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What it means to "use" a trademark for purposes of obtaining—and keeping—a federally-registered trademark with the USPTO

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When applying for a trademark or seeking to maintain or renew an existing trademark registration with the USPTO, one of the items that an applicant for registration must declare is that the mark is being used in commerce (or that the applicant intends to use the mark in commerce if applying on an intent-to-use basis). What exactly does this mean and what does an applicant or registrant need to show to the USPTO?

A recent example from the news illustrates what such use is not. Last summer, New England Patriots quarterback Tom Brady filed two trademark applications for the marks TOM TERRIFIC that would be used on shirts and certain collectible sports merchandise. The applications were filed on an intent-to-use basis, meaning that the marks weren't being used with such goods yet, but that he had a bona fide intention to use the marks. However, Brady apparently did not have any intention to use the marks based on comments he made when questioned by reporters about the applications in connection with that name being the nickname of Hall of Fame baseball pitcher Tom Seaver. According to the Boston Globe, Brady told reporters in June 2019 that he "didn't like the nickname" and only filed for the trademark "to make sure no one used it because some people wanted to use it."

The problem with Brady's statement answers our question: you cannot squat on a trademark. Although you can squat on website domain name registrations for any or no reason (i.e., you generally don't have to prove to anyone you are using the domain name when you register or renew it), you cannot apply for or sit on a trademark registration without actually using, or intending to use, it in connection with the goods or services it is applied for or registered with. The precise USPTO requirement is that the mark must be used conspicuously with the goods or services in commerce that can be regulated by the Federal government.

In simple terms, we advise clients of the following two requirements:

1. **Use the mark in commerce.** Your use of the mark, either in selling goods

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or providing services, must be accessible across state lines so that the Federal government, i.e., the USPTO, can regulate it. This is often very easy to achieve in today's interconnected world, especially if you advertise or offer your goods or services on a website (which is inherently capable of reaching all 50 United States and most of the world). The USPTO bar on this requirement is relatively low, as the USPTO has referenced that the use of a trademark with one service station in one location within one state met this requirement because the services were available to customers travelling on federal highways.

2. **Provide an example of the use of the mark in connection with the class description.** For services, the easiest examples include website screenshots showing the mark used with a description of those services. For goods, examples include photos of the mark on the goods, their packaging or catalog or website ordering instructions. However, take note that with goods, mere advertising for such goods is often not enough.

The requirement to use the mark in commerce often trips up owners of registered marks when it comes time to make the required maintenance filing between the fifth and sixth years after registration and the recurring 10-year renewals with the USPTO. In some cases, the owner may have met its requirement to use the mark sufficient to obtain registration but may have stopped using it sometime after registration. In those cases, we often get asked "Can't I keep the registration even if I'm not using the mark now? I might start using it again and would like to keep the registration." Unfortunately, the answer is "no", on the same principle that tripped up Tom Brady during his application for TOM TERRIFIC. If you're not using the mark, you cannot squat on your registration and must let it lapse.

Ultimately, TB12 was unsuccessful in applying for TOM TERRIFIC as the USPTO rejected both applications on the grounds that the nickname Tom Terrific "uniquely and unmistakably" refers to former New York Mets pitcher Tom Seaver. Although Brady can appeal the rejection, that may be unlikely given the public scrutiny over the use of the nickname and Brady's comments on actual use.

We're happy to answer any questions that you may have on potential trademark applications, renewals or rejections issued by the USPTO. Please reach out to the author of this post or any member of our firm's Trademark & Copyright group.

Disclaimer: This summary is provided for educational and information purposes only and is not legal advice. Any specific questions about these topics should be directed to attorney Arvid von Taube.

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