

## International reports

### Trademark and branding pitfalls in a hashtag culture

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In July 2017 the US Patent and Trademark Office (USPTO) issued a new Exam Guide to address the basis for rejecting a US trademark application known as 'merely informational matter'. The timing coincided roughly with that of President Donald Trump's now-infamous "covfe" tweet and the dozens of trademark applications for COVEFE that followed within hours, for everything from beer to investment advice. Shortly after the USPTO issued the new Exam Guide, Twitter debuted a longer character limit (from 140 to 280 characters) and hashtags such as #MeToo and #TakeAKnee covered many a social media feed.

Viral marketing using social media hashtags is on the rise with no sign of slowing and traditional marketing outlets have embraced marketing campaigns incorporating social or political messaging. Perhaps it is not surprising then that some practitioners have predicted an increase in the use of the merely informational refusal for trademark applications.

So, what is the merely informational refusal and how can brand owners avoid it? The USPTO explains that a mark is 'merely informational':

*"when, based on its nature and the context of its use by the applicant and/or others in the marketplace, consumers would perceive it as merely conveying general information about the goods or services or an informational message, and not as a means to identify and distinguish the applicant's goods/services from those of others."*

One type of mark which may be refused as merely informational is a widely used message that an applicant has built an advertising campaign or other branding around. BOSTON STRONG, I ♥ DC and ONCE A MARINE, ALWAYS A MARINE are examples of the type of message marks that the USPTO has refused on this basis. These marks show support for or affiliation with a common cause, but if the message is common enough the term or phrase may not be able to function as a trademark for a single brand owner according to USPTO guidance.

Once a message of support is picked up by social media or in a hashtag and is broadly disseminated, it may be a flag for the trademark examining attorney for each application in which the message appears. For example, BOSTON STRONG FITNESS GROUP may have once been a registrable trademark and a good brand for a Massachusetts-based fitness centre. However, after the 2013 Boston marathon bombing the slogan BOSTON STRONG emerged as a message of solidarity with the victims; the USPTO therefore refused applications to register BOSTON STRONG FITNESS GROUP in connection with personal and group fitness training services.

In attempting to connect with their consumer base, brand owners should be aware that widely known message marks are unlikely to be integrated into their trademark portfolio. Attempts to register such terms or phrases as trademarks for a single entity may even cause backlash towards the applicant, such as when the Hard Candy cosmetics company filed (and then withdrew) a trademark application for the term #METOO for use on cosmetics in late 2017 and early 2018. Although Hard Candy, LLC claimed that it would donate revenue from sales of the cosmetics to the #MeToo movement, it still faced a backlash from consumers and withdrew the trademark application before the USPTO could review it.

There are other bases for the USPTO to refuse merely informational trademarks, such as marks that contain only "general information about the applicant's identified goods or services", including highly laudatory phrases (eg, THE BEST BEER IN AMERICA). However, a refusal based on widely used messages seems to be one of the biggest pitfalls that can doom any mark that has gained wide social appeal and meaning, regardless of the way in which a brand owner proposes to use it. Certain brands will always strive to promote causes that align with their mission or vision, but should look elsewhere for the types of strong trademark that they can grow into valuable assets for their business.



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