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# Trademark Abandonment and Excusable Nonuse During COVID-19

## Related Practices

CARES Act Relief  
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Trademark

U.S. trademark rights depend on continued use of the mark in connection with the branded product or service. When use stops, rights may be abandoned. As many “non-essential” businesses close due to state orders in response to COVID-19, use of trademarks may be interrupted or stop completely, which may impact the owner’s rights.

### **1. Business closures due to COVID-19 may not result in abandonment of trademark rights.**

While many “non-essential” business are shuttered during this period, trademark rights might not be deemed abandoned. The Trademark Act defines a mark as “abandoned” when use of the mark was discontinued with no intent to resume use. Intent may be inferred based on the facts particular to the case. However, nonuse of the mark for three consecutive years is *prima facie* evidence of abandonment.

During the current COVID-19 crisis, many businesses affected by the outbreak have temporarily closed their doors due to state orders and are not voluntarily or permanently shutting down. In most cases, there is likely an intent to resume use of the mark as soon as possible, and so it may be difficult for another to successfully prove that the trademark owner abandoned its rights.

This is good news for business owners. To the extent possible, businesses should communicate to the public that the business is closed on a temporary basis and that business will resume as soon as permissible. If possible, businesses should also make products and services available however permitted, for instance, through online sales or virtual technology. These tactics may serve as valuable evidence of continued use of a trademark.

### **2. Registration maintenance filings during COVID-19 may require an excusable nonuse declaration.**

If a federal trademark registration is within a statutory maintenance filing period, this period of nonuse may put the registration in jeopardy. Those filing periods occur between the fifth and sixth anniversaries of the date of the registration and every ten years from the date of the registration.

However, there is a safeguard in the Trademark Act, which owners may be able to take advantage of to avoid cancellation of a registration. This safeguard applies if there is a temporary interruption of use of the trademark, which leaves the owner unable to file the appropriate declaration of use because of circumstances beyond the owner's control or by "forced outside causes." In this case, the owner may file a declaration of excusable nonuse. Such a declaration must include:

1. The date the use of the mark in commerce stopped;
2. The approximate date when such use is expected to resume; and
3. Facts that prove that the nonuse of the mark in connection with the goods and/or services is due to special circumstances that excuse the nonuse and is not due to intentional abandonment of the mark.

If a nonuse declaration must be filed, it should clearly explain that state order(s) requiring the "non-essential" business to close and the United States' unprecedented health crisis are the only reasons for nonuse.

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