FROM COVFEFE TO COVID: THE KNUCKLEHEAD TRADEMARK SAGA CONTINUES

Posted on March 28, 2020 by Michael A. Kahn



Tags: COVID - 19, COVID - IP, Michael A. Kahn, Trademark Tales

Back in July of 2017, I posted a piece entitled "Trademark Tales: Covfefe® Really?" My focus was on the increasing trend in which opportunistic knuckleheads believe that they can lock down exclusive rights in a word or phrase that has suddenly gone viral—a belief contrary to basic principles of trademark law.

The Story of COVFEFE

That trend was especially evident during the last Presidential campaign. While the election memes back then generated dozens of applications to register trademarks in NASTY WOMAN and BASKET OF DEPLORABLES, the weirdest example was COVFEFE. That 7-letter mystery was the typo in one of Donald Trump's wee-hours tweet grousing about "fake news."

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Within hours, that typo had generated millions of hits on Google, and by the close of business on that same day ten people had already filed applications to register the trademark in COVFEFE as a brand for everything ranging from beer to T-shirts to coffee to "advice relating to investments." The number of COVFEFE registration applications eventually ballooned to 42, although almost all of them have now been rejected by the US Patent and Trademark Office.



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One of the few havens for "covfefe" these days is Urban Dictionary, **which offers the following two definitions**:

1. When you fall asleep tweeting about nonsensical things;
2. When you want to type conference and your hands are too small to reach the keys.

The Rise of Coronavirus and COVID Trademarks

Well, the trademark knuckleheads have resurfaced, this time hoping to cash in on the Coronavirus disease (COVID-19).

As the disease sweeps across the globe, threatening millions, killing thousands, disrupting economies, overloading hospitals, and leaving hundreds of thousands jobless, the opportunists have filed **21 applications** to register trademarks containing CORONAVIRUS, **18 more seeking** to register trademarks containing the word COVID, and **three containing both words**, including: "I SURVIVED THE CORONAVIRUS/ COVID-19 OF 2020!" Many of these applications are for t-shirts.



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Given the death and destruction inflicted by that disease, it's hard to imagine any survivor sufficiently arrogant and insensitive to want to stroll around in public with that slogan on his t-shirt, or any of the dozen or so other "I SURVIVED" applications.

Same for many of the other t-shirt trademark applications, including:

- COVID KIDS
- I HEART COVID
- CLASS OF COVID-19
- COVID-19 IMMUNE
- WARNING: MY RIDE IS SICKER THAN THE CORONAVIRUS

The odds are slim to none, however, for any of these applications surviving review by the Examiners at the Trademark Office.

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Survival of the Knucklehead Trademark

Here's why: The very quality that makes "Coronavirus" or "COVID-19" so attractive to these applicants—namely, its widespread international use—is also the very quality that renders it unfit as a trademark.

> *Remember, the purpose of a trademark is to **uniquely** identify the owner of that trademark as the **sole** source of the goods covered by that trademark.*

Think of Nike® or Lululemon® or McDonald's®. Each of those trademarks distinctively identifies its owner as the source of the goods covered by that trademark. Same for RCA® and Apple® and St. Louis Cardinals®.

By contrast, consider "Coronavirus." Or, more to the point, consider the amusing and compelling opinion by the Trademark Trial and Appeal Board (TTAB) in its rejection of John E. Gillard's attempt to register #COVFEFE for hats, t-shirts, hoodies and other apparel. The Trademark Examiner had refused registration on the ground that #COVFEFE does not function as a trademark for the goods identified in the application. Mr. Gillard appealed that ruling to the TTAB, which affirmed the Examiner's decision.

The TTAB opinion is fun to read because, among other things, it is sprinkled throughout with images from tweets and other memes and graphics inspired by Trump's infamous typo, along with example upon example of t-shirts and other apparel featuring the word. But it's also instructive on basic trademark principles.

As Judge Larkin explained in rejecting Mr. Gillard's appeal:

> *"Applicant is thus correct that "here is no true meaning of the word," but it does not follow that #COVFEFE functions as his trademark. * * * he word is in the nature of a verbal Rorschach test, in which users and observers of the word can project onto it any meaning they wish, and, as a result, it has been used ubiquitously in the several non-trademark senses discussed above. The more commonly a phrase is used, the less likely that the public will use it to identify only one source and the less likely that it will be recognized by purchasers as a trademark."*

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@realDonaldTrump/Screenshot by NPR

As Judge Larkin concludes:

> *"The record as a whole makes it clear that #COVFEFE does not function as a trademark for Applicant's identified goods because the word "covfefe" has been widely used by the public in dialogue and on merchandise in a non-source identifying manner, and it does not identify Applicant as the sole source of clothing identified by that term. Applicant's proposed mark is thus ineligible for federal registration."*

And such will likely be the fate of all those pending COVID and Coronavirus registration applications. And in the interim, wash your hands and stop touching your face!



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