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Liquor & Cannabis Law

Selecting a Unique Brand for your Cannabis Business

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All brands should strive to be unique. However, it is particularly important that businesses in competitive industries, like the cannabis industry, adopt brands that are highly distinctive and unique. Why? In competitive industries, consumers are bombarded by choices. When consumers walk into a store and are faced with numerous, similar brands, they have a hard time distinguishing between them. Consumers may have had a positive experience with a brand, but they can't quite remember whether it was ACME 1 brand or ACME 2 brand. The need to be distinctive extends both to the brand name, as well as to its packaging. If ACME 1 and ACME 2 both have green and black packaging, it may be impossible for consumers to correctly identify the brand they had a positive experience with. Even worse, if a consumer had a negative experience with a brand that sounds and looks similar to another brand and its packaging, the consumer may avoid both brands, either because they can't tell them apart, or they assume they are related in some manner.To ensure cannabis brands benefit from consumer loyalty, and do not suffer negative branding consequences caused by inferior competitor products, it is imperative that cannabis brands strive to be distinct.

This means **(a) adopting a brand that is unique**, **and (b) utilizing packaging that is also distinctive**, particularly when viewed among dozens of competitive products.

Below is an overview of the strength continuum that is used to assess - from a legal perspective - the strength of all brands.

- **Generic terms.** On the left side of the continuum are generic terms, which are afforded no trademark protection at all because they do not function as proprietary source identifiers for any particular party.

Examples: "Pot," "marijuana," or "cannabis" for cannabis products.

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- **Descriptive terms and surnames.** Generic terms are closely followed by descriptive terms and surnames, which typically carry a very low degree of protection. However, there are exceptions within the surname category. For example, famous celebrities (like Snoop Dogg, Willie Nelson, Wiz Khalifa, and Tommy Chong, to name a few), may strategically elect to use their surname because it has already acquired distinctiveness through fame and recognition. In circumstances where a surname is famous, it can quickly help the brand achieve fame (as is arguably the case with the KHALIFA KUSH brand).
- **Suggestive brands**. Under normal circumstances, and excluding exceptions such as a famous celebrity name, the weakest type of brand that a cannabis business will ideally adopt is a suggestive brand. Not surprisingly, a suggestive brand will suggest something about the good or service, but it does not overtly describe the good or service.

Example: ELEVATE for cannabis products would be an example of a suggestive brand.

- **Arbitrary brands**. Arbitrary brands take common words and apply them to a good or service that has no application to the brand name.

Example: APPLE for computers is a well-known example of an arbitrary brand. OWL would be an example of a term applied in an arbitrary manner to cannabis goods or services.

- **Fanciful brands**. At its inception, the strongest type of brand that can be adopted for a new cannabis business, product, or service is a fanciful term. Fanciful terms do not exist in the vernacular and are only invented to serve solely as a brand for specific goods or services.

Example: KODAK and EXXON are examples of terms that were invented solely to serve as brand names. If a cannabis business invests in developing a fanciful brand, it will benefit significantly from the fact that its brand is only associated with its unique products and/or services.

- **Famous brands.** Finally, the strongest brands are famous brands. These do not happen overnight, and can be comprised of suggestive, arbitrary, or fanciful brands, and even surnames under the right circumstances.

Below is a visual depiction of the strength continuum for trademarks. When selecting brands for cannabis goods or services, it is a good idea to keep the strength of the mark in mind. By selecting a unique brand, cannabis businesses can help assure customer loyalty, avoid consumer confusion from occurring in the marketplace, and avoid being overlooked among a sea of similar-sounding competitors. In addition, strong trademarks are more easily registered and enforced.

Once you have a strong brand in mind, it is a good idea to ask a licensed attorney with trademark experience to conduct a clearance search, and provide advice regarding potential registration strategies available to cannabis providers. Please bear in mind that there are a number of factors involved with selecting a good brand for each business, and only an opinion specific to your proposed brand and goods/services should be taken as legal advice.

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For any questions, feel free to contact any member of our Intellectual Property group.

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