# IS THE PARTY OVER: DIFFICULTIES WITH PATENT PROTECTION AND POT WILL BECOME FURTHER COMPOUNDED UNDER PRESIDENT TRUMP

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There exist true difficulties associated with patent protection and pot, especially where these activities reside in the current political and legal climate. Having represented a consortium of marijuana entities looking to obtain time-limited government-sanctioned monopolies, i.e., patent protection, the issues surrounding federally-backed intellectual property can be difficult at times and daunting in the marijuana context. To be sure, the difficulty concerning pot and patents is not necessarily in obtaining this intellectual property instrument.[1] Rather, the difficulty lies in the unavailability of federal protections, their effective inaccessibility, or in some cases, even the unavailability of lawyers to help counsel their clients through a changing legal landscape. Under a Trump presidency with an attorney-general designate that is a 'strict prohibitionist,' the landscape has become even murkier. Thus, any potential applicant that seeks that type of intellectual property protection must fully analyze whether the return on investment supports such an endeavor.

Though recreational marijuana is legal in Oregon, other states, and the District of Columbia, pot resides in a unique legal quandary since its use and production, for examples, are both a federal crime. Additionally, cannabis is federally scheduled—perhaps anachronistically—as a Schedule I narcotic of the likes of heroin and morphine. Although the winds of legalization of marijuana had been at the backs of their proponents, two recent developments cast a shadow for more rapid change. Of course, a third and perhaps fundamental development, the swearing in of Mr. Trump as the 45th President of the United States, who at least subscribes to states' rights theory but surrounds himself with strict prohibitionists, may stall further normalization if not reversion.

First, this past summer, the Drug Enforcement Agency ("***DEA***") rejected attempts to reschedule marijuana, maintaining it, at least for now, in the most restrictive category. This result was not entirely unexpected despite what appears to be a conclusion that appeared to reek of hypocrisy: the DEA concluded there is no "consensus among qualified experts that marijuana is safe and effective" despite the fact that, for example, the U.S. Department of Health and Human Services already possesses a patent on cannabinoids, which according to the filing, are classified as an "antioxidant and neuroprotectant."

[1] The trademark process may be even more daunting. On November 1, 2016, the Trademark Trial and Appeal Board ("TTAB") of the U.S. Patent and Trademark Office ("USPTO") issued a precedential ruling doubling down on its refusal to register marks for marijuana products, rejecting a novel argument that the hands-off approach used by federal prosecutors in pot-friendly states makes cannabis goods "lawful" under the Lanham Act. Essentially, that means that businesses in the marijuana industry will be unable to secure federal trademark registrations if those registrations are related to 'unlawful' goods or services.

Second, only last week [October 13, 2016], a bankruptcy appellate case that potentially could have gone to the U.S. Supreme Court, stopped in its tracks when the litigants probably realized that the law was clear: bankruptcy law, like patent law, is a creature of federal law. Since the federal Controlled Substances Act is clear on marijuana and its criminality—supposed to some—the litigants had to have known that they could not rely on federal law. Patent protection may be no different.

With the tide of state laws changing and at least eight states having voted and approved marijuana reform this past November, 2016, hope for continued marijuana-legalization proponents abounds. Also, more than half of all Americans want to see marijuana legalized. However, regardless of the number of states that legalize pot—incidentally, none have done so legislatively, only through the ballot—only real systemic change will occur when the federal government changes its position. With the likes of Messrs. Jeff Sessions and Mike Pence (the attorney general designate and Vice President, respectively), both of whom vehemently oppose legalization while populating very high positions in the Trump administration, it seems unlikely that considerable change will occur. This is true despite Mr. Trump's position that he would not support the shutdown of existing marijuana markets. Such a position is, of course, very different from allowing other markets to commence and evolve.

In sum, obtaining a patent in the area of marijuana should not be entirely different than obtaining that kind of protection in a different area. However, this patent practitioner has found that many inventions are not even worthy of expending the necessary resources to obtaining patent protection in the first place for the simple reason that the net present value of the asset may be insufficient. That conclusion may be amplified in the marijuana industry in the current climates. Until the federal government seriously considers legalization, which would directly affect the ability to protect one's intellectual property, potential patent applicants must perform multi-factorial analyses when deciding whether and how to seek intellectual property protections.