Mailed: November 20, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Disorderly Kids, LLC.
v.
Roman Atwood

Cancellation No. 92062027

Matthew L. Seror and Jessie K. Reider of Buchalter Nemer APC for Disorderly Kids, LLC.

Benjamin C. Haynes of Haynes & de Paz PA for Roman Atwood.

Before Cataldo, Lykos and Adlin, Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Respondent, Roman Atwood, is the owner of U.S. Reg. No. 4695492 (the Registration) on the Principal Register for the mark SMILE MORE in standard characters, identifying the following goods and services:[1]

Pens, rubber bands, stickers, in International Class 16;

Backpacks, in International Class 18;

[1] Issued March 3, 2015 from application Serial No. 86342612, filed on July 21, 2014 and asserting September 1, 2013 as a date of first use of the mark in commerce in connection with all identified classes of goods and services.

Beanies, shirts, tank tops, in International Class 25; and

On-line retail store services featuring apparel and clothing, in International Class 35.

Petitioner, Disorderly Kids, LLC, has filed a petition to cancel the Registration. Petitioner's asserted grounds in its amended petition for cancellation[2] are that the term SMILE MORE is "a common expression and does not function as a mark";[3] and, in the alternative, that the mark "has not acquired distinctiveness, or achieved secondary meaning…in connection with clothing."[4] In his amended answer,[5] Respondent denied the salient allegations.

The case is fully briefed.

I. Evidentiary Objections.

Petitioner objects to the declaration of Respondent, Roman Atwood, and certain exhibits submitted therewith.[6] Many of the objections are to lack of foundation, relevance and hearsay.

TTAB proceedings are heard by Administrative Trademark Judges, not lay jurors who might be easily misled, confused, or prejudiced by flawed evidence. *Cf. Harris v.*

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[2] 8 TTABVUE.

[3] *Id*. at 5.

[4] *Id*. at 6.

[5] 9 TTABVUE. In addition, Respondent asserted certain affirmative defenses but did not pursue them at trial. Accordingly, they are deemed to be waived. *See Harry Winston, Inc. v. Bruce Winston Gem Corp.,* 111 USPQ2d 1419, 1422 (TTAB 2014) (pleaded affirmative defenses not pursued in the brief considered waived); *Research in Motion Ltd. v. Defining Presence Marketing Group Inc.*, 102 USPQ2d 1187, 1189-90 (TTAB 2012) (affirmative defenses not pursued at trial considered waived). Respondent further asserted as affirmative defenses matters that are amplifications of his denials, and have been so construed.

[6] 47 TTABVUE.

Rivera, 454 U.S. 339, 346 (1981) ("In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions."). We employ the standards the Board has applied before and accord the evidence whatever probative value it deserves. "Ultimately, the Board is capable of weighing the relevance and strength or weakness of the objected-to testimony and evidence in this case, including any inherent limitations, which precludes the need to strike the challenged testimony and evidence if the objection is well-taken." *Poly-America, L.P. v. Ill. Tool Works Inc.*, 124 USPQ2d 1508, 1510 (TTAB 2017). Mindful of any objections, we have given the declaration and accompanying evidence its due weight. *Luxco, Inc. v. Consejo Regulador del Tequila, A.C.,* 121 USPQ2d 1477, 1479 (TTAB 2017). As necessary and appropriate, we address any limitations to the evidence material to our decision. *Id.*

II. The record.

The record includes the pleadings and, by operation of Trademark Rule 2.122, 37 C.F.R. § 2.122, the file history of the involved mark. The record also includes testimony and evidence submitted by the parties.

Petitioner's evidence:

1. Notice of Reliance upon Respondent's answers to certain of Petitioner's Interrogatories (18 TTABVUE).

2. Notice of reliance upon copies of third-party registrations obtained from the USPTO's Trademark Electronic Search System (TESS) for marks including the wording SMILE MORE, SMILE, and formatives thereof, for various goods and services (*Id.*).

3. Notice of reliance upon printed screenshots from third-party informational and commercial websites displaying the wording SMILE MORE, and formatives thereof, in connection with the marketing of goods and services as well as

articles concerning dentistry and social and psychological aspects of smiling (18-19 TTABVUE).

Respondent's testimony and evidence:

1. Testimony declaration (redacted) of Respondent and exhibits (28 TTABVUE).[7]

2. Notice of reliance upon printed screenshots from Respondent's website and third-party websites showing use of SMILE MORE in connection with Respondent, and his goods and services (29 TTABVUE).

3. Notice of reliance upon printed screenshots from third-party websites showing use of SMILE MORE in connection with Respondent, his goods and services, and notifications to Respondent from Twitter users regarding goods displaying "Smile More" that do not emanate from Respondent; printouts from the USPTO's Trademark Search and Data Retrieval (TSDR) showing that Respondent is the owner of an additional registration and application for the mark SMILE MORE for various goods and services (30 TTABVUE).

4. Amended notice of reliance upon certain materials previously submitted in 29-30 TTABVUE, curing deficiencies therein pursuant to Board order.[8] (35 TTABVUE).

III. **Standing.**

As a threshold matter, Petitioner must prove its standing in order to be heard on the claims it has brought. *See, e.g., Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 187 (CCPA 1982). To do so, Petitioner must prove that it has a "real interest" in the proceedings and a "reasonable" basis for its belief of damage. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *see also Jewelers Vigilance Committee Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021 (Fed. Cir. 1987). To prove a "real interest" in this case, Petitioner must show that it

[7] A confidential copy was filed separately and is not visible on TTABVUE.

[8] On July 19, 2017, the Board issued an interlocutory order (34 TTABVUE) granting in part Petitioner's motion to strike (31 TTABVUE) certain exhibits to Respondent's notices of reliance and allowing Respondent leave to cure the deficiencies therein.

has a "direct and personal stake" in the outcome and is more than a "mere intermeddler." *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *Ritchie v. Simpson*, 50 USPQ2d at 1026.

Petitioner introduced into the record a copy of a cease and desist letter from Respondent's counsel to Wal-Mart regarding "Smile More" t-shirts sold at Wal-Mart's physical locations and online stores.[9] Petitioner asserts that it manufactured the "Smile More" t-shirts sold by Wal-Mart and is responsible for damage to Wal-Mart resulting from the letter or actions taken by Respondent in connection therewith.[10] Respondent acknowledges in his brief that Petitioner "sold Wal-Mart the t-shirt with the phrase 'Smile More' that was the subject of [Respondent's] cease and desist letter."[11] This evidence is sufficient to demonstrate Petitioner's standing. *See Miller v. Miller*, 105 USPQ2d 1615, 1619 (TTAB 2013) (cease and desist letters provide evidence that plaintiff has business interests that have been affected, i.e., a real interest in the proceeding.). *See also Ipco Corp. v. Blessings Corp.*, 5 USPQ2d 1974, 1977 (TTAB 1988); *Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.*, 123 USPQ2d 1844, 1848 (TTAB 2017). "Once standing is established, the [plaintiff] is entitled to rely on any of the grounds set forth in … the Lanham Act which negate [defendant's] right to its subject registration." *Jewelers Vigilance Committee,* 2 USPQ2d at 2023-24.

[9] 18 TTABVUE 28-30.

[10] 8 TTABVUE 3-4.

[11] 38 TTABVUE 6.

IV. Failure to function as a mark.

We now address Petitioner's claim that Respondent's mark fails to function as a service mark to "identify and distinguish the services of one person . . . and to indicate the source of the services." 15 U.S.C. § 1127 (definition of "service mark).

Petitioner argues:

> The phrase "Smile More" is frequently used in pop culture, artistic endeavors, including in the name of a song and album, in the name of live performance pieces and in connection with social commentary, scholarly articles, blog posts and news articles. *See* Petitioner's Notice of Reliance Exhs. 34, 46, 48, 57, 58, 64-93. At least one retailer named its loyalty program "Smile More" and "Smile More" was included as part of a successful marketing campaign of Wal-Mart, one of the largest retailers in the United States. *See* Petitioner's Notice of Reliance, Exhs. 59, 61 and 62.
>
> When reviewing the record in the instant proceeding, and the myriad third party uses of the phrase "Smile More", as well as the cultural significance behind the phrase, under the standard set by the Trademark Trial and Appeal Board in previous, relevant cases, the phrase "Smile More" cannot function as the source of a single origin of the goods at issue.[12]

A. Facts in evidence.

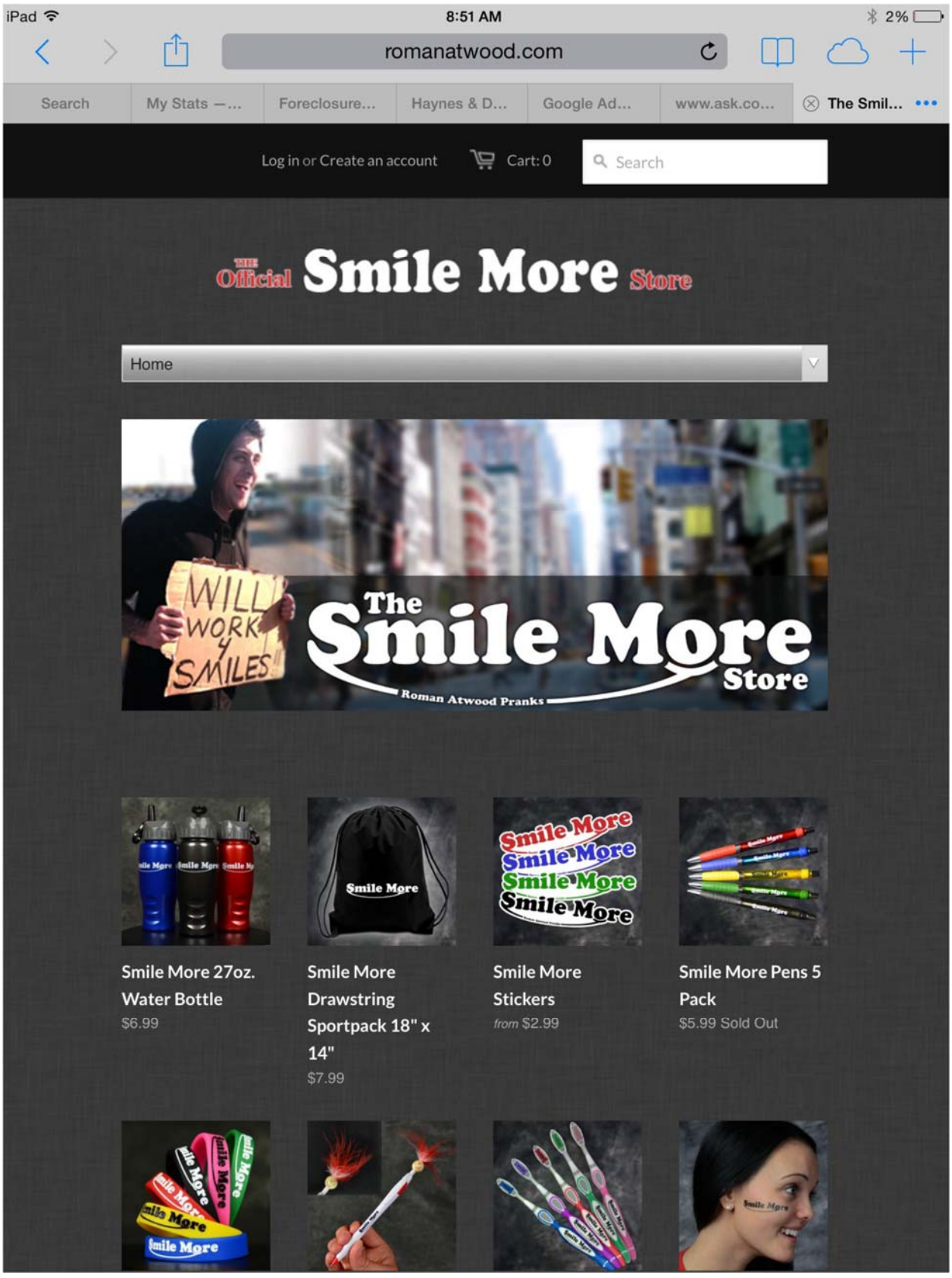
The Registration issued on the Principal Register without a showing of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f). The specimens of use submitted with the underlying application are reproduced below.

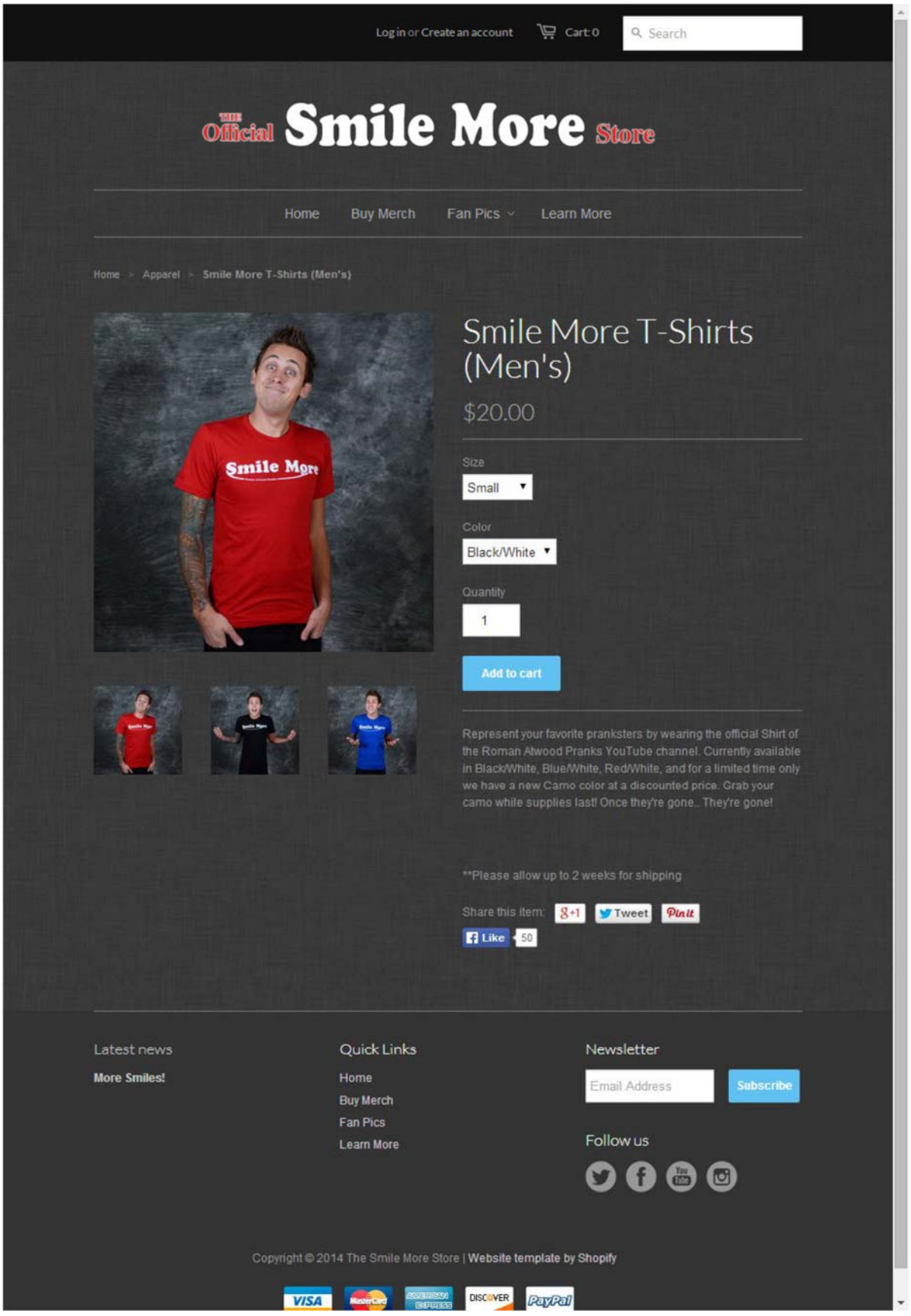
[12] Petitioner's brief at 9, 36 TTABVUE 9.


Smile More
Smile More
Smile More
Smile More
Roman Atwood Pranks


Smile More


Smile More


iPad
8:51 AM
2%
romanatwood.com
Search
My Stats —...
Foreclosure...
Haynes & D...
Google Ad...
www.ask.co...
The Smil...
Log in or Create an account
Cart: 0
Search
The Official Smile More Store
Home
WILL WORK 4 SMILES
The Smile More Store
Roman Atwood Pranks
Smile More 27oz. Water Bottle
$6.99
Smile More Drawstring Sportpack 18" x 14"
$7.99
Smile More Stickers
from $2.99
Smile More Pens 5 Pack
$5.99 Sold Out


Log in or Create an account
Cart: 0
Search
The Official Smile More Store
Home
Buy Merch
Fan Pics
Learn More
Home > Apparel > Smile More T-Shirts (Men's)
Smile More T-Shirts (Men's)
$20.00
Size
Small
Color
Black/White
Quantity
1
Add to cart
Represent your favorite pranksters by wearing the official Shirt of the Roman Atwood Pranks YouTube channel. Currently available in Black/White, Blue/White, Red/White, and for a limited time only we have a new Camo color at a discounted price. Grab your camo while supplies last! Once they're gone.. They're gone!
**Please allow up to 2 weeks for shipping
Share this item:
Tweet
Like 50
Latest news
More Smiles!
Quick Links
Home
Buy Merch
Fan Pics
Learn More
Newsletter
Email Address
Subscribe
Follow us
Copyright © 2014 The Smile More Store | Website template by Shopify
VISA
DISCOVER
PayPal

In his cease and desist letter to Petitioner, Respondent states as follows (emphasis in original):

> Mr. Atwood applied for a trademark and a service mark on July 21, 2014. On November 3, 2014, the USPTO attorney, Mr. Duong, called this law firm to discuss the uniqueness of this file. Mr. Duong stated that because the term "Smile More" is merely an expression that, under normal circumstances, it would not be given federal trademark protection from the USPTO. However, Mr. Duong further stated that due to Mr. Atwood's public figure status and his branding of the term "Smile More" over the last few years, that secondary meaning had attached to **all** of the various classes. Thus, the trademarks and service mark registration for "Smile More" in all four distinct international classes were granted to Mr. Atwood. …
>
> Smile More's secondary meaning was established through Mr. Atwood's incredible following on Youtube through his channels, RomanAtwood and RomanAtwoodVlogs. Mr. Atwood has a total of roughly 9.1 million unique followers on his youtube channels. Mr. Atwood has been promoting his "Smile More" brand on his videos, every single day, for years and thus Smile More is a brand that is associated with Mr. Atwood.
>
> Through Mr. Atwood's fanatical following, many fans have sent Mr. Atwood pictures of "Smile More" t-shirts being sold in Wal Mart stores and on Wal Mart's online store. Attached as Exhibit A is a picture of the "Smile More" t-shirts being sold in Wal Mart stores across the United States. Attached as Exhibit B is a picture of the "Smile More" t-shirts being sold on Wal Mart's online store (which shows they are out of stock because Wal Mart has been selling so many of them).
>
> Mr. Atwood has not given any type of license or authority to Wal Mart to sell such merchandise. Further, this is to be considered an official notice to Wal Mart of the infringement.[13]

In his response to Petitioner's Interrogatory No. 6, Respondent asserts as follows:

> The Registrant has encountered and stopped each and every infringing user it has become aware of. Overall, the Registrant has encountered over ten infringing users selling over 230 separate Smile More items, all of which were in violation, and recognized such, of Registrant's Registration number 4695492.

[13] 18 TTABVUE 28-29.

> Upon policing and coming across all 230 items, the Registrant sent eleven (11) specific demand letters demanding the users and its third party vendors to cease and desist the infringement. Within one week of each and every demand letter being sent, all 230 infringing goods were pulled from the internet and said users and third party vendors ceased selling and infringing on the Smile More trademark.
>
> The only user that has not ceased upon receipt of the Registrant's demand letter is the current Petitioner. Through production of documents, the [Petitioner] will find enclosed each and every demand letter sent, as well as the response from the receiving party, indicating proof that the Smile More mark has been more than substantially exclusive and policed by Registrant. Therefore, Paragraph 17 of the Petition to Cancel could not be more false. Further, many of the infringers were specifically selling Smile More apparel while using keywords such as "Roman Atwood, Roman Atwood Vlogs, Smile More, Smilemore" and similar key words in order to draw attention away from the primary source, Roman Atwood. This proof will be given to the Petitioner with the request for production.[14]

Third parties have registered the following eight SMILE MORE formative marks (all in standard characters unless otherwise noted):[15]

> Reg. No. 4867643 for SMILE MORE EAT WELL BEAN HAPPY, identifying "vegetable-based snack foods; bean-based snack foods";

[14] 18 TTABVUE 23.

[15] 18 TTABVUE 32-107.

Petitioner also introduced into the record four cancelled third-party registrations, one live third-party application, and fifteen abandoned third-party applications. The cancelled registrations are entitled to little, if any, probative value because a cancelled registration is not evidence of anything except that it issued. *See Action Temporary Servs. Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) ("[A] cancelled registration does not provide constructive notice of anything"); *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1654 n.6 (TTAB 2002). Any benefits conferred by the cancelled registrations, including the evidentiary presumptions afforded by Section 7(b) of the Trademark Act were lost when the registration expired. *See, e.g., Anderson, Clayton & Co. v. Krier*, 478 F.2d 1246, 178 USPQ 46, 47 (CCPA 1973).

Further, the pending and abandoned applications possess no evidentiary value. *In re Mr. Recipe, LLC,* 118 USPQ2d 1084, 1089 (TTAB 2016) (third-party application is "evidence only that the application was filed on a certain date"); *Interpayment Services Ltd. v. Docters & Thiede,* 66 USPQ2d 1463, 1468 n.6 (TTAB 2003).

Reg. No. 4755212 for ABRI DENTAL SMILE MORE, identifying various services related to dentistry;

Reg. No. 4114726 for SPEND LESS. SMILE MORE., identifying "dentist services; orthodontic services";

Reg. No. 4395934 for WINE AND SHINE SMILE BRIGHTENER (WINE and BRIGHTENER disclaimed), identifying "tooth whitening preparations";

Reg. No. 4355375 for STRESS LESS SMILE MORE, identifying "dentist services";

Reg. No. 3826541 for SMILE MORE, identifying "provision of marketing services, namely, providing dentist referral services";

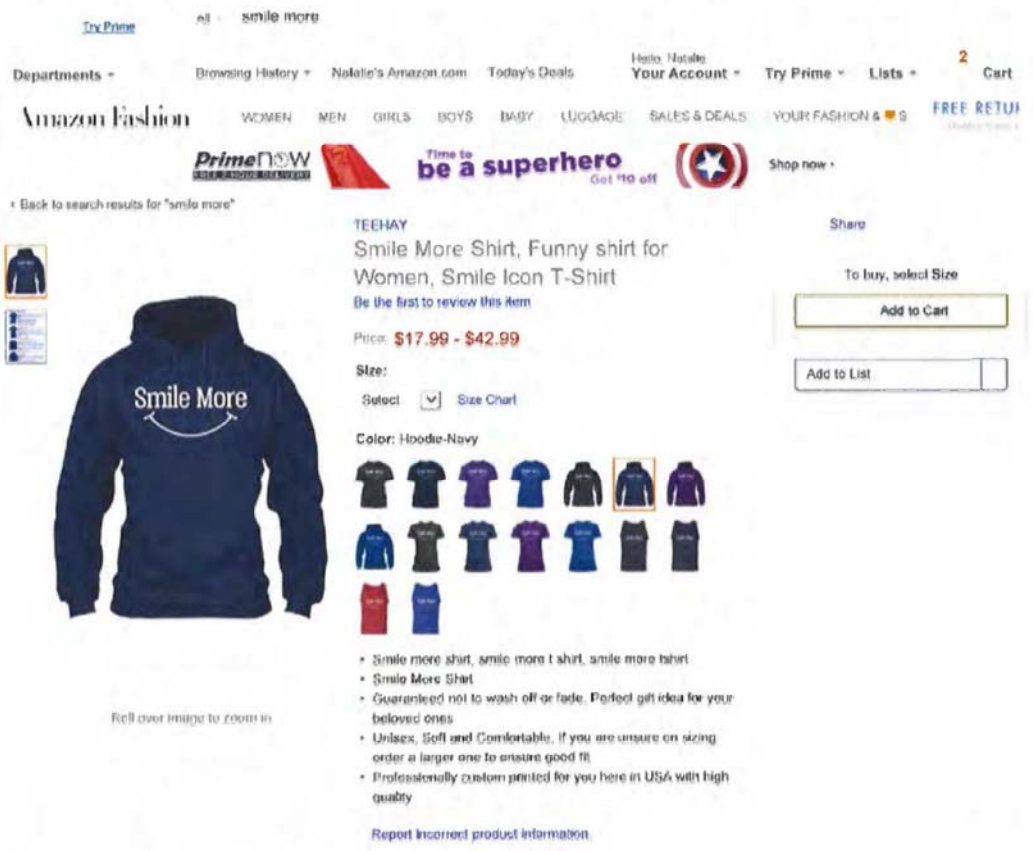
Reg. No. 4313357 for SMILE MORE, identifying "toothbrushes; electrical toothbrushes and parts therefor"; and

Reg. No. 4540967 for WHITEN SMILE MORE and design, identifying teeth whitening systems and timers therefor.

Petitioner introduced into the record "Smile More" t-shirts, hats and stickers available for sale from third-party vendors on amazon.com, cafepress.com, redbuble.com, customplanet.com, taoofsophia.com and youshouldsmilemore.com.[16] The following examples are illustrative:

[16] 18 TTABVUE 109-121, 145, 154-178, 181-182, 189-190, 233.

Amazon.com: Smile More Shirt, Funny shirt for Women, Smile Icon T-Shirt: Clothing Page 1 of 4



Customers Who Viewed This Item Also Viewed

Page 1 of 5

Firewel Roman Atwood Smile More Beanie Men's Hooded Sweatshirt

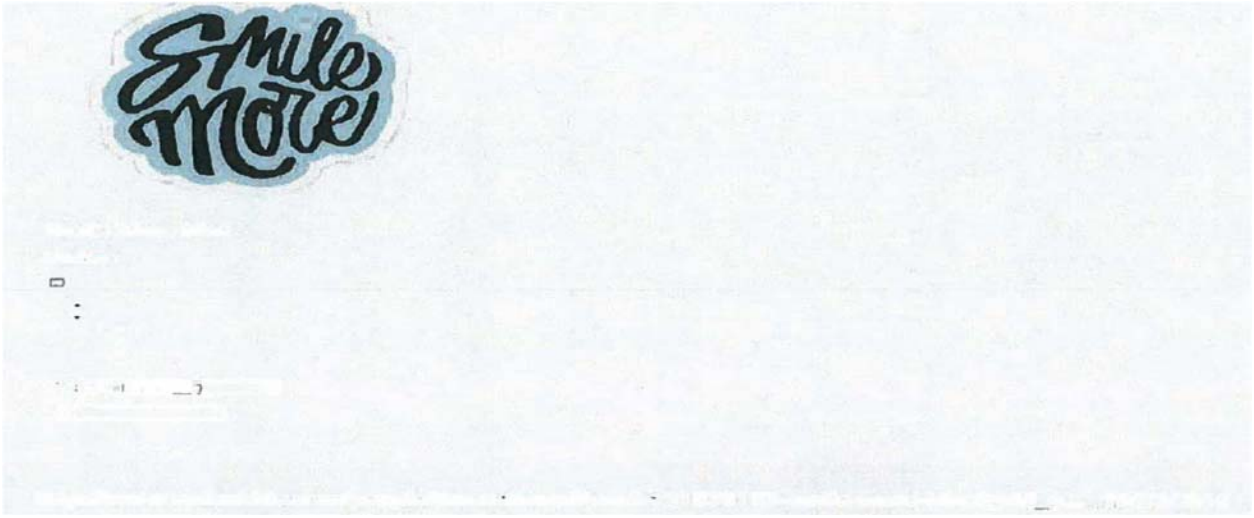
Natural Born Pranksters
Roman Atwood
283
DVD
$9.29

Special Offers and Product Promotions

Buy from TEEHAY Authentic:

https://www.amazon.com/Smile-Shirt-Funny-shirt-Hoodie/dp/B011IAW526/ref=sr_1_32... 10/27/2016


Sign In
Search
EMAIL US!!
CALL OR TEXT US!! 9-5 PST
(801)810-TEES
DESIGNS
PRODUCTS
Team Uniforms
Custom Clothing
Custom Headwear
Promotional
Spirit Packs
smilemore - Flat Bill Fitted Hats 123-969 - 123-9692028 - Custom Heat Pressed 6 7/8
POST TO FACEBOOK
SMILE
MORE
Fitted Hat Sizes 6 7/8
Quantity 1
$23.49
Add to Cart
Edit Design
Like Be the first of your friends to like this
Volume Discounts
Qty Price Per Unit
12 $18.16
48 $17.10
144 $16.28
Customer Reviews
Write A Review
Recent Designs
Browse Designs...
Baseball Designs
Basketball Designs
Football Designs
Soccer Designs
Fraternity Designs
Sorority Designs
Funny Designs
Political Designs
Free Artwork Help...
Need help with your Artwork?
Want to remove a white background?
Send it to us and we'll glad to help!
$5 Shipping...
Shipping is only $5.
If you need your order faster, just pay a rush charge based on the day you need it.
Nov
14
Affiliate Signup
Site Map
Artwork Help
Shipping Policy
Customer Testimonials
Terms and Conditions
Designer Tutorial
Contact Us
Follow us on Twitter
Order Status
Privacy Policy



Petitioner submitted additional evidence of trademark or trade name use of Smile More formatives in connection with dental services, such as Smile More Dental, Smile More Dental Savings Plan, Smile More Orthodontics, Smile More Live More Center and Smile More Dental Clinic. Petitioner also submitted evidence of trademark or trade name use by third parties of the term "Smile More" in connection with, e.g., the title of a musical album and musical sound recording, a short film, a photo booth service, stamps, kitchen and personal care items, comedy shows, a buyer loyalty program and a Wal-Mart advertising campaign.[17] Petitioner further introduced into the record internet articles featuring non-trademark use of the term "smile more" in the context of discussions regarding the health benefits of smiling, dentistry, and social conventions between and among men and women related to smiling.[18]

[17] 18 TTABVUE 122-144, 146-153, 179-180, 183-188, 191-232, 234-244. We note that Petitioner has not submitted any additional testimony or evidence regarding the relationship between itself and Wal-Mart or Wal-Mart's advertising campaign.

[18] 19 TTABVUE 1-193.

Respondent introduced his declaration with exhibits, declaring, *inter alia,* as follows:[19]

> his counsel has sent more than fifty cease and desist letters in the last two years, resulting in thousands of infringing items being removed from the internet;
>
> Petitioner is the only entity who has not ceased infringing Respondent's SMILE MORE mark;
>
> Respondent's confidential sales figures for goods under his SMILE MORE mark are considerable;
>
> Respondent's Smile More store on his website received over 6 million visitors last year;
>
> Respondent has never paid for advertisements for goods under the SMILE MORE mark and "all of our sales are organic"[20] to his website;
>
> Respondent has issued four limited licenses over the last fifteen months to entities seeking to use SMILE MORE in commerce;
>
> Respondent's website has recently added an intellectual property section allowing visitors to notify Respondent in the event of infringement of his SMILE MORE mark; and
>
> Respondent has received five email messages in the last several months from fans informing him of infringing items.

Respondent introduced with his declaration copies of cease and desist letters addressed to Café Press, Zazzle.com, Wal-Mart, USCD Apparel and RedBubble.[21] Respondent also included copies of correspondence between his counsel and the

[19] 28 TTABVUE 2-4.

[20] 28 TTABVUE 3.

[21] 28 TTABVUE 5-26.

above-mentioned retailers, all of which agree to remove the infringing content, with the exception of Wal-Mart.[22]

B. Discussion.

"The Trademark Act is not an act to register mere words, but rather to register trademarks. Before there can be registration, there must be a trademark, and unless words have been so used they cannot qualify." *In re Bose Corp.*, 546 F.2d 893, 192 USPQ 213, 215 (CCPA 1976). It is well settled that "not every designation adopted with the intention that it performs a trademark function and even labeled as a trademark necessarily accomplishes that purpose…." *Am. Velcro, Inc. v. Charles Mayer Studios, Inc.*, 177 USPQ 149, 154 (TTAB 1973); *see also Roux Labs., Inc. v. Clairol, Inc.*, 427 F.2d 823, 166 USPQ 34, 39 (CCPA 1970).

> The critical inquiry in determining whether a designation functions as a mark is how the designation would be perceived by the relevant public. 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 Inc., 96 USPQ2d 1227, 1229 (TTAB 2010) (citations omitted).

To be a mark, the phrase must be used in a manner calculated to project to purchasers or potential purchasers a single source or origin for the goods. *In re Volvo Cars of North America Inc.*, 46 USPQ2d 1455, 1459 (TTAB 1998). Matter that serves primarily as a source indicator, either inherently or as a result of acquired distinctiveness, and that is only incidentally ornamental or decorative, can be registered as a trademark. *In re Paramount Pictures Corp.*, 213 USPQ 1111, 1115

[22] 28 TTABVUE 27-118.

(TTAB 1982) ("In every case, the question is not whether the mark has been associated with the goods by a particular mode or manner, but whether the matter sought to be registered performs the function of a trademark by signifying to purchasers the source of the goods sold or offered for sale.").

Registration No. 4695492 issued on the Principal Register.[23] The registration therefore is entitled to the following presumption under Trademark Act Section 7; 15 U.S.C. § 1057:

> (b) *Certificate as prima facie evidence.* A certificate of registration of a mark upon the principal register provided by this chapter shall be prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner's ownership of the mark, and of the owner's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate, subject to any conditions or limitations stated in the certificate.

The specimens of use submitted with the application underlying the Registration display the SMILE MORE mark on the goods in an ornamental manner. Common expressions used in an ornamental manner frequently do not serve a trademark function. *See, e.g.*, *In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1403 (TTAB 2018) ("The phrase I LOVE YOU conveys a term of endearment comprising the bracelet and, thus, it is ornamental. It does not identify and distinguish the source of the bracelet, especially where there is so much jewelry decorated with the term I LOVE YOU in the marketplace."). However, in this case the specimens of use for Respondent's services display SMILE MORE in a non-ornamental manner, associate

[23] The subject registration issued without a showing of acquired distinctiveness under Section 2(f).

the SMILE MORE mark with "The Official Smile More Store" and "Roman Atwood Pranks" YouTube channel and clearly associate the SMILE MORE mark with Respondent.

Thus, the designation SMILE MORE as it appears on Respondent's goods conveys to the public a secondary source, namely, Respondent Roman Atwood, his YouTube channel and the content he posts there, and is registrable on the Principal Register. *In re Paramount Pictures Corp.*, 213 USPQ at 1112 (in this case, wording on a T-shirt "inherently tells the purchasing public the source of the T-shirt, not the source of the manufacturer but the secondary source."). Matter that serves primarily as a source indicator, either inherently or as a result of acquired distinctiveness, and that is only incidentally ornamental or decorative, can be registered as a trademark. *Id*. at 1114. *See also* TMEP § 1202.03 (October 2018) and authorities cited therein.

The record before us indicates that a modest number of third parties have produced and sold goods, including t-shirts, hats and stickers, bearing the decorative or ornamental wording "Smile More" and formatives thereof. However, the record further indicates that Respondent actively and vigorously polices his SMILE MORE mark and views such uses as infringement. Respondent has successfully prevented or stopped such uses by Café Press, Zazzle.com, USCD Apparel and RedBubble, i.e., the very third parties Petitioner relies upon for its assertion of widespread use of "Smile More" in connection with the relevant field of goods and services. The record further establishes that fans of Respondent actively report such uses when they encounter them. In addition, the record reflects that some of the third-party users

point to Respondent when advertising their "Smile More" merchandise in an attempt to associate their goods with him. For example, the hooded sweatshirt, or hoodie, displayed above for sale on Amazon.com is a direct copy of the SMILE MORE mark as it appears on Respondent's website and specimens of use.[24] In addition, the Amazon.com page offering the hoodie for sale by a third party not affiliated with Respondent, also offers for sale a "Roman Atwood Smile More Beanie" and the "Natural Born Pranksters" movie in which Respondent stars.[25] As a result, this record shows approximately six third-party uses of "Smile More" for relevant goods and services, some of which seek to associate their goods with Respondent, and most of which have ceased use after being challenged by Respondent.

The record further reflects registration of SMILE MORE and SMILE formative marks by eight third parties for goods and services related to dentistry in all but one instance and snack foods in the other. None of these goods and services are related to the goods and services recited in the Registration, and accordingly this evidence has little probative value in our determination of whether SMILE MORE functions as a mark. Similarly, the evidence of "Smile More" used as song and movie titles, dental services, customer loyalty and reward programs, and as an expression appearing in spoken and written speech do not serve to support Petitioner's assertion of "myriad

[24] 18 TTABVUE 116.

[25] *Id*.

third party uses of the phrase 'Smile More'"[26] in connection with the relevant goods and services.

This is not a case in which widespread ornamental use of the phrase SMILE MORE by third parties "is part of the environment in which the [mark] is perceived by the public and … may influence how the [mark] is perceived." *In re Hulting*, 107 USPQ2d 1175, 1178 (TTAB 2013) (quoting *In re Tilcon Warren Inc.*, 221 USPQ 86, 88 (TTAB 1984)). To the contrary, the record evidence discussed above supports a finding that SMILE MORE, as used in connection with the goods and services recited in the Registration, serves to indicate a single origin or source, namely Respondent. The existence of a very small number – namely, six – of third-party uses of "Smile More" in connection with related goods does not persuade us otherwise, especially given evidence that at least half of the uses have ceased upon challenges from Respondent as well as his assertions that all uses, aside from Petitioner, have ceased due to his policing of his mark. *Cf. In re Eagle Crest Inc.*, 96 USPQ2d at 1230 ("Because consumers would be accustomed to seeing this phrase [ONCE A MARINE, ALWAYS A MARINE] displayed on clothing items from many different sources, they could not view the slogan as a trademark indicating source of the clothing only in applicant. It is clear that clothing imprinted with this slogan will be purchased by consumers for the message it conveys."); *Damn I'm Good Inc. v. Sakowitz, Inc.*, 514 F. Supp. 1357, 212 USPQ 684 (S.D.N.Y. 1981) (where plaintiff used DAMN I'M GOOD as a message engraved on a bracelet and commenced use of the term on a hangtag only after

[26] 36 TTABVUE 9.

competitors began to produce similar products, court held that "plaintiff does not hold a valid trademark.").

Having considered all the evidence and arguments of record, we find that Petitioner has failed to meet its burden of demonstrating that SMILE MORE, as it appears in the Registration in connection with the recited goods and services, does not function as a trademark for Respondent's goods. In light of our determination, we need not consider its alternative claim that SMILE MORE has not achieved secondary meaning or acquired distinctiveness under Section 2(f).

Decision: The petition to cancel Reg. No. 4695492 is dismissed.