

Trademarking Tragedy: The Emergence of a New Phenomenon and How Trademark Law and Policy Must React in a Digital Age

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I. INTRODUCTION

On March 4, 2015, the trial of Dzhokhar Tsarnaev commenced in Boston, Massachusetts, despite multiple requests by his attorneys for a change of venue to escape the unification of Boston behind the battle cry of “Boston Strong,” that only continues to grow in strength as a mantra.¹ In the wake of the two-year anniversary of the Boston Marathon Bombing, “[t]he city has taught all of us what it means to be Boston Strong.”² While we may understand what it means to be Boston Strong, we still do not know what it means to trademark “Boston Strong.”³ With the rise of social media and the ever increasing breadth of technology, trademark law continues to face new and unique challenges. As social media has expanded, so has the ability of an innocuous comment to turn into the refrain of a nation.⁴ Over the past fifteen years, the United States Patent and Trademark Office (USPTO) has seen an influx in the amount of trademark registration applications filed in the wake and as a result of tragedy.⁵ While many consumers view these overly prompt filers as opportunists attempting to cash in on tragedy, public disdain has not

1. See Supplemental Brief in Support of Second Petition for Writ of Mandamus at 7, *In re Tsarnaev*, 780 F.3d 14 (1st Cir. 2015) (No. 15-1170); see also *In re Tsarnaev*, 780 F.3d at 32 (Torreuvella, J., dissenting) (“These stories and the ‘Boston Strong’ campaign continue to this day: almost two years later . . . as Boston was slammed with a massive blizzard leaving approximately two feet of snow, a man took it upon himself to shovel the finish line of the Marathon. This man was referred to by many in the community as a ‘hero’ and a ‘snowmaritan,’ and led to the viral ‘#WhoShoveledTheFinishLine’ hashtag on social media. . . . [A] dump truck has parked outside the courthouse bearing a ‘Boston Strong’ logo and a building currently being constructed across the street from the courthouse has hung a ‘Boston Strong’ banner.”).

2. Statement by the Press Secretary on Boston’s Nomination To Host the 2024 Olympic and Paralympic Games (Jan. 8, 2015) (White House Off. Commc’ns), 2015 WL 123941.

3. See, e.g., Stacy Grossman, *Trademark Profiteering: Can Let’s Roll, Boston Strong, I Can’t Breathe and Je Suis Charlie Be Registered as Trademarks?*, L. OFF. STACI J GROSSMAN (Feb. 21, 2015), <http://www.stacygrossmanlaw.com/blog/trademark-profiteering>; Tovia Smith, *A Year After Bombings, Some Say ‘Boston Strong’ Has Gone Overboard*, NPR (Apr. 10, 2014, 4:08 PM), <http://www.npr.org/2014/04/10/300989561/a-year-after-bombings-some-say-boston-strong-has-gone-overboard>; Mackenzie Yang, *Can ‘Boston Strong’ Be Trademarked?*, TIME (Apr. 25, 2013), <http://newsfeed.time.com/2013/04/25/can-boston-strong-be-trademarked>; Samuel, *Boston Strong Trademark*, U. DEL. INTELL. PROP. BLOG (Apr. 21, 2014), <http://sites.udel.edu/cisc356/2014/04/21/boston-strong-trademark>.

4. See Noah B. Bleicher, *Trademarking Tragedy: The Fight for Exclusive Rights to ‘Let’s Roll,’* 52 EMORY L.J. 1847 (2003).

5. While the USPTO does not publish data on this specifically, the phenomenon of trademark tragedy can be seen through a compilation of key word searches using the Trademark Electronic Search System (TESS) database. TESS searches returned results for the following attempts to trademark tragedy, listed in reverse-chronological order of the tragic event: “Je Suis Charlie,” “Hands Up Don’t Shoot,” “Black Lives Matter,” “MH17,” “MH370,” “Boston Strong,” “Seal Team 6,” and “Let’s roll.” See USPTO, <http://www.uspto.gov/main/trademarks.htm> (last visited Sept. 10, 2015, 8:14 PM) [hereinafter TESS Database] (providing the link to the TESS search engine database).

seemed to quell the lust for the registration of a tragedy trademark. Given this modern phenomenon and the uncertainty surrounding it, it is imperative that the United States Congress and the USPTO address this issue and clarify a procedural standard that aligns with traditional trademark principles, but also accounts for modern advances in technology.

This Comment will explore the largely uncharted waters of the tragedy trademark, focusing on how long-standing trademark principles can provide guidance on dealing with this new phenomenon and providing practical solutions for the future, given that these controversial USPTO applications do not seem to simply be a passing trend.

First, this Comment will outline the basic principles behind trademark law. Next, this Comment will provide an overview of the current classifications available for potential trademarks. Third, this Comment will delve into the area of trademarking tragedy through an exploration of the history of this phenomenon and an in-depth analysis of contemporary examples. Lastly, this Comment will present potential answers for the need to regulate trademark tragedy. This Comment concludes that the issue of trademarking tragedy is one that requires immediate action.

II. GENERAL OVERVIEW OF TRADEMARK PROTECTION

When exploring such a novel area of trademark law as trademarking tragedy, it is crucial to rely on the fundamental principles of trademark protection to provide insight into where the future of this area may proceed and how current practices can adjust to fulfill the goals of trademark law.

The Lanham Act defines a trademark as including “any word, name, symbol, or device, or any combination thereof” used by any person “to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others, and to indicate the source of the goods, even if that source is unknown.”⁶ The dual goals of trademark law are to both protect trademarked property and to protect the consumer from confusion.⁷ In order to achieve this, a major justification behind affording a mark trademark protection is that the mark is a source identifier for consumers, leading to reduced confusion.⁸ Plainly, “[N]o designation of any kind can be registered or protected as a mark unless it

6. 15 U.S.C. § 1127 (2012).

7. 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARK AND UNFAIR COMPETITION § 2:2 (4th ed. 2015).

8. *Id.* § 11:2.

has been used in a trademark or service mark sense as an identification of source.”⁹

III. CLASSIFYING A MARK USING THE SECOND CIRCUIT’S *ABERCROMBIE & FITCH CO. V. HUNTING WORLD INC.* DISTINCTIVENESS SPECTRUM TO DETERMINE THE LEVEL OF PROTECTION

In 1976, the United States Court of Appeals for the Second Circuit articulated the four different categories of marks in relation to trademark protection as generic, descriptive, suggestive, and arbitrary or fanciful.¹⁰ Speaking for the majority, Judge Friendly emphasized that the above four categories are in ascending order to reflect their ability to qualify as a trademark and the degree of protection afforded.¹¹ In order for a “mark” to be a valid trademark, it must be “distinctive.”¹² In *Two Pesos, Inc. v. Taco Cabana, Inc.*, the Supreme Court of the United States noted that the general rule in determining distinctiveness is that the mark needs to be either inherently distinctive or have acquired distinctiveness through a secondary meaning.¹³ Further, the Court also expressly approved of Judge Friendly’s classification spectrum to determine whether an unregistered mark is eligible for protection under the Lanham Act.¹⁴

The classification spectrum promulgated by Judge Friendly in *Abercrombie & Fitch* is inextricably bound to the goals of, and justifications for, trademark protection. As such, we must ask: as technology continues to rapidly evolve, how will this affect long-approved judicial tests seeking to protect these long-standing goals of trademark protection?

9. *Id.* § 11:2 n.2.

10. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976); *accord* *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992); *see also* *Wal-Mart Stores Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 212 (2000) (noting that Judge Friendly’s formulation of these four different categories of marks in *Abercrombie & Fitch* is now well established as the classic test and also providing a detailed discussion on the judicial distinction between marks found inherently distinctive based on their classification as either suggestive, arbitrary, or fanciful, and marks that are not inherently distinctive, but have developed a secondary meaning).

11. *Abercrombie & Fitch Co.*, 537 F.2d at 9.

12. 2 MCCARTHY, *supra* note 7, § 11:2.

13. *Two Pesos*, 505 U.S. 763, 769 (1992). The case involved a trade dress infringement claim brought by a Mexican chain restaurant operator against an operator of a similar chain. *Id.* at 764-65. The Supreme Court ultimately held that trade dress that is found to be inherently distinctive is protectable under § 43(a) of the Lanham Act without having to show that it has acquired a secondary meaning, reasoning that trade dress can be a source identifier, and that to require a showing of secondary meaning for inherently distinctive trade dress would undermine the purposes of trademark law. *Id.* at 764-66, 770-77; *see also* 15 U.S.C. § 1052(e)-(f) (2012).

14. *Two Pesos*, 505 U.S. at 763-66, 773-74.

IV. INTERSECTION OF TRADEMARK LAW AND HUMAN TRAGEDY

A. *Boston Strong: In-Depth Analysis of an Attempt To Trademark Tragedy*

In order to shed some light on what “Boston Strong” means in the trademark world and how attempts to trademark tragedy may be handled in the future, it is necessary to closely dissect a recent failed attempt of a private citizen out of Maynard, Maryland, to obtain a trademark on a recent tragedy.¹⁵ In a 2013 official response to a registration attempt of “Boston Strong,” the USPTO refused registration noting two main issues: (1) that the mark does not function as a trademark and (2) that the identification of goods, in this case clothing, by the applicant, was too broad and required specification.¹⁶ In regard to the mark not functioning as a trademark and therefore refusing registration, the USPTO noted, “[T]he applied-for mark merely conveys an informational social, political, religious, or similar kind of message.”¹⁷ The USPTO further seemed to reason that “Boston Strong” fit in the same category as “Once a Marine, Always a Marine” for clothing, and “Drive Safely” for cars and car parts, both of which were deemed not to be trademarkable based on public perception of the phrases as familiar expressions and not as trademarks.¹⁸

In the USPTO’s “Boston Strong” examination, the examiner first classified the applied-for mark as a familiar expression in the eyes of consumers, citing both trademark law and specific prior USPTO decisions.¹⁹ Next, the USPTO engaged in a discussion of when a slogan of this nature is not eligible for trademark registration.²⁰ Out of this discussion, the USPTO seemed to provide the beginnings of a framework that takes into account both the viral popularization of calls to action through social media and the underscoring event. In this analysis, the relevant factors to the applied-for mark can be viewed as threefold: how

15. U.S. Trademark Application Serial No. 85906569 (filed Apr. 17, 2013).

16. *Id.*

17. *Id.* (highlighting also that the applied-for mark did not function as a source identifier and was not in accordance with 15 U.S.C. §§ 1051-1053, 1127 (2012)).

18. *Id.* (citing *In re Eagle Crest, Inc.*, 96 U.S.P.Q.2d 1227, 1229-31 (T.T.A.B. 2010)). The application was denied based on consumer perception of “Once a Marine, Always a Marine” as an old and familiar expression. *Id.* This denial further crystalized the policy that slogans or terms that merely express an informational message will not be granted registration and noted that the more commonly used the “mark” is in daily speech, the less likely the public would be using it to solely identify one source, which decreases public perception that it is a trademark. *See also In re Volvo Cars of N. Am., Inc.*, 46 U.S.P.Q.2d BNA 1455, 1460-61 (T.T.A.B. 1998) (explaining that the term “drive safely” was denied due to the consumer perception of the applied-for mark as being a familiar safety phrase).

19. U.S. Trademark Application Serial No. 85906569 (filed Apr. 17, 2013).

20. *Id.*

the relevant public would perceive it if a trademark was granted, whether or not it merely conveys an informational message, and how commonly the slogan is used.²¹ Noting that the catalyst for “Boston Strong” was the Boston Marathon bombing of April 15, 2013, that left three dead and more than 260 people injured, the USPTO reasoned that the “motto or slogan” emerging out of this tragic event had come to represent a multitude of feelings and filled many different uses, from being used for fundraisers, chants at Boston Red Sox games, Facebook pages, and for mass commercialization on shirts, hats, and posters, just to name a few.²² With such widespread usage and newfound common use in everyday speech, “Boston Strong” was found to not be a motto or slogan that consumers would perceive as a trademark that identifies the source of the applicant’s goods, and was deemed “ubiquitous” and therefore not a trademark.²³

B. Je Suis Charlie: Recent Manifestation of the Trademark Tragedy Phenomenon

On January 7, 2015, in the center of Paris, France, the office of the French satirical magazine *Charlie Hebdo* was attacked by armed terrorists who were later discovered to be supporters of the Islamic State of Iraq and the Levant (ISIL).²⁴ This horrific attack resulted in the loss of twelve lives and global condemnation of the assault on freedom of speech and expression, which was largely conveyed through social media.²⁵ In the immediate aftermath, French artist and journalist Joachim Roncin created what was to become a hotly contested mark in global trademark law when he created and posted a grayscale graphic, reading “Je Suis Charlie,” to his Twitter account.²⁶ As of January 24, 2015, there were two trademark applications for “Je Suis Charlie.”²⁷ Recently, the

21. *Id.*

22. *Id.*; see also Smith, *supra* note 3.

23. U.S. Trademark Application Serial No. 85906569 (filed Apr. 17, 2013).

24. John Irish & Antony Pone, *Police Hunt Brothers After Paris Attack, Third Man Hands Himself In*, ELECONOMISTA.ES (Aug. 1, 2015, 4:16 PM), <http://www.eleconomista.es/cultura/noticias/6344651/01/15/Police-hunt-brothers-after-Paris-attack-third-man-hands-himself-in.html#>.

25. U.S. Trademark Application Serial No. 86499802 (filed Jan. 9, 2015).

26. See Zach Goldhammer, *#JeSuisCharlie Versus JeSuisCharlie(TM) Trademarking Tragedy in the Age of Twitter*, ATLANTIC (Jan. 16, 2015), <http://www.theatlantic.com/international/archive/2015/01/jesuischarlie-versus-jesuischarlie-tm/384615/>; Colleen Shalby, *Creator of #JeSuisCharlie Tries To Protect Its Meaning*, PBS (Jan. 19, 2015, 4:53 PM), <http://www.pbs.org/newshour/runtdown/creator-jesuischarlie-tries-protect-meaning/> (containing a preserved digital copy of the post as it appeared on Twitter).

27. See Abby Ohlheiser, *There Are Now Two U.S. Trademark Applications for ‘Je Suis Charlie,’ Because of Course There Are*, WASH. POST (Jan. 24, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/01/24/there-are-now-two-u-s-trademark-applications-for-je->

USPTO responded to one of these applications with a refusal due to the applied-for mark's failure to function as a trademark.²⁸ In the official letter in response to the trademark application, the USPTO employed a nearly identical analysis to that employed in the "Boston Strong" refusal discussed in the preceding Part.²⁹ The response similarities suggest that this may become the standard analysis for attempts to trademark tragedy.

V. THE NEED TO REGULATE TRADEMARKING TRAGEDY TO KEEP UP WITH ADVANCES IN TECHNOLOGY: FOUR POTENTIAL OPTIONS TO EXPLORE

Some legal scholars pay lip service to the idea that a tragedy trademark will ever achieve a high level of trademark protection, reasoning that most, if not all, of these phrases are instantly associated with multiple social, as well as economic, movements from their conception.³⁰ Following this reasoning, a mark of this nature would not be perceived by the consuming public as a trademark originating from a single source, making it fall outside of the scope of trademark protection.³¹ This position is seemingly bolstered by the rejection of "Occupy Wall Street" by the USPTO upon conclusion that the mark was "merely informational" and thus could not function as a trademark.³² However, even assuming, *arguendo*, that a majority of applications to register a tragedy will eventually be denied trademark status, there are still consequences for such applications being filed, especially given the rate and speed at which this is occurring in the digital age. The following

suis-charlie-because-of-course-there-are/; see TESS DATABASE, *supra* note 5 (confirming applications to the trademark "Je Suis Charlie").

28. U.S. Trademark Application Serial No. 86499802 (filed Jan. 9, 2015).

29. See U.S. Trademark Application Serial No. 86373501 (filed Aug. 21, 2014) (providing an additional example of the consistent nature of the threefold analysis, with the refusal of "Hands Up Don't Shoot," additionally noting that the applied-for mark is "not only a rallying cry but rather a common phrase used on merchandise associated with protest events rather than as a source indicator in applicant alone"). Compare U.S. Trademark Application Serial No. 85906569 (filed Apr. 17, 2013) with U.S. Trademark Application Serial No. 86499802 (filed Jan. 9, 2015) (noting the almost verbatim nature of the first two paragraphs under the Refusal Section, even down to the examples used, with the exception of the difference in event descriptions and the reference to the denial of trademark status of 'Je Suis Charlie' by European trademark offices).

30. See, e.g., Carl Eppler, *Commentary: Trademarking Tragedy*, NASHVILLE POST (Jan. 21, 2015), https://www.nashvillepost.com/blogs/postbusiness/2015/1/21/commentary_trademarking_tragedy; Goldhammer, *supra* note 26.

31. Goldhammer, *supra* note 26.

32. *Id.* (highlighting that informational slogans, as well as phrases, do not function as trademarks).

Parts explore four potential ways that issues associated with trademarking tragedy may be addressed in the future.

A. *A Case for Expanding the Abercrombie & Fitch Spectrum To Include a “Tragedy Mark” To Encourage More Stringent Regulation*

While expansion of Judge Friendly’s *Abercrombie & Fitch* spectrum to include a tragedy mark may be criticized as throwing open the floodgates for opportunistic trademark registration of marks that would potentially fit into this suggested fifth classification, it still remains a valid path to explore. Moreover, expansion of the classifications of marks is natural. While in 1977 the Supreme Court posited that, “[a]s the ease with which the hues in the solar spectrum may be classified on the basis of perception will depend upon where they fall in that spectrum, so it is with a term on the trademark spectrum,”³³ Judge Friendly cautioned two years earlier in *Abercrombie & Fitch* that “[t]he lines of demarcation . . . are not always bright.”³⁴

While proponents of a strictly intentionalistic interpretation of trademark protections may see this as conflicting with the basic principles of trademark law, it may actually prove to be more efficacious and in line with the needs of today’s consumers. Lower courts have noted the difficulties associated with characterizing marks within the *Abercrombie & Fitch* framework that seem to resemble the issues judges were faced with prior to the 1905 Amendment to the Trademark Act by Congress.³⁵ Due to judges’ concerns over being unable to find trademark infringement where there seemed to be a need for protection to account for marks that were “not merely descriptive, but on the other hand, were not purely arbitrary or fanciful,” the use of the term “suggestive” arose to

33. *Miller Brewing Co. v. G. Heileman Brewing Co.*, 561 F.2d 75, 79 (7th Cir. 1977).

34. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976). Judge Friendly continued:

Moreover, the difficulties are compounded because a term that is in one category for a particular product may be in quite a different one for another, because a term may shift from one category to another in light of differences in usage through time, because a term may have one meaning to one group of users and a different one to others, and because the same term may be put to different uses with respect to a single product.

Id.

35. *Compare Banff, Ltd. v. Federated Dep’t Stores, Inc.*, 841 F.2d 486, 489 (2d Cir. 1988) (“[W]e must acknowledge that placing a mark in one of these four categories is far from an exact science, and that the difference between the classes, which is not always readily apparent, makes placing a mark in its proper context and attaching it to one of the four labels a tricky business at best.”), *with* 1 MCCARTHY, *supra* note 7, §§ 4:3-:9, 11:63.

bridge the gap between arbitrary and descriptive marks.³⁶ Accordingly, the promulgation of a “Tragedy Mark” classification on the *Abercrombie & Fitch* spectrum, with the potential to truncate the ability to qualify as a trademark, may most effectively bridge this new and dangerous gap in a spectrum that continues to widen.

B. A Case for a Bright-Line Prohibition of Trademarking Tragedy Using the Lanham Act

On January 12, 2015, the aforementioned applicant for “Je Suis Charlie” sent a cease-and-desist letter to *Charlie Hebdo* over their use of the phrase “Je Suis Charlie” and went on to advise the magazine that he would be willing to discuss any “serious” licensing arrangements they may wish to make with him.³⁷ This demonstrates the danger presented by allowing registration for marks that are trademark tragedies.

Section 2 of the Lanham Act provides for certain statutory bars to Principal Register registration.³⁸ While “[n]o trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature,” section 2 goes on to provide a list of categories of marks that will never qualify for Principal Register registration.³⁹ For the purposes of trademark tragedy, section 2(a), which expressly refuses registration to a mark that “[c]onsists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute,” seems to apply.⁴⁰ The application of this statutory bar seems to depend on the interpretation of “immoral, deceptive, or scandalous” material.⁴¹ As noted in the *Trademark Manual of Examining Procedure*, “The meaning imparted by a mark must be determined in the context of the current attitudes of the day.”⁴² Further, “The determination of whether a mark is scandalous must be made in the context of the relevant marketplace for the goods or services identified in the application . . . from the standpoint of . . . a ‘substantial composite of the general public.’”⁴³ While many attempts to trademark tragedy may invoke feelings of disdain for those applicants

36. See 1 MCCARTHY, *supra* note 7, § 11:63.

37. See Ohlheiser, *supra* note 27.

38. 15 U.S.C. § 1052 (2012).

39. *Id.*; see 1 MCCARTHY, *supra* note 7, § 19:75.

40. 15 U.S.C. § 1052(a).

41. *See id.*

42. TMEP § 1203.01 (July 2015).

43. *Id.* (citing *In re McGinley*, 660 F.2d 481, 485 (C.C.P.A. 1981)).

who seem to be attempting to profit off of disaster, the words composing the mark may not be themselves scandalous, vulgar, or immoral.⁴⁴ Although this may render section 2(a) inapplicable to such marks, the USPTO should seek to clarify this for the benefit of the consuming public.

Finally, there is the consideration of whether an absolute statutory bar would produce a desirable result, because it would seem to instill a sentiment of “If I can’t have it, nobody can.” If section 1052(a) is broadened to include tragedy marks or if a distinct section is proposed in addition, providing for a ban on trademarking tragedy, people like Beamer Foundation members may be out of luck, but so will the countless number of people seeking to profit off of tragedy for their own benefit.⁴⁵ The double-edged sword of an absolute statutory bar on trademarking tragedy must be analyzed to determine if the goals of trademark law would be hindered or advanced.⁴⁶

C. *Social Pressure To Abandon an Application as Sufficient Protection*

Another potential way to mitigate capitalization of tragedies is to rely on the social media platforms that built and identified with an applied-for mark to take the mark away through abandonment.⁴⁷ In an age where applications for trademark registration can be easily searched and viewed online by the public, applicants, especially those attempting to profit off of tragedy, may think twice and not apply or later abandon the application upon the negative reaction of the community.⁴⁸ The influence of the public’s reaction on an applicant, however, may vary significantly based on the applicant, the level of media attention, and the media’s characterization of the application.⁴⁹ In response to public admonishment and immediate viralization of the company’s filing of three applications for “SEAL Team 6,” Disney expressly abandoned their trademark attempts.⁵⁰ While this is an example of how public outcry can protect consumers and thus the goals of trademark law, we will have to

44. *Id.*

45. *See, e.g.*, Michael Okwu, *Flight 93 Charity Seeks ‘Let’s Roll’ Trademark*, CNN (Feb. 2, 2002, 11:10 AM), <http://edition.cnn.com/2002/US/02/02/beamer.trademark/?related>.

46. *See id.*

47. *See, e.g.*, Deborah R. Gerhardt, *Social Media Amplify Consumer Investment in Trademarks*, 90 N.C. L. REV. 1491, 1499-1505 (2012).

48. *Id.* at 1502-07.

49. *Id.* at 1499-1500.

50. *See id.* at 1502-05 (highlighting that, while Disney claimed that their abandonment was ultimately done in deference to the Navy’s application, the characterization of Disney’s applications as “greedy and unpatriotic” as well as the mass criticism of the company by the public seem to have had the paramount influence on this decision).

wait and see if this strategy is effective, especially when dealing with applicants with less of a brand to protect than Disney.⁵¹

D. Employing a Defensive Trademark Strategy To Protect Against Tragedy Trademark Exploitation

Commercialization of the tragedy began merely two hours after the Boston Marathon bombing.⁵² With many consumers highlighting fears that the commercialization of “Boston Strong” may be belittling the actual tragedy, it has left some, including the author of this Comment, noticing a gap in the law.⁵³ Tovia Smith of National Public Radio (NPR) noted, “It’s almost as if people are using the Boston Strong brand to brand themselves, which raises a whole other concern that Boston Strong is not actually a brand and isn’t trademarked—so anyone can sell it, regardless of whether any money goes to charity.”⁵⁴ Consumers bear this risk, especially when a slogan may lead people to believe, based on the tragedy surrounding it (or even the guarantee of a t-shirt salesperson) that some of the proceeds, if not all, go to charity, which rarely proves to be the case.⁵⁵ This risk is elevated by the fact that a select few tragedy trademarks, like “Let’s roll,” are in fact registered trademarks.⁵⁶ In the case of “Let’s roll,” the trademark is registered to the Todd M. Beamer Memorial Foundation, Inc., in conjunction with the widow of the man who spoke those words while on hijacked United Airlines Flight 93 to an in-flight phone operator right before he, along with fellow passengers, courageously fought back against the hijackers, resulting in Flight 93’s crashing in a rural field in Pennsylvania, killing all forty-four people on board, yet sparing the lives of those at its intended, and most certainly high-kill, target.⁵⁷ “Let’s roll” would become the phrase of a nation after the catastrophic events of September 11, 2001.⁵⁸ The Todd M. Beamer Memorial Foundation’s statements to television network CNN less than six months later provide a clear look into what these trademarks mean to

51. *Id.*; see also U.S. Trademark Applications Serial Nos. 85310957, 85310966, 85310970 (filed May 3, 2011).

52. Smith, *supra* note 3.

53. *Id.*; see also Rachel Butler, *Boston Strong: Commercializing Trauma*, WASH. U. POL. REV. (Jan. 13, 2015), <http://www.wupr.org/2015/01/13/boston-strong-commercializing-trauma/> (providing further discussion on how phrases, significantly emotionally charged phrases like “Boston Strong,” enter the public, social world and are instantly commercialized).

54. Smith, *supra* note 3.

55. See *id.*

56. U.S. Trademark Application Serial No. 76317480 (filed Sept. 26, 2001); see Bleicher, *supra* note 4.

57. See Bleicher, *supra* note 4.

58. See *id.*

some applicants: “Now the Todd M. Beamer Foundation wants to trademark [‘Let’s roll’] to sell hats, T-shirts and mugs in [Beamer’s] memory[;] . . . the plan [is] to raise hundreds of millions of dollars to benefit the children who lost parents on Flight 93.”⁵⁹ The Foundation’s Executive Director went on to explain: “The trademarking of ‘Let’s roll’ is a strictly preventative measure from our standpoint We want to limit its use. We want to be able to protect it, and we want to utilize that to benefit the children.”⁶⁰ This defensive trademark instinct to protect Beamer’s words proved to be not without merit, as there is currently documentation of nearly forty trademark registration applications that the USPTO has processed to date.⁶¹

While Beamer’s widow, through the Todd M. Beamer Memorial Foundation, Inc., had been highly successful in her fight for the exclusive rights to her husband’s last words, it has been an uphill battle, but one that will continue to be fought to preserve that memory.⁶²

Perhaps having recognized the uphill battle of the “Let’s roll” trademark saga, other entities have begun attempting to quell the opportunity for potential profiting off of tragedy by swiftly reacting to tragic events with a defensive trademark.⁶³ As the phenomenon of tragedy trademarking seems to be continuing on an upward trajectory, companies and individuals seeking to employ a defensive trademark strategy against potential rogue applications from opportunists will need to be ready to act quickly because “[h]aving to register trademark applications related to a tragedy to defend against rogue applicants . . . is part of the reality of a world where some individuals see tragic events as a commercial opportunity.”⁶⁴

59. Okwu, *supra* note 45.

60. *Id.*

61. TESS Database, *supra* note 5.

62. *See, e.g.*, Todd M. Beamer Mem’l Found., Opposition No. 125,330, 2003 WL 21207452 (T.T.A.B. May 21, 2008) (providing a full analysis of the legal fight to trademark tragedy); *see also* U.S. Trademark Application Serial No. 76317480 (filed Sept. 26, 2001) (noting the status of the “Let’s roll” registration as having been cancelled as of October 3, 2009, due to the registrant’s failure to file an acceptable section declaration, specimen, and fee on a date that falls on or between the fifth and sixth anniversaries of the registration).

63. *See, e.g.*, Tim Lince, *Trademarking a Tragedy: The Need To Defend Against Rogue Trademarks of Tragic Events*, WORLD TRADEMARK REV. (July 24, 2014), <http://www.worldtrademarkreview.com/blog/detail.aspx?g=ee50c570-641f-41ee-a0dc-a2fb78239f7d> (discussing Malaysia Airlines recent attempt after MH17 and MH370 to register defensive trademarks in an attempt to block applications by registering the marks with the sole purpose being to ensure no party takes advantage of the tragedy for their personal gains as well as the new apparent nexus of trademark strategy and disaster management that is becoming the new norm); *see also* U.S. Trademark Application Serial No. 86334675 (filed July 11, 2014).

64. Lince, *supra* note 63; *see also* U.S. Trademark Application Serial No. 86334675 (filed July 11, 2014).

VI. CONCLUSION

In 2002, “Let’s roll” was feared to be a trademark target.⁶⁵ Now, over twelve years later, it is clear that tragedy trademarks are here to stay. While trademark law often deals with overreaching trademark owners, “here we have overreaching and insensitive trademark applicants.”⁶⁶ There are a multitude of questions that advances in trademark law will need to answer in the coming years as technology becomes even more pervasive, and arguably, the USPTO has a heightened responsibility in regard to trademarking tragedy.⁶⁷ This Comment has offered four potential responses to this phenomenon that is only going to become more omnipresent as people learn how to break through the current trademark procedure and trademark tragedy. While “Boston Strong” was declared a “ubiquitous” slogan and not a trademark, this does not bar other opportunists from distinguishing their tragedy trademark and succeeding in capitalizing on tragedy. We need to consider whether this is what we want and if we are willing to accept it as a public policy or if one of the four proposed responses provides a better balance. Questions still remain, such as, if there is a distinction to be made in a tragedy trademark analysis between an applicant related somehow directly to the tragic event versus an applicant with no connection and how trademark law will continue to adapt to the social media culture. It is imperative that Congress and the USPTO address the overarching concerns associated with the tragedy trademark and clarify a procedural standard.

65. See Bleicher, *supra* note 4, at 1864 (citing Marja Mills, ‘Let’s Roll’ United a Nation; Now It’s a Trademark Target, CHI. TRIB. (Apr. 4, 2002), 2002 WL 2640221.

66. Tim Lince, *Trademarked or Not, ‘Je suis Charlie’ Commercialisation Steps Up*, WORLD TRADEMARK REV. (Jan. 14 2015), <http://www.worldtrademarkreview.com/blog/detail.aspx?g=d4bcc4d6-b033-4740-9bf8-5d4c81b59490>.

67. *Id.*