

Will the Supreme Court Finally Let Trademarks Join their Intellectual Property Brethren In the Protection Provided Under the Bankruptcy Code?

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Earlier this year, we wrote about the First Circuit's decision in *In re Tempnology, LLC*, a bankruptcy case in which the First Circuit cemented a circuit split over whether a trademark licensee could retain its trademark rights after a debtor rejected the trademark license under the Bankruptcy Code. That was our third post about the case—we first wrote about it in December 2015 and then again in March 2017—and we predicted that the issue was headed for the Supreme Court.

It has now arrived at the Supreme Court, which granted *cert.* in October to hear the case, and is poised to put an end to this decades-old, circuit-dividing issue. Trademark owners, licensees, intellectual property lawyers, bankruptcy lawyers, and, of course, all of us here at The TMCA, are watching with bated breath.

As we explained in our previous posts, under section 365(a) of the Bankruptcy Code, a debtor has the right to reject executory contracts, meaning that the parties to any rejected contract are relieved of their obligations to perform. However, Congress included an exception for “intellectual property” licenses in section 365(n), which allows licensees to continue using the licensed intellectual property through the end of the term of the license even if the debtor rejected that license under section 365(a). Under the Bankruptcy Code, “intellectual property” is a defined term, which includes both copyrights and patents, but does not include trademarks.

In drafting section 365, Congress had concerns about whether trademarks should be treated differently from other types of intellectual property because the enforcement of a trademark license requires a debtor to enforce and control the quality of its marks. Due to these concerns, Congress left it to the courts to figure out what to do with trademark

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licenses. Although some courts treated them like other intellectual property, a number of courts, like the First Circuit in *In re Tempnology*, relied on the absence of trademarks from the definition of intellectual property to conclude that Congress intended to exclude trademarks from the protection granted to other forms of intellectual property. As a result, the fate of a rejected trademark license has been subject to the jurisdiction in which the debtor trademark owner files for bankruptcy. That has not been a good outcome.

Because Congress has failed to fix the problem by including trademarks in the definition of “intellectual property” or by formally excluding them, the issue is now before the Supreme Court. While we cannot predict the outcome of the case, we can promise you this: as soon as the Supreme Court issues its decision, we will write about it and tell whether the Court got it right and how the Court’s ruling affects trademark licenses in bankruptcy going forward. Stay tuned!