



VIRTUAL ROUND TABLE SERIES | IP WORKING GROUP 2021

The Evolution of the Cannabis Industry: An Intellectual Property Perspective

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FOREWORD BY EDITOR, ANDREW CHILVERS

Coming of Age: Why legislation is finally catching up with cannabis

While the world has been dominated by the Covid-19 pandemic during the past 18 months, one business sector that has quietly come of age during that time is the cannabis industry.

Nowhere has this been more evident than the United States. By the start of 2020, cannabis was the biggest growth industry in America. On election day cannabis was legalised in New Jersey, Montana, Arizona and Missouri and more than 100 million Americans now live in a state where it's legal to use cannabis for recreational and medicinal use. Annual sales of cannabis are expected to reach \$40 billion by 2025 with some quarter of a million people in the US in full time employment in the sector – making it one of the biggest sources of work in the country.

Along with the relaxation of state laws, federal law on cannabis legislation is expected to follow suit fairly soon. This will give the industry the potential to open the sector to investment that would make it an attractive business opportunity for global investors.

For many legal advisors, however, cannabis can still be difficult territory depending on how it is legally defined in a particular jurisdiction – along with how it is processed and used. These uses include medicinal, recreational or CBD (cannabinoid), which is a type of natural compound found in cannabis and hemp and not considered a narcotic by many (but not all) nations.

Furthermore, along with these unclear legal definitions regarding what is legal versus illegal comes the confusion around trademarks and patents. Can a business apply for them on a local level, when trademark law is enacted on federal level?

Joy Tea, a US CBD beverage company, is a typical example of the confusion surrounding the cannabis industry in the country. A business is unable to trademark a product that is not legal under federal law, even though it could be under state law. While hemp derivatives such as CBD were finally given the legal green light by the 2018 Farm Bill, the US Patent and Trade Office denied a trademark registration to Joy Tea because the Food and Drug Administration had no regulations in place allowing the legal marketing and advertising of CBD in food or supplements.

Joy Tea is now appealing this, and the case is being watched carefully by legal advisors in the US and abroad. Nevertheless, it highlights the confusion and grey areas that exist when setting up a cannabis-based business in the US.

Meanwhile, over the border in Canada CBD businesses are queuing up for trademarks. Indeed, since the legalisation of recreational cannabis in Canada in 2018, the trademark office has been inundated with trademark applications for cannabis-related goods and services. At the start of 2021 there were estimated to be some 7,000 applications and registrations in the country.

Unlike in the US, Canadian trademark registrations cover cannabis in lists of goods and services – and it's not just for CBD products. With recreational cannabis now hugely popular in Canada, the Canadian Intellectual Property Office ("CIPO") has entries for the range of cannabis products and services including 'smoking cannabis', 'cannabis cigarettes', 'cannabis oil for food' and 'dried cannabis'.

Indeed, many businesses based in the US are moving to Canada to start production and trademark their product or service in anticipation of the loosening of US federal laws in the near future.

Further south in Mexico many businesses and legal advisors are also gearing themselves up for proposed legislation to legalise the recreational use of cannabis following a Supreme Court ruling in 2017 – although the bill of law has yet to be approved.

When permission is granted, this bill will allow different licences for cannabis including cultivation, processing, sales, research and import/export. It promises to be one of the most liberal cannabis regimes in the world, legalising cannabis countrywide and opening up a market of 120 consumers to businesses and entrepreneurs eager to enter the world's biggest cannabis market. As with Canada, US companies are already looking south for big opportunities when the bill is approved into law.

In this Virtual Series IR Global Members discuss the enormous differences in attitudes to cannabis across jurisdictions that are as far apart as the US, Canada, Mexico, Europe and Japan. It's one of the most complex issues for legal advisors and business people to navigate, as they try to enter what could potentially be one of the most profitable emerging business sectors in the world.



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View from IR



ENGLAND

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Our Virtual Series publications bring together a number of the network's members to discuss a different practice area-related topic. The participants share their expertise and offer a unique perspective from the jurisdiction they operate in.

This initiative highlights the emphasis we place on collaboration within the IR Global community and the need for effective knowledge sharing.

Each discussion features just one representative per jurisdiction, with the subject matter chosen by the steering committee of the relevant working group. The goal is to provide insight into challenges and opportunities identified by specialist practitioners.

We firmly believe the power of a global network comes from sharing ideas and expertise, enabling our members to better serve their clients' international needs.

Featured Members



GERMANY

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Margret Knitter LL.M. is a partner of the German law firm SKW Schwarz and a Certified Expert for IP. Additionally, she is head of the Cannabis Practice Group at SKW Schwarz. She advises her clients in all matters of intellectual property and competition law. This includes not only strategic advice but also legal disputes. Her practice focuses on the development and defence of trademark and design portfolios, border seizure proceedings and advice on developing marketing campaigns. She advises on labelling obligations, packaging design and regulatory questions, in particular in the Life Sciences, Foodstuffs and Cannabis industries.

She regularly holds lectures at seminars and conferences. She is co-chair of the European INTA Bulletins Committee and a member of the board of the Branded Content Marketing Association of the Germany, Austria and Switzerland region. She is the author of numerous professional articles and other publications, e.g. [10 Q&A's related to Medical Cannabis in Germany](#).

Margret is recognized as a leading lawyer in Who's Who Legal 2020 in the category "Trademarks". IP Stars ranked Margret among the Top 250 Women in IP and among the Trade Mark Stars 2020. The Legal 500 (2020) recommends her as "an excellent trademark and competition lawyer" with "large expertise" who "keeps constantly in touch with the latest trends (or ahead of them)". Margret is a Gold Tier recommended lawyer in the 2021 edition of World Trademark Review.



JAPAN

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Kenji Kuroda has over 30 years of professional legal experience, and founded Kuroda Law Offices in 1995. The full service firm focuses on intellectual property litigation including Japanese and foreign patents, international business matters such as direct investment and finance projects, and mergers and acquisitions both domestic and abroad.

Mr. Kuroda also has ample experience with areas such as investing in developing nations and growing markets, project financing, cross-border leasing and corporate financing, and in relatively new fields, such as LEDs, internet businesses using digital contents, and sports marketing.

The firm has offices in Tokyo, Shanghai and Taipei, and its affiliate, KLO Investment Consulting (Shanghai) Co. Ltd, has branches in Guangzhou and Beijing, making it possible to offer comprehensive local, one-stop service. Mr. Kuroda has handled successfully numerous cases involving some of the most well-known domestic and international companies.



CANADA – EAST

Elizabeth S. Dipchand

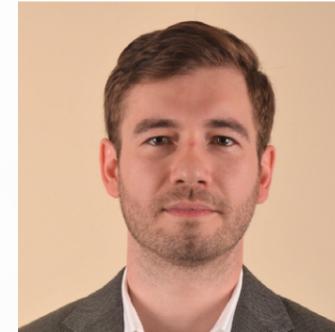
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Elizabeth regularly advises corporations on in-depth intangible asset management including licensing, contract, and transactional work with particular emphasis on assisting SMEs to achieve their long-term legal strategy to leverage their intellectual capital and assist in the overall growth and development of their company.

In her litigation practice, Elizabeth represents clients in matters before the Federal Court, Federal Court of Appeal, Ontario Superior Court and Ontario Court of Appeal. With extensive experience in the management of complex litigation—pharma, SAS, wireless communications, mining—she represents clients in traditional IP litigation matters, as well as disputes relating to misleading advertising, grey-goods/anti-counterfeit, and commercial litigation. Clients regularly rely on her to coordinate their intellectual capital management and enforcement strategies in crucial jurisdictions around the world.

Elizabeth gained significant experience in the intellectual property litigation group of a major national firm and continued her practice at the nation's top-ranked litigation boutique before founding Dipchand LLP. Her practice focused on pharmaceutical and biotech patent litigation, drug & biologics regulatory law. In particular, Elizabeth has had extensive involvement with proceedings commenced pursuant to the Patented Medicines (Notice of Compliance) Regulations.



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John is a Law School Graduate from the University of Monterrey and a holder of a Masters' Degree (LLM) in International Business Law from the University of Southampton, UK. He joined the firm in 2010 and has been involved in multiple international legal transactions of a commercial nature since then.



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Industry Focus:

Comprehensive legal advice in the development of pharmaceuticals and medical devices up to market launch, of technology companies in connection with research and development projects and research centres and consortia.

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Timothy J. Kelly has extensive experience in all aspects of trademark and unfair competition law, including domestic and international trademark portfolio management, clearing and prosecuting trademarks, licensing, IP due diligence investigations and litigation, both in the district and appellate courts and before the Trademark Trial and Appeal Board. He has also had experience negotiating and litigating Internet domain names and other e-commerce disputes.

Mr. Kelly has represented a wide range of clients in various industries including clothing, human foods and confections, pet foods, pharmaceuticals, electronics, appliances, and publications.

SESSION ONE

What advice would you give your clients about brand protection in your jurisdiction? Is it easy to trademark a cannabis brand?

Tim Kelly – US, New York: The federal government, which controls the federal trademark registration practise, has not legalised marijuana or cannabis up to now. It's not possible to get a federal trademark registration for cannabis products generally. As such, you are not going to be in a position to, for example, obtain a trademark registration for your particular brand of marijuana.

However, the good news is that regulations are loosening around it. About a year and a half ago there was a change where hemp-derived products (including hemp-derived CBD) containing a THC level of less than .3% were decriminalized. Now, if the THC level is below .3% in the final product, you could obtain registrations for certain products. The Trademark Office now requires that applicants state, for example, the THC percentage to ensure that the THC-containing product to be offered under the trademark is compliant.

But my view is that it's important to advise clients that legalization is going to happen at some point. Trademarks for these products are going to be registerable. For clients, it's important to start building their brands and doing what they can to secure the necessary protection. One client I have is in insurance and they're going to be able to secure trademark registrations in the general area without specifically calling out that their services will relate to, among other things, marijuana-related treatments.

For example, you can register your trademarks for lighters or for certain types of pipes. Those items aren't necessarily marijuana specific. Therefore, if you start to build your brand on some of these collateral items, at some point you're going to be in a position to have those brands at least somewhat protected when the opportunity presents itself to obtain registrations for additional items.

Those are some of the immediate things that that come to mind from my perspective.

Margret Knitter – Germany: I've been handling cannabis trademarks since 2017, when medicinal cannabis was legalised in Germany. In the beginning those marks were only accepted for Nice Class 5, meaning only cannabis for medicinal use was permitted. But that has changed. Both the European and the German IP office now accept cannabis marks for all sorts of cannabis and CBD products in various classes, which are not only for medical use.

However, in February I received a preliminary view of the German Federal Patent Court where they did not accept CBD products outside Class 5 for the mark applied for. They argued that in Germany only medicinal cannabis is legal and thus non-medical CBD can never be marketable.

This view is odd because the European Union Court of Justice (ECJ) only recently ruled that CBD products were no longer considered narcotics and should benefit from the free movement of goods between EU member states to the same extent as other legal goods.

Unfortunately, I couldn't fight this preliminary view of the court because the client decided not to pursue the matter.

But we still see some rejections based on absolute grounds.

Here's a good example of what's being rejected:

Cannabis Store Amsterdam

The European General Court held that this device mark, which showed cannabis leaves together with the wording "Cannabis Store Amsterdam", referred to the consumption of cannabis. This would be contrary to public policy or to accepted principles of morality and was not eligible for registration as a trademark. While cannabis consumption is generally legal in the Netherlands, the violation of the public order in other EU countries was sufficient for the rejection of the mark.

Despite the greater tolerance towards the consumption of marijuana within the EU, the decision making remains rather conservative when it comes to the assessment of the validity of the so called "cannabis marks". From what I see, the registration as EU trademarks of signs comprising the words 'marijuana', 'cannabis', 'hemp', 'grass', 'pot', 'weed', 'hash' remains problematic.

Elizabeth S. Dipchand – Canada: Canada is in a different position than the majority of countries in the world – cannabis has been approved for medicinal use for 20 years. Legalisation of recreational cannabis happened in October 2018 and since then the IP considerations have played a central role in the industry's business strategy. In particular, patents and trademarks acquisition has been active.

There are about 8,000 cannabis-related trademark applications pending before the Canadian Intellectual Property Office. But there is a bifurcated statutory regime that impacts the Canadian cannabis industry. The trademark protection of cannabis-related goods and services is regulated through the existing Canadian Trademarks Act and regulations, but the use and advertisement of cannabis products to the public is governed by the Cannabis Act and regulations.

In the context of trademarks, the Canadian registrations may expressly cover cannabis in their claimed goods and services and go so far as to list in the Canadian Goods and Services Manual pre-approved items such as cannabis for smoking, dried cannabis, cannabis oil for foods etc. These marks are assessed by CIPO in the way that any other marks would be examined, namely in consideration of issues such as distinctiveness, descriptiveness and confusion. When Margret spoke about the use of words like 'cannabis' and 'weed', descriptiveness objections are likely and potentially also invite confusion objections. As with any other trademark, the real focus is to try to increase the level of distinctiveness or even acquired distinctiveness to get these marks through to registration which may serve to strengthen its reputation.

But even if you get the marks, what's fascinating is the restrictions that Canada's Cannabis Act imposes on the use of those marks. At a high level, the main focus of the legislation is not public morality and society writ large, but it's specifically targeted to mitigate the impact of advertising to children and young people. You cannot advertise or display your marks in situations where it would be found to be appealing to young people or in a testimonial or in endorsements.



Elizabeth S. Dipchand at the IR 'On the Road' Conference in Miami, 2020



Kenji Kuroda at the IR 'On the Road' Conference in Tokyo, 2019

There are a couple of other strange stipulations trademarks and advertisements cannot promote glamour, recreation or excitement in association with cannabis. You cannot invoke thoughts of luxury or cutting-edge lifestyle using cannabis. And then there is the brand elements; its not only the word or design marks that are precluded from use in this way by the Cannabis Act, its also any distinguishing guises as well as everything associated with the brand identity that is not necessarily registerable.

The end result are two interrelated statutory instruments that have created a system where a given trademark registration may be available but use of that trademark may be curtailed or even prohibited.

John Colter – Mexico: The first permit to import a cannabis product was for medical purposes, regarding a child who suffered from epilepsy. The case became very famous and not so long after plenty of people started to import medical cannabis as an alternative medical treatment. This is a completely legal procedure in Mexico if you can obtain a prescription from a specialist doctor, but commercialization is not allowed, even for medical reasons. Different is the case for products that contain CBD and no THC; these types of products used in cosmetics, supplements and overall personal care are accepted and allowed for commercialization.

It wasn't until 2017 when the Supreme Court granted for the fifth time its recreational use, meaning that it became jurisprudence. Therefore, people who want to obtain a permit from the authority for the recreational use of the marihuana, will get it, although they'll have to go through a judicial procedure and once they obtain the positive resolution, then the authority will be forced to grant the permit. The Bill of Law is being prepared and has been bouncing from the congress to the lower chamber and back, with no results so far. Legislators are still hesitating over certain concerns, and it might take some time before the market is open for recreational use due to the highly permissive bill on law on review, but it's on the right track and surely it will be approved soon.

Now, in relation to the IP, the trademark registration is federal, so if you get a permit or exclusivity to use a name, you can use it across Mexico. However, you might not be able to advertise it because of public order and social concerns, depending on the nature of the product or service offered. But the Mexican Institute of Intellectual Property is open to accept trademark requests with names that include cannabis and certain other related words. There are patents as well. We are the country with more patents registered than anywhere else in Latin American. Mexico is also in the top 10 countries in the world with more patents related to cannabis and trademarks. There are more than 300 registers open right now waiting for resolution. This highlights the openness of the Mexican IP authority when it comes to cannabis related registrations.

Kenji Kuroda – Japan: Japan is a country where cannabis products are strictly prohibited. The Trademark Office grants trademark protection for CBD (or cannabidiol) and you can apply for a trademark, but you may be refused. Such trademark applications can be deemed to violate public order and morals. But generally speaking, the Japanese patent office tends to grant the trademark protection registrations for those trademarks.

Also, in Japan there is the Cannabis Control Act that stipulates cannabis plant and products are strictly prohibited. But there is an exception if it's THC-free CBD products extracted and manufactured from mature cannabis stems or seeds. That is the only exception where you can commercialise cannabis in Japan. That's why the Japan Patent Office has granted the trademark registrations for CBD.

Dr. Monika Hupfauf – Austria: The possibilities to register cannabis trademarks with the Austrian Patent Office are very limited. To date with the Austrian Patent Office only three trademark registrations including the term "cannabis" are (still) registered;

1. "Österreichisches Cannabis Netzwerk" for the Austrian Cannabis Network
2. "Cannabisin" for a drug (registered 2014)
3. "Jayzoo Cup Winner Cannabis" – combined trademark (registered 2021) in classes 3, 25, 34

Under EU law, inter alia, the following signs are not to be registered as trademarks: "Trademarks which are contrary to public policy or to accepted principles of morality". On this basis, registration of the device trademark "Cannabis Store Amsterdam" as an EU trademark was recently refused, as Margaret highlighted.

The General Court of the European Union (EGC) upheld this interpretation of the law. Although cannabis with a THC content below a certain threshold does not constitute a narcotic substance, the sign will be perceived in its entirety as referring to a narcotic substance (especially through the combination of the individual elements of the sign). The mark is therefore contrary to public policy because cannabis with a THC content above a certain threshold is illegal in many EU countries and tackling the spread of cannabis meets a public health objective.

According to the EUIPO's case practice, terms which may designate a cannabis variety, or a cannabis seed are also not protectable as a trademark.



Kenji Kuroda at the IR 'On the Road' Conference in Tokyo, 2019

SESSION TWO

What will be the biggest challenge clients face? What have advisors done in different jurisdictions to protect clients?

TK – US, New York: One of the biggest challenges is that while marijuana is illegal at the Federal level, many states (and more every year) are decriminalizing it and even making it legal to sell marijuana to consumers at retail. So, while there is currently no ability to obtain a Federal registration, there is nonetheless trademark use and it is frustrating not to have an nationwide route for protection of those brands. As noted, one of the things you do is try to register collateral items to build the presence of the brand as best you can. But another route is to pursue registration at the state level. Different states take different approaches to whether or not you can register. In some states it's only for medicinal use, while in more and more states it's being used for recreational purposes.

But even there, state registration is only going to give you limited (local) protection. From that perspective it's sort of a wait-and-see approach. Do what you can to build the brand and as things develop try to capitalise on that when the opportunity presents itself. But with marketing and advertising, those are unknowns really.

Certainly, there are regulations in the United States with respect to advertising tobacco products. And I have to expect that they're going to have similar things put in place for marijuana products when they become legalised nationwide. Neither the FDA nor the FTC (Federal Trade Commission) are going to start promulgating regulations/advertising guidance for products that are illegal. But at some point, that's going to happen and client's need to be aware and prepared.

I know from travelling state to state and going to states where marijuana is legal, that you see signs, you see advertising on a local level that I expect would not really square with what the federal level is going to eventually require. In other words, these mom-and-pop shops that are legal in Washington state, for example, are doing things to keep their local constituency apprised of the availability of the product in ways that may be too "colourful" for young kids in terms of attracting their attention.

MK – Germany: I would like to differentiate between the medicinal cannabis side and CBD because that's a totally different story here in Germany. So, as I said, only medicinal cannabis is legal at the moment. The German federal states don't have permission to handle it as they want; it's different from the United States. If you're caught with marijuana, it's a criminal offence wherever you are. It's only medicinal cannabis that is accessible and even this is difficult to get hold of with special doctors and prescriptions.

Clients also need to know that they're not allowed to advertise medicinal cannabis to consumers, it's only to healthcare professionals. CBD is a totally different issue and we do have CBD products. We even have a few stores, like I saw in Canada a few years ago in Toronto, where they sell CBD products, but they're very rare and the legal situation is quite unclear.

Here's a summary:

- Regulatory landscape for cannabis in Germany: for recreational purposes it's illegal, according to the German Narcotic Drugs Act
- Medicinal Cannabis has only been legal since 2017
- May not be purchased directly by consumers as it is classified as a narcotic
- Available only on a special prescription
- Not advertised to end consumers but to healthcare professionals only

Legal status of CBD in Germany in various aspects is unclear.

A CBD product does not fall under the regulations of the Narcotic Drugs Act) if:

- it originates from cultivation in countries of the European Union with certified seeds (commercial hemp) or
- the THC content does not exceed 0.2% and
- the traffic exclusively serves commercial or scientific purposes, which exclude abuse for intoxication purposes.

We do have a recent positive decision by the German Supreme Court regarding a tea called "hemp bar" with intoxication-free "CBD flowers" that can be sold. The tea consists of CBD flowers, THC content is below 0.2%. The accusation was that one could theoretically bake something with it and then the THC content would be above 0.2%. The Supreme Court, however, did not follow this line.

ED – Canada: I love sessions like this because you get to learn so much more about different jurisdictions. It's all very fascinating.

I want to come at this second question from a different angle. It's very interesting to see how many Americans, in particular, are coming to Canada to invest in these products in anticipation of US federal authorisation.

These US players participating in the Canadian cannabis industry are using this opportunity to invest and get a good handle on the technology and the brands. There are marks either registered or pending before CIPO in anticipation of when the US market is federally authorized and with the expectation of expansion as soon as the market becomes more widely accessible. At that time, I anticipate that we will see US filings on the basis of either Canadian use or the Canadian priority to pending or registered marks.

Another consideration is the practical implications of federal, provincial and even municipal regulation of impacting the sale of cannabis. Canada is wonderfully odd in a number of ways, but from a constitutional perspective there's a lot of distinction between what is authorised at the federal level, regulated provincially and even managed at the city/municipal level. This fascinatingly plays out in terms of access to both medicinal and recreational cannabis.

Federal authorizations deal with the production, cultivation and processing of cannabis and cannabis containing products across the country regardless of whether it is for medical or recreational purposes.

In terms of recreational cannabis access, our offices are in downtown Toronto and I can walk out my door and probably within five minutes I will hit at least six cannabis shops. That's not the case for all of the cities and municipalities in Canada. The advertisement of recreational sale of Cannabis is governed by the federal Cannabis Act, but the authorization of these stores is done at the provincial and even municipal levels each of which may decide differently how many stores to allow and where within their respective towns and cities, if they allowed these stores at all.

The takeaway is for all clients, Canadian or otherwise there is some significant governmental and statutory navigation that will impact operation and investment vehicles and activities.

JC – Mexico: I was interested in what Margaret said and how similar and different the regulations are between Germany and Mexico. CBD is broadly used here in percentages below the one percent of THC and there are more than a thousand uses for this.

The bill of law that is being proposed will consist of five different type of licences that will include the cultivation, the processing, sales, research and export or import. The intention is that it will be legalised countrywide. It's supposed to be very big news on the marijuana market worldwide because it will represent a market of 120 million people – this compares with the US, where it's legalised state by state.

Thus, issues around CBD and THC are very important. In Mexico there is big distinction between recreational and medicinal. The big debate right now is on recreational use. Some believe that a country like ours is not prepared. The authorities are not prepared. And definitely we don't know the exact consequences or the impact that it could provoke to the national security.

Regarding CBD below a certain THC percentage, you can start a CBD brand with things like supplements. The authorities should grant this type of item. On this product the only risk or warning I'd give the client would be that it might take time. Bureaucracy can be hugely complicated because it's a complicated topic.

KK – Japan: The biggest challenge clients will face in Japan is that cannabis is strictly regulated as a type of a narcotic in Japan. The only cannabis products that you can commercialise here is THC-free CBD products extracted and manufactured from mature cannabis stems or seeds. Actually, the Japanese government is publishing products in which THC is detected on the Internet.

If you want to commercialise CBD products, if the products contain a little THC, the government will publish it on the Internet. If you import-export or possess without a licence, you'll be punished. And getting a licence for cultivation or research is unrealistic. The authorities are not willing to grant any licences, so it is so difficult for us to advise clients to consider applying for such a licence.

For the purposes of recreational or medicinal use, any act relating to cannabis, except those that are not derived from mature stems or seeds and do not contain THC, is a crime. You have to be careful. That's my advice. But we hope that the Japanese government will be relaxing the strict control to the extent maybe it can be used for medicinal purposes. Actually, the government has started to consider whether or not the medical use of cannabis should be allowed. Then the situation will maybe change, but we're still be far behind Canada and the US.

MH – Austria: Although there is a rapidly growing number of CBD stores in Austria, it's worth noting a few different uses and the respective restrictions of cannabis products.

Food

Cannabinoid-containing extracts marketed as such or in food-stuffs – predominantly marketed as food supplements (e.g., CBD oil), are generally considered to be novel foods. Novel foods are defined as foods not used for human consumption on a significant scale in the European Union before May 15, 1997 and are included in at least one of the categories mentioned in Article 3 (2) (a) of the Regulation (EU) 2015/2283 on Novel Foods. Only approved novel foods included in the union list may be used as such in accordance with the conditions and may be placed on the market. At present, there is no such authorisation available. Thus, placing on the market is not permitted.

Cosmetics

Regarding the use of cannabis and extracts in cosmetic products, reference should be made to Article 14 (1) (a) of Regulation (EC) No. 1223/2009 in conjunction with Annex 2 (list of prohibited substances). In this list of substances prohibited in cosmetic products, natural and synthetic narcotics are mentioned. This includes cannabis and extracts made from it. It is therefore not permitted to place them on the market.

Recreational vs medicinal

Recreational

Production, import and sale of recreational cannabis are strictly forbidden according to the Addictive Drugs Act in Austria.

Medicinal

Classification of cannabinoid-containing extracts as medicinal products can only be considered when these products have properties of curing or alleviating or preventing a human alleviation or prevention of a human disease or pathological condition (presentational drugs) are attributed to these products (presentation medicinal products).

In Austria, a drug with cannabis active ingredients is currently approved. It contains the combination of two extracts, one from a THC-rich cannabis strain, one from a cannabidiol-rich strain. This medicine is approved for the treatment of spasmodic symptoms in patients with multiple sclerosis.

SESSION THREE

What's the biggest challenge advisors face when trying to understand risk in this space?

TK – US, New York: For me the biggest challenge is the fluidity of this. It's changing on a regular basis. You don't know where things are going to necessarily be a year from now or even six months from now. And so advising clients is hard because they're basing their decisions on some of what you say and they may be making investments in manufacturing or in advertising, etc., and things may change. Caution is an important aspect of what you do.

But at the same time, they're coming to you for assistance in protecting their product or idea and being able to stop others at some point in the future from trying to capitalise on whatever market share they may have garnered through their efforts or whatever investment they may have made. As noted earlier, in the US an important challenge is that even though marijuana may be legal in one state, it may not be legal in the next state over. You may have a manufacturing facility in your particular state where it's legal, but it may be the next state over where you want to sell it.

If you start shipping it across state lines, then you're violating federal laws. So, there are a lot of challenges. One thing I wanted to add is that to the extent possible, you want to try to protect your logo by way of copyright. Copyright registrations here in the US are much easier to get than trademark registrations. The copyright office in the US doesn't look at the application and say, 'oh, it's cannabis or it's marijuana or it says weed. Therefore, it is not registrable.' It does have to have a certain level of creativity associated with it, but assuming it does, it should be protectable from a copyright perspective and that will provide a certain level of protection (and rights for enforcement purposes).

MK – Germany: One of the challenges that we already talked about is that we don't have case law we can rely on. Advertising is a big issue. But I also think that the licencing process is very restricted in Germany. You need an official licence for everything down the line.

Regarding the market, medicinal cannabis is worth 190 million EUR turnover in 2020.

In April 2019, the German Cannabis Agency contracted with three companies (Aurora, Aphria, and Demecan) to cultivate cannabis in Germany and to supply 10.4 tons within the next four years. This is not enough to cover the need of the German market.

Thus, Germany depends on imports. International market players see Germany as one of the key growth markets worldwide. Positive assessments see a tenfold increase in market volume in the medical sector as possible.

CBD products

The non-medical market is currently about half as large as the market for medicinal cannabis. Germany is the biggest market for CBD products throughout the EU member states. The unclear legal assessment of non-medical CBD products currently leads to a limited availability of these products in mainstream channels such as drugstores or supermarkets. But the latest judgment of the German Supreme Court may make a change

The biggest challenge is that the legal status of CBD in Germany is still unclear. There have been several police raids of CBD shops on the grounds that selling CBD products to end consumers could not exclude abuse for intoxication purposes, which creates problems of legality following the latest Supreme Court judgement.

ED – Canada: I echo what Tim says. There is uncertainty despite the fact that we're pretty far along the chain of what's happening. The uncertainty for Canadian client comes from the lack of integration between the legislative instruments and case law development that is still in its infancy.

Ultimately, we are able to provide an interpretation of what we think is going to happen, but we do not have comprehensive judicial guidance yet. The lack of considered interpretation will persist until the cases make their way through the Courts.

In terms of cannabis accessibility; it's accessible anywhere, recreationally and medicinally.

Medicinal cannabis is even easier to get outside of urban centers with widely available retail store because it is available by mail from a centralised depot.

As the industry matures, it remains to be seen how many of the smaller players will be able to survive natural market consolidation. This is the type of consolidation that we have already seen among Canadian cannabis producers, the largest of which are predominantly in Ontario and in BC.

In terms of IP enforcement and advertisement restrictions, both the Trademarks Act and the Cannabis Act are federal instruments so there will not be any differentiation by province, these matters will eventually make it before the Federal Court of Canada.

JC – Mexico: My biggest challenge is just to understand the current state of the legislation. I mean since 2017 it was ruled by the Supreme Court that it should be legal; that is that it should be legal for recreational use in everything. But the bill of law just hasn't been approved. Now, it's been over three years.

Everybody has been very excited because it represents something very big. It's a big market and the legislation will be federal. So as soon as it is open everybody will go like crazy because it's a big opportunity. That also has a lot to do with our proximity with the US and Canada, particularly considering the trade agreements between the three nations. You can see why people are excited – it's a very big opportunity for business, whether import or export, whether to produce or for Canadian or American companies to come to the Mexican market to to sell their products.

I would say to clients that there are big opportunities here – in Mexico and across the border, but I can't guarantee the bill will become law any time soon. I don't think it will happen this year to be honest. But as Tim said, it's going to happen at some point. We're expecting the law to be very open, similar to Canada. People who would like to start a business will have plenty of flexibility to choose to enter the market.

KK – Japan: In Japan there has to be a discussion around cannabis for medicinal purposes. Clients need to know more about this. At the moment, the Japanese Ministry of Health, Labour



Kenji Kuroda at the IR 'On the Road' Conference in Tokyo, 2019

and Welfare is increasingly likely to change its guidance adding cannabis-based products to its banned lists for non-pharmaceutical products including health food and cosmetic. For instance, changing the lists on essential ingredients that correspond to pharmaceutical products.

Likewise, the Ministry of Health could at any time put CBD on the banned list for cosmetics, which would make it impossible to manufacture and sell cosmetics containing CBD. The government attitude changes all the time and it's a high-risk factor in Japan for any client looking for opportunities with cannabis-based products.

But as I mentioned, some regulations for CBD products may change significantly in the future depending on the business sector. We have to tell business people who want to enter the Japanese market that all we can do is keep an eye on the lists coming out of the Ministry of Health.

MH – Austria: A general, not Austria-specific, remark is that companies engaged in the production or distribution of cannabis need to ensure an additional level of security when cannabis is in transit. Whether it is the product moving from the supplier to the retailer or from the retailer to the consumer, the product is vulnerable to in-transit theft which could result in black market selling.

It might seem obvious, but product tampering is one of the biggest risks impacting companies engaged in the production or distribution of cannabis. Not only do products have to meet compliance standards (determined by the country/location where the business operates), but a product that has been tampered

with can result in physical harm to customers. Aside from the obvious health dangers to consumers, a tampered product could also result in a damage to the company's overall reputation.

Generally, regulators are not turning a blind eye when it comes to ensuring that cannabis companies are compliant. Maintaining compliance with industry regulations can make or break a cannabis business.

Medicinal cannabis is permitted in Austria under certain conditions. Despite this, there are still some issues with medicinal cannabis. Since the dried flowers of the cannabis plant are not legal in Austria, patients can only receive tablets, oils or creams as their prescribed medication.

Furthermore, doctors and insurance companies are still skeptical and often do not wish to prescribe or cover the costs of cannabis products as a treatment drug.

Due to the increasing legalisation of CBD products, these products are moving into the legal mainstream. Largely through positive press reviews, and hemp trade fairs and conferences about cannabis contribute to the fact that cannabis and products extracted from cannabis are losing their infamous image and are seen more as lifestyle products.

In Austria there are an increasing number of new CBD shops opened which are also moving away from the "weed image" and positioning themselves towards premium and wellness.

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The Evolution of the Cannabis Industry: An Intellectual Property Perspective

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