TRADEMARK EXCEPTIONALISM: QUALITY CONTROL STANDARDS AT PLAY IN BANKRUPTCY

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In 1988, Congress amended the Bankruptcy Code with the Intellectual Property Bankruptcy Protection Act, which provided protections against a debtor licensor’s rejection of a license to licensees of patents, copyrights and trade secrets – but not trademarks. As a result, a patent licensee, for example, can retain its rights to licensed technology despite the debtor’s decision to reject the contract in bankruptcy, while a similarly-situated trademark licensee essentially loses its investment in a licensed mark. The exclusion of trademarks from the intellectual property protection measures in the Bankruptcy Code was justified based on concerns that trademark licenses require quality control by the licensor. Congress opted to omit trademarks from the definition of intellectual property, saying further study was needed, and the issue was shelved. Meanwhile, courts have struggled in the void, creating havoc for many trademark licensees.

One possible approach to resolving the problems created by the unequal treatment of non-debtor trademark licensees in the bankruptcy setting is to position trademarks the same as patents, copyrights and trade secrets. However, that seems an incomplete solution that imperfectly takes account of the differences between trademarks and the other forms of intellectual property covered by bankruptcy law. In particular, it fails to address the very issue that Congress was concerned about, namely the different relationship that exists between the parties to a trademark license given the role of trademark as a source indicator that helps consumers avoid confusion in the marketplace. This article will examine the quality control requirement unique to trademark licenses and its implications within the licensor bankruptcy context. My analysis will also consider the manner in which courts have dealt with the existence of quality standards in trademark licenses in bankruptcy proceedings. Finally, I will seek to present a prescription for how Congress should address the concerns originally raised when it initially sought to protect the rights of trademark licensees.