

What Cannabis Cos. Can Expect If Broadcast Ad Bill Passes

By **John Heinbockel and Kenneth Wilton** (August 2, 2022)

In a move that typifies how indirect legislation can achieve what direct legislation may not, the U.S. House of Representatives passed a bill that would allow for cannabis ads to be broadcast on local television and radio.

On July 20, the fiscal year 2023 Financial Services and General Government Appropriations Act[1] federal funding legislation, together with a package of five other appropriations bills, was passed by the House by a 220-207 vote.

The legislation includes a provision that would bar the Federal Communications Commission from using any of the funds made available in the act to penalize or deny a license to a television or radio station that broadcast advertisements for cannabis businesses if cannabis can legally be sold in the state, political subdivision of a state or Indian Country where the station is licensed.

Because they are not licensed in the same manner as broadcast television and radio, cable channels can air cannabis ads. However, if broadcast television and radio air such ads, they may run afoul of the FCC because cannabis is illegal at the federal level.

As a result, in express recognition that cannabis remains a controlled substance, the act would not permit cannabis ads on local broadcast outlets — but it would stop the FCC from imposing penalties if local stations put those ads on air. This is likely why, while there was some objection to the provision when the act was in committee, the provision was unaltered when the act was passed by the House.

If it passes the U.S. Senate and is signed into law, a portion of the act — Section 512 to be precise — would create an entirely new avenue for advertising cannabis.

Currently, cannabis advertising is primarily regulated by state statutes. For example, both California[2] and Colorado[3] allow cannabis advertisements in television, radio, print and digital communications provided at least 71.6% of the audience is expected to be at least 21 years old.

Much like everything else related to cannabis, although some states allow broadcast cannabis ads, very few stations will accept those ads because of the fear of running afoul of the FCC.

As a result, Section 512 could be significant. With U.S. cannabis sales projected to be close to \$30 billion[4] in 2022, one would expect that more advertising dollars will flow to the expanded advertising audience of the 25% of viewers[5] who still watch their local stations, and the 82.5% of adults[6] who listen to radio.

Like all good things, more eyeballs or ears on advertising come with more legal hurdles to trip over. First, recreational cannabis statutes generally include a long list of guidelines that must be followed in order to pass muster under those statutes.



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For example, Washington state, like most states, prohibits advertising that is: false or misleading, promotes overconsumption, represents that marijuana has curative or therapeutic effects, or depicts or appeals to a person under the legal age to consume marijuana. These somewhat subjective state-imposed guidelines can be enforced through penalties running from fines to loss of license.

A recent case in California illustrates the risk arising from local government enforcement of these statutory requirements.

In 2021, a task force composed of district attorneys from eight California counties brought suit in Superior Court of the State of California, County of Monterey under California's consumer protections statutes^[7] against CannaCraft Inc. over therapeutic claims made on one of the business's websites, including that its CBD products could "change gene expression and remove beta amyloid plaque, the hallmark of Alzheimer's, from brain cells."

CannaCraft also made more general misleading claims, saying:

Scientific and clinical studies have shown that CBD could be therapeutic for many conditions, including chronic pain, cancer, anxiety, diabetes, epilepsy, rheumatoid arthritis, PTSD, sleep disorders, alcoholism, cardiovascular disease, antibiotic-resistant infections, and neurological ailments.

The parties ultimately reached a **settlement** totaling \$300,000 in damages and restitution, including an injunction prohibiting the company from, among other acts, making health-related claims that were not supported by "competent and reliable scientific evidence."^[8]

In addition to the cannabis-specific statutory prohibitions and requirements, cannabis advertisements face the same general scrutiny as all advertising: They must be truthful, substantiated and not misleading. Common pitfalls include the potential for claims concerning the therapeutic benefits of cannabis products or claims about whether products are accurately labeled for ingredients.

Enforcement of these standards can run from the Federal Trade Commission generally under Section 5 and 12 of the Federal Trade Commission Act, to consumers under state-specific consumer protection statutes, to competitors before the National Advertising Division.

Courts generally have held, however, that trademark infringement claims under the Lanham Act — the federal statute governing trademarks and related rights — will fail in part when such claims rest on an assertion of trademark rights arising from federally illegal activity. However, Lanham Act claims based on false associations or endorsements can be asserted.

By way of example, in July 2020, the FTC's Bureau of Consumer Protection filed suit against Kushly Industries LLC and the company's sole officer, Cody Alt, in the U.S. District Court for the District of Arizona over false or unsupported therapeutic claims.

The case concerned claims that CBD products could effectively treat or cure a host of conditions ranging from acne to more serious diseases including cancer and multiple sclerosis. The complaint also alleged that respondents falsely told consumers that scientific studies or research proved CBD products could effectively treat, mitigate or cure diseases including hypertension, Parkinson's disease and Alzheimer's disease.

A resulting consent order prohibits the business from making any further false or misleading

representations about the health benefits, efficacy, safety or side effects of CBD products.[9]

The settlement, like the district attorney-led California matter, requires the business to have and rely upon competent and reliable scientific evidence to support any such claims and to secure and preserve any human clinical tests or studies they use to substantiate these health claims.[10]

Consumer class actions have also arisen out of cannabis advertising. For example, consumers have brought class action lawsuits regarding the amounts and/or levels of THC and/or CBD content in **chocolates** and **CBD tinctures**.

Other class actions have attacked **CBD sellers** for marketing products that were allegedly mislabeled as dietary supplements and marketed in violation of the Federal Food, Drug and Cosmetic Act.

Even the National Advertising Division has been used to address purportedly false or misleading cannabis advertising. In 2020, for example, the Council for Responsible Nutrition challenged claims made by Grade A Nutraceuticals, the makers of CannaPure CBD Oil.

When Grade A failed to provide substantiation for its claims — such as "the medically proven therapeutic benefits of hemp"; "Cannabidiol helps reduce blood sugar levels and also regulate cholesterol" and "helps patients with diabetes" — the National Advertising Division referred[11] the matter to the FTC for enforcement. After investigation, the FTC concluded that the referenced claims were no longer being made and closed[12] the matter.

Of course, cannabis advertising must also be sure not to use celebrity names and likenesses without authorization. Such acts could give rise to a false endorsement claim under the Lanham Act as well as violating rights of personality and privacy under state law.

Actors such as **Clint Eastwood** and **Mayim Bialik** have won injunctions and, in some cases, multimillion-dollar judgments after cannabis businesses unscrupulously used their names or even fabricated interviews to market their products.

As a result, before rushing out to film a new ad to be aired on late-night television, cannabis businesses will need to make sure that their ads measure up under all the laws and regulations that apply to any advertisement, so they do not give consumer class action attorneys or competitors any reason to bring a claim that an advertisement is improper.

Because Section 512 is in an appropriations bill, it would only prohibit FCC enforcement from Oct. 1 through Sept. 30, 2023, if passed, which would mean the push to protect television and radio cannabis advertising would become an annual event unless and until there is federal legislation directly addressing the issue.

Of course, all of this depends on whether Section 512 survives the trip through the Senate unscathed, a questionable proposition in this day and age. If it does, then we could see a slew of televised new puns on weed, pot and grass, as well as a new source of residuals for all those artists who have recorded "Mary Jane" songs.

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[1] <https://www.congress.gov/bill/117th-congress/house-bill/8254/text>.

[2] https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=BPC&division=10.&title=&part=&chapter=15.&article=.

[3] <https://www.sos.state.co.us/CCR/GenerateRulePdf.do?ruleVersionId=8439>.

[4] <https://www.globenewswire.com/news-release/2022/03/02/2395463/0/en/BDSA-Reports-Global-Cannabis-Sales-to-Jump-22-in-2022-Forecasts-61-Billion-by-2026.html>.

[5] <https://www.statista.com/chart/25381/tv-consumption-in-the-us-by-channel/>.

[6] <https://www.statista.com/topics/1330/radio/>.

[7] Cal. Busi. & Prof. Code §§ 17200, et seq., and 17500, et seq.

[8] <https://www.co.monterey.ca.us/Home/Components/News/News/8226/9444?npage=6&rch=1>; <https://www.pressdemocrat.com/article/business/cannacraft-settles-false-advertising-case-for-250000/>.

[9] Federal Trade Commission v. Kushly LLC, Case No. MC-20-00036-PHX-SMB (D. Az. Oct. 5, 2020).

[10] <https://www.ftc.gov/news-events/news/press-releases/2021/05/ftc-announces-latest-enforcement-action-halting-deceptive-cbd-product-marketing>.

[11] <https://bbbprograms.org/media-center/newsroom/national-advertising-division-refers-advertising-claims-for-cannapure-cbd-oil-to-federal-trade-commission>.

[12] https://www.ftc.gov/system/files/documents/public_statements/1568651/nad_resolution_re_cannapure_2-27-20.pdf.