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Client Alert

What Does a Plant Patent Covering the Charlotte's Web Strain Mean for the CBD Industry?

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Many cannabis and investor news outlets recently reported that the United States Patent & Trademark Office (USPTO) awarded what appears to be the first patent for a hemp strain to Denver-based Charlotte's Web Holdings (CWBHF).[1] Plant patents are relatively rare compared to utility patents, but it will be important for those in the cannabis industry to understand their scope, how they compare and contrast to utility patents, and their potential impact on the cannabis industry.

CWBHF's hemp strain patent, U.S. Plant Patent No. PP30,639, lists CEO Joel Stanley as an inventor and is directed to "a new and distinct hemp cultivar designated as 'CW2A.'" The patent describes CW2A as a *Cannabis sativa* L. cultivar that is capable of producing up to 6.24% CBD and only 0.27% THC. The THC content of CW2A is notable for being below the 0.3% threshold required for federal classification as "hemp" under the 2018 Farm Bill. As background, the 2018 Farm Bill removed hemp from the scope of the Controlled Substances Act (CSA), opening the door for legal hemp cultivation in the United States.[2] CBD (cannabidiol) can be derived from hemp and has recently exploded in popularity. While regulators, including the US Food & Drug Administration (FDA), are still grappling with the rapidly-expanding CBD market, many in the cannabis industry are plowing forward with marketing plans in contemplation of federal regulations and state plan approvals that would authorize the legal cultivation of hemp.

Interest in hemp cultivation has risen in tandem with CBD's popularity. According to a recent study by the Brightfield Group, 285,000 acres of hemp were planted in the United States in 2019, an increase of 72% from 2018, and as much as 87% of that hemp is expected to be used for CBD processing.[3] Indeed, CWBHF's plant patent lists numerous potential market uses of the CW2A hemp strain, including: medical drugs, foods (e.g., margarine, food supplements), drinks (e.g., infused beverages, sports drinks), technical products (e.g., varnishes, fuel, print inks, solvents, coatings), personal hygiene products (e.g., cosmetics, soap, shampoo, bath gels), hemp-infused pet treats, textiles (e.g., apparel, diapers, fabrics, denim, socks, shoes, fine textiles, twine, rope, carpets, geotextiles), and building materials (e.g., fiber, insulation material, cement blocks). While some of these products (e.g., drugs, foods, drinks, pet treats) may require FDA approval, those not intended for human or animal consumption may not (e.g., textiles, building materials).

The issuance of CWBHF's patent begs the question: what does this mean for those who make, use, or sell hemp that is capable of producing up to 6.24% CBD and only 0.27% THC? The answer is that plant patents are relatively narrow in scope. Plant patents, which were created by the Plant Patent Act of 1930, afford protection for asexually propagated plants (i.e., clones having identical genetics to those of the patented plant). Plant patents do not protect sexually produced plants (e.g., those cultivated by seed). As a result, a plant patent is infringed only when the infringer has cloned the accused plant from the plant protected by the patent. Plant

patents are therefore generally not concerning to those who are seed farming or cultivating similar but not genetically identical plant varieties. If cloning proprietary strains ultimately proves critical to the cannabis industry, a patent covering such genetics could have far-reaching implications.

Utility patents, on the other hand, offer relatively broader protection and can be advantageous where the invention lies in the development of a plant or plant product that is cultivated to have previously unknown and non-naturally occurring properties. One advantage of utility patents over plant patents in this regard is that, if utility patent protection is awarded, the claimed invention can be infringed even if the accused product is reproduced sexually (e.g., by seed farming). Utility patents are routinely issued by the Patent Office for plants and plant elements (e.g., buds, pollen, fruit, plant-derived chemicals, extracts, proteins, engineered genes).

In sum, while a plant patent covering a commercially valuable strain for cloning purposes certainly has value, its scope is bounded to the genetics of the patented plant and leaves room for sexual reproduction (e.g., seed farming). By contrast, a utility patent covering a non-naturally occurring strain, where the claim is defined in terms of the plant's novel characteristics could make the avoidance of infringement more difficult and thus serve as stronger patent protection.

Patents are a large investment and sophisticated strategies are needed to ensure that they provide value to their owners—whether for defensive purposes, offensive purposes, or both. And while patenting activity in the cannabis space has a history dating back to the 1950s, the recent growth in commercial value, investment interest, and biomedical innovation is proving to be a game-changer. As a result, the need for sophisticated patent counsel has never been greater.

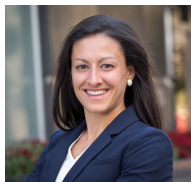
For more information about the cannabis practice at Sterne, Kessler, Goldstein & Fox, please visit the firm's [website](#).

[1] Chris Roberts, *This is the first hemp strain to be awarded a US patent*, Leafly (Sept. 13, 2019) ([link](#)); Graham Abbott, *First U.S. Hemp Strain Patent Awarded for Charlotte's Web*, Ganjapreneur (Sept. 18, 2019) ([link](#)); *Charlotte's Web Holdings' New Hemp Patent Could Be a Game Changer*, Yahoo! Finance (Sept. 17, 2019) ([link](#)).

[2] For more information on the impact of the 2018 Farm Bill: *IP's Developing Role In Cannabis Business Strategy* ([link](#)); *Hemp Legalization and the International CBD Boom* ([link](#)).

[3] *Hemp Cultivation Surges Across US and Abroad*, Brightfield Group ([link](#)).

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