What COVID-19 Retail Bankruptcies Can Teach Us About Intellectual Property in a Post-Pandemic World

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Our highly digitized world has changed the way people interact with retailers. In particular, the Coronavirus Pandemic (COVID-19) intensified the public’s reliance on the digital economy and accelerated preexisting retail industry trends, such as the shift from brick-and-mortar to e-commerce. As a result of this digital shift, a retailer’s intellectual property (IP) has become one of its most valuable assets. As studies show, online shoppers are more likely to trust and purchase products from
reputable brands. Thus, brand-building IP assets, particularly trademark and trade secrets, became a top priority for bankruptcy bidders.

COVID-19, in particular, greatly disrupted the retail industry. Many recognizable brands filed for bankruptcy, including names such as J. Crew, Neiman Marcus, and Sur La Table. In 2020 alone, there were nearly 7,200 commercial Chapter 11 bankruptcy filings, more than any single year since 2012. Among bankrupt retailers, IP may be their most valuable asset. Thus, retail bankruptcies, particularly bankruptcy auctions, present unique opportunities for creditors and investors. These parties can acquire valuable IP assets to either revitalize the troubled brand or grow their own market share.

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3 Edelman Trust Barometre Special Report: Brand Trust in 2020, EDELMAN 1 (Nancy Jeffrey et al. eds., 2020), https://www.edelman.com/sites/g/files/aatuss191/files/2020-06/2020%20Edelman%20Trust%20Barometer%20Spec%20Rept%20Brand%20Trust%20in%202020.pdf. According to Edelman’s 2020 survey of over 22,000 people, buying on beliefs has become the new normal. Id. at 2, 5. Whether consumers trust the company that owns the brand or brand that makes the product is second only to price in consumer purchase decisions. Id. at 7. Seventy percent of survey respondents also indicated that being able to trust a brand today is more important than in the past. Id. at 9. Finally, consumer trust unlocks “deeper, more resilient relationships” or loyal customers. Id. at 32. Thus, trust is now the make-or-break difference for brand survival. See generally Edelman, id.

4 Forget Real Estate and Inventory, IP and Data Continue to be the Draw for Bankruptcy Bidders, TFL (July 30, 2020), https://www.thefashionlaw.com/forget-real-estate-and-inventory-ip-continues-to-be-a-big-draw-for-bankruptcy-bidders/.


7 Cook, supra note 1. “A strong brand can be an invaluable asset during challenging times.” Id.

8 Id. Even though there are many forms of intellectual property, this article will focus solely on the value of trademarks and trade secrets in retail bankruptcy proceedings.
Both IP and bankruptcy laws are quite complex. With that in mind, this comment will narrowly focus on what retail bankruptcies amid COVID-19 can teach us about the value of IP, particularly trademarks and trade secrets, post-pandemic. Part II of this comment explores the relevant legal background, in particular IP and bankruptcy laws. Part III provides context regarding the retail industry and delves into relevant pre-pandemic trends. Further, Part IV discusses the impact of COVID-19 on the retail industry, particularly on consumer behaviors and bankruptcy bids. Part IV details lessons from such bankruptcies and the possible impacts on the industry and society at large.

I. LEGAL BACKGROUND

Retail bankruptcies can be quite complicated. This is because of the interplay of two complex areas of law: intellectual property (IP) and bankruptcy. To fully understand the impact of COVID-19 retail bankruptcies, a basic understanding of these two areas is necessary. First, IP and bankruptcy laws have different perspectives on asset management, causing the two to be at odds with one another.\(^9\) IP laws approach asset management from an *ex ante* perspective, thereby encouraging investment in research and development.\(^10\) In contrast, bankruptcy laws approach asset management from an *ex post* perspective.\(^11\) Instead of encouraging development, these laws focus on maximizing the value of the troubled company’s remaining assets.\(^12\) With this in mind, the following section will explore the basics of both IP and bankruptcy laws as well as the interaction of the two.

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\(^10\) Id. See James Chen, *Ex-Ante*, INVESTOPEDIA, https://www.investopedia.com/terms/e/exante.asp (last updated May 20, 2020). (noting ex-ante is translated to “before the event.”) This analysis focuses on predictions or forecasts that occur ahead of an event. Id.

\(^11\) Id at 751. See James Chen, *Ex-Post*, INVESTOPEDIA, https://www.investopedia.com/terms/e/expost.asp (last updated Nov. 27, 2020) (noting ex-post translates to “after the fact.”) In an ex-post analysis, the analyst “looks at financial results after they have occurred and utilizes them to predict the likelihood of future returns.” Id. See also H.R. REP. NO. 95-595, at 220 (1977).

\(^12\) Menell, supra note 9, at 737.
A. Intellectual Property Defined

Intellectual property broadly refers to “creations of the mind.” Intellectual property broadly refers to “creations of the mind.”13 Such “creations” can range from paintings to computer programs.14 This wide array of protectable IP contributes to its significant role in both our culture and economy.15 IP laws exist to promote public progress and welfare by giving creators a limited monopoly in exchange for their efforts.16 Absent such protection, a third party would be able to take the fruits of the creator’s investment, time, and labor without recourse.17 This lack of protection would disincentivize creatives from creating.18 Thus, IP protection is a vital resource for both creating culture and progressing the economy. Representative of this idea, is the fact that almost every business owns or uses some form of IP.19 Provided below is a basic description of the four main IP rights: patent, copyright, trademark, and trade secret.20

i. Patent

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14 *Id.* at 20.
15 *Id.* at 2.
16 See U.S. CONST. art. I, § 8, cl. 8. The Intellectual Property Clause of the U.S. Constitution describes the purpose of IP protection: “[t]o promote the Progress of Science and useful Arts, by securing for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries.” *Id.* See also *Mazer v. Stein,* 347 U.S. 201, 219 (1954). The court’s opinion noted: “The economic philosophy behind the [IP] clause . . . is the conviction that . . . [it] is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’ Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.” *Id.*; *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.,* 489 U.S. 141, 146 (1989) (“The . . . Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the ‘Progress of Science and useful Arts.’”).
17 Menell, *supra* note 9, at 738.
18 *Id.*
The first of the four main IP rights are patents. A patent is a property right granted by the federal government to an inventor of “any new and useful process, machine, manufacture . . . composition of matter, or any new and useful improvement thereof . . . .”\textsuperscript{21} Patents are governed by federal law: the Patent Act.\textsuperscript{22} To be eligible for patent protection, the invention must be useful, novel, nonobvious, and fall within the definition of patentable subject matter detailed above.\textsuperscript{23} Put simply, any man-made invention with a practical purpose is eligible for patent protection so long as it does not already exist in the relevant technical field.\textsuperscript{24} The patent application process is complicated and expensive, however, once the patent is granted the owner has the exclusive rights “to exclude others from making, using, offering for sale, or selling the invention” throughout the patent’s twenty-year term.\textsuperscript{25}

\begin{itemize}
\item \textbf{Copyright}
\end{itemize}

Copyrights are the second of the four main IP rights. A copyright is an IP right granted to an author of an “original work[] of authorship fixed in any tangible medium of expression . . . .”\textsuperscript{26} Such author may be a person, a company (under a work-made-for-hire arrangement), or multiple people (joint work).\textsuperscript{27} Copyrights are governed by federal law: the Copyright Act.\textsuperscript{28} A copyrighted work must fall within one of the eight broadly construed categories of “works of authorship.”\textsuperscript{29} Works of authorship include the following categories: (1) literary works; (2) musical

\begin{itemize}
\item \textsuperscript{22} 35 U.S.C. §§ 1–390.
\item \textsuperscript{23} 35 U.S.C. §§ 100–105.
\item \textsuperscript{24} See Diamond v. Chakrabarty, 447 U.S. 303, 309 (1980). In Diamond v. Chakrabarty, the Supreme Court found that Congress intended the subject matter of patent to “include anything under the sun that is made by man.” Id. However, the Court qualified this statement finding that “laws of nature, physical phenomena, and abstract ideas[,]” cannot be held patentable.” Id.
\item \textsuperscript{25} 35 U.S.C. § 154(a). The owner of a patent is typically the inventor, however, the inventor may assign the patent to another party, such as a company. 35 U.S.C. §§ 151–52.
\item \textsuperscript{26} 17 U.S.C. § 102(a). See also Copyright in General, U.S. COPYRIGHT OFF. https://www.copyright.gov/help/faq/faq-general.html (last visited Jan. 9, 2021).
\item \textsuperscript{27} 17 U.S.C. § 201.
\item \textsuperscript{28} 17 U.S.C. §§ 101–805.
\item \textsuperscript{29} 17 U.S.C. § 102(a).
\end{itemize}
works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. It is worth noting that registration is not required for a valid copyright. Instead, a copyright springs into existence when an original work is fixed in a tangible medium, such as paper or a hard drive. To meet the “originality” requirement, the work must be independently created by the author and have some modest quantum of creativity. Once a copyright springs into existence, the owner holds six exclusive rights for the duration of the copyright: the rights of (1) reproduction; (2) adaptation; (3) distribution; (4) public performance; (5) public display; and (6) public performance by means of digital audio transmission. Generally, copyright protection lasts for the life of the author plus 70 years. However, for works-made-for-hire, anonymous works, and pseudonymous works, copyright protection lasts 95 years from the date of first publication or 120 years from the date of its creation, whichever expires first.

iii. Trademark

A third IP right is trademark. A trademark is “any word, name, symbol, or device, or any combination thereof” used in commerce to identify and distinguish ones’ goods “from those manufactured or sole by others.” Put simply, trademarks are source-identifiers, such as brand

30 Id.  
32 17 U.S.C. § 101. “A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” Id.  
33 Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 363 (1991). “[T]he requisite level of creativity is extremely low; even a slight amount will suffice.” Id. at 345. In addition, copyright does not protect facts or ideas. 17 U.S.C § 102(b).  
34 17 U.S.C §106(1)–(6).  
36 Id. “A ‘work made for hire’ is [] a work prepared by an employee within the scope of his or her employment; or [] a work specially ordered or commissioned . . . .” 17 U.S.C. § 101.  
37 15 U.S.C. § 1127. The statute notes:
names and logos.\textsuperscript{38} Trademarks are governed both by state common law and federal law (the Lanham Act).\textsuperscript{39} Unlike copyright and patent protection, which both stem from the Intellectual Property Clause of the Constitution, federal trademark protection originates in the Commerce Clause.\textsuperscript{40} This means that the owner must make regular use of the trademark (or “mark”) in interstate commerce to receive federal protection.\textsuperscript{41} The mark cannot simply be a placeholder; the owner must have a \textit{bona fide} intent to use it.\textsuperscript{42} The mark must also be affixed to merchandise, be capable of distinguishing the good from others (“distinctive”), and not be functional.\textsuperscript{43} Like copyright, registration is not required for trademark protection.\textsuperscript{44} However, federal registration offers important advantages over “common law” trademark rights, such as presumption of validity and constructive notice.\textsuperscript{45} Protection lasts for as

The term ‘trademark’ includes any word, name, symbol, or device, or any combination thereof—(1) used by a person, or (2) which a person has a \textit{bona fide} intention to use in commerce and applies to register on the principal register established by this chapter, 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. \textit{Id.}


\textsuperscript{38} See 15 U.S.C. §§ 1051 et seq. \textit{See also} Menell, \textit{supra} note 9, at 748–49.

\textsuperscript{39} See U.S. Const. Art. I, § 8, cl. 3. Trademark law is tied to unfair competition laws (UCL), which are largely state based. \textit{Legal Information Institute}, https://www.law.cornell.edu/wex/unfair_competition (last accessed Feb. 17, 2021). These laws protect against practices such as false advertising and false representation of products and services. \textit{Id.}

\textsuperscript{40} \textit{See} Menell, \textit{supra} note 9, at 741.

\textsuperscript{41} 15 U.S.C. § 1127. “The term ‘use in commerce’ means the \textit{bona fide} use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark.” \textit{Id.}

\textsuperscript{42} \textit{See} SAUNDERS, \textit{supra} note 19, at 473–568.


\textsuperscript{44} \textit{Trademark FAQs, supra} note 44.
long as the trademark is used, but can expire through non-use ("abandonment") or "genericide."46

Trade dress is also protected under the Lanham Act.47 Trade dress, like trademarks, identify the single source of a product.48 Unlike trademarks, however, trade dress refers to the "total image of the product" such as size, shape, color, texture, and graphics.49 In other words, trade dress refers to the "feel" of a product that distinguishes the source.50 Some examples of trade dress include restaurant decorations, product configurations, and product packaging.51 Like trademarks, trade dress also cannot be functional.52

Trademarks are incredibly important to commerce because, as source-identifiers, they greatly enhance and facilitate consumer decisions.53 Trademark law aids consumers’ decision-making by encouraging companies “to supply quality products . . . and invest in

46 Chadha & Chadha, Death of a Trademark: Genericide, LEXOLOGY (June 19, 2020), https://www.lexology.com/library/detail.aspx?g=5027217f-1db2-4ebb-9838-8696e97c6191#:~:text='Trademark%20Genericide%20means%20that%20the proprietors', Trademark genericide “means that the marks, due to their own excessive popularity, have become descriptive terms for particular type of products.” Id.
49 Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 765 (1992) (holding that the decorations and theme of a Mexican-style restaurant qualified as protectable trade dress).
50 Id. at 763.
52 Id.
53 Menell, supra note 9, at 741.
building the ‘goodwill’ surrounding a brand name.”

Therefore, a trademark represents “the public’s confidence or ‘goodwill’ in a particular product.” As such, trademark protection secures owners the benefit of a good reputation and the goodwill attached. Because a trademark serves as a symbol of a company’s goodwill, infringement of the mark is viewed as “theft of goodwill.” The importance of trademark in the context of retail is described in part III.

iv. Trade Secret

Our fourth and final discussion of IP rights centers upon trade secret law, which protects valuable, confidential business information. Because the value of a trade secret stems from it being unknown to competitors, it must be a secret and subject to reasonable efforts to keep it so. A trade secret loses all protection when the information becomes general public knowledge, is inadequately kept secret, or is disclosed by the owner outside the bounds of confidentiality. Examples of trade secrets include secret recipes, business know-how, and customer data. Trade secrets are largely governed by state law with the exception of two federal acts: the Economic Espionage Act and the Defend Trade Secrets Act.

54 Id.; see also Park ‘n Fly v. Dollar Park & Fly, 469 U.S. 189, 191 (1984) (“National protection of trademarks is desirable because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation.”).


56 Park ‘n Fly, 469 U.S. at 191. Further, researchers note goodwill is “another name for reputation, credit, honesty, fair name, reliability.” Harry D. Nims, The Law of Unfair Competition and Trade-Marks 36 (1929).


58 SAUNDERS, supra note 19, at 10. The secret being protected must not be generally known to the public or easily obtained by others. Id.

59 Trade Secret Policy, USPTO (Feb. 7, 2019, 11:16 AM), https://www.uspto.gov/ip-policy/trade-secret-policy; see 18 U.S.C. §§ 1831, 1836 (discussing “economic espionage” within context of trade secret protection); see also Saunders, supra note 19, at 6 (discussing the requirements for trade secret protection).


61 SAUNDERS, supra note 19, at 6.
Act. No formal registration is required or necessary for trade secret protection, and it lasts for as long as the information is kept secret, potentially forever.

B. Licensing and Assigning Intellectual Property Rights

Each of the four basic forms of IP previously discussed can be licensed or assigned to third parties. The complexity of a transfer depends the type of IP and form of the transfer. There are two basic forms of transferring IP assets: by assignment or license. An “assignment” refers to the complete conveyance or sale of the IP right. In contrast, a “license” refers to transfers of less than the entirety of the IP right with the owner retaining an interest. The scope of a license depends upon agreed factors, such as geographic limitations and time restraints. A license may be exclusive or nonexclusive. An exclusive license gives the licensee the exclusive right to the particular IP, even to the exclusion of the licensor. A nonexclusive license, by contrast, gives permission only to use the particular IP, but not to the exclusion of the licensor or other licensees.

62 18 U.S.C §§ 1831, 1836; See also Trade Secret Policy, supra note 59 (discussing federal protections for trade secrets).


65 Id.

66 Id.

67 Id.

68 Id.


70 Id.

71 Id. A licensee is the party being granted the license. Id. A licensor is the party granting the IP right. Id.

72 Id. A licensing agreement is a written contract between two parties, in which a property owner permits another party to use that property under a specific set of parameters. Andrew Bloomenthal, Licensing Agreement, INVESTOPEDIA, https://www.investopedia.com/terms/l/licensing-agreement.asp (last updated Mar. 2, 2021).

If a license agreement is silent regarding exclusivity, it is presumed nonexclusive. 1 New York Intellectual Property Law § 9 (2020).
IP licenses and assignments may also include obligations for both parties on top of the transfer.\textsuperscript{73} IP transfers can be complex depending on the type of IP. Thus, only those transfers of the types of IP relevant to our discussion—trademark and trade secret—are described below.

\textit{i. Trademark Transfers}

As previously discussed, a trademark symbolizes a company’s goodwill; it has no independent value apart from the business it represents.\textsuperscript{74} This makes trademark transfers quite complicated. Trademarks cannot be assigned “in-gross,” or apart from the company’s associated goodwill.\textsuperscript{75} Such transfers are invalid.\textsuperscript{76} Thus, trademark assignment can occur only if the goodwill of the business is attached.\textsuperscript{77} Preventing such in-gross transfers protects consumers from confusion and deception in the marketplace.\textsuperscript{78}

Like assignments, trademark licenses have special rules. Any license of a trademark, whether exclusive or nonexclusive, must be supervised by the trademark owner.\textsuperscript{79} This means that the trademark owner must control “the nature and quality of the goods or services” sold by licensees.\textsuperscript{80} This ensures consistent product quality.\textsuperscript{81} “Naked licenses”—those in which the licensor fails to supervise—are a cause for trademark

\textsuperscript{73} Cooke, supra note 60, at 226.
\textsuperscript{74} See United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 97 (1918) (citing Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 412–14 (1916)) (“There is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed.”); Sugar Busters, L.L.C. v. Brennan, 177 F.3d 258, 265 (5th Cir. 1999).
\textsuperscript{75} 15 U.S.C. § 1060(a). “A registered mark or a mark . . . shall be assignable with the good will of the business in which the mark is used, or with that part of the good will of the business connected with the use of and symbolized by the mark.” Id.
\textsuperscript{76} See Marshak v. Green, 746 F.2d 927, 929 (2d Cir. 1984); Greenlons, Inc. of Cincinnati v. Greenlawn, Inc., 542 F. Supp. 890, 893 (S.D. Ohio 1982).
\textsuperscript{77} See United Drug Co., 248 U.S. at 97.
\textsuperscript{78} See Sugar Busters, 177 F.3d at 265; Visa, U.S.A., Inc. v. Birmingham Trust Nat’l Bank, 696 F.2d 1371, 1375 (Fed. Cir. 1982).
\textsuperscript{80} Id.
\textsuperscript{81} Cooke, supra note 60, at 232.
loss. In addition, trademark licenses are also personal to the licensee. Meaning, unless the licensing agreement indicates otherwise, a licensee cannot assign their particular license without the trademark owner’s consent. In sum, trademark assignments and transfers are complicated due to the symbolic nature of the mark.

ii. Trade Secret Transfers

Trade secret transfers are much simpler than trademark transfers. The Supreme Court has adopted a property-like view of trade secrets and has deemed them assignable. So, trade secrets can be assigned via any valid contract subject to confidentiality provisions. Without such confidentiality, the trade secret may lose protection altogether. Trade secret information can also be licensed, but must also be subject to confidentiality provisions if so. Trade secret licenses are typically personal. Thus, the licensee usually cannot assign the license without the owner’s consent. So long as the trade secret information remains secret, assignments and licenses are valid.

C. Bankruptcy Defined

As previously mentioned, the second major area of law applicable to this discussion is bankruptcy. Bankruptcy is a legal action in which a troubled debtor obtains financial relief through a judicially supervised reorganization or liquidation of assets. Bankruptcy actions take place in federal Bankruptcy Courts and are governed by the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure (“Bankruptcy Rules”). The

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82 Id.
84 Id.
86 Id. “If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished.” Id.
87 Menell, supra note 9, at 764.
88 Id.
89 Id.
90 Id.
91 Bankruptcy, BLACK’S LAW DICTIONARY (11th ed. 2019).
92 See 11 U.S.C. § 101 et seq.; Fed. R. Bankr. P. Bankruptcy Courts are part of the District Court system and often hear disputes as they arise during the
bankruptcy process begins when a company files a bankruptcy petition with the Bankruptcy Courts. This filing may be voluntary under Section 301 or forced by creditors under Section 303. Under either circumstance, a petition has two immediate effects. First, it triggers an “automatic stay,” which stops any impending action by creditors against the debtor. Second, it creates the “bankruptcy estate.” The bankruptcy estate consists of the debtor’s property interests, both tangible and intangible, that exist at the time of filing or may be acquired in the future. This estate is managed by a fiduciary—either the trustee in a Chapter 7 case or the “debtor-in-possession” (DIP) in a Chapter 11 case. The bankruptcy estate functions as “the pot out of which creditors’ claims are paid.”

The Bankruptcy Code provides two ways in which a company-debtor can discharge outstanding obligations: reorganization under Chapter 11 or liquidation under Chapter 7. The first option is reorganization under Chapter 11. Chapter 11 provides a framework in which a debtor can reorganize debts and continue operations. In such a case, the debtor retains possession of assets necessary for continued business operation (hence, the term “debtor-in-possession”) and creates a plan of reorganization. By doing so, the debtor can start afresh by


94 Id.
97 Id.
102 11 U.S.C. §§ 1107–08. The company’s management continues to run day-to-day operations, but certain significant decisions may need the bankruptcy court’s approval. Bankruptcy: What Happens When Public Companies Go Bankrupt, U.S. SEC. AND EXCH. COMM’N (Feb. 3, 2009), https://www.sec.gov/reportspubs/investor-publications/investorpubsbankrupthtm.html. This is rare, however, as many bankruptcy court’s apply a deferential business judgment rule standard. See In re Nellson Nutraceutical, Inc., 369 B.R. 787, 797 (Bankr. D. Del. 2007) (“[I]f the Court determines that a transaction is in the ordinary course of a debtor’s business,
ridding itself of any “dead weight” and by salvaging profitable aspects of the business. The other option is liquidation under Chapter 7. In a Chapter 7 case, the court appoints a trustee to sell off (or “liquidate”) the entirety of the bankruptcy estate and distribute the proceeds to creditors. Because all of the company-debtor’s assets are liquidated, Chapter 7 bankruptcies generally refer to the company's death.

i. Intellectual Property and Executory Contracts

Bankruptcy is further complicated when the debtor is a licensor or licensee. Such arrangements are typically considered executory. A contract is executory “if performance remains due to some extent on both sides” of the transaction. Why are these contracts important to distinguish? Executory contracts differ from other assets held by the debtor. Instead of automatically entering the bankruptcy estate upon filing, the trustee or DIP must either assume or reject executory contracts, subject to court approval. If rejected, the contract is considered breached and may give rise to a claim for breach of contract. If assumed, the pre-

the Court will not entertain an objection to the transaction, provided that the conduct involves a business judgment made in good faith[,] and within the scope of authority under the Bankruptcy Code.

106 Bhattarai, supra note 105.
107 Menell, supra note 9, at 764.
109 Id.
110 Id.
111 11 U.S.C § 365. When the fiduciary rejects, “the rejection . . . constitutes a breach of [] contract” with the breach being deemed to have occurred “immediately before the date of the filing of the petition.” Debra A. Dandeneau & Pamela T. Church, Tempnology is a Victory for Trademark Licensees but Doesn’t Completely Resolve the Debate Over the Effects of Rejection, BAKER MCKENZIE, (May 23, 2019). https://restructuring.bakermckenzie.com/2019/05/23/united-states-tempnology-
petition contract is reinstated and fully binding on the estate. However, after assuming the contract, the trustee or DIP may assign it to a third party.

Executory contracts are even more complicated in the context of intellectual property (IP). Assignments of IP rights are typically not “executory” because little to no obligations remain on both sides after assignment. Licenses, however, are typically considered “executory.” For example, trade secret licenses are usually executory because both parties to the contract must maintain secrecy. Trademark licenses are also usually executory because the licensor must exercise quality control and the licensee must satisfy contract obligations, such as payment, reporting, and marketing. Thus, it is worthy to note whether a company-debtor is a licensor or licensee of an IP right.

If the debtor is a licensor they can reject the licensing agreement. However, section 365(n) of the Bankruptcy Code provides that such rejection does not revoke the licensee’s license. Instead, the rejection functions as a breach of contract. In the past, courts struggled in applying this concept to trademark licenses because the definition of “intellectual property" in the Bankruptcy Code excluded trademarks. The Seventh Circuit advocated for a rejection-as-breath approach, consistent with the treatment of other forms of IP, while the First Circuit advocated for a rejection-as-revocation approach. The Supreme Court,

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112 Menell, supra note 9, at 767.
113 Id. at 768.
114 See generally id.
115 Id. at 758.
116 Id.
117 Id. at 764.
118 Id.
119 Id.
122 Id.
123 11 U.S.C. § 101; See Menell, supra note 9, at 773–75.
in *Mission Product Holdings, Inc. v. Tempnology, LLC*, sided with the Seventh Circuit and settled on the rejection-as-breach approach. Thus, when a debtor-licensor rejects the licensing agreement, the effect equates to a breach of contract in which the trademark licensee can continue to use the license and pursue breach of contract damages. Therefore, trademark licenses are treated the same as other IP licenses under Section 365(n).

### ii. Section 363(b) Sales

Another important topic regarding bankruptcy are Section 363(b) sales. Subject to court approval, Section 363(b) of the Bankruptcy Code authorizes the bankruptcy trustee or Chapter 11 DIP to “use, sell, or lease” estate property other than that which is used in the ordinary course of business. Section 363(b) sales (“363 Sales”) can move quickly, especially when the debtor has identified a “stalking-horse” bidder prior to filing. If obtained, the stalking-horse bid sets the floor for the general auction. A competitive bidding process for the debtor’s assets ensues at a general auction, usually resulting in a sale to the best offer. After obtaining court approval of the sale, proceeds are used to repay

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126 *Id.*
127 *Id.*
129 C. J. Harayda et al., *Strategies for Purchasing IP Assets from Distressed Owners*, LAW360 (June 24, 2020), https://www.law360.com/articles/1282744, “A stalking-horse bid is an initial bid on the assets of a bankrupt company.” Will Kenton, *Stalking-Horse Bid*, INVESTOPEDIA, https://www.investopedia.com/terms/s/stalkinghorsebid.asp (last updated Oct. 23, 2020). Once a stalking-horse bidder submits their offer, the company may receive other offers (which must be higher than the stalking-horse bid) from other buyers. *Id.* The bankrupt company wants the stalking-horse bid to be as high as possible. *Id.* Oftentimes, this means that they will offer the stalking-horse bidder various incentives such as expense reimbursements, breakup fees, and exclusivity for a specified period. *Id.*
130 Harayda, *supra* note 129.
Thus, 363 sales provide ample opportunity for competitors and investors alike to buy a troubled company’s assets at a bargain price. Such assets may include valuable IP or IP licenses.

II. THE RETAIL INDUSTRY

A. What is the Retail Industry?

Especially noteworthy to this discussion of retail bankruptcies amid COVID-19 is the “retail industry.” The “retail industry” is the nation’s largest private-sector employer. As of 2018, retail supported more than one in four American jobs, totaling about 52 million working Americans. In addition, the United States alone has about 4.2 million retail establishments. Although the term “retail” is widely recognizable, it is often left undefined. For precision, “retail” is defined as the sale of products to consumers in small quantities for use or consumption. So, the “retail industry,” as a whole, refers to an industry engaged in the sale of small quantities of finished products to end-user consumers.

Retail encompasses a variety of businesses, including clothing, book, and general merchandise stores. There are two major methods

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133 Id.

134 Id.


136 Id. at E-1.

137 Id.


139 Id. (labeling these types of transactions as “business-to-consumer” transactions (B2C)).

retailers use to sell products. The first is brick-and-mortar retailing, or, selling product from a physical location. The second use, and the newer of the two, is non-store retailing, or selling products without a physical location. Examples of non-store retailing methods include catalogue sales, e-commerce transactions, and multi-level marketing. Both methods focus on attracting customers through displays, whether that be on shelves in a store or the design of a website.

As one may expect, the retail industry is consumer driven. It is highly dependent upon and affected by both consumer behavior and economic conditions. Because consumer spending drives much of the economy, retail sales serve as an important economic indicator. In other words, a growth or decline in retail sales can indicate whether the economy is healthy or not. This is relevant to the impacts of COVID-19 on retailers discussed in part IV.

B. Trademarks and Trade Secrets: Retail Brand-Building Assets

Retailers typically own and use various forms of IP, including patent and copyright. However, this comment focuses on trademarks and trade secrets as they relate to a retailer’s brand value. Trademarks are arguably the most important IP asset a retailer can own. This is because trademarks identify the source of products—the retailer. For example, Nike owns the famous “Swoosh” trademark. Thus, a shirt featuring the “Swoosh” identifies Nike as the shirt’s maker. So, trademarks can distinguish one retailer’s product from another’s. This, in turn, encourages retailers to supply quality product and build brand

141 Id.
142 Id.
143 Id.
144 Id.
145 Id.
146 Id. About two-thirds of the U.S. GDP comes from retail consumption.

Id.

147 See Menell, supra note 9, at 741.
149 Id.
In a crowded industry like retail, brand value means everything. It enhances perceived quality of product, influences customer decisions, and even promotes additional sales. As symbols of a retailer's reputation, strong trademarks are fundamental retail assets.

Although not obvious, trade secret protection also plays a vital role in retail. Trade secret information is of utmost importance to building a reputable brand, especially in the current digital age. For example, retailers typically collect customer data. This may include customers' physical addresses, emails, demographics, personal characteristics, and purchase histories. Retailers often collect and store such data because it provides valuable insight into consumer behaviors and desires. Armed with this knowledge, a retailer can better advertise and target particular consumers, especially in the current digital realm. This, in turn, produces profits and builds reputation with customers. In addition to customer data, trade secret information may include supplier information, marketing strategies, and research findings. In sum, trade secret

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151 See Menell, supra note 9, at 741. See also United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 97 (1918) (citing Hanover Star Milling Co v. Metcalf, 240 U.S. 403, 412-14 (1916))(holding that the function of trademarks is “to designate the goods as the product of a particular trader and to protect his goodwill. . . .”); See Park v. Dollar Park & Fly, 469 U.S. 189, 198 (1985)(finding that “trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation.”).


154 Id.

155 Id.

156 Id.

157 Id. As brands president of Gordon Brothers, Ramez Toubassy stated, “[k]nowing somebody has bought my product and knowing what they bought and knowing when and why they bought it puts me in a better position to sell them more products.” Id.

158 Id.

information may be an important tool in which a retailer builds brand value. Together, both trademarks and trade secrets are important brand-building assets. Trademarks symbolize earned goodwill, while trade secrets function to further establish rapport with consumers through avenues such as targeted advertising strategies based on collected data.

C. Relevant Pre-Pandemic Retail Industry Trends

As previously mentioned, retail sales are tied to economic health. So, analyzing pre-existing trends is essential to predicting future impacts of COVID-19 on retailers. Significant shifts in the retail industry have occurred in the past few decades. Companies are holding more wealth in intangible assets. Consumers and business alike are transitioning to a “digital economy.” In addition, the Great Recession revealed an overpopulated physical retail space and exposed consumers to deep discounts. Finally, due to Amazon, consumers are opting for online shopping rather than buying products in-store. The combination of five trends detailed below reveal a transitioning retail environment—one that is becoming digitized and modernized.

1. Examples of trade secrets can be found in methods of calculating.

2. See infra Sections III.C.i–iv.

3. See infra Section III.C.i.

4. See infra Section III.C.ii.


6. See infra Section III.C.iv.

7. See infra Section III.C.i–iv. The five trends discussed are the following: (1) companies are holding more wealth in intangible assets, (2) the rise of the digital economy, (3) the impact of the 2008 financial crisis on consumer behavior, (4) the retail apocalypse, and (5) the “Amazon effect.” Cory Mitchell notes, “[t]he Amazon effect refers to the impact created by the online, eCommerce, or digital marketplace on the traditional brick and mortar business model that is the result of the change in shopping patterns, customer expectations, and the industry’s competitive landscape.” Cory Mitchell, The Amazon Effect: Definition, Statistics, Impact on Consumers, INVESTOPEDIA, https://www.investopedia.com/terms/a/amazon-effect.asp (last updated October 31, 2021).
Companies are holding more and more wealth in intangible assets. Unlike tangible assets, intangible assets do not have a physical form. Classic examples of intangible assets include IP and stocks. Tangible assets, like inventory, can always be transacted for some monetary value. Intangible assets, however, are riskier because they have no obvious monetary value. This risk makes holding intangible more lucrative than tangible counterparts. As such, more companies are investing in intangible assets. Thus, intangible assets are playing an increasingly larger role in today’s economy. Company value has noticeably shifted from tangibles to intangibles, like IP. For example, studies show that intangible assets now command over 90% of the S&P 500 market value, a historical high. In addition, the value of intangible assets in the S&P 500 has risen from $122 billion in 1975 to $21.03 trillion in 2018. This shift reflects the fact that “[i]deas and innovation are [becoming] the world’s new capital.”

167 Id.
168 Id.
169 Id.
170 Id.
174 Ali, supra note 173.
175 Ipos, The Rise of Intangibles in an Increasingly Complex Business Environment, REUTERS (Aug. 1,
The Rise of the Digital Economy

The digital revolution has also changed the way people and businesses interact, as reflected by the “digital economy.”\textsuperscript{176} The digital economy refers to economic activity resulting from “billions of everyday online connections among people, businesses, devices, data, and processes.”\textsuperscript{177} The digitization of the economy has disrupted the retail industry “by undermining conventional notions of how businesses are structured” and by changing “how consumers obtain services, information, and goods.”\textsuperscript{178} Although the term “digital economy” seems highly theoretical, this trend is more easily understood by looking at some of today’s dominant companies: Uber, Facebook, and Airbnb.\textsuperscript{179} Uber is the world’s largest ride-sharing company, yet it does not own any vehicles of its own.\textsuperscript{180} Facebook is one of the world’s most popular media owners, yet, it does not create content of its own.\textsuperscript{181} Airbnb is one of the world’s largest vacation rental providers, yet it does not own the real estate it provides to renters.\textsuperscript{182} These real-life examples show an overriding trend: digitization is disrupting traditional business norms.\textsuperscript{183}

In addition, the digital economy has disrupted traditional forms of consumer interaction.\textsuperscript{184} Today, consumers use computers “to identify sellers, evaluate products and services, compare prices, and exert market leverage.”\textsuperscript{185} As a result, the digital economy has altered the means by
which retailers connect with potential customers and express their brand value. Instead of relying on brick-and-mortar stores as the primary means to reach customers, retailers now use the internet to expand customer reach. Thus, the rapid digital transformation of our society and economy is of note when discussing the rising value of IP in bankruptcy transactions.

iii. The Impact of the 2008 Financial Crisis on Consumer Behavior

It would be unwise to discuss the potential recession caused by COVID-19 without mentioning the 2008 Financial Crisis, or “the Great Recession.” A “recession” typically consists of two consecutive quarters of declining gross domestic product (GDP), usually caused by a sudden economic shock, excessive debt, asset bubbles, excess inflation, excess deflation, or even technological change. The 2008 Financial Crisis was caused by a combination of factors with roots in the U.S. housing market. In total, the Great Recession caused American households’ net-


Id.


David Rodeck, What is a Recession?, FORBES, https://www.forbes.com/advisor/investing/what-is-a-recession/ (Aug. 4, 2021, 8:42 PM). Alternatively, a “recession” can be defined as “a significant decline in economic activity that lasts for months or even years.” Id.

worth to decline by 26%. In more drastic terms, the crisis cost each American an average of $70,000. As a result, the Great Recession greatly impacted the retail industry with declines in consumer spending and shifts in consumer habits.

The Great Recession had lasting impacts on the retail industry. Ten years after the crisis, U.S. gross domestic product (GDP) was still “well below” pre-crisis predictions. The Great Recession was no exception, causing “record-breaking declines in sales, inventories, consumer confidence, and stock prices.” Retail sales dropping to 35-year lows dramatically shifted consumer preferences and buying habits. Instead of buying items at full price, the 2008 Financial Crisis conditioned consumers to “wait for the deal,” even after the recession ended. This is because retailers, during the recession, resorted to deep discounts to pad their bottom lines. This measure, however, caused a

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196 Samuel Cook, Which Industries Will be Most Affected by a Recession?, KENZIE ACAD. (Apr. 28, 2020), https://kenzie.snhu.edu/blog/which-industries-will-be-most-affected-by-a-recession/.

197 Farfan, supra note 194.

198 Andres, supra note 193. See also Farfan, supra note 194.

199 Lauren Thomas & Lauren Hirsch, 10 Years After the Financial Crisis, Americans are Still Looking for a Deal, CNBC (Sept. 18, 2018, 8:36 AM), https://www.cnbc.com/2018/09/18/ten-years-after-the-financial-crisis-were-still-looking-for-a-deal.html.

200 Andres, supra note 193.
shift in consumer mentality.\textsuperscript{201} Instead of buying products at full price, many consumers are now conditioned to hunt for sales and discounts.\textsuperscript{202} This shift is revealed in the rise of discount retailers, such as T.J. Maxx, Nordstrom Rack, and Saks Off Fifth.\textsuperscript{203}

Not only did the Great Recession impact consumer spending, it also revealed the overabundant amount of brick-and-mortar stores in the United States.\textsuperscript{204} In the midst of the crisis, 87 million square feet of retail space went dark.\textsuperscript{205} As the crisis wound down and consumers returned to stores, the pace of physical retail growth slowed down exponentially.\textsuperscript{206} From 2000 to 2008, new retail space grew by approximately 172 million square feet per year.\textsuperscript{207} However, from 2010 to 2018, the pace of retail growth dropped to about 48 million square feet per year.\textsuperscript{208} This is a significant decrease, about 72 percent.\textsuperscript{209} This extreme decline in the pace of brick-and-mortar growth signals a shift away from traditional, mall-oriented retail practices. In sum, the 2008 Financial Crisis exposed an overpopulated physical retail environment and conditioned consumers to hunt for “the deal.”

iv. The “Retail Apocalypse” and “Amazon Effect”

In 2017, conversations arose of a so-called “Retail Apocalypse.”\textsuperscript{210} This occurred after nine major retailers filed for bankruptcy and closed close to 7,000 physical locations.\textsuperscript{211} 2018 faced a

\begin{flushright}
  \textsuperscript{201} Thomas & Hirsch, supra note 199. \\
  \textsuperscript{202} Id. \\
  \textsuperscript{203} Id. \\
  \textsuperscript{204} Id. \\
  \textsuperscript{205} Id. \\
  \textsuperscript{206} Thomas & Hirsch, supra note 199. \\
  \textsuperscript{207} Id. \\
  \textsuperscript{208} Id. \\
  \textsuperscript{209} Thomas & Hirsch, supra note 199. \\
  \textsuperscript{210} Mairead J. Fitzgerald-Mumford, Shells of the Stores They Once Were: Returning Vacant Retail Property to Productive Use in the Midst of the “Retail Apocalypse”, 94 NOTRE DAME L. REV. 1797, 1797 (2019). \\
\end{flushright}
similar trend with 9,300 store closings. As represented by the numbers, the Retail Apocalypse refers to mass closures of brick-and-mortar retail stores in the U.S. This trend is a symptom of the disruption caused by the 2008 Financial Crisis, the transition to the digital economy, and the “Amazon Effect,” discussed below.

The Retail Apocalypse coincides with another phenomena: the “Amazon Effect.” The “Amazon Effect” refers to the disruption of traditional retail practices caused by the increase in online shopping, namely due to Amazon. For reference, Amazon accounted for almost fifty percent of all U.S. e-commerce purchases and five percent of all combined online and offline sales in 2018. The Amazon Effect has disrupted consumer behaviors and expectations. Due to its vast selection, fast shipping, free returns, and low prices, Amazon has cultivated new

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215 AJ Agrawal, The ‘Amazon Effect’: How Ecommerce Will Change in 2019 and Beyond, ENTREPRENEUR.COM (Jan. 3, 2019), https://www.entrepreneur.com/article/325556; see also Kate Taylor, One statistic shows how much Amazon could dominate the future of retail, BUS. INSIDER (Nov. 1, 2017, 1:20 PM), https://www.businessinsider.com/retail-apocalypse-amazon-accounts-for-half-of-all-retail-growth-2017-11. According to Starbucks CEO and Chairman Howard Schultz, “For every consumer brand that exists today, especially a brick-and-mortar retailer like Starbucks, there are very unique challenges because there is such a seismic change in consumer behavior, the Amazon effect—everything.” Kate Taylor, Businesses everywhere are getting slammed by the Amazon effect — and Starbucks is bracing for the impact, BUS. INSIDER (Oct. 10, 2017, 8:03 AM), https://www.businessinsider.com/starbucks-shultz-amazon-effect-threatens-retailers-2017-10. Further, Schultz claims that, “Starbucks, like every other consumer brand, must push for innovation and must do everything possible not to embrace the status quo,” to compete with Amazon. Id.
consumer expectations. Consumers now expect the same smoothness, variety, deals, timely response, and convenience of Amazon in other businesses, even those operating in-store. Retailers, for example, who cannot compete with Amazon on such e-commerce factors, may suffer the consequences via reputation and goodwill. In sum, the retail industry has seen many shifts throughout the years. In combination, these most recent trends reveal a digital shift: traditional means of retailing are out, e-commerce is in. These trends also unveil new consumer expectations: desire for extreme convenience, deep discounts, wide variety, and exceptional online interface.

III. THE IMPACT OF COVID-19 ON THE RETAIL INDUSTRY

COVID-19 has created and exacerbated many problems in the United States. The retail industry was among those hit hardest by COVID-19 government mandates and consumer safety concerns. Many major retailers filed Chapter 11 bankruptcy petitions amid COVID-19, such as J.Crew, Lucky Brand, and Brooks Brothers. Others saw significant declines in revenue, including the likes of Marc Jacobs, Nike, Under Armour, and Urban Outfitters. In 2020 alone, a record number of 12,200 stores closed their doors, concentrated particularly among mall-based retailers. This number amounted to 159 million square feet of retail space. Further, in 2020, there were more than 32,506 new bankruptcy filings with over 7,000 being commercial. Accordingly, bankruptcy

216 Agrawal, supra note 215.
219 Id.
221 Id.
filings among retailers marked the worst increase since 2008, even impacting American mainstays like JCPenney and Stein Mart. The pandemic created problems of its own, but also accelerated pre-existing retail trends.

A. The Impact of COVID-19 on Consumer Expectations

Consumer expectations have shifted due to nationwide stay-at-home orders, government-mandated store closures, and raging illness. At the onset of COVID-19, most states issued stay-at-home orders.224 Citizens were encouraged to remain home at all times except for permitted errands.225 With surges well-into 2020, some states, like California, re-issued such orders.226 In addition, many local and state authorities mandated that certain “non-essential” retailers close.227 However, these


225 Id.

226 See About COVID-19 Restrictions, CA.GOV, https://covid19.ca.gov/stay-home-exception-for-essential-needs/#:~:text=All%20individuals%20living%20in%20the%20state%20must%20stay%20home%20and%20leave%20home%20for%20essential%20activities%20such%20as%20work%20or%20school%20and%20daily%20tasks.&text=All%20individuals%20living%20in%20the%20state%20must%20stay%20home%20for%20essential%20activities%20such%20as%20work%20or%20school%20and%20daily%20tasks. (last updated Jan. 8, 2021) (noting orders which were issued well after the pandemic began).

orders affected retailers disproportionately. Retailers deemed “essential,” such as grocery stores, pet stores, and pharmacies, remained open.\(^{228}\) This included the likes of Target, Walmart, and Costco.\(^{229}\) Many “essential” retailers’ sales soared as they remained the only in-person shopping options.\(^{230}\) However, retailers without the coveted “essential” label struggled.\(^{231}\) For example, after Macy’s, a department store, was deemed “non-essential,” it remained closed and lost business to the likes of Amazon, Target, and Walmart.\(^{232}\) These mandated closures based only upon product offerings have been especially damaging to specialized retailers, particularly, clothing retailers like J. Crew.\(^{233}\) As a result of mandated closures, many consumers resorted to the same “essential” retailers.

COVID-19 will likely have lasting impacts on the way consumers relate to retailers.\(^{234}\) “[C]ontagion, self-isolation, and economic uncertainty” will have lasting impacts on consumer behavior.\(^{235}\) First, many consumers amid COVID-19 have faced economic uncertainty and job insecurity.\(^{236}\) Like the Great Recession, this means restricted spending


\(^{228}\) Bose, supra note 227.


\(^{230}\) Id.

\(^{231}\) Id.


\(^{233}\) Id. Many retail groups claimed that “it is unfair to require some stores to close while allowing others to remain open based on what they sell.” Id.


\(^{235}\) Id.

\(^{236}\) Id. at 2.
on retail.\textsuperscript{237} Yet, COVID-19 is unique in that some consumers actually saved funds.\textsuperscript{238} Less spending on prior necessities, like gas and business attire, gave some consumers extra cash for funding particular online purchases.\textsuperscript{239} According to a McKinsey report on consumer behavior, COVID-19 caused a surge in e-commerce expenditures, a preference for trusted brands, and a decline in discretionary spending.\textsuperscript{240} In addition, the personal savings rate jumped from eight to thirty-three percent from February to March of 2020.\textsuperscript{241} Taken together, this information shows that consumers are more selective both in the brands they buy from and the amount they spend. Those companies with strong goodwill attached to their trademarks will likely reap the benefits of this behavior trend.\textsuperscript{242}

Consumer preferences for personal safety, health, and convenience increased amid the pandemic, with effects on the retail industry.\textsuperscript{243} COVID-19, in particular, created a surge in e-commerce transactions.\textsuperscript{244} Global adoption rates of e-commerce covered a decade’s worth of change in only eight weeks.\textsuperscript{245} In addition, many retailers began offering convenient alternatives such as options to buy product online and pick up in-store or curbside.\textsuperscript{246} Like the Great Recession’s impact, consumers will likely expect lasting convenience options.\textsuperscript{247} Thus, failure

\begin{itemize}
\item 238 Id.
\item 239 See id. See also Rimma Kats, Consumers Are Spending Less on Clothes and More on Food, HEALTH PRODUCTS, EMARKETER (Apr. 21, 2020), https://www.emarketer.com/content/consumers-are-spending-less-on-clothes-and-more-on-food-health-products.
\item 240 Id.
\item 243 See generally Kohli, supra note 234.
\item 244 Kohli et al., supra note 234, at 3.
\item 245 Id.
\item 246 Sides et al., supra note 234.
\item 247 Id.
\end{itemize}
to meet newfound consumer expectations may result in a diminishing of the retailer’s business and brand.\footnote{248}{See id.}

COVID-19 likely will have lasting impacts on brand loyalty. As mentioned above, consumers have newfound preferences for personal health and greater convenience.\footnote{249}{See generally Kohli, supra note 234.} At the onset of the pandemic, seventy-five percent of consumers tried new brands, places to shop, or methods of shopping.\footnote{250}{Tamara Charm, Janette Hwang, Jackie Laird, Nancy Lu, et al., \textit{Survey: US Consumer Sentiment During the Coronavirus Crisis}, McKinsey \& Co. (Dec. 14, 2021), https://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/survey-us-consumer-sentiment-during-the-coronavirus-crisis#.} This behavior was primarily driven by convenience and value.\footnote{251}{Id.} Although some pandemic-driven consumer behaviors likely will diminish as health conditions improve, consumer product selectivity based on convenience, value, and trusted brand names will likely remain.\footnote{252}{See Kohli et al., supra note 234.} In a recent study, 60\% of brand-loyal consumers chose reputable brand-name products because they believed them to be of higher quality and more trustworthy.\footnote{253}{Global State of the Consumer Tracker, Deloitte, https://www2.deloitte.com/us/en/insights/industry/retail-distribution/consumer-behavior-trends-state-of-the-consumer-tracker.html (last updated Jan. 6, 2021). See also Richard Edelman, \textit{Trust Barometer Special Report: Brand Trust and the Coronavirus Pandemic}, Edelman (Mar. 30, 2020), https://www.edelman.com/research/covid-19-brand-trust-report (referenced article is an ongoing survey, the cited information for this article is current as of publication of this article).} So, for those retailers that adapt to meet changing consumer preferences, brand loyalty will likely remain strong.\footnote{254}{See Bevin Arnason \& Livia Zufferli, \textit{COVID-19: Maintaining Customer Loyalty And Trust During Times Of Uncertainty}, Deloitte (last visited Feb. 17, 2022), https://www2.deloitte.com/ca/en/pages/finance/articles/covid-19-maintaining-customer-loyalty-trust-during-uncertainty.html.} Yet, retailers that fail to meet new consumer expectations, such as convenience and online shopping, may lose consumers’ confidence and trust.\footnote{255}{See Rachel Diebner, Elizabeth Sullivan, Kelly Ungerman \& Maxence Vancauwenbergh, \textit{Adapting Customer Experience In The Time Of Coronavirus}, McKinsey \& Co. (Apr. 2, 2020), https://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/adapting-customer-experience-in-the-time-of-coronavirus.} Thus, retailers
must utilize convenient options and preserve quality to maintain trustworthiness and to survive the impacts of COVID-19. Without such traits, the goodwill and reputation associated with the retailer will likely diminish. These changing consumer expectations provide ample opportunities for competitors and investors alike to revitalize and modernize an outdated brand.

B. The Impact of COVID-19 on Intellectual Property Bids

In recognition that online shoppers are more likely to trust and buy from recognizable brands, competitors and investors alike are stalking bankruptcy auctions for brand-building IP assets.256 As previously discussed, many companies now hold most of their value in IP.257 Thus, these eager bidders are searching for two things in troubled retailers: (1) established reputations and (2) strong customers relations.258 In other words, they seek trademarks, along with the goodwill of the business they represent, and trade secrets.259

Many bankruptcy bidders, primarily brand-management and holding companies, are hunting for troubled retailers with established reputations but outdated business models.260 As retail shifts to the digital arena, trademarks and trade secrets have become huge draws at bankruptcy


257 Id.

258 Id.

259 See supra, Section II (discussing intellectual property and its value generally).

actions. A strong brand provides resilience during market downturns. Yet, creating a strong brand can take years of time and effort. Thus, these bidders hope to shortcut this process by buying trademarks and the goodwill associated with them. One such bankruptcy bidder is Retail Ecommerce Ventures (REV). REV’s goal: buy troubled, recognizable companies for pennies-on-the-dollar and transform them into booming e-commerce retailers. Recently, REV purchased Pier 1’s IP, data, and other assets related to its e-commerce business for the low price of $31 million. REV also purchased Stein Mart’s IP for the low price of $6 million. Other bidders include Simon Property Group and Brookfield Asset Management, who acquired Brooks Brothers ($325 million) and Lucky Brand ($140 million). These three examples of holding firms buy so-called “zombie-brands,” brands that are well-regarded in the public but

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262 Id.


265 Id.


267 Id. REV currently holds brands such as Pier 1, Radio Shack, Dressbarn, Stein Mart, Modell’s Sporting Goods, and Linens ‘n Things. Id.


270 LeClair, supra note 260.
have grown out of popularity. These holding companies hope to revive “zombie-brands” by modernizing business mechanisms and transitioning them to booming e-commerce ventures. In order to do so, they need the public recognition tied to the trademark as well as the underlying business.

In addition to reputable trademarks, bankruptcy bidders seek trade secrets, in other words, they want customer data. As previously discussed, customer data is valuable for building a retailer’s goodwill and enhancing public recognition. Accordingly, holding companies hoping to revive dying brands online want this data to also shortcut the brand-building process. This approach, however, raises concerns of consumer privacy. Some retailers have preemptively addressed the issue of consumer privacy by including provisions allowing sale of such consumer data in company privacy policies. Such provisions typically describe the effect of a future sale of the consumer’s information to another entity. Bidders who buy this data from companies with such policies have no problem. Issues may arise if a retailer lacks such provision. What those

271 Id.
272 Id.
275 Miranda, supra note 274.
276 Id.
277 Id.
278 Id.
279 Id.
280 For example, Dick’s Sporting Goods purchased the Sports Authority’s customer data to capitalize on Sports Authority’s customers. Customers could opt-out of their data being shared. See Lauren Zumbach, Sports Authority Customer Data Sold to Dick’s, but Customers can opt out, CHICAGO
issues may be, however, are beyond the scope of this comment. In sum, bankruptcy bidders are buying retailer IP to shortcut the brand-building process and fast-track their way to online success.281

This trend does not end with bankruptcy auctions. Troubled companies that have retained their IP, or have not sold it during a bankruptcy auction, have also shifted their focus to e-commerce.282 For example, Neiman Marcus established a new board of directors, adding eBay’s former Chief Strategy Officer.283 This addition is noteworthy because of the new member’s relationship to eBay, an early mover in e-commerce retail space.284 This hire may signal a greater focus on e-commerce. In addition, J. Crew, which filed for Chapter 11 bankruptcy protection in May, emerged with a new strategy “focused on three core pillars: delivering a focused selection of iconic, timeless products; elevating the brand experience to deepen [its] relationship with customers; and prioritizing frictionless shopping.”285 Popular frictionless shopping options include mobile ordering, order-ahead solutions, curbside pickup, and delivery.286 This statement suggests that J.Crew is emerging from bankruptcy ready to address shifting consumer expectations, such as those tailored towards greater convenience. Thus, COVID-19 retail bankruptcies have revealed the importance of IP, particularly trademarks and trade secrets, in the post-pandemic retail-space, particularly among new players.

281 Miranda, supra note 274.
282 LeClair, supra note 260.

COVID-19 retail bankruptcies provide many lessons. Retailers must meet shifting consumer demands and adapt to industry shifts to survive. Additionally, trademarks and trade secrets are and likely continue to be among retailers’ most valuable assets in the digital realm.287 Of most importance, COVID-19 retail bankruptcies have two key takeaways. First, COVID-19 bankruptcies show that retailers must not devalue their IP; instead, they must maximize its use to make the shift online. Second, new owners of IP must be vigilant in protecting the distinctiveness of the business they buy to maintain customer loyalty.

First, COVID-19 retail bankruptcies show that retailers must focus their attention on e-commerce. The shift is clear: digital is in, brick-and-mortar is out.288 These bankruptcies solidify this pre-existing trend.289 That is not to say brick-and-mortar is “dead.” Yet, it is clear retailers must digitize to maintain and grow the reputation and goodwill attached to their company.290 As more retailers shift to e-commerce, the digital retail realm will likely become increasingly competitive.291 The internet may become the equivalent of a gigantic digital mall. Thus, retailers will need to develop, innovate, and invest in their IP, particularly trademarks and trade secrets.292 In doing so, the value of trademarks and trade secrets will only go up.293 As retailers specialize and adapt, early e-commerce movers may need to watch their backs.294

288 Id.
289 Id.
291 Id.
292 Id.
293 Id.
294 Agrawal, supra note 215; see also Kate Taylor, One Statistic Shows How Much Amazon Could Dominate the Future of Retail, BUS. INSIDER (Nov. 1,
Second, bids by holding companies may be detrimental to brand value. Many holding companies aggregate brands into larger portfolios. This runs the risk of the brand losing the very "ethos" or "DNA" that brought customers to it in the first place. A brand has roots in its founder; the founder constructed the company’s reputation and goodwill. Detaching a brand from its founder may disrupt consumer trust and impact brand loyalty. New owners may displace the soul or essence of the brand with an overriding need for profit. In other words, the trademark is legally transferred to new owners with goodwill attached; however, if the new owners do not act in light of or preserve the reputation symbolized by the trademark, consumers may lose respect for the brand. As a result, the mark's value may deteriorate. For example, bidder REV now owns a portfolio of IP assets for various brands. However, each REV-affiliated brand shares a website heading with a link to all other

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296 Leclair supra, note 260.  
297 Id.  
298 See Amit Dua, *How The Founder’s Personal Brand Impacts The Business*, Inc42 (Apr. 12, 2017), https://inc42.com/entrepreneurship/how-founders-personal-brand-impacts-business (noting that “startups have little to count on except for the founder or CEO’s personal brand and goodwill in the market . . .”).  
299 Id. Dua notes that the influence of a CEO’s individual branding on a business can be so strong that their departure can cause “an immediate detrimental impact on the business.” Id.  
301 TFL supra, note 273.  
302 Id.  
303 Valinsky, *supra* note 269.
affiliates pages. This website setup is similar to Gap, in which each of Gap's sub-brands, including Old Navy, Gap, Athleta, and Banana Republic, share a website header. Perhaps this tactic will boost sales revenue, however, it could also erode each brands' distinctive features by association to previously unrelated brands. Only time will tell. Thus, bankruptcy IP buyers must be vigilant in protecting the distinctive elements of the businesses they buy. In doing so, they will retain the trademark and also maintain customer loyalty.

IV. CONCLUSION

In sum, retailer bankruptcies during COVID-19 reflect the accumulation and acceleration of many pre-existing retail trends. Retailers in the COVID-19 era and beyond must acknowledge the changing retail industry and adapt by using their IP. In doing so, retailers must focus on shifting consumer behaviors to build the goodwill attached to their trademarks and propel brand growth. Strong IP assets, particularly trademarks and trade secrets, are vital to survival in a post-pandemic environment.