

# BIGLAW REDEFINED

## **Brand Management in the Age of Cancel Culture:**

Adapting Trademark  
Adoption,  
Enforcement, and  
Licensing Best  
Practices to a Social  
Media-Driven World



# Welcoming Remarks

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Shareholder, Trademark & Brand Management Group

## **Strafford Webinars**

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Dear Mr. Feldman,

Unfortunately, the customer response to our initial promotional efforts for the 2/17/21 Brand Management in a Cancel Culture program is lower than average, indicating that total attendance would be relatively small. We therefore have decided to cancel the program as presenting to a small crowd would not be a good use of your time and resources or give you the type of marketing exposure for which we strive.

## Program Panelists



**Adraea M. Brown**  
Assistant General  
Counsel – Trademarks

**HARLEY**  
**DAVIDSON®**



**Anna Kim**  
Counsel, Brands & Content  
Intellectual Property

**NBCUniversal**



**Joel Feldman**  
Vice Chair, Trademark &  
Brand Management Group

**GT** GreenbergTraurig

## The Benefits and Risks of Social Media

Broad reach and  
audience



Replies to the original  
post get the same  
exposure/audience as  
the original message

## The Benefits and Risks of Social Media

Instantaneous  
messaging ability



Public expectation of  
instantaneous response  
and presumed guilt  
through inactivity

## The Benefits and Risks of Social Media

A casual/conversational  
tone is generally  
acceptable



Fewer levels of  
review/vetting causes  
more errors

## The Benefits and Risks of Social Media

People and brands can participate in relevant and timely conversations



Participation can be seen as disingenuous, opportunistic, and/or pandering *and* the participant can negatively become the subject of the conversation



## The Benefits and Risks of Social Media

No media buy required  
for the brand owner



No media buy required  
for the brand owner's  
critics (it's "free for all")

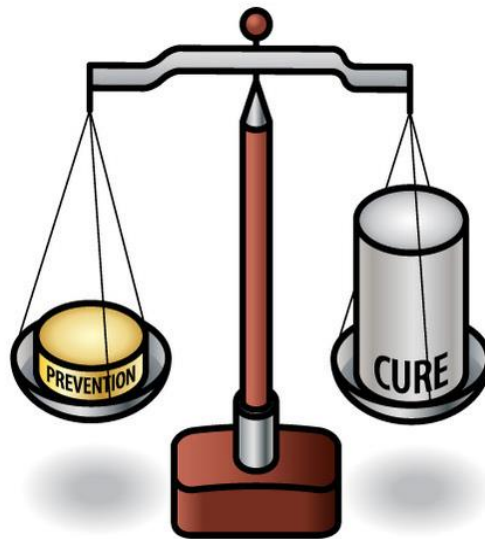
## The Benefits and Risks of Social Media

Brands can directly interact with and communicate with their customers



Consumers can directly and publicly interact with brands

# Trademark Adoption in the Age of Cancel Culture



## Courts vs. Public Opinion

- The court of public opinion generally decides who is right and who is wrong prior to a court.
- The court of public opinion is not bound by the facts of a case.
- The court of public opinion is not bound by the law.

## **The Role of Clearance**

- Clearance generally cannot fully eliminate the risk of a legal claim.
- Likewise, clearance generally cannot fully eliminate the risk of social media negativity.
- But clearance is the best tool we have.

## ▶ **Best Practices for Clearance**

- Perform clearance, even for terms that seem safe, like descriptive, generic, and geographic terms.
- Evaluate the current landscape for the proposed word or term on social media.
- Evaluate the potential effect of adopting the proposed word or term on internet search rankings/results.

## Evaluating Potential Relative Issues

- Typically, we have evaluated the size and sophistication of prior rights owners to determine *legal* risk.
- To determine *reputational* risk, are the relevant prior rights:
  - Owned by an individual or small business?
  - Owned by a charitable or educational organization?
  - Owned by a diverse individual or organization?

## Evaluating Potential Absolute Issues

- Typically, we have evaluated whether we *can* register a mark and erred on the side of trying.
- To determine reputational risk, we must evaluate whether we *should* attempt to register a mark.
- Applications are closely watched, and filing an application can be perceived as aggressive or appropriation.



# Trademark Enforcement in the Age of Cancel Culture



## ***Before you Enforce . . .***

- How strong is your legal case (facts + law)?
- How strong is your logic?
- How far are you willing to go?
- What is your exit strategy if the reputational risk becomes severe?

## *When you Enforce . . .*

- Consider the court of public opinion.
- Approach every communication as if it will be posted on social media.

## Tone

- Conversational or formal?
- Educational or matter of fact?
  - When you approach every communication as if it will be posted on social media, you must assume that you are educating the public and third-party readers.
  - There is a fine line between educational and condescending.

## ▶ **Sender**

- In-house lawyer
- Outside counsel
- Non-lawyer (e.g., business to business)

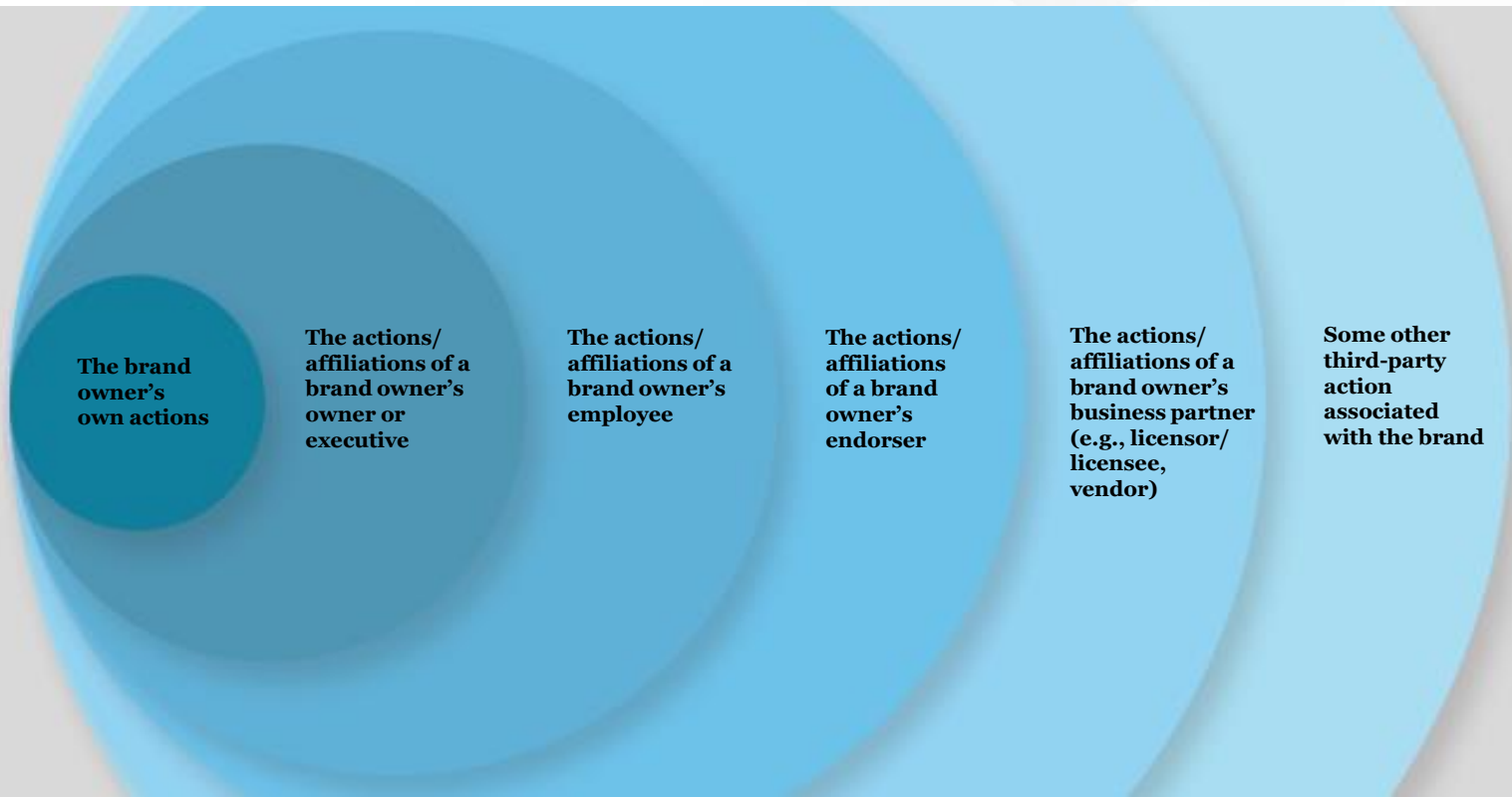
## Format

- Email
- Formal letter
  - By U.S. mail
  - By overnight courier
- Phone call

# Trademark Licensing in the Age of Cancel Culture



*"Sorry I'm late, I was up all night canceling celebrities."*



**The brand owner's own actions**

**The actions/affiliations of a brand owner's owner or executive**

**The actions/affiliations of a brand owner's employee**

**The actions/affiliations of a brand owner's endorser**

**The actions/affiliations of a brand owner's business partner (e.g., licensor/licensee, vendor)**

**Some other third-party action associated with the brand**



## *Heat, 1995*

“Don't let yourself get attached to anything you are not willing to walk out on in 30 seconds flat if you feel the heat around the corner.”

## **Can You Walk Away in 30 Seconds Flat?**

- Term
- Termination rights
- Early termination penalties
- Morals clause
- Reputational damage clause

## ▶ **Aligning Licensor and Licensee Interests**

- Most agreements penalize bad behavior.
- Should license agreements be reimagined to reward good behavior?
  - Quantitative metrics
  - Qualitative metrics

## Rethinking Third-party Reliance

- Should brands reduce their reliance on third parties they can't control?
- Should brands favor transactional relationships over long-term relationships?



CANCEL AND GRETTEL

# Q&A



**How can patience be an effective tool in mitigating the effect of calls for cancellation?**

**How do you answer the business’  
question of “how likely are *they* to  
*come after us*”?**



**Can IP enforcement tools (e.g.,  
infringement notices to platforms)  
be effectively used to respond to  
negative social media attention?**

**What is the trademark lawyer's role in the overall discussion of potential reputational damage arising from trademark-related decisions? When does it end?**

**Is “consequence culture” a more appropriate term than “cancel culture”?**

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