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LAW BULLETIN MEDIA.

Legality of hemp plays into question of protecting product's trademark

Question: Can a trademark for a hemp-based product be challenged as a trademark for an illegal substance?

Discussion: AK Futures LLC manufactures e-cigarettes that contain hemp-based delta-8 THC under the trademark "Cake." AK Futures brought suit against Boyd Street Distro, LLC for allegedly selling counterfeit versions of the "Cake" e-cigarettes. In defense to AK Futures' motion for preliminary injunction, Boyd Street argued that AK Futures' trademark "Cake" was not protectable because it was being used to sell illegal products.

The District Court held that AK Futures was likely to succeed in showing trademark infringement, noting that the Cake products sold by Boyd Street were "almost identical" to the originals. The court ultimately agreed with AK Futures that — on the available record — its products are lawful under the 2018 Farm Bill.



IP NEWS CHALLENGE

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Boyd Street appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit agreed with the lower court that the 2018 Farm Bill contains "plain and unambiguous" language that "compelled the conclusion" that

delta-8 THC products are lawful.

Boyd Street had two counterarguments. First, that the Farm Bill did not apply to the delta-8 THC due to the method of its manufacture. Second, that Congress did not intend for the Farm Bill to legalize any psychoactive substance.

The Ninth Circuit rejected both arguments. It affirmed the lower court's ruling and remanded the case.

Answer: This was really a trick question. The USPTO will not register a trademark identified for use to market illegal substances or activities. However, hemp based delta-8 THC is not an illegal substance. Therefore, a trademark for hemp-based delta-8 THC can be registered.

Case Cite: *AK Futures LLC v. Boyd St. Distro LLC*, 35 F.4th 682 (9th Cir. 2022)

Sur-Reply: More and more states are legalizing marijuana. If the trend continues and federal legalization becomes a reality, trademark protection will follow suit.