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Can Inventions Related to Cannabis be Protected?

April 17, 2018 by Dan Bliss (https://www.cannabisbusinessexecutive.com/author/dan-bliss/)

Suppose that you want to obtain a patent for an invention related to your cannabis business. What if the invention is a device for extracting oils, an ornamental design for a new vaporizer, or a new breed of cannabis plant?

Should you attempt to patent your invention with the U.S. Patent and Trademark Office? Can you obtain a patent from the U.S. Patent and Trademark Office?

The answer is YES — if the invention meets certain conditions for patentability.

According to U.S. law, anyone who invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent.

Since almost all inventions are useful such as the device, the ornamental design, or a sexual reproduction of non-tuber plants, this is an easy condition to meet. Under 35 U.S.C. Section 102, a person shall be entitled to a patent unless the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention.

However, there are exceptions.

For example, a disclosure of an invention made one year or less before the effective filing date of a claimed invention shall not be prior art to the claimed invention. Under 35 U.S.C. Section 103, a patent for a claimed invention may not be obtained if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains.

Thus, if the invention related to cannabis is useful, novel, and unobvious, a patent may be obtained.

Does the federal Controlled Substance Act, that prohibits among other things, manufacturing, distributing, dispensing, or possessing certain controlled substances, including marijuana and marijuana-based preparations, have any affect on patenting an invention related to cannabis?

The answer is NO. There is no prohibition in the U.S. patent law on obtaining a patent on an invention related to cannabis.

For example, a few of cannabis-related patents granted include:

- U.S. Patent No. 9,810,673 for a cannabis cultivation test.
- U.S. Patent No. 9,913,868 for an imbibable cannabis extract.
- U.S. Patent No. 9,852,393 for cannabis chain of custody management.
- U.S. Plant Patent No. PP27,475 for a cannabis plant named “Ecuadorian Sativa.”

In fact, over the past seven years, filings on patent applications for inventions related to cannabis have been increasing.

Why should you try to obtain a patent on your invention related to cannabis?

Because a patent provides a monopoly to the patent owner with the right to exclude others from making, using, offering for sale, or selling any patented invention within the United States or importing into the U.S. any patented invention during the term of the patent.

In the United States, a utility patent for the device has a term of twenty years from the earliest filing date, a design patent for the ornamental design has a term of fifteen years from the grant date, and a plant patent for the asexual reproduction of non-tuber plants has a term of twenty years from the filing date of the application. The patent can be enforced against an infringer in federal court and damages may be increased if the infringement is willful.

Before applying for a patent, a prior art search should be conducted to determine whether the invention is novel under 35 U.S.C. Section 102. This can be done electronically using various databases specifically designed for this purpose.

The prior art search can be conducted using the search engines found at www.freepatentsonline.com (http://www.freepatentsonline.com/), www.patents.google.com (http://www.patents.google.com/), as well as www.epo.org (http://www.epo.org/).

A prior art search can also be conducted on the records of the United States Patent and Trademark Office at www.uspto.gov (http://www.uspto.gove/). Prior art searches are often conducted by a trained professional or third-party provider.

Assuming that the invention is useful and novel, a patent application should be prepared and filed. In the U.S. an inventor *must* file for patent protection within one year of the date the inventor first *offers* to sell the invention or publicly discloses it.

However, under the laws of most other industrialized countries, public disclosure (including an offer to sell *but not experimental use or testing*) is a bar to patentability. Since the United States is a “first-to-file” country, a patent application should be prepared and filed as soon as possible and preferably prior to any public disclosure.

In order to preserve rights in most foreign countries, a patent application should be filed somewhere (typically in the United States) *before* public disclosure of the invention. The laws in the U.S. allow inventors to file “provisional patent applications” which can reserve rights domestically, as well as in certain foreign countries.

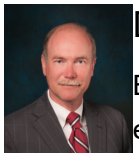
Once a provisional application has been filed, the inventor’s rights have been “reserved”, so to speak, and the inventor may then publicly disclose the invention without fear of loss of rights in this country. Thereafter, the inventor must convert the provisional patent application in the United States as well as other foreign countries *within one year* of the date the provisional application was filed or lose the reserved rights.

Once filed, patent pending may be used in connection with the invention. This is a notice provision which tells others that a patent application has been filed.

Thus, cannabis inventions can be patented if the conditions for patentability are met. A prior art search should be conducted to determine whether the invention is novel under 35 U.S.C. Section 102. If the invention is useful and novel, a patent application should be filed before the invention is disclosed publicly.

If you're able to obtain a patent, you can enforce your patent against infringers in federal court to exclude them from making, using, offering for sale, selling, or importing the patented invention in the United States. Therefore, it is recommended that you patent your invention related to cannabis as soon as possible with the United States Patent and Trademark Office.

About The Author:



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Bliss focuses his practice on all phases of intellectual property litigation. Bliss is a business attorney with extensive background and expertise in all phases of intellectual property law, including patents and copyrights. He has worked with dozens domestic and multi-national companies in obtaining, managing, evaluating and licensing intellectual property. Bliss can be reached at dbliss@howardandhoward.comand 248-723-0389.

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