prerequisite for filing a federal trademark infringement suit.

77. *Id.*

1. Story-ed Origins and a Juicy Demise

One of the principle requirements of patentability under Title 35 of the U.S. Code is that the invention in question possess utility.⁷⁸ One aspect of this requirement, known as beneficial utility, arose in the early 1800s and persisted in the courts for more than a century.⁷⁹ In *Lowell v. Lewis*, Justice Joseph Story assessed that the utility requirement eliminated from patentability any invention deemed frivolous or injurious to society.⁸⁰ Though the case was about a (presumably morally neutral) mechanical pump, Justice Story saw fit to elucidate on the idea that immoral inventions should not be deemed useful.⁸¹ Justice Story later formalized the language in *Bedford v. Hunt*, denying utility to that “which is injurious to the morals, the health, or the good order of society.”⁸² This view took hold, and expanded in the coming decades.⁸³ In particular, courts used the doctrine in assessing inventions related to gambling.⁸⁴ In *Fuller v. Berger*, an invention designed to detect counterfeit coins came before the court, challenged on morality grounds due to its usefulness to the gambling industry.⁸⁵ The court held that, while the system clearly possessed utility in the gambling industry, other uses outside the realm of immorality existed, granting the invention utility.⁸⁶ In a separate case, a “punch board” invention was held by the court to only be useful for gambling, thus it lacked (moral) utility under the Beneficial Uses Doctrine.⁸⁷

The first major blow to the Beneficial Uses Doctrine occurred in 1977 in *Ex parte Murphy*.⁸⁸ There, the PTAB again assessed the utility of a gambling device.⁸⁹ The board held that the application of the Beneficial Uses Doctrine to gambling devices made little sense in the modern era, mentioning the legality of coin-operated gambling in many U.S. jurisdictions and the fact the “prevailing public or judicial view that coin-operated gambling devices [are] harmful to public morals or to the public welfare . . . is long gone.”⁹⁰

This blow by *Murphy* was followed by a sort of *coup de grâce* in 1999’s *Juicy Whip, Inc. v. Orange Bang, Inc.*⁹¹ In that case, the Federal Circuit considered whether the deceptive nature of the invention in question made it so injurious to society as to be

78. 35 U.S.C §§ 101, 112 (2012).

79. For the generally-accepted beginning and end points of this doctrine, see *Lowell v. Lewis*, 15 F. Cas. 1018 (C.C.D. Mass. 1817), and *Juicy Whip, Inc. v. Orange Bang, Inc.*, 185 F.3d 1364, 1368 (Fed. Cir. 1999).

80. *Lowell*, 15 F. Cas. at 1019.

81. *See id.* (referencing inventions for poisoning, debauchery, and private assassination).

82. *Bedford v. Hunt*, 3 F. Cas. 37, 37 (C.C.D. Mass. 1817) (“The law . . . does not look to the degree of utility; it simply requires, that it shall be capable of use, and that the use is such as sound morals and policy do not discountenance or prohibit.”).

83. *Nat’l Automatic Device Co. v. Lloyd*, 40 F. 89, 90 (C.C.N.D. Ill. 1889); *In re Nelson*, 280 F.2d 172, 178 (C.C.P.A. 1960) *overruled by In re Kirk*, 376 F.2d 936 (C.C.P.A. 1967).

84. *See Nat’l Automatic*, 40 F. at 90 (referencing an automated horse racing display used for gambling).

85. *See generally Fuller v. Berger*, 120 F. 274 (7th Cir. 1903) (describing a particular gambling device’s patent case).

86. *Id.* at 275.

87. *Brewer v. Lichtenstein*, 278 F. 512, 514 (7th Cir. 1922).

88. *Ex parte Murphy*, 200 U.S.P.Q. (BNA) 801, 1977 WL 22879, at *2–*3 (B.P.A.I. 1997).

89. *Id.* at *1.

90. *Id.* at *1.

91. *See generally Juicy Whip, Inc. v. Orange Bang, Inc.*, 185 F.3d 1364 (Fed. Cir. 1999) (holding that a deceptive drink dispenser did not lack utility).

unpatentable.⁹² In its ruling, the court said that it was not the PTO's role, but that of other government actors and agencies, to identify and prevent deceptive trade practices.⁹³ Basing their decision in part on *Ex parte Murphy*, the Federal Circuit held there was no statutory basis for the Beneficial Uses Doctrine and that the drink dispenser patent would not be held invalid based on moral utility.⁹⁴ In doing so, the court "essentially wrote morality out of American patent law."⁹⁵

2. Modern Applications and Marijuana-Related Patents

It is difficult to overstate the precedential value of the *Juicy Whip* decision. In recognizing that it was not the province of the USPTO to displace state police power, patents have been granted for numerous devices that might be viewed as immoral, such as radio signal scanners (whose presumed uses include circumvention of law enforcement authorities).⁹⁶ *Juicy Whip*'s influence has even expanded into the USPTO's governing Manual of Patent Examining Procedure (MPEP) itself.⁹⁷ The MPEP does not mention morality at all, instead simply citing to *Juicy Whip*.⁹⁸

The limited place for morality in the patent system has allowed numerous individuals to receive patent protection for marijuana-related inventions and methods.⁹⁹ Several patents exist protecting rights to assorted smoking devices.¹⁰⁰ As of July 2017, there are approximately 500 currently active patents in that field.¹⁰¹ Even the federal government operates in this arena, receiving a patent on a method of using certain cannabinoids¹⁰² as antioxidants and neuro-protectants.¹⁰³ In at least one case, a patent has been issued for a specialty strain of cannabis.¹⁰⁴

That is not to say that the Beneficial Uses Doctrine is completely dead.¹⁰⁵ The Doctrine is relevant in the context of human cloning applications, and, most relevant to this Note, has been applied multiple times to bar the patenting of strains of cannabis.¹⁰⁶

92. *Id.* at 1365.

93. *Id.* at 1368.

94. *Id.* at 1367.

95. ERIC BENSON, 1-1 PATENT LAW PERSPECTIVES § 1.6 (2017)

96. U.S. Patent 20,130,288,626 A1.

97. MPEP § 706.03(a)(III) (Rev. 8, Jan. 2018).

98. *Id.*

99. *See, e.g.*, U.S. Patent Nos. 9,220,294 and 9,095,554 (two of the many patents issued for cannabis associated inventions and methods).

100. *Id.*

101. Julie Weed, *US Patent Office Issuing Cannabis Patents to a Growing Market*, FORBES (Jul. 24, 2017, 8:42 AM), <https://www.forbes.com/sites/julieweed/2017/07/24/us-patent-office-issuing-cannabis-patents-to-a-growing-market/>.

102. "Cannabinoids" is an umbrella term for numerous organic compounds found in the marijuana plant. Both CBD and THC are contained within the definition.

103. *See* U.S. Patent No. 6,630,507 B1 (describing a medical use for cannabis).

104. *See* U.S. Patent No. 9,095,554 B2 (entitled "Breeding, production, processing and use of specialty cannabis") (citations omitted).

105. R. CARL MOY, 2 MOY'S WALKER ON PATENTS § 6:15 (4th ed. 2017) ("In practice, this ground of invalidity is narrow. It applies only where the invention is incapable of being used for purposes that are beneficial. In general, the conclusion that the invention is wholly incapable of being used for acceptable purposes is disfavored.")

106. Andrew R. Smith, Note, *Monsters at the Patent Office: The Inconsistent Conclusions of Moral Utility and the Controversy of Human Cloning*, 53 DEPAUL L. REV. 159, 179–80 (2003); David F. DuTremble, *Next*

III. ANALYSIS

Part II of this Note described the underpinnings of the Unlawful Uses Doctrine and Beneficial Uses Doctrine and how the current application of the Unlawful Uses Doctrine has created problems in the state-legal cannabis industry. Part III will first analyze the evolution of both doctrines and the logic behind each. Next, it will address how changes in societal norms have led the doctrines to their current states. Third, this Part will show that curtailing the UUD for marijuana marks is feasible. It will do so by addressing how the main goals of each doctrine are better achieved through non-USPTO means and then by addressing potential arguments against curtailing the Unlawful Uses Doctrine for state-legal marijuana marks.

A. Comparing the Policy and Origins of the Beneficial Uses and Unlawful Uses Doctrines

The most important goal of trademark law is to educate consumers about the products they are buying.¹⁰⁷ The logic goes that the trademarked images help consumers differentiate between the goods and services of competing producers and purchase accordingly.¹⁰⁸ The Unlawful Uses Doctrine does not serve this emphasis on education. The UUD seems instead to supplement the authority of all other laws and regulations pertaining to products and commerce.¹⁰⁹ Such applications can often lead to conflict, particularly in the state-legal cannabis industry.¹¹⁰

The law of patents is primarily focused on encouraging innovation.¹¹¹ This too differs from the goal of the Beneficial Uses Doctrine, which was to better enforce a standard of morality in the American populace.¹¹² The *Juicy Whip* decision tangentially addressed the major problems this raises, pointing out the numerous valuable inventions that would have otherwise been barred under a strict morality view of patent law.¹¹³

Both the Beneficial Uses Doctrine and the Unlawful Uses Doctrine arose to serve purposes not within their constitutional scope and underlying intent of their respective intellectual property fields. The Beneficial Uses Doctrine served morality at the expense of patent law's greater purpose of encouraging innovation, and thus actually served to undermine the system. Similarly, the Unlawful Uses Doctrine emphasizes supplementing federal laws and regulations at the expense of trademark law's primary goal of consumer education.

Dance with Mary Jane? An Argument for the Patentability of Specific Genetic Strains of Marijuana Under Federal Patent Law, 10 CHARLESTON L. REV. 445, 463 (2016); Ryan Davis, *Marijuana Patent Applications Face Tough Road at USPTO*, LAW360 (Jan. 8, 2015, 2:08 PM), <https://www.law360.com/articles/609140/marijuana-patent-applications-face-tough-road-at-uspto>.

107. Rabe, *supra* note 30, at 291.

108. Schuster & Wroldsen, *supra* note 1, at 135.

109. Rabe, *supra* note 30, at 299.

110. Kamin & Moffat, *supra* note 10, at 282–83.

111. U.S. CONST. art. I, § 8, cl. 8.

112. DONALD CHISUM, 1 CHISUM ON PATENTS § 4.03 (2017).

113. *Juicy Whip, Inc. v. Orange Bang, Inc.*, 185 F.3d 1364, 1367 (Fed. Cir. 1999). The court's opinion mentioned several deceptive yet acceptable inventions, including cubic zirconium, imitation gold leaf, synthetic fabrics, and artificial leather.

B. 20th and 21st Century Changes in Societal Norms

The history of the Beneficial Uses Doctrine is a story of moral evolution in American jurisprudence. As Justice Story's moralistic view of utility waned, American views on morality have changed as well. In the case of gambling devices, the *Murphy* board recognized that a change in public opinion and individual jurisdictions' choice to legalize made a strong case for ignoring the Story approach.¹¹⁴ The court in *Juicy Whip* acknowledged that it was not the role of the USPTO to pass moral judgments, as those judgments were assigned to other government actors. Similar logic, while not explicit in USPTO decisions, seems to apply to the field of cannabis-related products.

Though well-documented in case law and TTAB decisions, the Unlawful Uses Doctrine has begun to succumb to societal pressure against it. The TTAB itself called the entire doctrine into question (albeit while using the doctrine to remove a mark's registration) in 1981, stating, "there is a serious question as to the advisability of our attempting to adjudicate whether a party's use in commerce is in compliance with the particular regulatory act or acts which may be applicable thereto."¹¹⁵

Additionally, the doctrine's strict application has diminished in recent years.¹¹⁶ The current TMEP holds simple labeling errors to not be unlawful uses, though some case law exists suggesting that labeling errors on any sample of a product indicate unlawful use, and consequentially no mark registration. Conversely, the recent *Morgan Brown* and *JJ206* rulings from the TTAB strongly suggest that limitations on marijuana-related trademarks are not being relaxed, but are instead being expanded. The above referenced TMEP even explicitly mentions marijuana in its description of per se federal violations as grounds for denying registration to marks.

Society has changed in its views on cannabis and its use since the inception of both the BUD and the UUD. Patent law responded to similar changes, minimizing the applicability of the BUD, even in the realm of products like marijuana accessories. Trademark law, however, has not kept up with these societal changes in the same way. The UUD has been minimized in most regards, but is expanded for cannabis despite increased societal acceptance.

C. Alternate Means of Meeting the Goals of the UUD and the BUD

The underlying goals of both the Beneficial Uses Doctrine and the Unlawful Uses Doctrine are best achieved through means outside the USPTO. First, consider the BUD. This doctrine was intended to reduce immorality and unlawful behavior by eliminating government-granted monopolies on inventions that lent themselves to such behaviors. However, as part of its decision in *Juicy Whip*, the Court of Appeals acknowledged that

114. *Ex Parte Murphy*, 200 U.S.P.Q. (BNA) 801, 1977 WL 22879, at *2 (B.P.A.I. 1977). The first major blow to the Beneficial Uses Doctrine occurred in 1977's *Ex parte Murphy*. There, the PTAB assessed the utility of a gambling device. The board held that the application of the Beneficial Uses Doctrine to gambling devices made little sense in the modern era, mentioning the legality of coin-operated gambling in many US jurisdictions and the fact the "prevailing public or judicial view that coin-operated gambling devices [are] harmful to public morals or to the public welfare . . . is long gone."

115. *Satinine Societa in Nome Collettivo Di S.A. E. M. Usellini v. P.A.B. Produits et Appareils de Beaute*, 209 U.S.P.Q. 958, 1981 WL 48126, *6 (T.T.A.B. 1981).

116. *See FN Herstal SA v. Clyde Armory Inc.*, 838 F.3d 1071, 1087 (11th Cir. 2016) ("Not every violation . . . will be sufficient to justify denial of trademark protection based on unlawful use.").

“Congress never intended that the patent laws should displace the police powers of the States, meaning by that term those powers by which the health, good order, peace and general welfare of the community are promoted.”¹¹⁷ This poses a few difficulties, given the numerous federal and state governmental bodies dedicated to protecting the American people from supposedly immoral products. Illegal substances and products are subject to the Justice Department’s investigations. Potentially fraudulent products, like the drink dispenser in *Juicy Whip*, are held accountable by the Bureau of Consumer Protection, a subdivision of the Federal Trade Commission. Any hazardous food product issues are addressed by the FDA. Supplementary legal issues stemming from these patented inventions are all assigned to the varying branches of the federal government, leaving no true need for the PTO to deny protection to an otherwise patentable product. The morality of the United States is addressed in these departments adequately without the BUD.

The Unlawful Uses Doctrine, on the other hand, arose as a means to help protect the consumer from dangerously unlawful products.¹¹⁸ And just as the goals of the BUD are better achieved by non-USPTO actors, so is the goal of the UUD in regard to marijuana marks. Just as the above agencies protect against the problems associated with patented inventions, so too can they police marijuana-related products branded with registered marks. Furthermore, any fraudulent practices by marijuana businesses with respect to their investors is subject to review by the SEC.¹¹⁹ The UUD offers no further protection to the consumer than what already exists among the relevant federal agencies.

Adoption of a standard similar to the morally-neutral one in patent law in place of the UUD for marijuana marks will not impact the federal government’s ability to protect consumers from any perceived dangers of marijuana and marijuana-associated products. What such an adoption will do is remove the responsibility to protect consumers from the USPTO and instead reserve those protective activities to the various federal agencies best suited to perform them.

D. Challenges and Controversy

The first major challenge to adoption of the relaxed standard on morality in patents relates to the separate origins of trademark and patent law. Patent law derives from the Creation Clause of the United States Constitution whereas trademark law arises from Congress’s Commerce Power.¹²⁰ Thus, trademarks must be used in commerce in order to receive protection. Given the requirement of lawful commerce, marijuana trademarks (per se illegal under federal law) seem to be in a bind. However, the language of the Commerce Clause itself does not speak to any “lawful” requirement. The UUD is simply a creature of interpretation. Likewise, the Beneficial Uses Doctrine in patent law was simply a common law determination and was not based in any Constitutional language. As described earlier, the Beneficial Uses Doctrine was subsequently curtailed by the court ruling in *Juicy Whip*. It is not difficult to imagine a court ruling that similarly curtails the Unlawful Uses Doctrine for marijuana-related marks.

A second challenge arises in the optics of granting federal protection to marijuana

117. *Juicy Whip*, 185 F.3d at 1367–68.

118. Rabe, *supra* note 30, at 300.

119. Adrian A. Ohmer, *Investing in Cannabis: Inconsistent Government Regulations and Constraints on Capital*, 3 MICH. J. PRIV. EQUITY & VENTURE CAP. L. 97, 106–07 (2013).

120. Kamin & Moffat, *supra* note 10, at 241.

marks. The registration of marks has the potential to be seen as the federal government endorsing behavior that remains illegal on the federal level. However, this issue is far less serious upon further inspection. First, it is important to emphasize that the United States government retains a patent related to medical use of marijuana, despite federal law against marijuana use.¹²¹ This patent has not been interpreted to undermine the federal drug enforcement scheme. Second, as stated above, the federal government has numerous means of seeking out and prosecuting violations of the Controlled Substances Act. These include the FBI and the Drug Enforcement Agency for actual investigations and the IRS for the taxation-based crimes of sellers and distributors. The IRS goes so far as to receive and process tax payments from current marijuana businesses.¹²² Few if any commentators see such tax payments as federal endorsement of marijuana businesses. Instead, the IRS is simply performing its core mission of securing tax-revenue from these businesses and asserting a degree of lawfulness in the industry. Any perceived endorsement related to allowing federal trademark registration for marijuana products is quickly disregarded in the face of the massive federal system for reducing marijuana usage in the population as a whole.

Finally, if the USPTO is to adopt a similar system for cannabis-related marks as it does for cannabis-related patents, it must contend with the notion that patent protection is still not generally available to individual strains of marijuana.¹²³ While initially troublesome, this issue can be mitigated by simple analogy. The products on which marijuana-marks will be sought, be they individual marijuana-containing products or accessories such as rolling papers and pipes, are much more akin to the patentable smoking devices than they are to the scientifically-complex individual strains of cannabis. While this is perhaps an imperfect analogy, it does not seem like the sort of issue to derail an otherwise valuable and forward-thinking change to the current trademark system.

This Subpart is not suggesting that a roll-back of the Unlawful Uses Doctrine in regard to cannabis would be without its problems. It instead simply seeks to show that these problems are not of such a magnitude as to outweigh the benefits that would come from permitting state-legal cannabis businesses to acquire federal trademark protection.

IV. RECOMMENDATION

This Part will offer legal recommendations for each of the major players in the marijuana trademark space. First, it will recommend that the federal circuits modify their approach to determinations of trademark validity in the context of cannabis-related marks. Second, it will recommend that the USPTO (and through it the Trademark Trial and Appeal Board) adopt an amendment to the current TMEP modifying the Unlawful Uses Doctrine. Finally, this Part will offer recommendations to marijuana businesses on how to protect their trademarks in the new potential regime.

A. Recommendations for the Federal Courts

The most valuable benefit the mark owners earn via trademark registration is the ability to defend those marks from infringement in the federal court system. This benefit is

121. See U.S. Patent No. 6,630,507.

122. Ohmer, *supra* note 119, at 107.

123. See *supra* Part II.C.2.

denied to those in the cannabis industry in the wake of the TTAB's creation and the federal court system's adoption of the UUD. Thus, those federal courts must make exceptions to allow for such marks to have an opportunity for enforcement. Chief among these exceptions will be a rejection of the Unlawful Uses Doctrine as it currently applies to cannabis-related marks and a full endorsement of permitting marijuana mark registration in certain situations.

The federal courts should replace the current de facto bar with a thoughtful analysis of the mark application. This analysis should include various interrogatories, including whether the mark meets the statutory requirements of trademark protection, and whether the mark-seeker has maintained constant and full compliance with the cannabis laws of the state in which the mark is used. Material deviation from those state laws should absolutely merit a denial or cancellation of registration based on the Unlawful Uses Doctrine.

B. Recommendations for the USPTO

Given that the Unlawful Uses Doctrine, in particular its application to marijuana, is written explicitly into the Trademark Manual of Examining Procedure, the change ahead will not be as simple as in *Juicy Whip*. The first step in the process is an amendment to the TMEP endorsing the federal court precedent (based on the recommendations in the above section) on marijuana marks. Such an amendment should require that lawful use of a good or service, as dictated by the laws of the state in which it is sold, be considered in the course of trademark evaluation. The current relevant text, found in 37 C.F.R. Section 2.69, is seen below:

However, if the record indicates that the mark itself or the goods or services violate federal law, an inquiry or refusal must be made. For example, evidence indicating that the identified goods or services involve the sale or transportation of a controlled substance or drug paraphernalia in violation of the Controlled Substances Act ("CSA"), 21 U.S.C. §§801-971, would be a basis for issuing an inquiry or refusal. See *In re JJ206, LLC*, 120 USPQ2d at 1569-70; *In re Brown*, 119 USPQ2d at 1351-53. Subject to certain limited statutory exceptions, the CSA makes it unlawful to manufacture, distribute, or dispense a controlled substance; possess a Schedule I controlled substance; or sell, offer for sale, or use any facility of interstate commerce to transport drug paraphernalia. See 21 U.S.C. §§ 812(b)(1)(B), 841(a)(1), 844(a), 863. *Note that, regardless of state law, marijuana, marijuana extracts, and the psychoactive component THC remain Schedule I controlled substances under federal law and are subject to the CSA's prohibitions.* 21 C.F.R. §1308.11; see U.S. Const. Art. VI. Cl. 2; *Gonzales v. Raich*, 545 U.S. 1, 27, 29 (2005); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491 (2001); *In re JJ206, LLC*, 120 USPQ2d at 1571; *In re Brown*, 119 USPQ2d at 1352. *These prohibitions apply with equal force to the distribution and dispensing of medical marijuana. In re PharmaCann LLC*, 123 USPQ2d at 1126 [emphasis added].¹²⁴

In the above text, all references to marijuana should be redacted, as well as any

124. TMEP § 907 (Oct. 2018) (emphasis added). See also 37 C.F.R. § 2.69 (1989) (providing the USPTO with authority to determine whether a product for which an application has been made "compli[es] with other laws").

references to *In re JJ206, LLC*. An amendment should be added to the manual section, codifying the following:

- Before any consideration of the Unlawful Uses Doctrine, the state of domicile of the rights seeker is to be determined.
- Any consideration of the Unlawful Uses Doctrine must assess 1) what is the proposed unlawful use of the mark, 2) what is the applicable current state law in the domicile of the rights seeker, and 3) has the rights seeker been in compliance with that state's law for the life of the mark in question.
- Complete, consistent compliance with applicable state laws shall be a condition precedent for federal registration of the mark.
- Rights seekers in the state-legal marijuana space shall remain subject to every other requirement of the trademark registration process.
- This amendment is in no way meant to imply federal approval of state-level legalization of marijuana, but instead serves to provide a degree of lawfulness to the field of trademarks until the issue is resolved at the national level.

Essentially, the amendment should remove the presumptive bar on marijuana marks and replace it with a thoughtful analysis on whether the mark seeker has complied with local state law and what the harm would be in permitting registration of the mark. This opens up the option to acquire marijuana marks at the federal level and will afford those acquiring such marks the same valuable benefits that any other federal trademarks rights holder would possess. This offers trademark protections more in line with the current protections afforded to marijuana-related patents.

C. Recommendations for Marijuana-Related Mark Applicants

Finally, this Part provides recommendations to those individuals actually engaged in the marijuana industry. Assuming the acquiescence to the above recommendations by the USPTO and the federal courts, marijuana marks will be treated much the same as any other business's marks. The first step will be to register marks currently in use. Registration seekers should be prepared to demonstrate full compliance with the marijuana laws of their state, as it will be their burden to demonstrate said compliance in order to avoid immediate application of the Unlawful Uses Doctrine. Assuming the marks are approved for registration, the rights owners will now be tasked with monitoring for infringement in their own and other marijuana-legal jurisdictions. Should such an infringement arise, the rights owners will take their case in front of the appropriate federal court, as in any other federal trademark dispute.

The benefits of this new doctrinal approach will be numerous for would-be mark owners. They will no longer be limited to inferior state-level actions against infringers.¹²⁵ This removes the need to establish state-wide usage¹²⁶ and offers rights owners the ability to enforce trademark rights in other states. This enhanced protection will increase the value of marijuana-businesses' intellectual property and serve to promote investment in the industry. Furthermore, marijuana companies that have operated within the confines of state law and have built up goodwill with their customers will be able to better protect that reputational benefit through the power of the federal court system.

125. Schuster & Wroldsen, *supra* note 1, at 138.

126. *Id.* at 144.

V. CONCLUSION

The current federal approach to cannabis trademark law is woefully inadequate to address the greater issues of that quasi-legal commercial space. By adopting an evolved standard toward cannabis marks that is more in line with the current patent law approach to cannabis-related inventions, the USPTO has the opportunity to foster a greater degree of lawfulness in the field. The change will further innovation and better educate consumers in cannabis-legal states. A cannabis-specific revision to the TMEP, along with application of said revision by the TTAB and the federal courts will bring lawfulness to the world of cannabis trademarks.