

Good afternoon, and thank you for the opportunity to share my experience, and those of the small businesses I serve in my work as it relates to the topic of fraudulent trademarks. My name is Thomas Williams, and I currently serve as a lecturing fellow and supervising attorney in the Start-Up Ventures Legal Clinic at the Duke University School of Law. Today, I hope to speak to the concerns of small businesses as I have come to understand them through this work, and to advocate for the creation of tools and systems that place small businesses on equal footing with others with respect to challenging and accessing trademark protections. I would also like to provide a special thanks to the Committee staff, whose hard work made this possible. The issue is an important one for small business owners, some of whom my students, along with Clinic Director Bryan McGann and I have the privilege of serving as clients. We are appreciative of the Committee taking the time consider the issue, and especially their impact on small businesses.

Legal clinics provide a space in which second and third year law students have the opportunity to engage in client focused legal work. This work builds on the doctrinal teaching which law school's particularly focus on in the first year of student education and integrates and bridges that knowledge into the practice of law. In our clinic, that means students work with small businesses individually and in teams to help gain an understanding of their goals, needs, and concerns, and then use that knowledge to counsel them on a wide range of legal issues they have to navigate.

Our clinics, and clinics more generally across the country, focus on providing pro-bono legal services to a wide array of those who cannot otherwise afford the assistance of an attorney. At Duke, we focus not only on serving the local Durham community, but those in need across the state. Most recently, the Start-Up Ventures Clinic's advanced students have begun providing services to small business owners in the eastern portion of the state, and we hope to continue efforts to bring legal services to entrepreneurs in need across North Carolina.

Small business is the backbone of the United States economy. According to the 2018 Small Business Profile created by the Office of Advocacy of the Small Business Administration, 99.9 percent of the businesses in this country are, in fact, small businesses. Every major company in the world was, at some point, a small business that grew and flourished. Small businesses are important; they create economic possibility for their founders and owners, and also for the communities that they serve. Small businesses are responsible for almost sixty million jobs in this country. Because of this, reducing costs related to trademark protection can help to boost this number and the flexibility and economic promise of small business in communities.

I am here today not because of my expertise in the field of trademark law, but because I hope to relay to you in a meaningful way the stories of the clients my students and I serve. The stories and narratives of small businesses owners are critical to good policy creation with respect to trademarks, and how we police and enforce them. Through the stories of our clients and their experiences, we can begin to see trends, start to ask empirical questions, and create new models of policy that serve the needs of this important backbone of the American economy.

My clinic is focused on the corporate governance and transactional work of small businesses just starting out. We advise a broad range of clients – a sample in any given semester might include non-profit entities, tech companies trying to gain their footing, health care related start-ups, and a retail venture or two.

These clients come to us with concerns typical of new companies. But one of the singular interests that binds such a wide array of clients together is the need for adequate means to address their intellectual property concerns. Among these, trademark looms large. Many small businesses come to our student attorneys with well-formed ideas, and in some instances, they are at the helm of a business that is up and running. In almost every case, they have never had legal guidance, or spoken with a lawyer about what to consider as they move through the process of building a small business, or taking on the roles of founder and owner.

Often, our students are the ones to direct their clients to the importance of protecting their intellectual property interests. Our attention is usually focused on protecting the interests in their name, or wordmark, through federal trademark protection. Often times, the bulk of this work is concentrated on avoiding, or contemplating, infringement of the intellectual property rights of other trademark holders. Doing this requires our students to become proficient in intellectual property basics using usual avenues and skill sets – they spend a good amount of time learning to navigate the TESS system, consulting with our intellectual property specialist, Brandee Woolard, and using TMTKO's analytics to come to conclusions about whether or not the name, phrase, or logo of a client is likely infringing on another party's trademark rights. Use of these tools provides us with a particular type of knowledge; namely, if there is a trademark that our client may be infringing on, or if it is free and clear. Even when we know a trademark is held, however, it may not be clear as to whether it is fraudulent, or stale. But based on these discussions, and the information we have available to us, we work with clients create a trademark strategy moving forward.

In some cases, we advise clients that they will likely need to create another name, and to do so as soon as possible. For clients' whose companies are nascent this is not a hard task, though it does slow down their progress, especially if they have invested in the name in meaningful ways – examples include creating logos, preparing marketing materials, and other ramp up activities. For other clients the task is much more onerous, and the decision making much more complicated. Some are already out doing business in the world, and they have to answer some critical business-related questions that legal counsel alone cannot create clear answers to. One option for the client is to knowingly infringe, with the hope that the trademark holder will not seek them out, or discover their usage. Even if discovered, for some clients, the costs of rebranding may be so high as to make the risk of infringement, and the associated costs, reasonable. It is often hard to know.

The costs of indecision, rebranding itself, or the loss of business that may occur with respect to a rebranding for a small business are often unclear. What is clear, however, is that there is a cost in the current structure. For many small businesses, which fail at a high rate – around sixty

percent fail within a six-year period, the ambiguous costs associated with trademark related issues could be the proverbial straw that breaks the camel's back. Just a few thousand dollars for these companies can make a huge difference. In fact, for some of our clients, the decision to apply for trademark protection at all comes down to a short-term financial analysis.

Providing a means of challenging existing fraudulent, or stale trademarks that are not exercised in a substantive and meaningful way, would likely prove a critical aid to small and emerging companies. Small business owners already face incredible hurdles – financing, business strategy, and market conditions are a few. Any barriers we can reduce, or make more reasonable will help. Providing a simplified means of challenging fraudulent or stale trademarks would eliminate an enormous amount of uncertainty for many small businesses. Because so many of them do unfortunately fail, it also seems reasonable that when someone else has a great idea, and the timing is right, that they should be able to seek the refuge of trademark protection for their wordmark, product, or logo, and that this right should supersede the interests of predecessors who are no longer actively using marks, no matter how long ago they gained those rights.

Some form of well structured, fair ex parte system can create the space for this and help to create a less burdensome playing field for small businesses in the United States. One important component of such a system would be some form of anonymity when challenging a trademark to ensure that a small business owner can take on a trademark troll, or a larger, more well-established company without fear of retribution. The current system, while allowing for challenges, makes the challenging party known, setting them up as a mark for the holder, or in the line of fire for trademark litigation, the expense of which most small businesses cannot bear.

In some cases, our students have raised the possibility of seeking out the conflicting trademark holder in an effort to reach a settlement ex-ante, especially where it appears it is no longer in use. Doing so, however, raises other questions akin to the current challenge system. We may subject a client to the trolling of the trademark holder through revealing their existence to the opposing party. No options currently provide a reasonable, clear solution. Bear in mind, that in all of these instances the founders or small businesses we work with have the luxury of assistance of counsel. Many others with great ideas and viable businesses do not, and fairness mandates the need for tools to help everyone navigate these complex systems with relative independence.

In closing, there is no question that our trademark system is an important one. It provides important protections and incentives for innovation and helps to fuel a culture of entrepreneurship important to all of us. That being said, we should be striving to create a system with a firm foundation and focus on fairness. Part of creating a fair and reasonable system means thinking about the role small businesses play in our economy and in our communities and making room for new small businesses to gain access to the protections that help to create value around the work they do.

Thank you again for the opportunity to speak with the Committee today. I look forward to your questions, and to assisting you and the Committee staff in any way that I can moving forward with this important work.