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'Whose Brilliant Idea Was This?': How Ohio State Successfully Trademarked the Word 'THE'

7–9 minutes



Illustration by Scott Seymour, The Chronicle; photo from iStock

"So, whose brilliant idea was this? And how much \$\$\$ did we think it would bring?," read an email from an Ohio State University professor to one of the university's top spokespeople after news broke in 2019 that Ohio State was attempting to register a

trademark for the most commonly used word in the English language — “THE.”

News of the trademark plan went viral on Twitter. Media outlets across the country covered it. It even turned into a bit on *The Late Show With Stephen Colbert*. (“I really think there are huge opportunities to fully lean into all this and leverage it for national publicity,” one university spokesman wrote in an email to a colleague after the episode aired).

Records obtained by *The Chronicle* following the news of the trademark application show that top administrators apparently did not have much to do with the “THE” pursuit. Ohio State’s media-relations department knew little about the filing, the documents show, with the university’s then senior associate vice president for university communications writing in an email to a professor that “no one asked me whether we should do this.”

The trademark filing — despite all the jokes, as well as doubts from experts about its likelihood for approval — was serious. So serious, in fact, that on Tuesday, Ohio State’s bid to trademark “THE” was approved by the U.S. Patent and Trademark Office. News of the success was first reported by [Josh Gerben](#), a trademark lawyer who also first publicized the application.

The trademark will allow Ohio State to use the word “without claim to any particular font style, size, or color” and to be used on clothing “sold through channels customary to the field of sports and collegiate athletics,” the trademark reads.

Benjamin Johnson, a spokesman for Ohio State, said in an emailed statement that the university “is pleased to have received a trademark for THE on branded products associated with and

sold through athletics and collegiate channels.”

“‘THE’ has been a rallying cry in the Ohio State community for many years, and Buckeye fans who purchase official Ohio State gear support student scholarships, libraries, and other university initiatives,” Johnson wrote.

Not everyone is as enthused. “This is a very stupid decision” by the U.S. Patent and Trademark Office, said James Boyle, a professor at Duke University’s law school. “But the more concerning thing is that it is a trend.”

Boyle and Jennifer Jenkins, a clinical professor of law at Duke University, are the authors of [“Mark of the Devil: The University as Brand Bully,”](#) an article in the *Fordham Intellectual Property, Media & Entertainment Law Journal* examining “trademark bullies” at colleges, especially their own, Duke. The two write that “a trademark is not a right in gross over a word, but rather a protection of a particular mark in connection with a particular set of goods and services.”

People should be able to recognize the trademark as part of a brand. “THE” on a T-shirt, Boyle said, is not something a regular consumer would recognize as part of Ohio State’s brand. “It’s absolutely absurd,” he said. “This is a general generic word, which

has no particular acquired distinctiveness.”

Boyle said that while he is a wholehearted supporter of colleges’ protecting trademarked rights to their core names and logos associated with their names and the names of their athletics teams, trademarks like Ohio State’s create “a real tension” of mission creep.

Jenkins said how Ohio State will use its new trademark is a major question. In their research, she and Boyle found that Duke had aggressively attempted to protect its brand even against trademarks that were clearly not infringing on it.

“You might think that a ‘Do Your Dooty!! — Major Duke’ design of a saluting soldier seated on a toilet, as a trademark for toilet deodorant and a toilet footstool, was at worst, in poor taste,” they wrote. “Duke opposed it, as it did ‘Geek’d’ for clothing items; ‘Beach’d’ for beach bags and cosmetic bags; ‘i-D’ for providing travel, health, and fashion information; ‘D’Grill’ for barbecue smokers and grills; and ‘Bluefood’ for various food products.”

Time will tell whether Ohio State will attempt to defend as aggressively against other uses of the word “THE.” *The Chronicle* reported in 2019 that one example of the branding could be a simple T-shirt sporting the university’s colors — scarlet and gray — along with the three-letter word on the front.

Since 1878, “The” has been slotted ahead of Ohio State’s name after its Board of Trustees designated its new name, [according to the university](#). During the past few decades, professional football players who hail from Ohio State have [famously emphasized the “the”](#) before their alma mater’s name during televised segments introducing the team’s rosters.

Ohio State submitted its initial 2019 filing after the Marc Jacobs fashion brand filed to trademark “THE,” Johnson said. Last year, the two parties reached an agreement for both to register and use “THE” branded products.

But the patent office twice denied Ohio State’s trademark request over the years “because the applied-for mark as used on the specimen of record is merely a decorative or ornamental feature of applicant’s clothing and, thus, does not function as a trademark to indicate the source of applicant’s clothing and to identify and distinguish applicant’s clothing from others,” documents from the office show.

If the trademark application fails to signify to consumers who produced the product, then it doesn’t function as a trademark, Jenkins said.

Jenkins said she and Boyle did not think the trademark would be approved “because we didn’t think that the word ‘the,’ one of the most common words in the English language, standing alone was serving as a source identifier.” Ultimately, Ohio State persuaded the office otherwise by presenting enough evidence, Jenkins said.

“Like other institutions, Ohio State works to protect the university’s brand and trademarks because these assets benefit students and faculty, and support our core academic mission of teaching and research,” Johnson wrote in the emailed statement. “Ohio State’s trademark and licensing program generates an average of over \$12.5 million annually in revenue for the university, which funds student scholarships and university programs.”

The argument that trademarking “THE” would help fund programs at the university was opposed by some in 2019, records show, with

one alumnus writing, “Everyone knows what it’s for — selling more gear.”

“Please consult with your colleagues and make them understand that this is a PR disaster,” the opponents wrote. “It makes our university and state look like fools. Whatever the financial benefit of selling clothing is, it cannot outweigh this debacle.”