

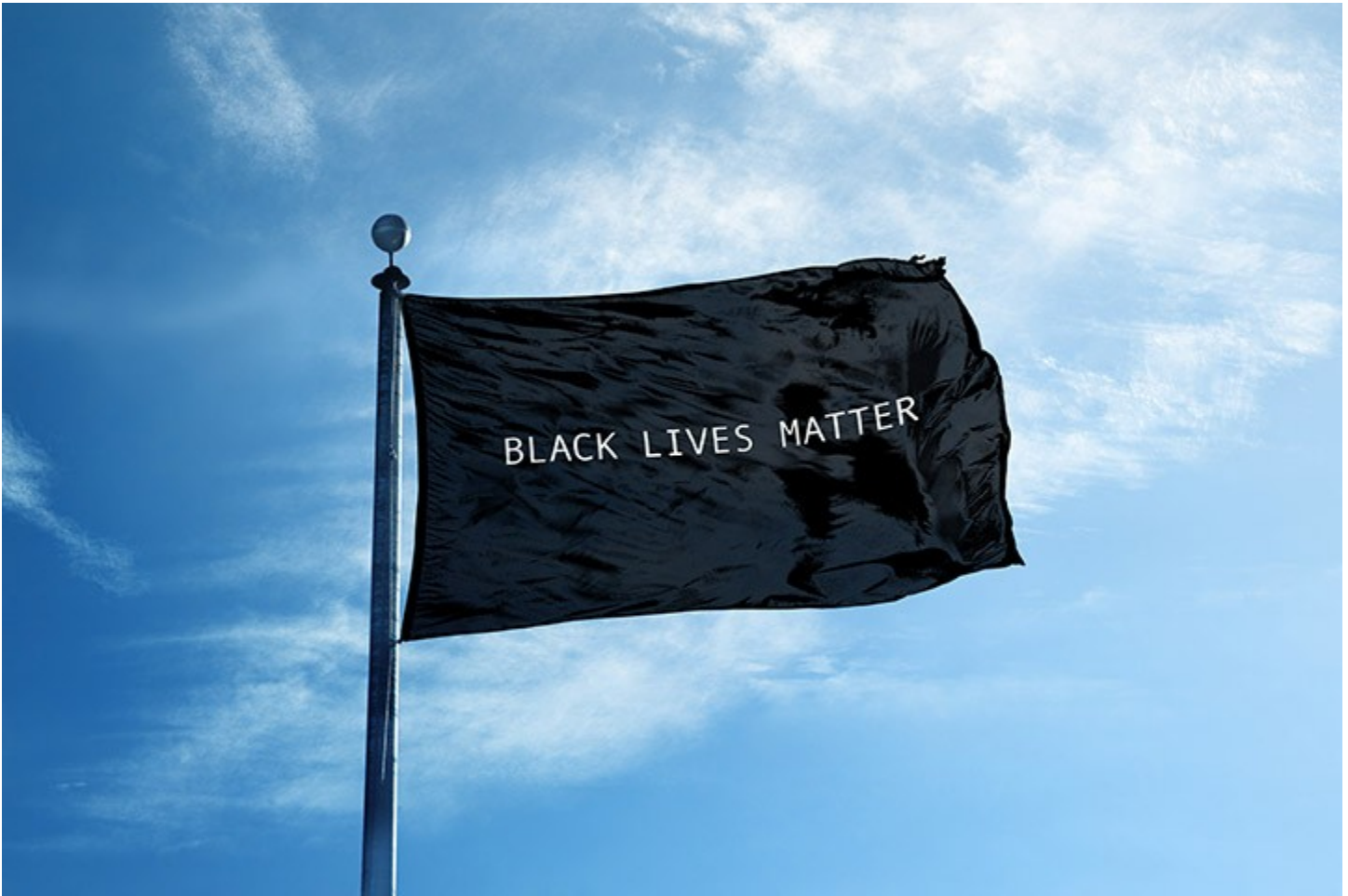
#BLACKLIVESMATTER: A Trademark or A Social Justice Movement

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One of the many reasons the year 2020 will be memorable is for the social justice movements and demonstrations that have inspired a flood of new trademark applications with the U.S. Patent and Trademark Office.

A recent search of the USPTO database revealed that there are 77 pending or dead applications for trademarks that include the phrase “Black Lives Matter.” Since the murder of George Floyd in late May 2020, over 50 new applications were filed for marks such as “BLACK LIVES MATTER MOVEMENT,” “BLACK LIVES MATTER HAND SANITIZER,” and “BLACK LIVES MATTER MOSCATO.”

This wave of “Black Lives Matter”-related trademark applications in 2020 is remarkable, given the USPTO’s previously articulated position regarding the registrability of trademarks using the phrase. Specifically, in 2018, the USPTO rejected the six applications containing the phrase “Black Lives Matter” that were filed by the originators of the movement. Founded by Alicia Garza, Patrisse Cullors, and Opal Tometi, three black women, #BlackLivesMatter was ignited in response to the acquittal of George Zimmerman who fatally shot Trayvon Martin. Since 2013, #BlackLivesMatter (or sometimes referred to as “BLM”) has utilized its platform to address racism across the nation, and seeks to affirm black humanity, to acknowledge of the contributions made in

society by black men and women, and recognize the resilience of the black community in the face of oppression.

Relying upon this history, the USPTO rejected the BLM founders' the applications for three reasons. First, the USPTO determined that the "Black Lives Matter" a slogan or term that does not function as a trademark or indicate the source of applicant's goods and/or services and to identify and distinguish them from others. Second, the phrase identifies an informational, social, political, religious, or similar kind of message that merely conveys support of, admiration for, or affiliation with the ideals conveyed by the message. Third, the phrase is not one the public would not perceive as source-identifying matter that identifies applicant alone as the source of the goods/services, but rather as an expression of support for anti-violence advocates and civil rights groups because potential consumers would simply access the publications and enlist or engage in applicant's services because they want to support the cause that the slogan represents, not because they believe the slogan indicates the source of such goods and services. The USPTO gave no weight to the fact that the founders of the BLM movement lodged the application.

The USPTO's position is not surprising given that the purpose of a trademark registration is to identify a source. Trademarks help consumers identify the goods and services they wish to purchase, and those they want to avoid. The function of trademark is to designate the source of a particular good or service and to protect the good will of merchant supplying that good or service. Whether a term or phrase functions as a trademark or service mark depends on how it would be perceived by the public. The USPTO has determined that the more frequently a phrase is used, the less likely that the public will use it to identify a source. In fact, the USPTO's standard practice is to reject applications seeking to register marks that are merely informational, based on the nature and the context of the mark's use 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. See Trademark Manual of Examining Procedure section 1202.04. Specifically, the USPTO instructs the examiners reviewing trademark applications to reject those seeking to register "widely used messages" or otherwise, slogans, terms, and phrases used by various parties to convey ordinary or familiar concepts or sentiments, as well as social, political, religious, or similar informational messages that are in common use or are otherwise generally understood. See 1202.04(b).

The USPTO has recently rejected the first of Black Lives Matter applications that were filed in 2020. Like the applications filed by the BLM founders in 2018, the USPTO determined that the recently applied-for mark, "2020 BLACK LIVES MATTER," fails to function as a trademark to indicate the source of the applicant's goods and fails to identify and distinguish itself from other "Black Lives Matter" marks or the movement itself. However, a rejected application does not diminish the value and significance of the Black Lives Matter slogan or movement.

Kevin Britton, a summer associate, co-wrote this with Tiana Towns.