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HOW A PANDEMIC BLOSSOMS TRADEMARK FILINGS

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Although the Coronavirus (“COVID-19”) pandemic has had several negative impacts on the economy, public health, and individual lifestyles, the pandemic has had at least one unique impact on American business—an uptick in trademark registrations. Since January 2020, the Coronavirus pandemic has consumed conversations in the news, ads, and TV shows, creating common phrases and buzzwords such as “Covid-19,” “Corona Virus,” “Pandemic,” “Social Distancing,” “Patient Zero,” “Self-Isolation” and countless others. Consequently, this has resulted in a wave of pandemic-related trademarks hitting the United States Patent and Trademark Office (“USPTO”). Because distinctiveness is one of the primary features that characterizes a trademark, individuals and companies seeking to use pandemic-related marks are now caught in a race to register their marks with the USPTO.

On April 7, 2020, a search on the USPTO’s website revealed that the word “pandemic” has been used in thirty-five trademark applications. Notably, ten of those applications are for the word on its own.¹ Other attractive combinations using this keyword include “Stop panicking it's only a pandemic Corona 2020,” “I survived Pandemic 2020,” and “Take the panic out of pandemic.”² In addition, twenty-three applications have been submitted with the keyword “Coronavirus.”³ The oldest in the list is “CoronaVirus survival guide.”⁴ Understandably, the most popular buzzword is “COVID-19,” with sixty-eight applications as of April 8, 2020.⁵ The buzzword also appears in more specific and imaginative marks such as “Love in the time of Covid-19,” “Together we are stronger than Covid-19,” “Be covidgilant,” and “Class of Covid-19.” The list increases with six

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¹ USPTO, <http://tmsearch.uspto.gov> (last visited Apr. 7, 2020).

² *Id.*

³ *Id.*

⁴ USPTO, <http://tmsearch.uspto.gov> (last visited Apr. 11, 2020).

⁵ USPTO, <http://tmsearch.uspto.gov> (last visited Apr. 8, 2020).

applications per day on average.⁶ The question that remains is whether pandemic-related marks can be registered under federal trademark law.

One of the underlying purposes of trademark law is to give rights to marks that indicate the source of the good provided. Notably, the USPTO has established guidelines for determining whether a mark meets this foundational purpose. Under Section 1202.04 of the Trademark Manual of Examining Procedure (“TMEP”), “[m]erely informational matter fails to function as a mark to indicate source and thus is not registrable.” Section 1202.04(b) further explains that a mark may be “merely informational” if it is a “widely used message.” Widely used messages include “slogans, terms, and phrases used by various parties to convey ordinary or familiar concepts . . . or similar informational messages that are in common use or are otherwise generally understood.”⁷

In considering a trademark application, the examining attorney will determine how the public would perceive the word or phrase based on the meaning of the word, or words, and the context of its use. Generally, it is expected that the USPTO will deny all trademark applications containing widely used messages such as “Pandemic,” “Covid-19,” or “Coronavirus,” and other pandemic-related words and phrases. These proposed marks will likely be considered commonplace phrases rather than marks indicating the source of the goods provided.

The coming months will tell whether the USPTO will give trademark rights to these pandemic related marks. Given the USPTO’s current examination procedures, intellectual property attorneys will likely be fighting an uphill battle to prove that their clients’ pandemic-buzzwords indicate a particular source of goods or services.

⁶ In between April 8–11, 2020, eighteen new trademarks were filed with the keyword “Covid-19.” See, USPTO, <http://tmsearch.uspto.gov> (last visited Apr. 11, 2020).

⁷ TMEP Sec. 1202.04(b). See e.g. *In Re Manco Inc.*, 24 U.S.P.Q.2d 1938 (T.T.A.B. 1992) (THINK GREEN for products advertised to be recyclable and to promote energy conservation was found not to function as a mark because it conveys a message of environmental awareness or ecological consciousness).