

This Opinion is not a
Precedent of the TTAB

Oral Hearing: November 19, 2020

Mailed: January 29, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Bunkhouse Management, LLC

Serial No. 87539883

Christopher M. Dolan, Philip A. Jones and Sarah P. Harrell of Barnes & Thornburg
LLP, for Bunkhouse Management, LLC.¹

Robert N. Guliano, Trademark Examining Attorney, Law Office 105,
Jennifer Williston, Managing Attorney.

Before Zervas, Adlin and Heasley,
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Bunkhouse Management, LLC (“Applicant”) seeks registration on the Principal

Register of the proposed mark

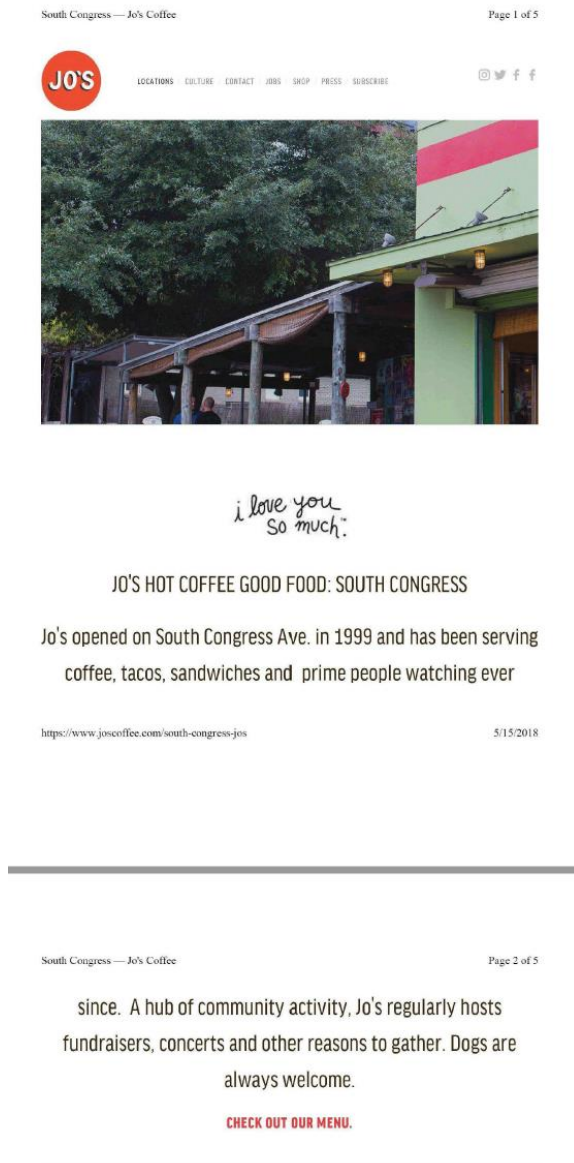
i love you
so much

•² for “charitable fundraising

¹ Mr. Jones argued for Applicant in the oral hearing.

² For convenience, we refer to the stylized proposed mark in this decision as “I LOVE YOU SO MUCH.”

services by means of organizing and conducting special events” in International Class 36.³ The Examining Attorney accepted the specimen of use submitted with the June 5, 2019 Office Action Response, duplicated in relevant part below:



³ Application Serial No. 87539883, filed on July 24, 2017 pursuant to Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a). The application claims first use and first use in commerce at least as early as July 1, 2011 and states that color is not claimed as a feature of the mark. The description of the mark in the application provides that “[t]he mark consists of the wording ‘I LOVE YOU SO MUCH.’ with the ‘I LOVE YOU’ portion of the wording above the ‘SO MUCH.’ portion of the wording and in cursive lettering.”

The Examining Attorney refused registration of Applicant's mark under Trademark Act Sections 1, 2, 3 and 45, 15 U.S.C. §§1051-1053, 1127, because Applicant's mark, as used on the specimens of record, is a slogan or term that does not function as service mark by indicating the source of Applicant's services, identifying and distinguishing them from those of others. Specifically, the Examining Attorney contends that the evidence shows that I LOVE YOU SO MUCH. fails to function as a mark because it "conveys a commonplace message of deep affection."⁴

After the Examining Attorney made the refusal final, Applicant appealed to this Board and requested reconsideration. The Examining Attorney denied the request for reconsideration. Applicant then requested remand from the Board to submit additional evidence, which the Board granted. On remand, the Examining Attorney was not persuaded and maintained the final refusal to register. The Board resumed the appeal, and Applicant and the Examining Attorney filed briefs. An oral hearing was held on November 19, 2020. We affirm the refusal to register.

I. Evidentiary Issue

Applicant submitted evidence for the first time with its appeal brief.⁵ The record in an application should be complete prior to the filing of an appeal. Trademark Rule

⁴ Examining Attorney's brief, 17 TTABVUE 4.

Citations to the briefs and to the March 17, 2020 Req. for Remand are to TTABVUE, the Board's online docketing system. Specifically, the number preceding "TTABVUE" corresponds to the docket entry number, and any number(s) following "TTABVUE" refer to the page number(s) of the docket entry where the cited materials appear. Page references to the application record are to the downloadable .pdf version of the United States Patent and Trademark Office's Trademark Status & Document Retrieval (TSDR) system. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

⁵ Applicant's brief Exh. 1, 15 TTABVUE 24-44.

2.142(d), 37 C.F.R. §2.142(d). Untimely evidence may be considered by the Board, however, if the nonoffering party (1) does not object to the new evidence, and (2) discusses the new evidence or otherwise affirmatively treats it as being of record. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1207.03 (2020). Because the Examining Attorney did not discuss the untimely evidence or otherwise affirmatively treat it as being of record, we do not further consider this evidence.

II. Preliminary Issues

Applicant states it is related to an entity named Jo's Coffee, which appears to use the phrase I LOVE YOU SO MUCH. According to Applicant:

Jo's Coffee, a coffee shop and eatery in Austin, Texas, has used the Mark for several years. Jo's Coffee is a related company to Applicant. The Mark's first appearance was on the exterior wall of the Jo's Coffee unit on South Congress in Austin, Texas. Since that time, the Mark, particularly in the stylized form that is the subject of this Application, has become widely associated by consumers with Jo's Coffee and its high quality goods and services. The Mark's appearance has also received widespread notoriety in media posts and articles, such as Trip Advisor.

The Mark also appears on Applicant's own social media pages, including Twitter, where, as of the Request for Reconsideration, it had in excess of 10,000 followers, and it currently has more than 20,000 followers. Quite simply, many Austin visitors come to Jo's Coffee, order food and beverages, immerse themselves in the Austin culture and community, and associate the conspicuous Mark with Jo's Coffee and this great experience.⁶ (citations to the record omitted).

⁶ Applicant's brief at p. 4, 15 TTABVue 5.

Much of Applicant's evidence and argument pertains to Jo's Coffee's mark and activities. Applicant does not explain the precise relationship between Applicant and Jo's Coffee, or even if Applicant owns the proposed mark mentioned on Jo's Coffee's website, and, if so, how Applicant controls the nature and quality of the charitable fundraising services involved herein. On the other hand, these issues were not raised in the course of examination, so Applicant was not given the opportunity to explain the relationship fully. For purposes of this appeal only, we therefore have assumed that Applicant controls the nature and quality of any services, including charitable fundraising services, provided by Jo's Coffee.

Applicant also states that the basis for refusal is "erroneous":

The Examining Attorney expressly withdrew the failure to function in his Final Office Action. ... However, without explanation, the Examining Attorney's basis for the final refusal is that the Mark fails to function as a mark because it is merely informational. ... However, a refusal because a mark is merely informational is not valid unless the merely informational nature of the mark makes it fail to function as a trademark. "Merely informational" is not one of the listed exceptions in Section 2 of the Lanham Act; the legal basis for refusing registration of a mark because it is merely informational is that it fails to function as a trademark, and therefore does not meet the statutory basis for registration. The Examining Attorney improperly separated merely informational from failure to function, thereby revealing the core of his position – that the Mark is merely informational without regard to whether it functions as a trademark. This procedural point alone is a sufficient basis for overturning the Examining Attorney's refusal to register.⁷

⁷ Reply brief at p. 8, 18 TTABVUE 9.

The TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1202.04 (Oct. 2018)

explains:

Matter may be merely informational and fail to function as a source indicator for various reasons, including one or more of the following:

The matter merely conveys general information about the goods or services.

The matter is a common phrase or message that would ordinarily be used in advertising or in the relevant industry, or that consumers are accustomed to seeing used in everyday speech by a variety of sources.

The matter is a direct quotation, passage, or citation from a religious text used to communicate affiliation with, support for, or endorsement of, the ideals conveyed by the religious text. (citations omitted).⁸

In the Final Office Action, issued after Applicant submitted - on its third try - an acceptable specimen of use,⁹ the Examining Attorney explained:

In previous Office actions, registration was refused based on Sections 1, 2, 3, and 45 of the Trademark Act as merely informational, Sections 1, 2, 3, and 45 of the Trademark Act for a failure to function, and because of a matching issue between the specimen and drawing. Applicant responded by submitting arguments and evidence against the refusals and by submitting substitute specimens. The failure to function and matching refusals have been withdrawn.

⁸ Applicant's comments at pp. 13-14 of its brief (15 TTABVUE 14-15) and citation to *In re Wal-Mart Stores, Inc.*, 129 USPQ2d 1148 (TTAB 2019) regarding the mark INVESTING IN AMERICAN JOBS are directed to the first paragraph of this quoted excerpt from Section 1202.04 as opposed to the second paragraph thereof, which is relevant to the Examining Attorney's refusal to register.

⁹ The Examining Attorney first raised the specimen issue in an October 30, 2017 Office Action. It was on June 5, 2019 that Applicant submitted an acceptable specimen.

Registration is refused because the applied-for mark is a slogan or term that does not function as a trademark or service mark to indicate the source of applicant's services and to identify and distinguish them from others. Trademark Act Sections 1, 2, 3, and 45, 15 U.S.C. §§1051-1053, 1127.¹⁰

The Examining Attorney followed the guidance of Section 1202.04. He did not improperly separate a merely informational refusal from a failure to function refusal, but restated the refusal in view of Applicant's submission of an acceptable specimen. The Final Office Action makes clear that the refusal is grounded in Sections 1, 2, 3 and 45 of the Trademark Act.

III. Evidence and Arguments

A. Evidence submitted by the Examining Attorney¹¹

1. Dictionary Entries for I LOVE YOU SO MUCH or ILYSM

- Urban Dictionary entry for I LOVE YOU SO MUCH – “Sometimes you have no way else to say it You’ve thought about it and no matter how you say it, whatever wonderful vocabulary you can design to make sound of your heartfelt emotion for your respective angel, they will never quite grasp it.”¹²

¹⁰ June 11, 2019 Office Action, TSDR 1.

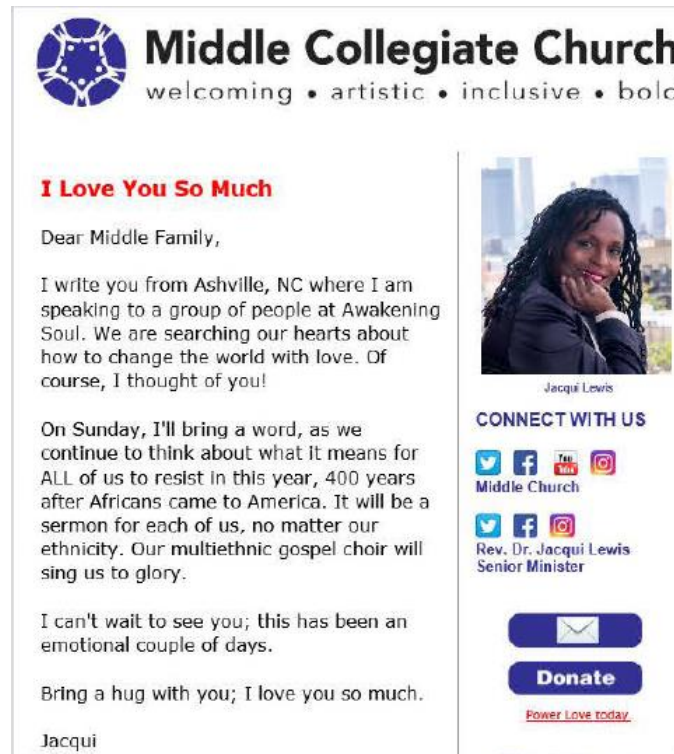
¹¹ Some of the Examining Attorney's Internet evidence does not exhibit a full address (URL) for the webpage. If an examining attorney does not include the URL and the date when the Internet evidence was accessed or printed and the applicant objects, the Board will not consider the material. However, if the applicant does not object to the non-complying material, the Board may consider the material for whatever probative value it may have. *See* TBMP § 1208.03 and cases cited therein. Because Applicant did not object, we consider the evidence.

¹² June 11, 2019 Office Action, TSDR 66.

- cyberdefinitions.com – “The abbreviation ILYSM is used with the meaning ‘I Love You So Much’ as an expression of affection. It is typically used to show appreciation of an act of kindness by a loved one.”¹³

- The Free Dictionary entry for “ILYSM” — “I Love You So Much”¹⁴

2. Uses in the context of charitable fundraising:



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¹³ April 7, 2020 Office Action, TSDR 2.

¹⁴ *Id.*, TSDR 6.

¹⁵ January 27, 2020 Office Action, TSDR 16. We note the button “Donate” appearing at the bottom right.

The screenshot shows the website for the Association of Fundraising Professionals Central South Carolina Chapter. At the top left is the AFP logo. To the right, the text reads "Association of Fundraising Professionals Central South Carolina Chapter". Below this, there is a "Back" link and an "Add to my calendar" button. The main heading is "February Luncheon: I Love You So Much, I Could Squish You!". Below the heading, the event details are listed: "When 09 Feb 2017 11:30 AM - 1:00 PM", "Location 11:30 - 1:00 PM 300 Senate at Senate's End, 300 Senate Street, Columbia, SC, 29201", and "Registration" with a list: "• AFP Members – \$20.00", "• Guests – \$25.00", "• SCANPO Members – \$20.00". To the right of the location, the date "February 9, 2017" and time "11:30 - 1:00 PM" are shown, along with the address "300 Senate at Senate's End, 300 Senate Street, Columbia, SC 29201". Below the address, the title "I Love You So Much, I Could Squish You!" is repeated, followed by the subtitle "Utilizing Donor Retention Trends and Stewardship to Create Joyful Donors". A paragraph of text follows: "Most people would agree that true love doesn't happen by accident – it's deliberate, it's intentional, it's purposeful, but in the end, it's well worth it! Creating and maintaining long-term relationships with donors, not only when your organization needs help, is a vital part of ensuring sustainable fundraising success. Together we will explore donor retention trends and learn effective stewardship best practices designed to preserve our organization's greatest assets – our donors!"

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In addition, the Examining Attorney submitted the following webpages, which include “I love you so much” used in messages concerning charitable donations:

Submitted with the June 11, 2019 Office Action:

- Bella Muntean (webpage showing a “donate” button), TSDR 45
- GoFundMe webpage entitled “A little bit goes a long way,” TSDR 46
- GoFundMe webpage entitled “Keep Hope Alive,” TSDR 47
- GoFundMe webpage entitled “Tyler’s Top Surgery,” TSDR 48
- GoFundMe webpage entitled “Help Support the Golema Family,” TSDR 49
- HelpHopeLive (webpage showing a “give” button), TSDR 50

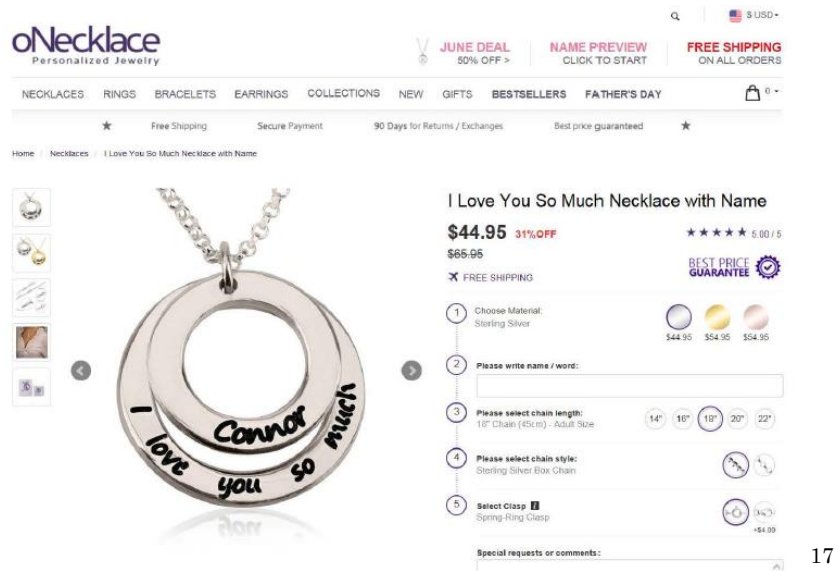
¹⁶ *Id.*, TSDR 21.

- “Caroline Watson’s Fundraising Page,” “4k for Cancer,” TSDR 51
- “Light the Night,” with caption “My Fundraising Page,” TSDR 52
- Love Out Lavender webpage “\$4,925.00 Raised by 12 supporters,” TSDR 53
- “Strides for Safe Kids” “Fundraising Walk and Expo,” TSDR 54
- “Boston Children’s Hospital” webpage “Choose a donation amount,” TSDR 55-56

Submitted with the January 27, 2020 Office Action:

- Women of the World stating “Women of the World is grateful to all of our wonderful donors and their terrific mothers” with a link to “Donate”, TSDR 7
- Frankie Grande School webpage with a “DONATE” button, TSDR 9
- Paws4People with “Donate” button, TSDR 10
- ALS Association “Smith Family Fleet is raising money for the ALS Association – Wisconsin Chapter,” TSDR 11
- NEGU with “GIVE ONCE,” “GIVE MONTHLY” and “FUNDRAISE” buttons, TSDR 12
- Race Roster identifying “Recent donors,” TSDR 13
- Mirth Films with title “Fundraiser: A tribute for BassBullets,” TSDR 14

3. Other Uses



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¹⁷ June 11, 2019 Office Action, TSDR 57.

¹⁸ *Id.*, TSDR 60.

The Examining Attorney submitted the following uses of the literal elements of proposed mark with the May 10, 2018 Office Action:

- Youtube, TSDR 2 (title of a song)
- Etsy, TSDR 3 (appearing ornamentally on a spoon)
- Amazon, Office Action, TSDR 4 (title of a book)
- Mercedes Salazar, TSDR 5 (used as a message on jewelry)
- Filmmaker, TSDR 6 (title of a film)
- The Bold Italic, TSDR 7 (title of article)
- Thought Catalog, TSDR 8 (theme of essay)
- The Sealy News, TSDR 9 (mother's day message)
- Webpoco, TSDR 10 (message to celebrity)
- Tennessean, TSDR 11 (message to concert crowd)
- Chocolate, TSDR 12 (message written out in chocolate candies)
- Wayfair, TSDR 13 (appearing ornamentally on duvet)
- Bigkoro, TSDR 14 (appearing ornamentally on t-shirt)
- People, TSDR 15 (birthday message to loved one)
- E News, TSDR 16-19 (birthday message to loved one)
- The Sweet Dood, TSDR 20 (Valentine's Day story book theme)
- Pandora, TSDR 21 (title of a song)

4. Jo's Coffee and Social Media Uses:

I LOVE YOU SO MUCH. appears as a mural on the wall of Jo's Coffee's "unit":



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Applicant's social media pages, submitted with the June 11, 2019 Office Action, contain dozens of postings of people posing in front of the I LOVE YOU SO MUCH. mural:



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¹⁹ Specimen of use submitted on April 3, 2018.

²⁰ June 11, 2019 Office Action, TSDR 11.



- ellieichinger, TSDR 2 (photo of a couple next to mural with a caption “speaks for itself” and a comment on the photo stating “I really do love you so much.”).

²¹ *Id.* at TSDR 12.

²² *Id.* at TSDR 33.

- starcelly, TSDR 3 (photo of couple kissing with hashtag “#iloveyousomuch” in the caption).
- aileen_burke, TSDR 4 (photo of couple celebrating their 8th anniversary with caption “I love you very much”).
- deirdrewalsh, TSDR 5 (photo of couple kissing).
- katinacydnee, TSDR 6 (photo of couple with caption “Love you so much pals, thanks for visiting”).
- micahelhcruz, TSDR 7 (photo of couple with hashtag “#iloveyousomuch” above comment of “#iloveyoutoo”).
- sushigirl_atx, TSDR 8 (photo of person with a puppy with caption “We [heart symbol] you so much @_miss_nala [dog symbol]”).
- adamksilver, TSDR 9 (photo of couple).
- _socheryl, TSDR 10 (photo of couple with caption “Love you!”).
- _j.cherry.g_, TSDR 13 (photo of couple with caption “& That’s The Truth My Love”).
- Sambeuhler12, TSDR 14 (photo of couple embracing).

B. Evidence submitted by Applicant

● Seven form declarations stating that the declarant recognizes I LOVE YOU SO MUCH. as “an indicator of the source of coffee, food, café services and other goods or services”; and “I expect that goods and services sold in connection with the words ‘I love you so much.’ in this script form, originate from a single source, namely Jo’s Coffee.”²³

²³ Req. for Remand, Exh. 2, 9 TTABVUE 12.

- Instagram posts showing pictures of the proposed mark on the exterior of Jo's Coffee in Austin, Texas.²⁴

- Applicant's use of the proposed mark:

- Jo's Coffee website.²⁵

- Applicant's social media pages.²⁶

- Trip Advisor reviews of Jo's Coffee.²⁷

- Third-party registrations for I LOVE YOU and LOVE YOU-formative marks²⁸

- Third-party registrations for marks expressing sentiment such as ILIKEYOU (Reg. No. 5285888), I HATE CLOWNS (Reg. No. 2818920), and WE LOVE YOU GUYS! (Reg. No. 4719822).²⁹

- Third-party registrations³⁰ for marks that convey information such as YOU DESERVE A BREAK TODAY (Reg. No. 4696083), and MAKE AMERICA GREAT AGAIN (Reg. No. 4773272), or that are registered for decorative and display purposes.³¹

²⁴ December 11, 2019 Req. for Recon., TSDR 13- 21.

²⁵ November 13, 2018 Resp. to Office Action, TSDR 8-12; December 11, 2019 Req. for Recon., TSDR 109-110.

²⁶ December 11, 2019 Req. for Recon., TSDR 88.

²⁷ November 13, 2018 Resp. to Office Action, TSDR 4, 13-14.

²⁸ June 5, 2019, Resp. to Office Action, TSDR 7-97; December 11, 2019 Req. for Recon., TSDR 112-187.

²⁹ December 11, 2019 Req. for Recon., TSDR 189-269.

³⁰ Applicant also timely submitted several third-party applications for various marks it contends are relevant. The probative value of third-party applications is only to show that the applications were filed. *Interpayment Servs. Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003).

³¹ November 13, 2018 Resp. to Office Action, TSDR 15-16; December 11, 2019 Req. for Recon., TSDR 33-77, 45-52, 66-70.

- Third-party social media posts featuring informational slogans unrelated to the involved mark.³²

- Articles regarding murals and street art which Applicant maintains fosters a connection between brands and goods and services.³³

C. Arguments

The Examining Attorney argues that the phrase I LOVE YOU SO MUCH is so commonly used in the context of charitable fundraising and in ordinary parlance that consumers perceive it as a message of deep affection, not as an indicator of a single source of charitable fundraising services.³⁴

Applicant argues the Board should focus on the evidence of consumer perception in the record, such as consumer declarations and social media posts, in which consumers associate the proposed mark with Applicant and Applicant's services. According to Applicant, the consumers who take their photos in front of the mural at Jo's Coffee do so to "commemorate their visits to the hip Austin establishment where people enjoy great beverages and food, and [to] experience the culture of Austin's special South Congress neighborhood."³⁵ "Their pictures are primarily meant to commemorate their visit to one of the landmark purveyors of food and beverages in Austin."³⁶ In addition, Applicant states there is no obvious informational use with

³² December 11, 2019 Req. for Recon., TSDR 77-86.

³³ *Id.*, TSDR 90-107.

³⁴ 17 TTABVUE 5-8.

³⁵ Applicant's brief at pp. 11-15, 15 TTABVUE 12-16.

³⁶ *Id.* at p. 13, 15 TTABVUE 14.

respect to the charitable fundraising services; it compares its mark to marks that have been registered such as other I LOVE YOU marks, MAKE AMERICA GREAT AGAIN and GOT MILK?, and maintains that its proposed mark should not be treated any differently than those registered marks. Applicant adds that informational refusals are for limited situations where marks are in widespread use, which is not the case here, and that the stylized appearance of Applicant's mark makes it more likely that consumers will recognize it as an indicator of source and not merely informational.³⁷

IV. Analysis

“The Trade-Mark Act is not an act to register words but to register trademarks. Before there can be registrability, there must be a trademark (or a service mark) and, unless words have been so used, they cannot qualify for registration.” *In re Standard Oil Co.*, 275 F.2d 945, 125 USPQ 227, 229 (CCPA 1960). Thus, we consider the Act's definition of a service mark, which is “any word, name, symbol, or device, or any combination thereof ... [used] to identify and distinguish the services of one person ... from the services of others and to indicate the source of the services, even if that source is unknown.” Trademark Act § 45, 15 U.S.C. § 1127. *See also In re Bose Corp.*, 546 F.2d 893, 192 USPQ 213, 216 (CCPA 1976) (“the classic function of a trademark is to point out distinctively the origin of the goods to which it is attached”).

Whether the phrase I LOVE YOU SO MUCH. falls within this definition and functions as a mark depends on whether the relevant public, i.e. purchasers or

³⁷ *Id.* at pp. 15-22, 15 TTABVUE 16-23.

potential purchasers of Applicant's services, would perceive the term as identifying Applicant's services and their source or origin. *See e.g. In re Texas With Love, LLC*, 2020 USPQ2d 11290, *2 (TTAB 2020); *In re TracFone Wireless, Inc.*, 2019 USPQ2d 222983, *1-2 (TTAB 2019) ("The key question is whether the asserted mark would be perceived as a source indicator for Applicant's [goods or] services."); *In re Aerospace Optics, Inc.*, 78 USPQ2d 1861, 1862 (TTAB 2006) ("[T]he critical inquiry is whether the asserted mark would be perceived as a source indicator."); *In re Volvo Cars of N. Am. Inc.*, 46 USPQ2d 1455, 1459 (TTAB 1998) ("A critical element in determining whether a term or phrase is a trademark is the impression the term or phrase makes on the relevant public.").

"[W]idespread use of a term or phrase may be enough to render it incapable of functioning as a trademark, regardless of the type of message." *In re Texas With Love*, 2020 USPQ2d 11290, at *7. Expressions in ubiquitous use are unlikely to be perceived as source identifiers. *See D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d 1710, 1716 (TTAB 2016); *In re Eagle Crest Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010); *In re Volvo Cars of N. Am.*, 46 USPQ2d at 1460-61. "To make this determination we look to the specimens and other evidence of record showing how the designation is actually used in the marketplace." *In re Eagle Crest*, 96 USPQ2d at 1229 (citations omitted).

Here, the specimen accepted by the Examining Attorney reveals that Applicant uses I LOVE YOU SO MUCH. on its website, which mentions Applicant's services, and uses the trademark symbol ("TM") with its proposed service mark. That does not necessarily mean that I LOVE YOU SO MUCH. functions as a service mark, however.

“Not every word, name, phrase, symbol or design, or combination thereof which appears on a product functions as a trademark,” and “[m]ere intent that a phrase function as a trademark is not enough in and of itself to make it a trademark.” *In re Pro-Line Corp.*, 28 USPQ2d 1141, 1142 (TTAB 1993). *See also In re Wal-Mart Stores, Inc.*, 129 USPQ2d 1148, 1152 (TTAB 2019) (“The mere fact that a phrase proposed for registration appears on the specimens of record does not establish its use as a service mark.”).

In this case, notwithstanding Applicant’s use of the term and apparent intent that it function as a service mark, the evidence reveals that I LOVE YOU SO MUCH. does not perform the desired service mark function and does not fall within the Act’s definition of a service mark because it would be perceived not as a mark, but as a widely-used expression of a sentiment.

The phrase I LOVE YOU SO MUCH is defined as a heartfelt phrase spoken to loved ones.³⁸ It is used so often that it has been abbreviated to ILYSM.³⁹ The Examining Attorney’s extensive evidence demonstrates use of this phrase and its abbreviation, not only in the context of charitable fundraising, but also in other contexts.

Applicant argues that the Examining Attorney’s evidence of use of I LOVE YOU SO MUCH in the context of charitable giving should not be given any weight because it comprises “simple thank you messages for donations or charitable support where

³⁸ June 11, 2019, Final Office Action, TSDR 66.

³⁹ *See* April 7, 2020, Reconsideration Letter, TSDR 2-13 (showing several sources defining ILYSM as an initialism of “I love you so much,” an expression of profound affection).

the organizer writes ‘I love you so much’” and “[t]he Examining Attorney’s evidence says nothing about whether consumers perceive the Mark as an indicator of source. ... None of them appear to be an attempt at trademark use.”⁴⁰ This argument has no merit because the issue before us is whether widespread use of a phrase by others has rendered it “incapable of functioning as a trademark, regardless of the type of message.” *In re Texas With Love*, 2020 USPQ2d 11290, at *7. We find that the evidence reflects that use of I LOVE YOU SO MUCH is so widespread that it is incapable of functioning as a service mark.

Turning to Applicant’s evidence, we find that it does not establish that consumers will perceive I LOVE YOU VERY MUCH. as a mark. The declarations Applicant submitted are only seven in number, and there is no explanation of how Applicant obtained the declarations.⁴¹ See *In re Benetton Group, S.p.A.*, 48 USPQ2d 1214, 1217 (TTAB 1998) (“given the nature of applicant’s services, the statements of twenty three individuals do not establish an association of the [mark] with a single source by other than an extremely small number of the purchasing public.”). Three are dated May, 19, 2020, two are dated February 20, 2020 and two are undated. All seven are identical in substance, having been written on preprinted forms with space saved for the declarant to add his or her location of residence, signature, printed name and date. Form declarations such as these may not “actually reflect the views of the declarants” and are entitled to “little weight.” *In re EBSCO Indus. Inc.*, 41 USPQ2d

⁴⁰ Reply brief at p. 8, 18 TTABVUE 9.

⁴¹ March 17, 2020 Req. for Remand, Exh. 2, 9 TTABVUE 12.

1913, 1917 (TTAB 1996); *see also In re Pohl-Boskamp GmbH & Co.*, 106 USPQ2d 1042, 1051 (TTAB 2013) (“probative weight ... [of declarations] is affected somewhat by the fact that they are all essentially identical in form and were clearly not composed individually. ... [S]uch statements are less persuasive than statements expressed in the declarants’ own words.”).

The declarations further suffer because they do not identify the declarants’ relationship to Applicant, e.g., consumers, suppliers or contractors.⁴² Because all seven declarants state that they reside in Austin, Texas, they reflect only a sampling of consumers in a very limited portion of the United States.⁴³ They state that they recognize the proposed mark “as an indicator of the source of coffee, food, café services and other goods or services,”⁴⁴ and that “the words, ‘I love you so much,’ in ... script form do not give any information about the goods or services Jo’s Coffee offers,” but they are silent as to the specific charitable fundraising services that Applicant identified in its application. Also, the issue before us is not whether the matter merely conveys general information about the goods or services, but whether the proposed mark is viewed as a common phrase or message that consumers are accustomed to seeing used in everyday speech. *In re Mayweather Promotions, LLC*, 2020 USPQ2d 11298, *4 (TTAB 2020) (“A term may still fail to function as a mark even if it does not

⁴² Applicant represents in its brief that the declarations are consumer declarations but the declarants have not stated that they are consumers.

⁴³ Applicant is seeking national rights for its proposed mark, not limited to Austin, Texas.

⁴⁴ March 17, 2020 Req. for Remand, 9 TTABVUE 10.

convey information about the goods [or services].”). In sum, the probative value of the seven declarations is extremely limited.

Turning to the postings on Applicant’s social media accounts submitted by both Applicant and the Examining Attorney, they fail to demonstrate a use of the phrase to indicate the source of charitable fundraising services. The following Instagram page is exemplary:



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One post states, “Apparently this mural outside my favorite almost-daily coffee shop is pretty famous or something.” The reference is to the mural, not to any goods or services, including charitable fundraising services. So are the specific Instagram postings noted by Applicant in its brief from Tarahluke, Cristinagiselle,

⁴⁵ December 11, 2019 Req. for Recon., TSDR 13 – 21.

Captur3Media and Austin.bucketlist.⁴⁶ Nothing on the postings indicates awareness that Applicant provides charitable fundraising services. The same applies to the TripAdvisor⁴⁷ pages submitted by Applicant - they are silent about any charitable fundraising services.

Turning to the third-party registrations, Applicant puts great stock in the fact that the USPTO has registered I LOVE YOU and LOVE YOU-formative marks, as well as marks with similar messages, and marks that convey information such as MAKE AMERICA GREAT AGAIN. The Board stated in *In re Texas With Love*, 2020 USPQ2d 11290, at *21-22, that mere third-party registrations, without more, do not reveal

how the marks are used in connection with the registrants' goods and services; whether third parties use the same or similar marks, and, if so, how; whether the marks convey particular meanings or commercial impressions, and if so what those meanings or impressions are; or how extensively the marks are used by others, if at all. And without that information, there is no support for Applicant's contention that the refusal of its application was rendered in a situation that is "contextually identical" to the circumstances leading to the allowance of these other registrations.

In addition, it is settled that the existence of third-party registrations does not compel a specific result in later, allegedly analogous, cases. *Id.* at n. 10, * 22-23, (citing *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370,

⁴⁶ Applicant's brief at pp. 12-13, 15 TTABVUE 13-14.

⁴⁷ November 13, 2018 Resp. to Office Action, TSDR 13-14, stating in relevant part, "[t]he signature drink is the Iced Turbo but the[y] do have other great drinks here too and have breakfast tacos in the morning until they run out. My iced coffee was very good."

1377 (Fed. Cir. 2018) (“these prior registrations do not compel registration of [Applicant’s] proposed marks”) (citing *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016)) (“The [US]PTO is required to examine all trademark applications for compliance with each and every eligibility requirement, ... even if the [US]PTO earlier mistakenly registered a similar or identical mark suffering the same defect.”); *In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009) (“Even if all of the third-party registrations should have been refused registration under section 1052(a), such errors do not bind the USPTO to improperly register Applicant’s marks.”); *In re Cooper*, 254 F.2d 611, 117 USPQ 396, 401 (CCPA 1958) (“the decision of this case in accordance with sound law is not governed by possibly erroneous past decisions by the Patent Office”). Thus, “[w]e do not believe that our decision here is inconsistent with the registration of the third-party marks cited by Applicant, but to the extent that it is, it is the decision required under the statute on the record before us.” *In re Ala. Tourism Dept.*, 2020 USPQ2d 10485, *11 (TTAB 2020).

Applicant also argues that the recent decision in *USPTO v. Booking.com B.V.*, 140 S. Ct. 2298, 207 L. Ed. 2d 738, 2020 USPQ2d 10729, *1 (2020) emphasizes that consumer perception be examined and teaches that any concerns regarding the impact of registering Applicant’s mark on others is not controlling.⁴⁸ There is no doubt

⁴⁸ Applicant’s brief at pp. 9-10, 15 TTABVue 10-11.

Even though Applicant argues that “the impact of registering Applicant’s mark on others is not controlling,” *id.*, Applicant argues that the declarants have said that they would believe Jo’s Coffee was somehow connected with an event or establishment if another entity used the proposed mark, noting “[t]he trademark registration process exists to allow trademark owners to enjoy the benefits of registering their mark as an added level of protection against

that consumer perception must be considered and we have considered consumer perception by considering all of the evidence in the record and giving it appropriate weight. In referring to consumer perception, *Booking.com* does not break new ground.

TMEP § 1202.04 states:

The critical inquiry in determining whether matter functions as a trademark or service mark is how the proposed mark would be perceived by the relevant public. See *D.C. One Wholesaler, Inc.*, 120 USPQ2d at 1713; *In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1827 (TTAB 2012) (noting that the critical inquiry in determining whether a mark functions as a trademark is the “commercial impression it makes on the relevant public (e.g., whether the term sought to be registered would be perceived as a mark identifying the source of the goods or merely as an informational phrase)”; *In re Eagle Crest, Inc.*, 96 USPQ2d at 1229; *In re Remington Prods., Inc.*, 3 USPQ2d [1714, 1715 (TTAB 1987)].

As to the impact on others, Applicant is wrong - this can be considered. The Court commented in *Booking.com* in the context of a genericness analysis involving a term which functioned as a necessarily unique URL due to its inclusion of “.com,” a different situation than the one we are presented with in this appeal. In the *Texas With Love* case, which issued after *Booking.com*, the Board recognized the anticompetitive effects of registering a mark that failed to function due to well-recognized and widespread use. The Board stated:

[G]ranting the registration Applicant seeks “would achieve the absurd result of hampering others in their use of the common” phrase TEXAS LOVE for clothing or related products. *In re Schwauss*, 217 USPQ [361, 362 (TTAB 1983)]; *In re Volvo Cars*, 46 USPQ2d at 1460 (“to grant

encroachment by unaffiliated entities who are likely confusing consumers.” *Id.* at p. 12, 15 TTABVue 13.

exclusive rights to applicant in this ordinary and commonly used safety admonition would interfere with the rights of others in the automobile industry to freely use the familiar phrase” to promote safe driving); *see also America Online, Inc. v. AT&T Corp.*, 243 F.3d 812 , 57 USPQ2d 1902, 1910-11 (4th Cir. 2001) (widespread use of “You Have Mail” in connection with an email service could not be protected as a trademark where consumers would perceive it “in its commonly understood way”).

In re Texas With Love, 2020 USPQ2d 11290, at *7. As with TEXAS LOVE, if the phrase I LOVE YOU VERY MUCH. for Applicant’s identified services were to be registered, the registration would interfere with competitors’ free use of the phrase for the same or similar services. As the record in this case shows, and in sharp contrast to *Booking.com*, to the extent the proposed mark in this case identifies the source of any goods or services, the source is not Applicant alone, but rather many of those who use the phrase in question. It does not function as a service mark to identify a single source.

Applicant also argues that the stylization of the lettering in its proposed mark makes it more likely that the proposed mark would be recognized as a source indicator. For support, Applicant relies on the declarations discussed above, which state, “[w]hen I see the words ‘I love you so much.’ in the script form shown above I think of Jo’s Coffee.”⁴⁹ We find the cursive lettering in the proposed mark to be common and ordinary. It does not create a commercial impression different from the widely used message “I love you very much.” *Cf. See In re Sadoru Grp., Ltd.*, 105 USPQ2d 1484 (TTAB 2012) (stylization insufficient given blue “slightly stylized block

⁴⁹ March 17, 2020 Req. for Recon., 9 TTABVUE 9-15.

lettering”). There is nothing about the cursive lettering that creates its own impression, apart from the wording.

In view of the forgoing, we find that notwithstanding Applicant’s use of the term and apparent intent that it function as a service mark, the evidence reveals that I LOVE YOU SO MUCH. does not perform the desired service mark function and does not fall within the Act’s definition of a service mark because it would be perceived not as a mark, but as a merely informational and widely used phrase. Applicant’s competitors and other third parties should be able to freely use the widespread phrase I LOVE YOU SO MUCH in connection with the same or similar services. *See In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1403 (TTAB 2018) (I LOVE YOU, appearing on bracelets, would be viewed as a term of endearment rather than a source-identifying trademark).

V. Conclusion

Because the evidence of record shows that I LOVE YOU VERY MUCH. is a widely-used expression of a sentiment, it would not be perceived as an indicator of source in the context of Applicant’s identified services. I LOVE YOU VERY MUCH. fails to function as a trademark under Sections 1 , 2, 3 and 45 of the Trademark Act.

Decision: The refusal to register the phrase I LOVE YOU SO MUCH. is affirmed because it fails to function as a mark.