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

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WHAT COVID-19 RETAIL BANKRUPTCIES CAN TEACH US ABOUT
INTELLECTUAL PROPERTY IN A POST-PANDEMIC WORLD

Brenna Arbuckle

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INTRODUCTION

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.¹ As a result of this digital shift, a retailer’s intellectual property (IP) has become one of its most valuable assets.² As studies show, online shoppers are more likely to trust and purchase products from

¹ Cameron Cook, *Intellectual Property Value in the COVID-19 Era*, GORDON BROS. (July 2, 2020), <https://assets.gordonbrothers.com/insights/article/2020/intellectual-property-value-in-the-covid-19-era>.

² *Id.*

reputable brands.³ 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.⁴ Many recognizable brands filed for bankruptcy, including names such as J. Crew, Neiman Marcus, and Sur La Table.⁵ In 2020 alone, there were nearly 7,200 commercial Chapter 11 bankruptcy filings, more than any single year since 2012.⁶ Among bankrupt retailers, IP may be their most valuable asset.⁷ 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.⁸

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%20Spec1%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/>.

⁵ Abha Bhattarai, *Pandemic Bankruptcies: A Running List of Retailers That Have Filed For Chapter 11*, WASH. POST (Dec. 4, 2020), <https://www.washingtonpost.com/business/2020/05/27/retail-bankruptcy-chapter11/>.

⁶ *December 2020 Commercial Bankruptcy Filings*, AACER, <https://abi-org-corp.s3.amazonaws.com/articles/aacer-dec-2020-commercial-bankruptcy-filings-all-chapters-ch-11-focus.xlsx> (last visited Feb. 20, 2021). This compares to 2012, when there were nearly 7,800 commercial Chapter 11 filings. *Id.*

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.

⁹ Peter S. Menell, *Bankruptcy Treatment of Intellectual Property Assets: An Economic Analysis*, 22 BERKELEY TECH. L.J. 733, 737 (2007).

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.”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

¹³ *What is Intellectual Property?*, WORLD INTELL. PROP. ORG. 1 (2004), https://www.wipo.int/edocs/pubdocs/en/wipo_pub_450_2020.pdf.

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.*

¹⁹ KURT M. SAUNDERS, *INTELLECTUAL PROPERTY LAW: LEGAL ASPECTS OF INNOVATION AND COMPETITION* (West Academic Publishing ed., 1st Ed. 2016).

²⁰ WIPO, *supra* note 13, at 2.

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”²¹ Patents are governed by federal law: the Patent Act.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.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.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.²⁵

ii. Copyright

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”²⁶ Such author may be a person, a company (under a work-made-for-hire arrangement), or multiple people (joint work).²⁷ Copyrights are governed by federal law: the Copyright Act.²⁸ A copyrighted work must fall within one of the eight broadly construed categories of “works of authorship.”²⁹ Works of authorship include the following categories: (1) literary works; (2) musical

²¹ 35 U.S.C. § 101. *See also* U.S. PAT. AND TRADEMARK OFF., *General Information Concerning Patents*, USPTO (Oct. 2015) <https://www.uspto.gov/patents/basics/general-information-patents>.

²² 35 U.S.C. §§ 1–390.

²³ 35 U.S.C. §§ 100–105.

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.*

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.

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).

²⁷ 17 U.S.C. § 201.

²⁸ 17 U.S.C. §§ 101–805.

²⁹ 17 U.S.C. § 102(a).

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.³⁰ It is worth noting that registration is not required for a valid copyright.³¹ Instead, a copyright springs into existence when an *original* work is *fixed* in a tangible medium, such as paper or a hard drive.³² To meet the “originality” requirement, the work must be independently created by the author and have some modest quantum of creativity.³³ 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.³⁴ Generally, copyright protection lasts for the life of the author plus 70 years.³⁵ 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.³⁶

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.”³⁷ Put simply, trademarks are source-identifiers, such as brand

³⁰ *Id.*

³¹ *What is Copyright?*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/what-is-copyright/> (last visited Feb.19, 2021).

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).

³⁵ 17 U.S.C. § 302.

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.³⁸ Trademarks are governed both by state common law and federal law (the Lanham Act).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.⁴⁰ This means that the owner must make regular use of the trademark (or “mark”) in interstate commerce to receive federal protection.⁴¹ The mark cannot simply be a placeholder; the owner must have a *bona fide* intent to use it.⁴² The mark must also be affixed to merchandise, be capable of distinguishing the good from others (“distinctive”), and not be functional.⁴³ Like copyright, registration is not required for trademark protection.⁴⁴ However, federal registration offers important advantages over “common law” trademark rights, such as presumption of validity and constructive notice.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 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. *Id.*

³⁸ *Trademark Process*, USPTO, <https://www.uspto.gov/trademarks/basics/trademark-process> (last visited Feb. 19, 2021).

³⁹ See 15 U.S.C. §§ 1051 et seq. See also Menell, *supra* note 9, at 748–49.

⁴⁰ See U.S. Const. Art. I, § 8, cl. 3. Trademark law is tied to unfair competition laws (UCL), which are largely state based. 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. *Id.*

⁴¹ See Menell, *supra* note 9, at 741.

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

⁴³ See SAUNDERS, *supra* note 19, at 473–568.

⁴⁴ *Trademark FAQs*, USPTO, https://www.uspto.gov/learning-and-resources/trademark-faqs#type-general_1976 (last visited Feb. 19, 2021). “Distinctiveness is often expressed on an increasing scale: Word marks may be (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful.” United States PTO v. Booking.com B.V., 140 S. Ct. 2298, 2300 (2020).

⁴⁵ *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), [⁴⁷ 15 U.S.C. § 1125\(a\). The Lanham Act “provides no basis for distinguishing between trademark and trade dress.” *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 773 \(1992\).](https://www.lexology.com/library/detail.aspx?g=5027217f-1db2-4ebb-9838-8696e97c6191#:~:text=Trademark%20Genericide'%20means%20that%20the,p articular%20product%20i.e.%20the%20proprietor. Trademark genericide “means that the marks, due to their own excessive popularity, have become descriptive terms for particular type of products.” <i>Id.</i></p>
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⁴⁸ Laura Ganoza and Hannah Lutz, *Brand Protection: Looking Beyond Trademarks to A Broader Arsenal of Intellectual Property Tools*, THE NAT’L L. REV. (Feb. 13, 2019), <https://www.natlawreview.com/article/brand-protection-looking-beyond-trademarks-to-broader-arsenal-intellectual-property>.

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.

⁵¹ Jonathan Hyman, *These Boots Are Made For Walkin’: Trade Dress and the Distinctive Look of a Boot Sole*, KNOBBE MARTENS (Mar. 22, 2017), [⁵² *Id.*](https://www.knobbe.com/news/2017/03/these-boots-are-made-walkin%E2%80%99-trade-dress-and-distinctive-look-boot-sole#:~:text=The%20classic%20example%20of%20trade,inherently%20distinctive%20and%20immediately%20protectable. The classic example of trade dress is the distinctive Coca-Cola bottle. <i>Id.</i></p>
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⁵³ Menell, *supra* note 9, at 741.

building the ‘goodwill’ surrounding a brand name.”⁵⁴ Therefore, a trademark represents “the public’s confidence or ‘goodwill’ in a particular product.”⁵⁵ As such, trademark protection secures owners the benefit of a good reputation and the goodwill attached.⁵⁶ Because a trademark serves as a symbol of a company’s goodwill, infringement of the mark is viewed as “theft of goodwill.”⁵⁷ 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.⁵⁸ 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.⁵⁹ 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.⁶⁰ Examples of trade secrets include secret recipes, business know-how, and customer data.⁶¹ Trade secrets are largely governed by state law with the exception of two federal acts: the Economic Espionage Act and the Defend Trade Secrets

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.”).

⁵⁵ *Premier Dental Prods. Co. v. Darby Dental Supply Co.*, 794 F.2d 850, 853 (1986).

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).

⁵⁷ *Black’s Law Dictionary* (11th ed. 2019).

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).

⁶⁰ See Brett T. Cooke, *Intellectual Property Licenses and Assignments Under Chapter 11 of the Bankruptcy Code: A Brief Survey of the Nature of Property Rights Conferred and Implications Due to Reorganization*, 15 TEX. INTEL. PROP. L. J. 213, 236 (2007) (discussing the ways in which trade secrets lose protection).

⁶¹ SAUNDERS, *supra* note 19, at 6.

Act.⁶² 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.⁶³

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.⁶⁴ The complexity of a transfer depends the type of IP and form of the transfer.⁶⁵ There are two basic forms of transferring IP assets: by assignment or license.⁶⁶ An “assignment” refers to the complete conveyance or sale of the IP right.⁶⁷ In contrast, a “license” refers to transfers of less than the entirety of the IP right with the owner retaining an interest.⁶⁸ The scope of a license depends upon agreed factors, such as geographic limitations and time restraints.⁶⁹ A license may be exclusive or nonexclusive.⁷⁰ An exclusive license gives the licensee the exclusive right to the particular IP, even to the exclusion of the licensor.⁷¹ A nonexclusive license, by contrast, gives permission only to use the particular IP, but not to the exclusion of the licensor or other licensees.⁷²

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

⁶³ Michael J. Kasdan and Kevin M. Smith, *Trade Secrets: What You Need to Know*, THE NAT’L L. REV. (Dec. 12, 2019), <https://www.natlawreview.com/article/trade-secrets-what-you-need-to-know>; *see Trade Secret Policy, supra* note 59 (noting there is no time-limit to the protection).

⁶⁴ *See generally* 1 New York Intellectual Property Law § 9 (2020) (noting most IP owners realize value from their intellectual property through licensing agreements).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *See generally* 1 New York Intellectual Property Law § 9 (2020) (discussing the scope of a license in intellectual property transactions).

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.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.

i. Trademark Transfers

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

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

⁷³ Cooke, *supra* note 60, at 226.

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).

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.*

⁷⁶ See *Marshak v. Green*, 746 F.2d 927, 929 (2d Cir. 1984); *Greenlon, Inc. of Cincinnati v. Greenlawn, Inc.*, 542 F. Supp. 890, 893 (S.D. Ohio 1982).

⁷⁷ See *United Drug Co.*, 248 U.S. at 97.

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).

⁷⁹ 15 U.S.C. § 1055.

⁸⁰ *Id.*

⁸¹ Cooke, *supra* note 60, at 232.

loss.⁸² In addition, trademark licenses are also personal to the licensee.⁸³ Meaning, unless the licensing agreement indicates otherwise, a licensee cannot assign their particular license without the trademark owner's consent.⁸⁴ 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.⁸⁵ So, trade secrets can be assigned via any valid contract subject to confidentiality provisions.⁸⁶ Without such confidentiality, the trade secret may lose protection altogether.⁸⁷ Trade secret information can also be licensed, but must also be subject to confidentiality provisions if so.⁸⁸ Trade secret licenses are typically personal.⁸⁹ Thus, the licensee usually cannot assign the license without the owner's consent.⁹⁰ 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.⁹¹ Bankruptcy actions take place in federal Bankruptcy Courts and are governed by the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules").⁹² The

⁸² *Id.*

⁸³ See 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 25.33 (4th ed. rev. 2006).

⁸⁴ *Id.*

⁸⁵ See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984).

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.⁹³ This filing may be voluntary under Section 301 or forced by creditors under Section 303.⁹⁴ 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.⁹⁵ Second, it creates the “bankruptcy estate.”⁹⁶ 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.⁹⁷ 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.⁹⁸ The bankruptcy estate functions as “the pot out of which creditors’ claims are paid.”⁹⁹

The Bankruptcy Code provides two ways in which a company-debtor can discharge outstanding obligations: reorganization under Chapter 11 or liquidation under Chapter 7.¹⁰⁰ The first option is reorganization under Chapter 11. Chapter 11 provides a framework in which a debtor can reorganize debts and continue operations.¹⁰¹ 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.¹⁰² By doing so, the debtor can start afresh by

bankruptcy. *Process–Bankruptcy Basics*, U.S. COURTS, <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics> (last visited Jan. 8, 2021).

⁹³ 11 U.S.C. §§ 301–303.

⁹⁴ *Id.*

⁹⁵ 11 U.S.C. § 362.

⁹⁶ 11 U.S.C. § 541.

⁹⁷ *Id.*

⁹⁸ 11 U.S.C. §§ 322, 1107.

⁹⁹ *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1656 (2019).

¹⁰⁰ 11 U.S.C. §§ 701–784, 1101–1195.

¹⁰¹ *See* 11 U.S.C. §§ 1101–1174 (2006). *See also* *Mission*, 139 S. Ct. at 1656.

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.¹⁰³ The other option is liquidation under Chapter 7.¹⁰⁴ 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.¹⁰⁵ Because all of the company-debtor’s assets are liquidated, Chapter 7 bankruptcies generally refer to the company’s death.¹⁰⁶

i. Intellectual Property and Executory Contracts

Bankruptcy is further complicated when the debtor is a licensor or licensee. Such arrangements are typically considered executory.¹⁰⁷ A contract is executory “if performance remains due to some extent on both sides” of the transaction.¹⁰⁸ Why are these contracts important to distinguish? Executory contracts differ from other assets held by the debtor.¹⁰⁹ Instead of automatically entering the bankruptcy estate upon filing, the trustee or DIP must either assume or reject executory contracts, subject to court approval.¹¹⁰ If rejected, the contract is considered breached and may give rise to a claim for breach of contract.¹¹¹ 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[,] upon a reasonable basis[,] and within the scope of authority under the Bankruptcy Code.”)

¹⁰³ 11 U.S.C. §§ 1121, 1125; Will Kenton, *Reorganization*, INVESTOPEDIA, <https://www.investopedia.com/terms/r/reorganization.asp> (last updated Dec. 31, 2020).

¹⁰⁴ 11 U.S.C. §§ 701–784.

¹⁰⁵ 11 U.S.C. § 704. *See also* Abha Bhattarai, *What is Chapter 11 Bankruptcy?*, WASH. POST (July 23, 2020, 8:04 AM), <https://www.washingtonpost.com/business/2020/07/23/faq-chapter-11-bankruptcy/>.

¹⁰⁶ Bhattarai, *supra* note 105.

¹⁰⁷ Menell, *supra* note 9, at 764.

¹⁰⁸ *Mission Prod. Holdings v. Tempnology, LLC*, 139 S. Ct. 1652, 1656 (2019) (quoting *NLRB v. Bildisco & Bildisco*, 465 U. S. 513, 522, n. 6 (1984) (internal quotation marks omitted)).

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.¹¹² However, after assuming the contract, the trustee or DIP may assign it to a third party.¹¹³

Executory contracts are even more complicated in the context of intellectual property (IP).¹¹⁴ Assignments of IP rights are typically *not* “executory” because little to no obligations remain on both sides after assignment.¹¹⁵ Licenses, however, are typically considered “executory.”¹¹⁶ For example, trade secret licenses are usually executory because both parties to the contract must maintain secrecy.¹¹⁷ 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.¹¹⁸ Thus, it is worthy to note whether a company-debtor is a licensor or licensee of an IP right.¹¹⁹

If the debtor is a licensor they can reject the licensing agreement.¹²⁰ However, section 365(n) of the Bankruptcy Code provides that such rejection does not revoke the licensee’s license.¹²¹ Instead, the rejection functions as a breach of contract.¹²² In the past, courts struggled in applying this concept to trademark licenses because the definition of “intellectual property” in the Bankruptcy Code excluded trademarks.¹²³ The Seventh Circuit advocated for a rejection-as-breach approach, consistent with the treatment of other forms of IP, while the First Circuit advocated for a rejection-as-revocation approach.¹²⁴ The Supreme Court,

is-a-victory-for-trademark-licensees-but-doesnt-completely-resolve-the-debate-over-the-effects-of-rejection/.

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.*

¹²⁰ 11 U.S.C. § 365(n).

¹²¹ *See* Mission Prod. Holdings v. Tempnology, LLC, 139 S. Ct. 1652, 1656 (2019).

¹²² *Id.*

¹²³ 11 U.S.C. § 101; *See* Menell, *supra* note 9, at 773–75.

¹²⁴ *See generally* Mission Prod. Holdings v. Tempnology, LLC (*In re* Tempnology, LLC), 879 F.3d 389 (1st Cir. 2018); Sunbeam Prods., Inc. v. Chicago Am. Manuf., LLC, 686 F.3d 372 (7th Cir. 2012).

in *Mission Product Holdings, Inc. v. Tempnology, LLC*, sided with the Seventh Circuit and settled on the rejection-as-breach approach.¹²⁵ 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.¹²⁶ Therefore, trademark licenses are treated the same as other IP licenses under Section 365(n).¹²⁷

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.¹²⁸ Section 363(b) sales (“363 Sales”) can move quickly, especially when the debtor has identified a “stalking-horse” bidder prior to filing.¹²⁹ If obtained, the stalking-horse bid sets the floor for the general auction.¹³⁰ A competitive bidding process for the debtor’s assets ensues at a general auction, usually resulting in a sale to the best offer.¹³¹ After obtaining court approval of the sale, proceeds are used to repay

¹²⁵ *Mission Prod. Holdings*, 139 S. Ct. at 1652.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ 11 U.S.C. § 363(b).

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.

¹³¹ *Distressed M&A - A Road Map for Potential Buyers of Distressed Businesses in the US in Section 363 Bankruptcy*, BAKER MCKENZIE (Apr. 8, 2020), <https://www.bakermckenzie.com/en/insight/publications/2020/04/distressed-ma-road-map>.

creditors.¹³² Thus, 363 sales provide ample opportunity for competitors and investors alike to buy a troubled company's assets at a bargain price.¹³³ Such assets may include valuable IP or IP licenses.¹³⁴

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.¹³⁵ As of 2018, retail supported more than one in four American jobs, totaling about 52 million working Americans.¹³⁶ In addition, the United States alone has about 4.2 million retail establishments.¹³⁷ 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.¹³⁸ 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.¹³⁹

Retail encompasses a variety of businesses, including clothing, book, and general merchandise stores.¹⁴⁰ There are two major methods

¹³² Paul A. Fanning & Tyler J. Russell, *The Section 363 Sale Process: Buying Assets from a Bankrupt Company*, THE NAT'L L. REV. (Sept. 5, 2017), <https://www.natlawreview.com/article/section-363-sale-process-buying-assets-bankrupt-company>. Bankruptcy courts almost always approve of sales due to the deferential business judgment standard. *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ PRICEWATERHOUSECOOPERS, THE ECONOMIC IMPACT OF THE US RETAIL INDUSTRY, 9 (May 2020), <https://cdn.nrf.com/sites/default/files/2020-06/RS-118304%20NRF%20Retail%20Impact%20Report%20.pdf>.

¹³⁶ *Id.* at E-1.

¹³⁷ *Id.*

¹³⁸ *What is retail? Definition and examples*, MKT. BUS. NEWS, <https://marketbusinessnews.com/financial-glossary/retail/#:~:text=The%20retail%20sector%20includes%20all,personal%20and%20not%20business%20use> (last visited Feb. 18, 2021).

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

¹⁴⁰ Barbara Farfan, *2016 US Retail Industry Overview*, BALANCE EVERYDAY, <https://www.thebalanceeveryday.com/us-retail-industry-overview-2892699> (last updated June 25, 2019).

retailers use to sell products.¹⁴¹ The first is brick-and-mortar retailing, or, selling product from a physical location.¹⁴² The second use, and the newer of the two, is non-store retailing, or selling products without a physical location.¹⁴³ Examples of non-store retailing methods include catalogue sales, e-commerce transactions, and multi-level marketing.¹⁴⁴ Both methods focus on attracting customers through displays, whether that be on shelves in a store or the design of a website.¹⁴⁵

As one may expect, the retail industry is consumer driven. It is highly dependent upon and affected by both consumer behavior and economic conditions.¹⁴⁶ Because consumer spending drives much of the economy, retail sales serve as an important economic indicator.¹⁴⁷ 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.¹⁴⁸ This is because trademarks identify the source of products—the retailer.¹⁴⁹ For example, Nike owns the famous “Swoosh” trademark. Thus, a shirt featuring the “Swoosh” identifies Nike as the shirt's maker.¹⁴⁰ So, trademarks can distinguish one retailer's product from another's.¹⁵⁰ 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.

¹⁴⁸ *Nike Trademarks: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/nike-trademarks> (last updated June 30, 2020).

¹⁴⁹ *Id.*

¹⁵⁰ FL, *Forget Real Estate and Inventory, IP and Data Continue to Be The Draw for Bankruptcy Bidders* (July 30, 2020), <https://www.thefashionlaw.com/forget-real-estate-and-inventory-ip-continues-to-be-a-big-draw-for-bankruptcy-bidders/>.

reputation.¹⁵¹ In a crowded industry like retail, brand value means everything. It enhances perceived quality of product, influences customer decisions, and even promotes additional sales.¹⁵² 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.¹⁵³ For example, retailers typically collect customer data.¹⁵⁴ This may include customers' physical addresses, emails, demographics, personal characteristics, and purchase histories.¹⁵⁵ Retailers often collect and store such data because it provides valuable insight into consumer behaviors and desires.¹⁵⁶ Armed with this knowledge, a retailer can better advertise and target particular consumers, especially in the current digital realm.¹⁵⁷ This, in turn, produces profits and builds reputation with customers.¹⁵⁸ In addition to customer data, trade secret information may include supplier information, marketing strategies, and research findings.¹⁵⁹ In sum, trade secret

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 'n Fly 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.").

¹⁵² Abigail Rubinstein, *7 Reasons Why Trademarks are Important to Your Business*, ENTREPRENEUR (July 24, 2014), <https://www.entrepreneur.com/article/235887>.

¹⁵³ TFL, *From Addresses to Purchase Histories, Customer Data is Driving Retail Bankruptcy Acquisitions* (Aug. 20, 2020), <https://www.thefashionlaw.com/bankruptcy-bidders-wants-customer-data-and-ailing-retailers-are-selling/>.

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.*

¹⁵⁹ John F. Hornick, *Trade Secrets: What Your Company Needs to Know*, FINNEGAN (July/Aug. 2004), <https://www.finnegan.com/en/insights/articles/trade-secrets-what-your-company-needs-to-know->

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.¹⁶⁰ Companies are holding more wealth in intangible assets.¹⁶¹ Consumers and business alike are transitioning to a “digital economy.”¹⁶² In addition, the Great Recession revealed an overpopulated physical retail space and exposed consumers to deep discounts.¹⁶³ Finally, due to Amazon, consumers are opting for online shopping rather than buying products in-store.¹⁶⁴ The combination of five trends detailed below reveal a transitioning retail environment—one that is becoming digitized and modernized.¹⁶⁵

l.html#:~:text=Examples%20of%20trade%20secrets%20can,plans%3B%20budgets%3B%20methods%20of%20calculating.

¹⁶⁰ See *infra* Sections III.C.i–iv.

¹⁶¹ See *infra* Section III.C.i.

¹⁶² See *infra* Section III.C.ii.

¹⁶³ See *infra* Section III.C.iii. “The Great Recession [refers to] the sharp decline in economic activity during the late 2000s. . . . officially lasting from December 2007 to June 2009.” The Investopedia Team, *The Great Recession*, INVESTOPEDIA, <https://www.investopedia.com/terms/g/great-recession.asp> (last updated May 26, 2022).

¹⁶⁴ See *infra* Section III.C.iv.

¹⁶⁵ 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).

i. Companies are Holding More Wealth in
Intangible Assets

Companies are holding more and more wealth in intangible assets. Unlike tangible assets, intangible assets do not have a physical form.¹⁶⁶ Classic examples of intangible assets include IP and stocks.¹⁶⁷ Tangible assets, like inventory, can always be transacted for some monetary value.¹⁶⁸ Intangible assets, however, are riskier because they have no obvious monetary value.¹⁶⁹ This risk makes holding intangible more lucrative than tangible counterparts.¹⁷⁰ As such, more companies are investing in intangible assets. Thus, intangible assets are playing an increasingly larger role in today's economy.¹⁷¹ Company value has noticeably shifted from tangibles to intangibles, like IP.¹⁷² For example, studies show that intangible assets now command over 90% of the S&P 500 market value, a historical high.¹⁷³ In addition, the value of intangible assets in the S&P 500 has risen from \$122 billion in 1975 to \$21.03 trillion in 2018.¹⁷⁴ This shift reflects the fact that “[i]deas and innovation are [becoming] the world's new capital.”¹⁷⁵

¹⁶⁶

Will

Kenton, *Intangible*

Asset, INVESTOPEDIA, <https://www.investopedia.com/terms/i/intangibleasset.asp> (May 29, 2020).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Jenna Ross, *Intangible Assets: A Hidden but Crucial Driver of Company Value*, VISUAL CAPITALIST (Feb. 11, 2020), <https://www.visualcapitalist.com/intangible-assets-driver-company-value/>.

¹⁷² Seyfarth Shaw LLP, *The Valuation of Trade Secrets*, JD SUPRA, <https://www.jdsupra.com/post/contentViewerEmbed.aspx?fid=a64b4690-1522-4587-9488-dff1365f5a65> (last visited Jan. 9, 2021).

¹⁷³ *Intangible Asset Market Value Study*, OCEAN TOMO, <https://www.oceantomo.com/intangible-asset-market-value-study/> (last visited Jan. 8, 2021); Aran Ali, *The Soaring Value of Intangible Assets in the S&P 500*, VISUAL CAPITALIST (Nov. 12, 2020), <https://www.visualcapitalist.com/the-soaring-value-of-intangible-assets-in-the-sp-500/>.

¹⁷⁴ Ali, *supra* note 173.

¹⁷⁵ IPOs, *The Rise of Intangibles in an Increasingly Complex Business Environment*, REUTERS (Aug. 1,

ii. The Rise of the Digital Economy

The digital revolution has also changed the way people and businesses interact, as reflected by the “digital economy.”¹⁷⁶ The digital economy refers to economic activity resulting from “billions of everyday online connections among people, businesses, devices, data, and processes.”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.”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.¹⁷⁹ Uber is the world’s largest ride-sharing company, yet it does not own any vehicles of its own.¹⁸⁰ Facebook is one of the world’s most popular media owners, yet, it does not create content of its own.¹⁸¹ Airbnb is one of the world’s largest vacation rental providers, yet it does not own the real estate it provides to renters.¹⁸² These real-life examples show an overriding trend: digitization is disrupting traditional business norms.¹⁸³

In addition, the digital economy has disrupted traditional forms of consumer interaction.¹⁸⁴ Today, consumers use computers “to identify sellers, evaluate products and services, compare prices, and exert market leverage.”¹⁸⁵ As a result, the digital economy has altered the means by

2019), <https://www.reuters.com/article/sponsored/the-rise-of-intangibles-in-an-increasingly-complex-business-environment>.

¹⁷⁶ *What is Digital Economy?*, DELOITTE, <https://www2.deloitte.com/mt/en/pages/technology/articles/mt-what-is-digital-economy.html> (last visited Jan. 9, 2021).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Tom Goodwin, *The Battle is for the Customer Interface*, TECHCRUNCH (Mar. 3, 2015, 3:00 PM), <https://techcrunch.com/2015/03/03/in-the-age-of-disintermediation-the-battle-is-all-for-the-customer-interface/>.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *See generally What is Digital Economy?*, *supra* note 176.

¹⁸⁴ *Id.*

¹⁸⁵ Thomas L. Mesenbourg, *Measuring the Digital Economy*, U.S. BUREAU OF THE CENSUS 2 (2001),

which retailers connect with potential customers and express their brand value.¹⁸⁶ Instead of relying on brick-and-mortar stores as the primary means to reach customers, retailers now use the internet to expand customer reach.¹⁸⁷ Thus, the rapid digital transformation of our society and economy is of note when discussing the rising value of IP in bankruptcy transactions.¹⁸⁸

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.¹⁸⁹ The 2008 Financial Crisis was caused by a combination of factors with roots in the U.S. housing market.¹⁹⁰ In total, the Great Recession caused American households’ net-

<https://www.census.gov/content/dam/Census/library/working-papers/2001/econ/umdigital.pdf>.

¹⁸⁶ Michael Ellis, *The Evolution of the Internet and Its Impact on Retail Spaces*, WIRED, <https://www.wired.com/insights/2014/07/evolution-internet-impact-retail-spaces/> (last visited Jan. 9, 2021).

¹⁸⁷ *Id.*

¹⁸⁸ See also Aisha Al-Muslim, *Intellectual-Property Assets are Getting More Valuable*, WALL ST. J., <https://www.wsj.com/articles/intellectual-property-assets-are-getting-more-valuable-11597829401> (Aug. 27, 2019, 11:27 AM) (discussing the fact that “[i]ntellectual property assets such brand names, customer data and trademarks [have] gain[ed] value” during the COVID-19 pandemic, as revealed by the “wave of corporate bankruptcies”).

¹⁸⁹ 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.*

¹⁹⁰ Eric Rauchway, *The 2008 Crash: What Happened to All That Money?*, HISTORY, <https://www.history.com/news/2008-financial-crisis-causes> (Jan. 20, 2021). The factors causing the 2008 Financial Crisis include the housing bubble, subprime customer mortgage loans with balloon payments or adjustable interest rates offered by banks, and the widespread bundling of mortgages for purchase by investors. *Id.*

worth to decline by 26%.¹⁹¹ In more drastic terms, the crisis cost each American an average of \$70,000.¹⁹² As a result, the Great Recession greatly impacted the retail industry with declines in consumer spending and shifts in consumer habits.¹⁹³

The Great Recession had lasting impacts on the retail industry.¹⁹⁴ Ten years after the crisis, U.S. gross domestic product (GDP) was still “well below” pre-crisis predictions.¹⁹⁵ As discussed, the retail industry is greatly impacted by economic downturns.¹⁹⁶ The Great Recession was no exception, causing “record-breaking declines in sales, inventories, consumer confidence, and stock prices.”¹⁹⁷ Retail sales dropp[ing] to 35-year lows” dramatically shifted consumer preferences and buying habits.¹⁹⁸ Instead of buying items at full price, the 2008 Financial Crisis conditioned consumers to “wait for the deal,” even after the recession ended.¹⁹⁹ This is because retailers, during the recession, resorted to deep discounts to pad their bottom lines.²⁰⁰ This measure, however, caused a

¹⁹¹ William R. Emmons & Bryan J. Noeth, *Household Financial Stability: Who Suffered the Most from the Crisis?*, ST. LOUIS FED. (July 1, 2012), <https://www.stlouisfed.org/publications/regional-economist/july-2012/household-financial-stability--who-suffered-the-most-from-the-crisis>.

¹⁹² Regis Barnichon, Christian Matthes & Alexander Ziegenbein, *The Financial Crisis at 10: Will We Ever Recover?*, FRBSF (Aug. 13, 2018), <https://www.frbsf.org/economic-research/publications/economic-letter/2018/august/financial-crisis-at-10-years-will-we-ever-recover/>. This value is measured in terms of lifetime present-value income loss. *Id.*

¹⁹³ See Tommy Andres, *Divided Decade: How the Financial Crisis Changed Retail*, MARKETPLACE (Dec. 20, 2018), <https://www.marketplace.org/2018/12/20/what-we-learned-retail/>.

¹⁹⁴ Barbara Farfan, *2016 US Retail Industry Overview*, LIVEABOUT, <https://www.liveabout.com/us-retail-industry-overview-2892699> (June 25, 2019).

¹⁹⁵ Barnichon, et al, *supra* note 192.

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.²⁰¹ Instead of buying products at full price, many consumers are now conditioned to hunt for sales and discounts.²⁰² This shift is revealed in the rise of discount retailers, such as T.J. Maxx, Nordstrom Rack, and Saks Off Fifth.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.²⁰⁴ In the midst of the crisis, 87 million square feet of retail space went dark.²⁰⁵ As the crisis wound down and consumers returned to stores, the pace of physical retail growth slowed down exponentially.²⁰⁶ From 2000 to 2008, new retail space grew by approximately 172 million square feet per year.²⁰⁷ However, from 2010 to 2018, the pace of retail growth dropped to about 48 million square feet per year.²⁰⁸ This is a significant decrease, about 72 percent.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.”²¹⁰ This occurred after nine major retailers filed for bankruptcy and closed close to 7,000 physical locations.²¹¹ 2018 faced a

²⁰¹ Thomas & Hirsch, *supra* note 199.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Thomas & Hirsch, *supra* note 199.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Thomas & Hirsch, *supra* note 199.

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).

²¹¹ *Id.* The list of major Chapter 11 bankruptcies from 2017 include Toys R Us, Styles for Less, Charming Charlie, Payless, Vitamin World, True Religion, Rue21, BCBG Max Aria, RadioShack, and many more. See Corinne Ruff & Ben Unglesbee, *The running list of 2017 retail apocalypse victims*, RETAILDIVE (Dec. 13, 2017), <https://www.retaildive.com/news/retail-bankruptcies-2017/446086/> (noting companies affected in the “Retail Apocalypse”).

similar trend with 9,300 store closings.²¹² As represented by the numbers, the Retail Apocalypse refers to mass closures of brick-and-mortar retail stores in the U.S.²¹³ 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.²¹⁴ 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 2018.²¹⁵ 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

²¹² Jordan Valinsky, *Macy’s is closing 28 stores and a Bloomingdale’s store*, CNN BUSINESS (Jan. 8, 2020, 10:49 AM), <https://amp.cnn.com/cnn/2020/01/08/business/macys-store-closures/index.html>.

²¹³ Hayley Peterson, *The retail apocalypse is still in its ‘early innings’ – and thousands more stores will close before it ends*, BUS. INSIDER (Oct. 3, 2018, 12:50 PM), <https://www.businessinsider.com/retail-apocalypse-is-still-in-early-innings-cowen-says-2018-10>.

²¹⁴ Cory Mitchell, *Amazon Effect*, INVESTOPEDIA (last updated Oct. 31, 2021), <https://www.investopedia.com/terms/a/amazon-effect.asp#:~:text=The%20Amazon%20Effect%20is%20the,the%20increase%20in%20online%20shopping.&text=Online%20shopping%20provides%20convenience%20and,touching%20a%20product%20before%20buying>.

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.²¹⁶ Consumers now expect the same smoothness, variety, deals, timely response, and convenience of Amazon in other businesses, even those operating in-store.²¹⁷ 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.²¹⁸ Others saw significant declines in revenue, including the likes of Marc Jacobs, Nike, Under Armour, and Urban Outfitters.²¹⁹ In 2020 alone, a record number of 12,200 stores closed their doors, concentrated particularly among mall-based retailers.²²⁰ This number amounted to 159 million square feet of retail space.²²¹ Further, in 2020, there were more than 32,506 new bankruptcy filings with over 7,000 being commercial.²²² Accordingly, bankruptcy

²¹⁶ Agrawal, *supra* note 215.

²¹⁷ Mitchell, *supra* note 214. Startups, like Warby Parker, Casper, and Bonobos, have capitalized on this shift in mindset. Derek Thompson, *What in the World Is Causing the Retail Meltdown of 2017?*, THE ATLANTIC (Apr. 10, 2017), <https://www.theatlantic.com/business/archive/2017/04/retail-meltdown-of-2017/522384/>.

²¹⁸ *Retailers and Fashion Brands Severely Affected by COVID-19*, TROUBLED COMPANY REPORTER (Nov. 2, 2020).

²¹⁹ *Id.*

²²⁰ Phil Wahba, *A record 12,200 U.S. stores closed in 2020 as e-commerce, pandemic changed retail forever*, FORTUNE (Jan. 7, 2021, 7:00 AM PST), https://fortune.com/2021/01/07/record-store-closings-bankruptcy-2020/?utm_source=morning_brew.

²²¹ *Id.*

²²² *December 2020 Commercial Bankruptcy Filings*, ACCER, <https://abi-org-corp.s3.amazonaws.com/articles/aacer-dec-2020-commercial-bankruptcy-filings-all-chapters-ch-11-focus.xlsx>.

filings among retailers marked the worst increase since 2008, even impacting American mainstays like JCPenney and Stein Mart.²²³ 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

²²³ Jeremy Hill & Katherine Doherty, *Pandemic Spurs Most Bankruptcy Filings Since 2009*, BLOOMBERG (Jan. 5, 2021), <https://www.bloomberg.com/news/articles/2021-01-05/u-s-bankruptcy-tracker-pandemic-spurs-most-filings-since-2009>.

²²⁴ Sarah Mervosh, Denise Lu & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N. Y. TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> (last updated Apr. 20, 2020). A majority of U.S. states told residents to stay at home via statewide order at the onset of the virus, including: Alaska, California, Washington, Oregon, Nevada, Idaho, Montana, Colorado, Arizona, New Mexico, Kansas, Texas, Louisiana, Montana, Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio, Kentucky, Tennessee, Mississippi, Alabama, Georgia, Florida, South Carolina, North Carolina, Virginia, West Virginia, Maryland, Delaware, Pennsylvania, New Jersey, Connecticut, New York, Massachusetts, Vermont, New Hampshire, and Maine. *Id.*

²²⁵ *Id.*

²²⁶ *See About COVID-19 Restrictions*, CA.GOV, <https://covid19.ca.gov/stay-home-except-for-essential-needs/#:~:text=All%20individuals%20living%20in%20the,the%20Questions%20and%20answers%20below> (last updated Jan. 8, 2021) (noting orders which were issued well after the pandemic began).

²²⁷ Nandita Bose and Melissa Fares, *What is essential? Retailers face confusion over government rules on store closings*, REUTERS (Mar. 18, 2020, 12:48 PM), <https://www.reuters.com/article/us-health-coronavirus-usa-retail/what-is-essential-retailers-face-confusion-over-government-rules-on-store-closings-idUSKBN2153L6>. “In states hit hard by the coronavirus, like New York and California, governors and mayors have mandated the closure of all but the obviously essential stores, like supermarkets and pharmacies.” Michael Corkery and Saphna Maheshwari, *Essential? Retailers like Guitar Center and Michaels*

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

Think They Are, THE NY TIMES (Mar. 25, 2020), <https://www.nytimes.com/2020/03/25/business/coronavirus-essential-retailers.html>.

²²⁸ Bose, *supra* note 227.

²²⁹ Phil Wahba, *A record 12,200 U.S. stores closed in 2020 as e-commerce, pandemic changed retail forever*, FORTUNE (Jan. 7, 2021), https://fortune.com/2021/01/07/record-store-closings-bankruptcy-2020/?utm_source=morning_brew.

²³⁰ *Id.*

²³¹ *Id.*

²³² Nathaniel Meyersohn, *As Black Friday approaches, retailers lobby states to stay open*, CNN BUSINESS (Nov. 21, 2020, 2:43 PM), <https://www.cnn.com/2020/11/21/business/macys-retail-coronavirus/index.html>.

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.*

²³⁴ See Sajal Kohli, Björn Timelin, Victor Fabius & Sofia Moulvad Veranen, *How COVID-19 is Changing Consumer Behavior—now and forever*, MCKINSEY & CO. (July 30, 2020), <https://www.mckinsey.com/~media/mckinsey/industries/retail/our%20insights/how%20covid%2019%20is%20changing%20consumer%20behavior%20now%20and%20forever/how-covid-19-is-changing-consumer-behaviornow-and-forever.pdf>.

²³⁵ *Id.*

²³⁶ *Id.* at 2.

on retail.²³⁷ Yet, COVID-19 is unique in that some consumers actually saved funds.²³⁸ Less spending on prior necessities, like gas and business attire, gave some consumers extra cash for funding particular online purchases.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.²⁴⁰ In addition, the personal savings rate jumped from eight to thirty-three percent from February to March of 2020.²⁴¹ 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.²⁴²

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

²³⁷ See Stephanie Hugie Barello, *Consumer Spending and U.S. Employment From The 2007_2009 Recession Through 2022*, Monthly Labor Review (Oct. 2014), <https://www.bls.gov/opub/mlr/2014/article/consumer-spending-and-us-employment-from-the-recession-through-2022.htm>.

²³⁸ *Id.*

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>.

²⁴⁰ *Id.*

²⁴¹ Rodney R. Sides, Bobby Stephens, Daniel Bachman & Lupine Skelly, *The retail evolution's great acceleration*, DELOITTE, <https://www2.deloitte.com/us/en/pages/consumer-business/articles/retail-recession.html> (last visited Jan. 9, 2021).

²⁴² See Katie Jones, *Pandemic Proof: The Most Loved Brands of COVID-19*, VISUAL CAPITALIST (Dec. 7, 2020), <https://www.visualcapitalist.com/pandemic-proof-the-most-loved-brands-of-covid-19/>.

²⁴³ See generally Kohli, *supra* note 234.

²⁴⁴ Kohli et al., *supra* note 234, at 3.

²⁴⁵ *Id.*

²⁴⁶ Sides et al., *supra* note 234.

²⁴⁷ *Id.*

to meet newfound consumer expectations may result in a diminishing of the retailer's business and brand.²⁴⁸

COVID-19 likely will have lasting impacts on brand loyalty. As mentioned above, consumers have newfound preferences for personal health and greater convenience.²⁴⁹ At the onset of the pandemic, seventy-five percent of consumers tried new brands, places to shop, or methods of shopping.²⁵⁰ This behavior was primarily driven by convenience and value.²⁵¹ 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.²⁵² 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.²⁵³ So, for those retailers that adapt to meet changing consumer preferences, brand loyalty will likely remain strong.²⁵⁴ Yet, retailers that fail to meet new consumer expectations, such as convenience and online shopping, may lose consumers' confidence and trust.²⁵⁵ Thus, retailers

²⁴⁸ *See id.*

²⁴⁹ *See generally* Kohli, *supra* note 234.

²⁵⁰ Tamara Charm, Janette Hwang, Jackie Laird, Nancy Lu, et al., *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#>.

²⁵¹ *Id.*

²⁵² *See* Kohli et al., *supra* note 234.

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, *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).

²⁵⁴ *See* Bevin Arnason & Livia Zufferli, *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>.

²⁵⁵ *See* Rachel Diebner, Elizabeth Sullivan, Kelly Ungerman & Maxence Vancauwenberghé, *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>.

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

²⁵⁶ Ethan Miller, *Why Are Companies Battling to Snatch Up Bankrupt Retailers? They Want Your Data*, NBC NEWS (Aug. 19, 2020, 9:08 AM), <https://www.nbcnews.com/business/business-news/why-are-companies-battling-snatch-bankrupt-retailers-they-want-your-n1237168>.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

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

²⁶⁰ Catherine LeClair & Madeline Stone, *We Asked the New Owners of Bankrupt Brands Like Brooks Brothers, Radio Shack, and Pier 1 About the Plans to Revive Them*, BUS. INSIDER (Dec. 21, 2020), https://www.businessinsider.com/why-companies-acquired-zombie-brands-brooks-brothers-pier-1-2020-12?nr_email_referer=1&utm_source=Sailthru&utm_medium=email&utm_content=Business_Insider_select&pt=385758&ct=Sailthru_BI_Newsletters&mt=8&utm_campaign=Insider%20Select%202020-12-17&utm_term=INSIDER%20SELECT%20%20ENGAGED%2C%20ACTIVE%2C%20PASSIVE%2C%20DISENGAGED%2C%20NEW.

actions.²⁶¹ These IP assets are important to a retailer's brand value.²⁶² A strong brand provides resilience during market downturns.²⁶³ Yet, creating a strong brand can take years of time and effort.²⁶⁴ Thus, these bidders hope to shortcut this process by buying trademarks and the goodwill associated with them.²⁶⁵ One such bankruptcy bidder is Retail Ecommerce Ventures (REV).²⁶⁶ REV's goal: buy troubled, recognizable companies for pennies-on-the-dollar and transform them into booming e-commerce retailers.²⁶⁷ Recently, REV purchased Pier 1's IP, data, and other assets related to its e-commerce business for the low price of \$31 million.²⁶⁸ REV also purchased Stein Mart's IP for the low price of \$6 million.²⁶⁹ Other bidders include Simon Property Group and Brookfield Asset Management, who acquired Brooks Brothers (\$325 million) and Lucky Brand (\$140 million).²⁷⁰ These three examples of holding firms buy so-called "zombie-brands," brands that are well-regarded in the public but

²⁶¹ Matthew Bultman, *Bankrupt Retailers' IP Assets Draw More Demand in Online Shift*, BLOOMBERG LAW (July 27, 2020, 3:01 AM), <https://news.bloomberglaw.com/bankruptcy-law/bankrupt-retailers-ip-assets-draw-more-demand-in-online-shift>.

²⁶² *Id.*

²⁶³ See David Roth & Richard Ingleton, *2020 BrandZ™ Top 100 Most Valuable Global Brands Ranking 22*, WPP & KANTAR, https://www.brandz.com/admin/uploads/files/2020_BrandZ_Global_Top_100_Report.pdf. The most valuable global brands have steadily increased in value over six percent since COVID-19 began. *Id.*

²⁶⁴ Megan Bartkowski, *Part Three: Trademark Rights and Their Implementation: Trademarks as Components of Goodwill*, 19 J. CONTEMP. LEGAL ISSUES 163 (2010); Devra Gartenstein, *Factors That Lead to the Rise of Goodwill in Business*, CHRON, <https://smallbusiness.chron.com/factors-lead-rise-goodwill-business-78520.html> (last visited Feb. 4, 2023).

²⁶⁵ *Id.*

²⁶⁶ *Holdings*, RETAIL ECOMMERCE VENTURES, <https://www.retailcommerceventures.com/> (last visited Jan. 9, 2020).

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

²⁶⁸ Aisha Al-Muslim, *Entrepreneurs Top Sycamore in Pier 1 Bankruptcy Auction*, THE WALL STREET JOURNAL (July 8, 2020), https://www.wsj.com/articles/entrepreneurs-top-sycamore-in-pier-1-bankruptcy-auction-11594246288?mod=article_inline.

²⁶⁹ Jordan Valinsky, *Stein Mart is Being Relaunched Online*, CNN BUSINESS (Dec. 2, 2020), <https://www.cnn.com/2020/12/02/business/stein-mart-new-owner/index.html>.

²⁷⁰ LeClair, *supra* note 260.

have grown out of popularity.²⁷¹ These holding companies hope to revive “zombie-brands” by modernizing business mechanisms and transitioning them to booming e-commerce ventures.²⁷² In order to do so, they need the public recognition tied to the trademark as well as the underlying business.²⁷³

In addition to reputable trademarks, bankruptcy bidders seek trade secrets, in other words, they want customer data.²⁷⁴ As previously discussed, customer data is valuable for building a retailer’s goodwill and enhancing public recognition.²⁷⁵ Accordingly, holding companies hoping to revive dying brands online want this data to also shortcut the brand-building process.²⁷⁶ This approach, however, raises concerns of consumer privacy.²⁷⁷ Some retailers have preemptively addressed the issue of consumer privacy by including provisions allowing sale of such consumer data in company privacy policies.²⁷⁸ Such provisions typically describe the effect of a future sale of the consumer’s information to another entity.²⁷⁹ Bidders who buy this data from companies with such policies have no problem.²⁸⁰ Issues may arise if a retailer lacks such provision. What those

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ TFL, *Forget Real Estate and Inventory, IP and Data Continue to be the Draw for Bankruptcy Bidders* (July 30, 2020), <https://www.thefashionlaw.com/forget-real-estate-and-inventory-ip-continues-to-be-a-big-draw-for-bankruptcy-bidders/>.

²⁷⁴ See Leticia Miranda, *Why are Companies Battling to Snatch up Bankrupt Retailers? They Want Your Data*, NBC NEWS (Aug. 19, 2020), <https://www.nbcnews.com/business/business-news/why-are-companies-battling-snatch-bankrupt-retailers-they-want-your-n1237168>; see also TFL, *Forget Real Estate and Inventory, IP and Data Continue to Be The Draw for Bankruptcy Bidders* (July 30, 2020), <https://www.thefashionlaw.com/forget-real-estate-and-inventory-ip-continues-to-be-a-big-draw-for-bankruptcy-bidders/>; TFL, *From Addresses to Purchase Histories, Customer Data is Driving Retail Bankruptcy Acquisitions* (Aug. 20, 2020), <https://www.thefashionlaw.com/bankruptcy-bidders-wants-customer-data-and-ailing-retailers-are-selling/>.

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.

TRIBUNE (Aug. 26, 2016), <https://www.chicagotribune.com/business/ct-sports-authority-customer-data-0827-biz-20160826-story.html>.

²⁸¹ Miranda, *supra* note 274.

²⁸² LeClair, *supra* note 260.

²⁸³ *Board of Directors*, NIEMAN MARCUS GROUP, <https://www.neimanmarcusgroup.com/board-of-directors?item=3> (last visited Aug. 14, 2022).

²⁸⁴ Suzanne Wells, *The Beginnings of eBay*, THE BALANCE (Jan. 14, 2019), <https://www.thebalancesmb.com/how-did-ebay-start-1140007>.

²⁸⁵ Lauren Thomas, *The 10 biggest retail bankruptcies of 2020*, CNBC (Dec. 26, 2020), <https://www.cnn.com/2020/12/26/the-10-biggest-retail-bankruptcies-of-2020.html>.

²⁸⁶ Ally Azzarelli, *How Frictionless Shopping is Transforming Retail*, ACCUSTORE (May 30, 2019), <https://www.accustore.com/how-frictionless-shopping-is-transforming-retail/>.

C. *The Way Forward: What COVID-19 Retail Bankruptcies Reveal About the Importance of IP in a Post-Pandemic World.*

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

²⁸⁷ Hayley Peterson, *The Retail Apocalypse Is Still in Its 'Early Innings' – and Thousands More Stores Will Close Before It Ends*, BUS. INSIDER (Oct. 3, 2018), [businessinsider.com/retail-apocalypse-is-still-in-early-innings-cowen-says-2018-10](https://www.businessinsider.com/retail-apocalypse-is-still-in-early-innings-cowen-says-2018-10).

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ 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>.

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.²⁹⁵ Many holding companies aggregate brands into larger portfolios.²⁹⁶ This runs the risk of the brand losing the very "ethos" or "DNA" that brought customers to it in the first place.²⁹⁷ A brand has roots in its founder; the founder constructed the company's reputation and goodwill.²⁹⁸ Detaching a brand from its founder may disrupt consumer trust and impact brand loyalty.²⁹⁹ 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;³⁰⁰ 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.³⁰¹ As a result, the mark's value may deteriorate.³⁰² For example, bidder REV now owns a portfolio of IP assets for various brands.³⁰³ However, each REV-affiliated brand shares a website heading with a link to all other

2017, 1:20 PM), <https://www.businessinsider.com/retail-apocalypse-amazon-accounts-for-half-of-all-retail-growth-2017-11>.

In 2018, Amazon accounted for approximately 50 percent of all U.S. e-commerce purchases and five percent of all combined offline and online sales.

Id.

²⁹⁵ Ben Unglesbee, *Life after liquidation: Why some brands thrive after closing shop and others don't*, RETAIL DIVE (Oct. 19, 2020), <https://www.retaildive.com/news/life-after-liquidation-why-some-brands-thrive-after-closing-shop-and-other/586933/>.

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.*

³⁰⁰ See Prableen Bajpai, *Goodwill vs. Other Intangible Assets: What's the Difference?*, Investopedia, <https://www.investopedia.com/articles/investing/100614/goodwill-vs-other-intangible-assets-whats-difference.asp> (Apr. 23, 2021) (noting that "[g]oodwill cannot exist independently of the business, nor can it be sold, purchased, or transferred separately.")

³⁰¹ TFL *supra*, note 273.

³⁰² *Id.*

³⁰³ Valinsky, *supra* note 269.

affiliates pages.³⁰⁴ 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.³⁰⁵ 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.

³⁰⁴ *Holdings*, RETAIL ECOMMERCE VENTURES, <https://www.retailcommerceventures.com/> (last visited Jan. 9, 2020).

³⁰⁵ *About*, GAP, INC., <https://www.gapinc.com/en-us/> (last visited Feb. 20, 2021).