



Are Tattoos Protected by Copyright Law?

In February 2021, photographer Jeffrey Sedlik sued tattoo artist Katherine Von Drachenberg (aka Kat Von D), alleging copyright infringement for a tattoo based on his 1989 photograph of Miles Davis.

The Davis photograph was registered with the U.S. Copyright Office in 1994 and remains registered to date. Since its creation, Sedlik offered and sold non-exclusive licenses authorizing limited reproduction, distribution, display, and creation of derivative works of the Davis photograph for commercial and non-commercial purpose.

Sedlik also issued one tattoo license before this case, but it was for zero dollars. Sedlik claimed infringement by Von D on his copyright which included the actual tattoo, the tattoo sketch, and related social media posts.

In January 2024, a Los Angeles jury sided with Von D, finding that neither the tattoo nor the sketch were substantially similar to the Davis photograph.

The jury utilized the intrinsic test, which considers the similarity of expression from the standpoint of the ordinary reasonable observer.

The jury also found that the social media posts qualified as fair use. Fair use is an exception to copyright law and a leading defense one can raise when accused of copyright infringement. Under Section 107 of the US. Copyright Law, the following factors are used to determine if a particular use is “fair use”:

1. The purpose and character of the use;
2. The nature of the original content;
3. The amount and substantiality of the original content taken both quantitatively and qualitatively; and
4. The effect on the market for the original

It's important to note that no one factor is determinative, and each case is a balancing test for the specific situation.

In January 2024, Sedlik appealed to the district court, focusing on the jury's failure to utilize the extrinsic test when determining the similarities to the Davis photograph, noting that this particular test is intended to assess the objective similarities of the works. The district court did not find Sedlik's appeal persuasive so the case transitioned to review by the 9th Circuit Court of Appeals.



The 9th Circuit panel discussed that the intrinsic test is reserved for the finder of fact (such as a jury), while the extrinsic test is often determined as a matter of law at an earlier stage of litigation (such as in a summary judgment action). The panel concluded that because the jury found that the works were not intrinsically similar to the photograph, it need not reach the extrinsic test, meaning that the district court had not erred.

On January 2, 2026, the 9th Circuit affirmed the prior decision, rejecting Sedlik's appeals. However, the main opinion and concurrences by the judges seems to open the door for consideration of the intrinsic test surrounding a copyright infringement determination.

The 9th Circuit judges discussed that the court developed the intrinsic test to protect a work's full expression, but over time it has lost its legal content, and now the standardless, intrinsic test invites juries to reach copyright verdicts unconstrained by copyright law. The Ninth Circuit opinion demonstrates the potential to pivot from the intrinsic test and replace it with a legal rule that offers more consistent and even-handed protection to copyrighted works.

At KKLAS, we have expertise in copyright assessment, registration, and enforcement. If you have questions, please reach out to our team.

Decoding the Delta-8 Trademark Paradox: How *AK Futures* Charted a Path Through USPTO Resistance

The 9th Circuit spoke clearly in 2022. The court declared that federal law allows hemp-derived Delta-8 THC products to be eligible for federal trademark protection. *AK Futures LLC v. Boyd St. Distro, LLC*, 35 F.4th 682, 689 (9th Cir. 2022). Prior to the court's ruling, USPTO Examiners rejected Delta-8 applications, calling these products "controlled substances" or finding technical flaws in the proposed marks themselves. This found cannabis brands vulnerable in a competitive market with respect to trademark protection.

AK Futures LLC and other trademark applicants found ways to overcome these arguments, but many current applicants are facing similar oppositions. This article reveals the strategies of AK Futures LLC and will explain the landmark case, expose the USPTO's rejection tactics, and share methods successful Delta-8 brands have used to overcome these barriers.

Legal Foundation: *AK Futures v. Boyd Street*

The *AK Futures* case began with a trademark infringement claim against Boyd Street Distro for alleged counterfeiting of AK Futures' "Cake" branded Delta-8 vape products. Boyd



Street argued that Delta-8 products could not receive trademark protection because Delta-8 remained illegal under federal law. The 9th Circuit disagreed.

The court ruled that Delta-8 THC products derived from hemp with less than 0.3% Delta-9 THC concentration “fit comfortably within the statutory definition of hemp” under the 2018 Farm Bill and thus qualify for trademark protection. *AK Futures LLC*, 35 F.4th at 691. Moreover, the court rejected arguments about manufacturing methods, stating that **“the source of the product—not the method of manufacture—is the dispositive factor.”** *Id.* at 692. Simply put, hemp-derived Delta-8 products with compliant Delta-9 THC levels are legal and can receive federal trademark protection.

USPTO's Resistance: Beyond Technical Objections

Despite the 9th Circuit's ruling on *AK Futures*, the USPTO's blinking of this opinion continues to create Delta-8 trademark application denials. Could the USPTO deny a mark because it morally opposes the drug? No. In 2019, the Supreme Court ruled that the USPTO cannot reject trademarks on “immoral” grounds. *Iancu v. Brunetti*, 588 U.S. 388, 399 (2019). Yet, with the USPTO unable to explicitly reject Delta-8-related marks for moral reasons, Examiners appear to have developed different denial strategies for these applications. These include, but are not limited to:

1. **Selective Citation:** Examiners cite the *AK Futures* case while ignoring its central holding about Delta-8's legality. Examples from different applications include:
 - [USPTO Non-Final Action Letter regarding application for “Dodi Delta 8”](#): “Delta-8-THC is a tetrahydrocannabinol having similar chemical structures and pharmacological activities to those contained in the cannabis plant and may be synthetically produced from non-cannabis materials, which does not fall under the definition of hemp. *AK Futures LLC v. Boyd St. Distro, LLC*, 35 F.4th 682, 693 (9th Cir. 2022).”
“Thus, Delta-8 THC meets the definition of “tetrahydrocannabinols” and are controlled in schedule 1 by 21 U.S.C. § 812(c) Schedule I, and 21 C.F.R. § 1308.11(d), with limited exceptions. *AK Futures LLC*, 35 F.4th 682 (9th Cir. 2022).”
 - [USPTO Non-Final Action Letter regarding application for “Delta 8”](#): “Thus, Delta-8 THC meets the definition of “tetrahydrocannabinols” and are controlled in schedule 1 by 21 U.S.C. § 812(c) Schedule I, and 21 C.F.R. § 1308.11(d), with limited exceptions. *AK Futures LLC*, 35 F.4th 682 (9th Cir. 2022).”



- [USPTO Non-Final Action Letter regarding application for “Candy Paint”](#): “Thus, Delta-8 THC meets the definition of “tetrahydrocannabinols” and are controlled in schedule 1 by 21 U.S.C. § 812(c) Schedule I, and 21 C.F.R. § 1308.11(d), with limited exceptions. *AK Futures LLC*, 35 F.4th 682 (9th Cir. 2022).”
2. **Manufacturing Method Focus**: Despite the 9th Circuit's explanation that source matters more than the production method, the USPTO fixates on whether manufacturers “synthetically produce” Delta-8. The USPTO then labels Delta-8 a controlled substance and therefore denies related trademark applications.
 3. **Secondary Refusals**: Applications that overcome legality objections often face secondary barriers when Examiners reject the proposed mark as “merely descriptive” or claim “non-functionality due to the Controlled Substance Act.”
 4. **Information Overload**: Examiners request extensive product information resulting in additional hurdles for applicants.

These patterns suggest the USPTO may use technical objections as proxies for unstated moral concerns about Delta-8 products.

Effective Strategies for Trademark Application Approval

AK Futures LLC, along with other successful trademark applicants, has developed effective response strategies that other cannabis trademark applicants can adopt.

First, they directly confront legal misinterpretations by quoting the 9th Circuit’s language about their products. When the USPTO cited the *AK Futures* case but claimed Delta-8 remained illegal, applicants responded by quoting the court’s unambiguous statement: [AK Futures Response to Office Action Brief](#): “As detailed above Applicant’s hemp-derived Delta-8 THC products are legal under federal law, which was the conclusion reached by the Ninth Circuit. “The record on appeal convinces us that AK Futures’ delta-8 THC products are lawful under the plain text of the Farm Act and may receive trademark protection.” (emphasis added). *Id.*”

Second, successful applicants emphasize hemp derivation and Farm Bill compliance rather than defending Delta-8 specifically. [Applicant Response to Office Action regarding “Bearly Legal”](#): “In *AK Futures* the 9th Circuit held on May 19, 2022 that AK Futures’ delta-8 tetrahydrocannabinol (“delta-8 THC”) goods are legal since the goods contain no more than 0.3 percent delta-9 THC concentration on a dry weight basis.”



Third, if asked, these companies provide lab results proving their Delta-8 products are derived directly from hemp cannabinoids.

Fourth, two outcomes may follow once applicants successfully challenge the USPTO's denial based on the *AK Futures* decision. The USPTO might approve the mark without amendments, as they did with AK Futures LLC's "Cake" trademark. Alternatively, the USPTO might begin negotiating changes to the description of goods and services. We call this second option the "Ambiguity Approach."

The Advantages of the Ambiguity Approach

When faced with the opportunity, applicants seeking post-AK Futures trademark approval have occasionally accepted USPTO amendments that remove explicit Delta-8 language while preserving product protection.

One example is AK Futures LLC's own ["Cake XL" trademark application](#). Instead of fighting for specific Delta-8 language, the company accepted this revised description: "all of the foregoing cannabis-related goods containing cannabis ingredients solely derived from hemp with a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis with the resulting goods containing a delta-9 tetrahydrocannabinol (THC) concentration of not more than 0.3 percent on a dry weight basis."

This strategic ambiguity creates four advantages:

1. **Broader Protection:** The phrasing encompasses all hemp-derived cannabinoids, not exclusively Delta-8. As a result, it widens potential trademark coverage.
2. **Avoiding Red Flags:** Adopting the plain language established in the Farm Bill may help circumvent potential unspoken moral concerns some Examiners harbor regarding Delta-8 specifically.
3. **Regulatory Credibility:** If a class description directly references established federal standards, it could lend legitimacy to the application in the eyes of Examiners.
4. **Future-Proofing:** A broader description remains relevant even as regulations change, including potential updates to the current Farm Bill that expires September 2025.

Adopting the "hemp with delta-9 THC concentration of not more than 0.3 percent" language may strengthen a trademark protection while avoiding USPTO objections. Using of a mark in connection with Delta-8 products, even without mentioning Delta-8 in the trademark description, builds secondary meaning over time as the brand gains marketplace recognition.



Navigating the Trademark Paradox: Your Path Forward

The *AK Futures* case offers solid precedent, but applicants should not ignore its limits. Courts in different circuits might rule differently as states continue creating their own patchwork of Delta-8 regulations. Additionally, the approaching expiration of the 2018 Farm Bill in September 2025 may bring dramatic changes to the industrial hemp language found in the bill.

Ironically, this uncertainty makes the *AK Futures* playbook more crucial than ever. Cannabis brands willing to challenge misinterpretations of the law, thoroughly document their compliance, and frame product descriptions using careful Farm Bill language have successfully pushed past USPTO roadblocks.

For an industry still fighting for legitimacy, solid trademark rights matter tremendously. KK Legal & Advisory Services, Inc. is here to help navigate these obstacles and strategize with trademark applicants regarding the best approach. Please contact us to discuss.