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PRECEDENT OF THE TTAB

Mailed: October 29, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Dragonsteel Entertainment, L.L.C.

Serial No. 97200167

Joseph Shapiro of Shapiro IP Law,
for Dragonsteel Entertainment, L.L.C.

Tasha Pulvermacher, Trademark Examining Attorney, Law Office 125,[1]
Heather Biddulph, Managing Attorney.

Before Pologeorgis, Lebow, and Lavache,
Administrative Trademark Judges.

Opinion by Lavache, Administrative Trademark Judge:[2]

Dragonsteel Entertainment, L.L.C. ("Applicant") seeks registration on the Principal Register of the mark displayed below for "jewelry," in International Class

[1] The application was reassigned from the original examining attorney to the above-named examining attorney during the examination of the application.

[2] As part of an internal Board pilot program to broaden acceptable forms of legal citation in Board cases, case citations in this opinion are in the form recommended in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the pages on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). Practitioners should also adhere to the practice set forth in TBMP § 101.03.

14, and "Clothing, namely, t-shirts, socks, hoodies," in International Class 25.[3]

The application includes the following description of the mark:

> The mark consists of a horizontally symmetric[4] glyph,[5] comprising two upper curved lines that cross at an imaginary horizontal axis of symmetry; an arrow-like design having a tail, pointing upward, and centered on the imaginary horizontal axis of symmetry; a circle positioned inside the arrowhead of the arrow-like design, and centered on the imaginary horizontal axis of symmetry; and a double curve feature complementing the arrow-like design and centered on the imaginary horizontal axis of symmetry.

[3] Application Serial No. 97200167 was filed January 3, 2022, based on Applicant's allegation of use in commerce under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), claiming January 1, 2019, as both the date of first use and the date first use in commerce for both classes of goods. Color is not claimed as a feature of the mark.

[4] The description of the mark states that the mark is "horizontally symmetric." But, based on both the mark drawing and the specimens of use, it appears that the proposed mark is vertically symmetrical, in that a vertical line down the center of the proposed mark would result in two mirror-image halves. However, whether the mark is horizontally or vertically symmetrical does not affect our analysis.

[5] A "glyph" is "a symbol (such as a curved arrow on a road sign) that conveys information nonverbally" or "a symbolic figure or a character (as in the Mayan system of writing) usually incised or carved in relief." MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/glyph (accessed on October 22, 2024). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed form or regular fixed editions. *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, Opp. No. 91061847, 1982 TTAB LEXIS 146, at *7 (TTAB 1982), *aff'd*, 703 F.2d 1372 (Fed. Cir. 1983); *In re Red Bull GmbH*, Ser. No. 75788830, 2006 TTAB LEXIS 136, at *7 (TTAB 2006); TBMP § 1208.04.

The Examining Attorney refused registration under Trademark Act Sections 1, 2, and 45, 15 U.S.C. §§ 1051, 1052, 1127, on the ground that the proposed mark, as used in the specimens of record, is merely a decorative or ornamental feature of the identified goods and thus does not function as a trademark to indicate the source of Applicant's goods and to identify and distinguish them from those of others. After the Examining Attorney made the refusal final, Applicant appealed. The case is fully briefed. We affirm the refusal for the reasons set forth below.

I. Discussion

The USPTO "is statutorily constrained to register matter on the Principal Register if and only if it functions as a mark." *In re Brunetti*, Ser. No. 88308426, 2022 TTAB LEXIS 297, at *14 (TTAB 2022). Trademark Act Sections 1, 2, and 45 provide the statutory basis for refusal to register subject matter that does not function as a trademark. 15 U.S.C. §§ 1051, 1052, 1127. Specifically, Trademark Act Section 1 sets forth requirements for requesting registration of a trademark. *See* 15 U.S.C. § 1051. Section 2 provides for registration of, "trademark[s] by which the goods of the applicant may be distinguished from the goods of others." 15 U.S.C. § 1052. And Section 45 defines a "trademark" in relevant part, as "any word, name, symbol, or device, or any combination thereof . . . used by a person . . . 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." 15 U.S.C. § 1127. Accordingly, "'[m]atter that does not operate to indicate the source or origin of the identified goods . . . and distinguish them from those of others does not meet the statutory definition of a trademark and may not be registered.'" *In re*

Greenwood, Ser. No. 87168719, 2020 TTAB LEXIS 499, at *5 (TTAB 2020) (quoting *In re AC Webconnecting Holding B.V.*, Ser. No. 85635277, 2020 TTAB LEXIS 428, at *8-9 (TTAB 2020)).

Importantly, "[n]ot every word, name, phrase, symbol or design, or combination thereof which appears on a product functions as a trademark." *In re Peace Love World Live, LLC*, Ser. No. 86705287, 2018 TTAB LEXIS 220, at *10 (TTAB 2018) (citing *In re Pro-Line Corp.*, Ser. No. 74174721, 1993 TTAB LEXIS 24, at *5 (TTAB 1993)); *see also In re Texas with Love*, Ser. No. 87793802, 2020 TTAB LEXIS 466, at *5-6 (TTAB 2020). And "[t]here are many reasons a proposed mark may fail to function." *In re The Ride, LLC*, Ser. No. 86845550, 2020 TTAB LEXIS 2, at *18 (TTAB 2020); *see generally* TRADEMARK MANUAL OF EXAMINING PROCEDURE §§ 1202, 1202.01-1202.19 (May 2024).

Relevant to our analysis here, one reason a proposed mark may fail to function as a trademark is that it would be perceived as mere ornamentation for the goods it is applied to and thus does not serve to indicate the source of the goods. *See, e.g.*, *In re Fantasia Distrib., Inc.*, Ser. No. 86185623, 2016 TTAB LEXIS 471, at *3 (TTAB 2016). "The critical question in determining whether [a proposed mark] functions as a trademark is the commercial impression it makes on the relevant public, i.e., whether the term sought to be registered would be perceived as a mark identifying the source of the goods." *Peace Love World Live*, 2018 TTAB LEXIS 220, at *7. Here, the relevant public is all potential purchasers of jewelry, t-shirts, socks, and hoodies. *In re Team Jesus LLC*, Ser. No. 88105154, 2020 TTAB LEXIS 503, at *6 (TTAB 2020) ("In this

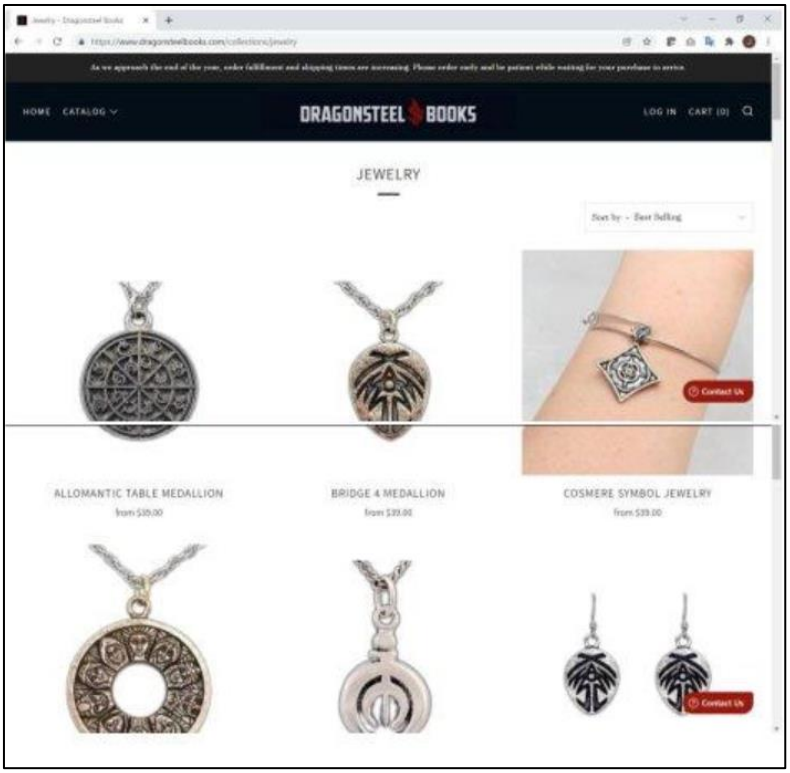
case, because there are no limitations to the channels of trade or classes of consumers, the relevant consuming public comprises all potential purchasers of the identified goods and services.").

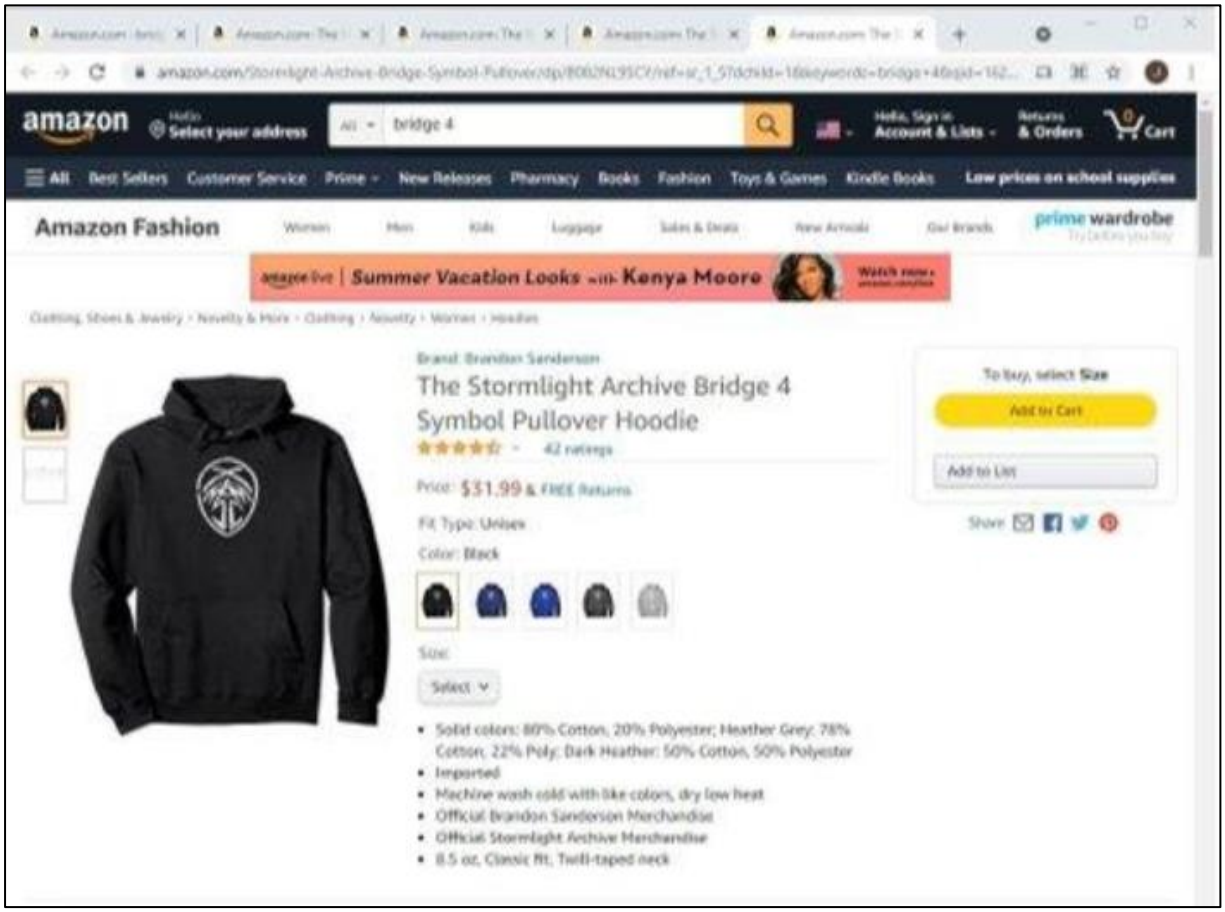
"To make this determination we look to the specimens and other evidence of record showing how the designation is actually used in the marketplace." *In re Eagle Crest, Inc.*, Ser. No. 77114518, 2010 TTAB LEXIS 346, at *6 (TTAB 2010); *see also In re Bose Corp.*, 546 F.2d 893, 897 (CCPA 1976) ("[T]he manner in which an applicant has employed the asserted mark, as evidenced by the specimens of record, must be carefully considered in determining whether the asserted mark has been used as a trademark with respect to the goods named in the application."). Further, when assessing whether consumers will perceive a proposed mark as merely ornamental, or instead as an indicator of source, "we have found it helpful to consider various aspects of designs and shapes, stating repeatedly, 'we must consider the size, location and dominance of the designs in determining the commercial impression of designs.'" *In re Lululemon Athletica Can. Inc.*, Ser. No. 77455710, 2013 TTAB LEXIS 2, at *6 (quoting *In re Right-On Co. Ltd.*, Ser. No. 79014936, 2008 TTAB LEXIS 17, at *13 (TTAB 2008)).

With the foregoing in mind, we consider the following specimens of record.[6]

[6] January 3, 2022 Application at TSDR 3, 7, 10, 14.

The TTABVUE and Trademark Status and Document Retrieval ("TSDR") citations in this opinion refer to the docket and electronic file database for the involved application.


DRAGONSTEEL BOOKS
JEWELRY
ALLOMANTIC TABLE MEDALLION
BRIDGE 4 MEDALLION
COSMERE SYMBOL JEWELRY


amazon
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Amazon Fashion
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The Stormlight Archive Bridge 4 Symbol Pullover Hoodie
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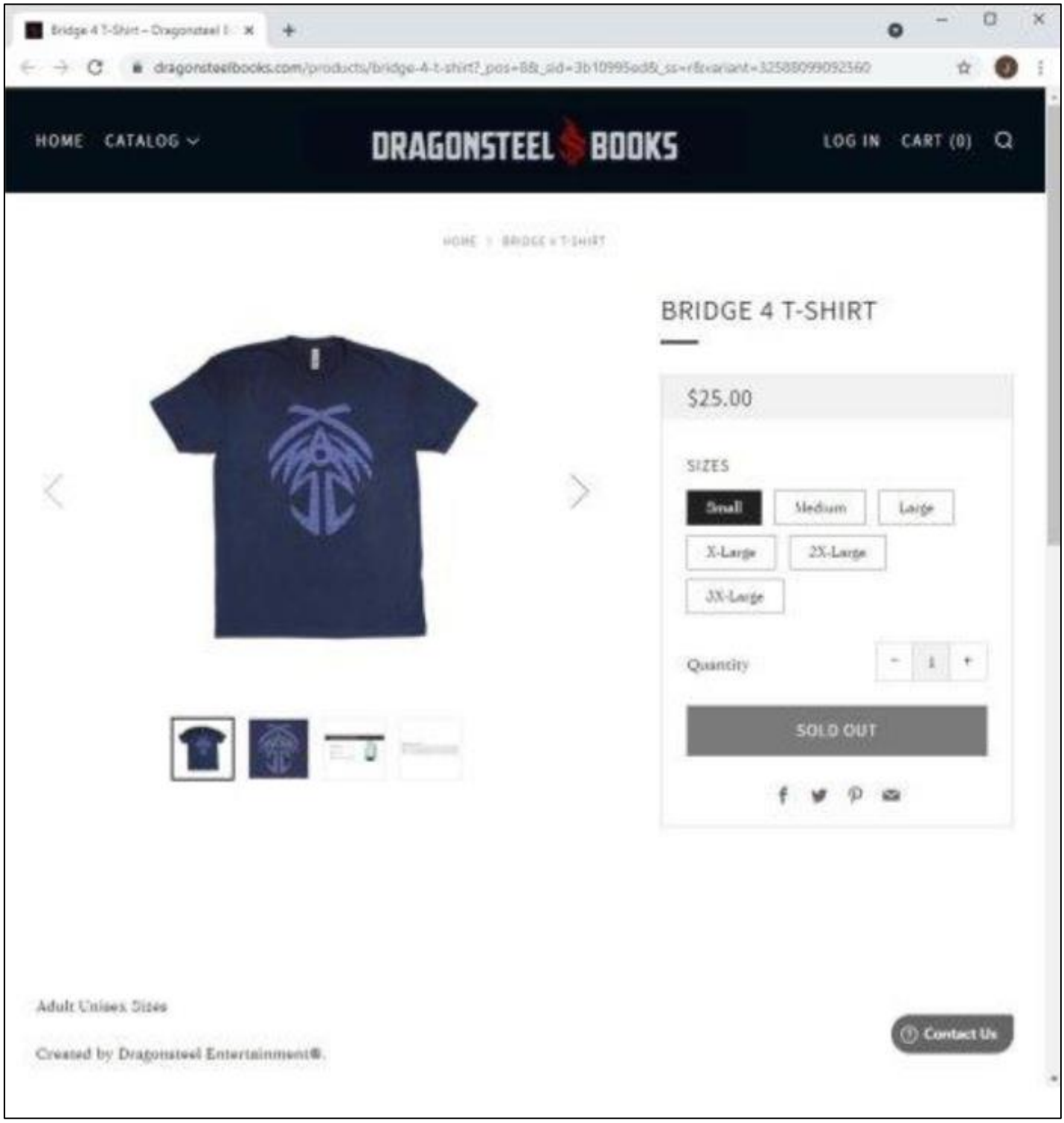
HOME
CATALOG
DRAGONSTEEL BOOKS
LOG IN
CART (0)
BRIDGE 4 T-SHIRT
$25.00
SIZES
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3X-Large
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Adult Unisex Sizes
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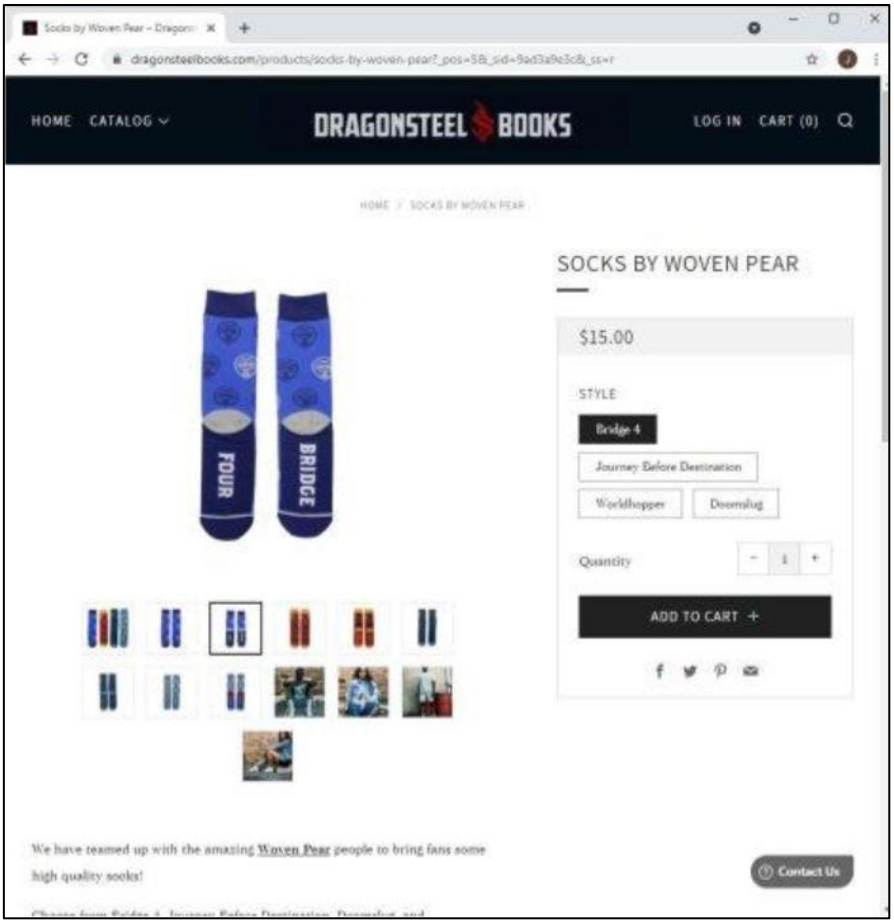

Based on these specimens of use, the Examining Attorney asserts that the proposed mark "is mere ornamentation that does not function as a trademark mark to identify the source of the applicant's goods and to distinguish them from the goods of others."[7] Specifically, as to the identified jewelry, the Examining Attorney argues that the specimens show the proposed mark "prominently engraved into the front portions of pendants and earrings, in a large size that occupies almost all of their visible exteriors" and thus the proposed mark serves as the jewelry's "sole decorative

[7] Examining Attorney's Brief, 6 TTABVUE 3.

element."[8] As to the identified clothing items, the Examining Attorney argues that the specimens show the proposed mark "prominently featured on the front portions of t-shirts and sweatshirts, in a large size that occupies the majority of the shirts' exterior."[9] As with the jewelry, the Examining Attorney asserts that the proposed mark "dominates the overall appearance of the shirts" and serves as the "shirts' sole decorative element."[10] Regarding the specimen showing socks, the Examining Attorney notes that "[d]ue to the quality of the image, it is not clear if the design element appears on the socks,"[11] but contends that, "if the circular design [on the upper portion of the socks] does contain the mark, this would also be ornamental use of the mark."[12]

For its part, Applicant argues that "[t]he TTAB has made it clear that 'emblazoning' a logo on the front of a t-shirt or hoodie does not preclude the logo functioning as a source identifier in the minds of the consuming public."[13] We agree, and, in fact, we have previously rejected any "per se rule regarding registrability based on the size of a mark on clothing." *Lululemon*, 2013 TTAB LEXIS 2, at *9.

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[8] *Id.* at 5.

[9] *Id.* at 4.

[10] *Id.*

[11] *Id.* at 8 n.3.

[12] *Id.* The Examining Attorney also notes that "it is also not clear if the applied-for mark appears in the [specimens submitted with the January 3, 2022 Application at TSDR 13, 15] on a shirt and a hoodie because the design element is fuzzy. . . . if this is the applied-for mark, it is also used in an ornamental manner on the center of the shirt as part of the BRIDGE logo." *Id.* We agree that the poor image quality of these specimens prevents us from making a determination as to whether the proposed mark actually appears on the goods displayed.

[13] Appeal Brief, 4 TTABVUE 10.

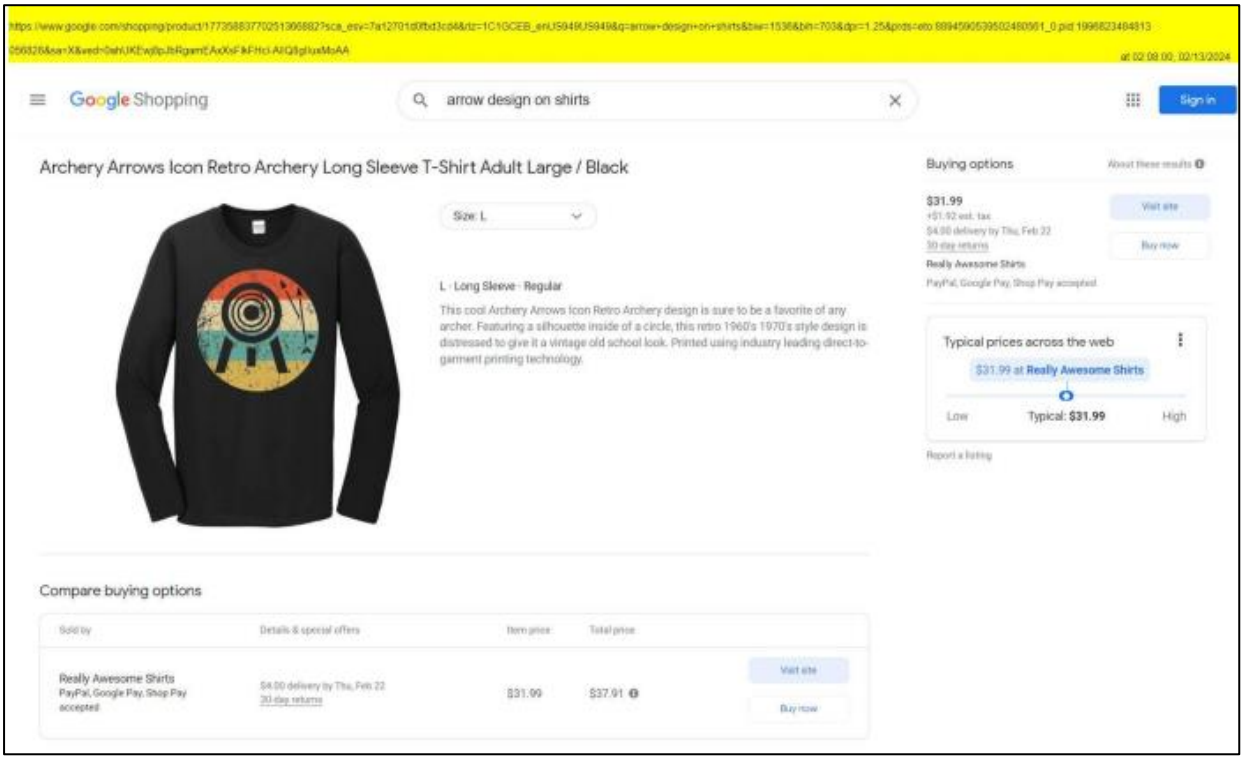
Instead, we have held that "in considering the commercial impression of marks of this nature, the size of the mark is one consideration along with others, and the registrability of each mark must be determined on a case-by-case basis." *Id.*

In this case, we find that the size, as well as the location and dominance, of the proposed mark on the goods make it more likely than not that consumers viewing the mark will perceive it as mere ornamentation, rather than as an indicator of source. Specifically, in all of the specimens above, except the one displaying the socks, the proposed mark is the only design element on the goods and it is displayed on the front of goods, taking up a significant portion of the shirts' surface area and composing almost the entirety of the jewelry items. Thus, the proposed mark wholly defines the appearance of the jewelry and forms the essence of the shirts' expressive element. *See, e.g.*, *Peace Love World Live*, 2018 TTAB LEXIS 220, at *9 (finding the proposed mark to be ornamental as applied to a bracelet because, inter alia, it composed the whole of the bracelet's appearance); *Pro-Line*, 1993 TTAB LEXIS 24, at *4-5 (finding the proposed mark to be primarily ornamental where its "prominent display immediately catches the eye" and formed "part of the thematic whole of the ornamentation of applicant's shirts"). As to the socks, we agree with the Examining Attorney that the poor image quality of the specimen prevents us from determining whether the proposed mark actually appears on the socks. Therefore, we cannot make a determination as to whether this specimen shows merely ornamental use of the proposed mark.

In addition to the specimens of use, we must also consider any marketplace evidence showing that the relevant goods commonly feature decorative elements or that the design featured in the proposed mark is a mere refinement of a common form of ornamentation. *Lululemon*, 2013 TTAB LEXIS 2, at *3; *see also In re Soccer Sport Supply Co.*, 507 F.2d 1400, 1402 (CCPA 1975) ("[A] design which is a mere refinement of a commonly-adopted and well-known form of ornamentation for a class of goods would presumably be viewed by the public as a dress or ornamentation for the goods."); *In re Gen. Tire & Rubber Co.*, 404 F.2d 1396, 1398 (CCPA 1969) (affirming mere ornamentation refusal after finding that tire whitewall ornamentation is a common practice in the tire industry and that the proposed mark, a three-ring whitewall design, was a mere refinement of this common practice); *Peace Love World Live*, 2018 TTAB LEXIS 220, at *9-10 ("The ornamental nature of the proposed mark [I LOVE YOU] is corroborated by the third-party use of that phrase on bracelets and other jewelry demonstrating that consumers are accustomed to seeing similar, ornamental displays of I LOVE YOU on bracelets and other jewelry from different sources."); *cf. In re Chippendales USA, Inc.*, 622 F.3d 1346, 1356 (Fed. Cir. 2010) (finding "cuffs and collar" costume of male exotic dancers was a mere refinement of a form of ornamentation in exotic dancing industry).

To that end, the Examining Attorney argues that marketplace evidence of record here further supports the conclusion that consumers viewing the proposed mark as used on the identified goods would perceive it as mere ornamentation, because it establishes "that decorative and/or ornamental designs such as the applied-for mark

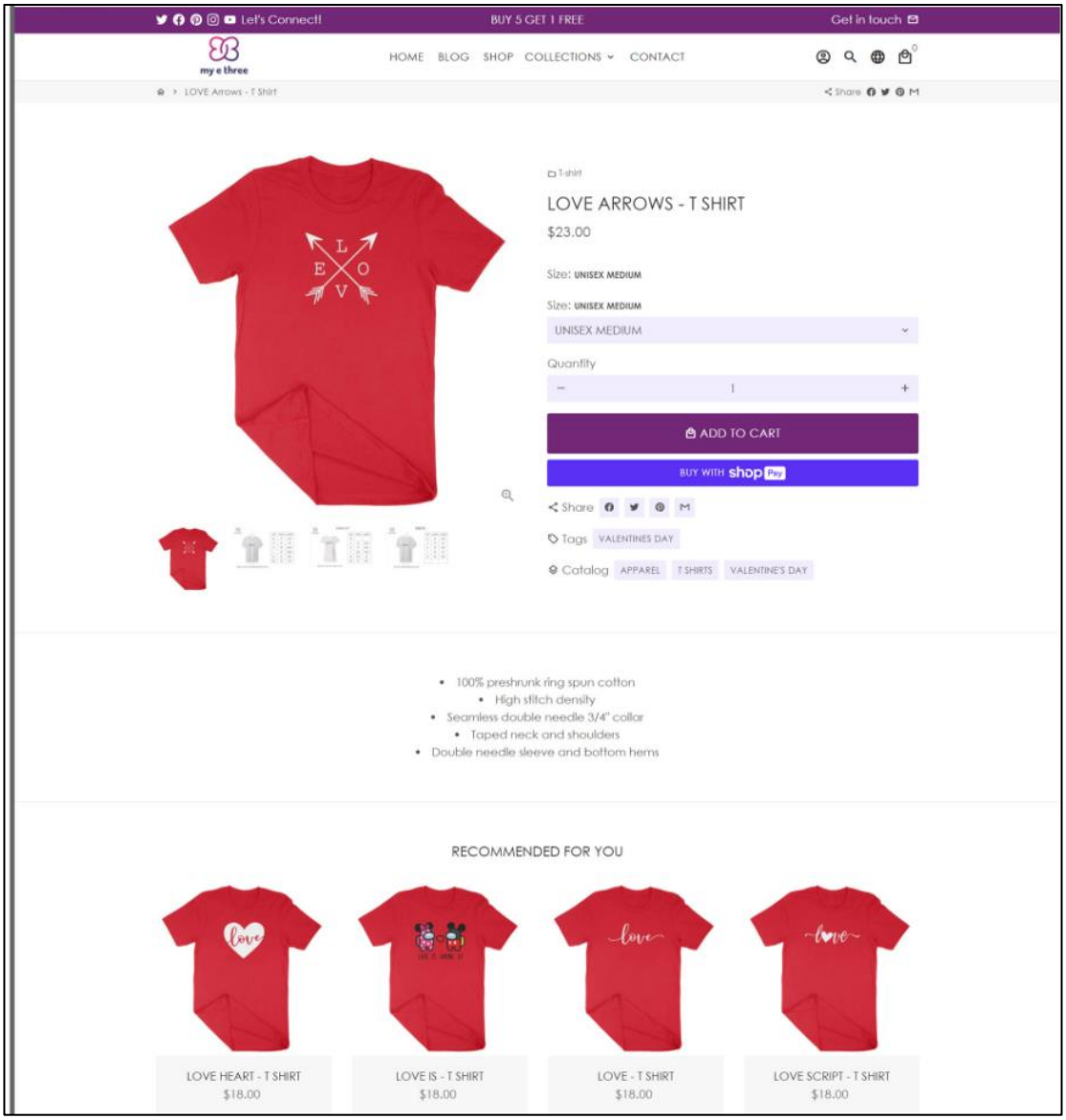
commonly appear in a large size on the front portions of shirts, sweatshirts, and other articles of clothing."[14] In particular, noting that "Applicant has described its design as an arrow shape,"[15] the Examining Attorney draws our attention to the record's following "examples of arrow designs being placed on clothing in a similar manner."[16]



[14] Examining Attorney's Brief, 6 TTABVUE 4.

[15] *Id.*

[16] *Id.* The examples reproduced here appear in the February 13, 2024 Final Office Action at TSDR 19-22.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High stitch density
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Taped neck and shoulders
Double needle sleeve and bottom hems
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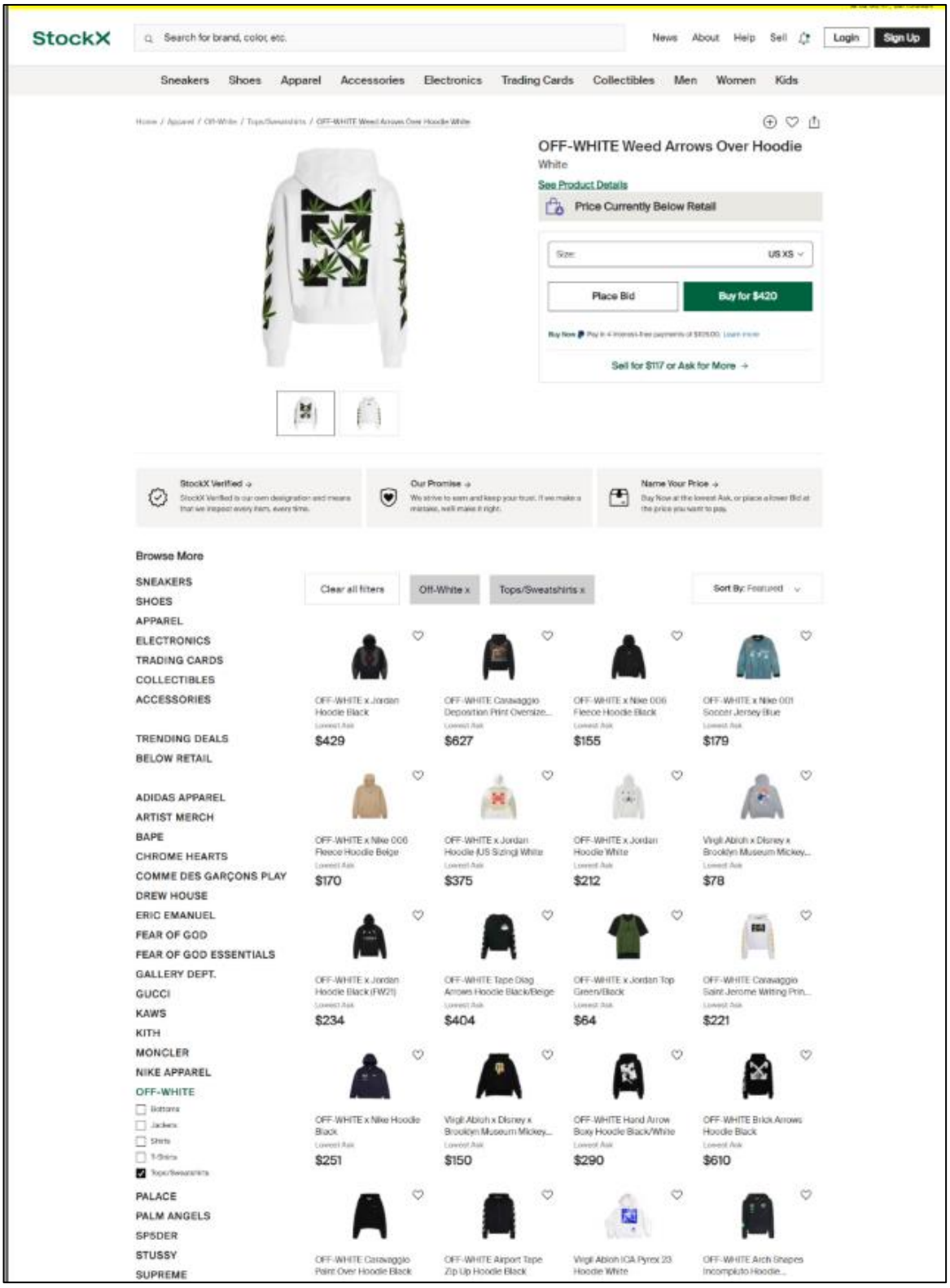
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Kids
OFF-WHITE Weed Arrows Over Hoodie
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See Product Details
Price Currently Below Retail
Size:
US XS
Place Bid
Buy for $420
Sell for $117 or Ask for More
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Our Promise
Name Your Price
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ARTIST MERCH
BAPE
CHROME HEARTS
COMME DES GARÇONS PLAY
DREW HOUSE
ERIC EMANUEL
FEAR OF GOD
FEAR OF GOD ESSENTIALS
GALLERY DEPT.
GUCCI
KAWS
KITH
MONCLER
NIKE APPAREL
OFF-WHITE
PALACE
PALM ANGELS
SP5DER
STUSSY
SUPREME
Clear all filters
Off-White x
Tops/Sweatshirts x
Sort By: Featured
OFF-WHITE x Jordan Hoodie Black
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OFF-WHITE Caravaggio Deposition Print Oversize...
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Virgil Abloh x Disney x Brooklyn Museum Mickey...
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OFF-WHITE x Jordan Hoodie Black (FW21)
$234
OFF-WHITE Tape Diag Arrows Hoodie Black/Beige
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$64
OFF-WHITE Caravaggio Saint Jerome Writing Prin...
$221
OFF-WHITE x Nike Hoodie Black
$251
Virgil Abloh x Disney x Brooklyn Museum Mickey...
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$290
OFF-WHITE Brick Arrows Hoodie Black
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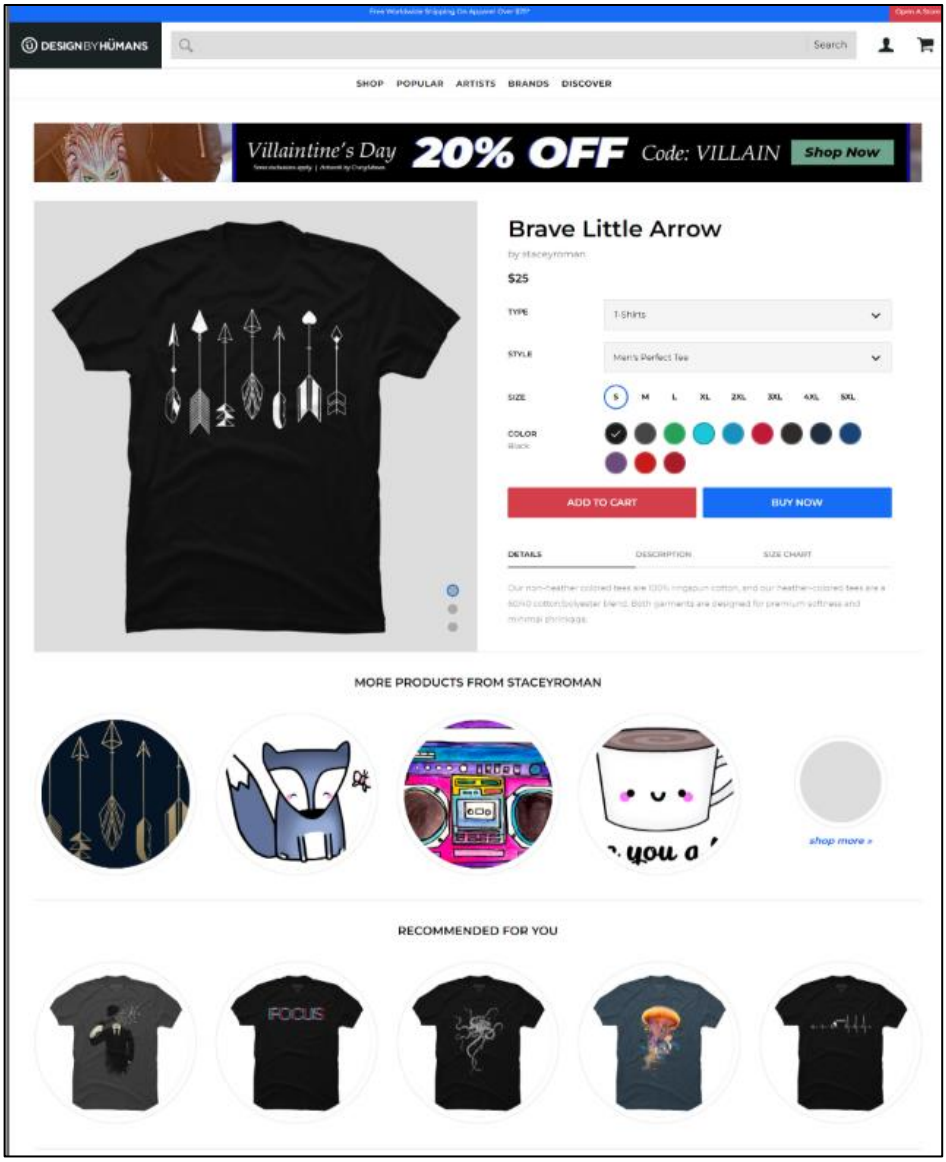
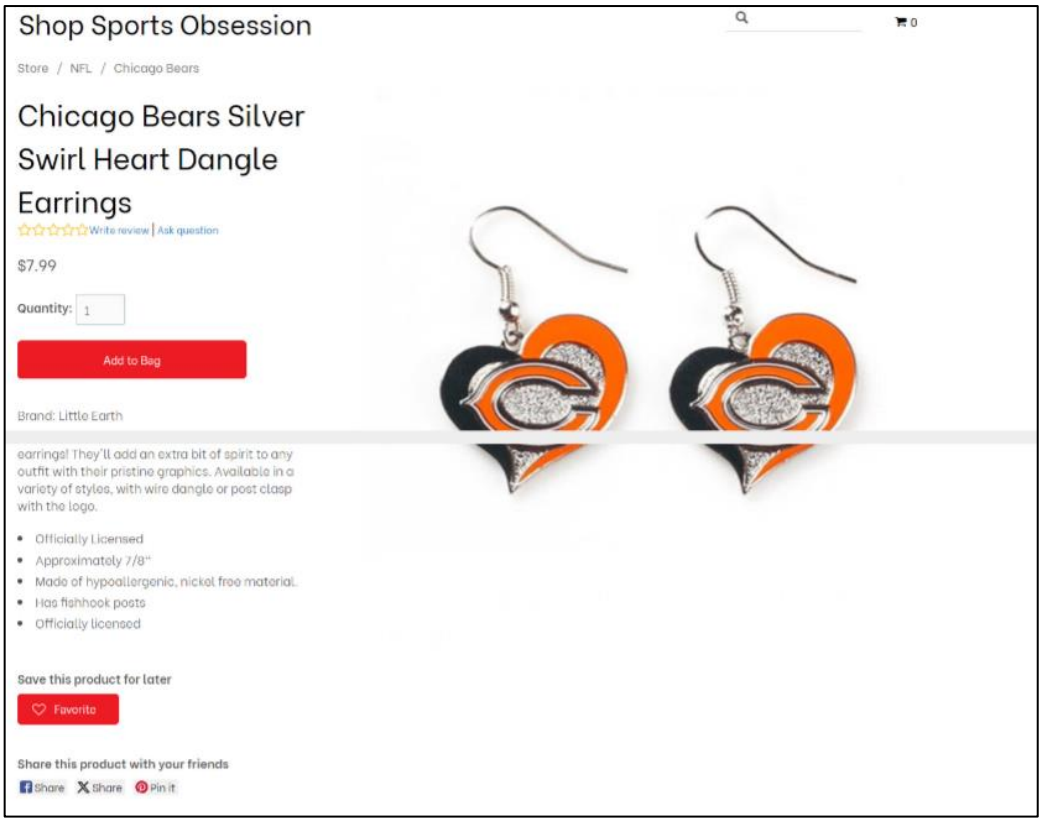


In addition, the Examining Attorney asserts that other marketplace evidence of record, some of which is reproduced below, shows "that decorative and/or ornamental designs similar to the applied-for mark commonly appear in a large size on the exterior portions of jewelry."[17]

[17] Examining Attorney's Brief, 6 TTABVUE 5. The examples reproduced here appear in the February 13, 2024 Final Office Action at TSDR 11-12, 16.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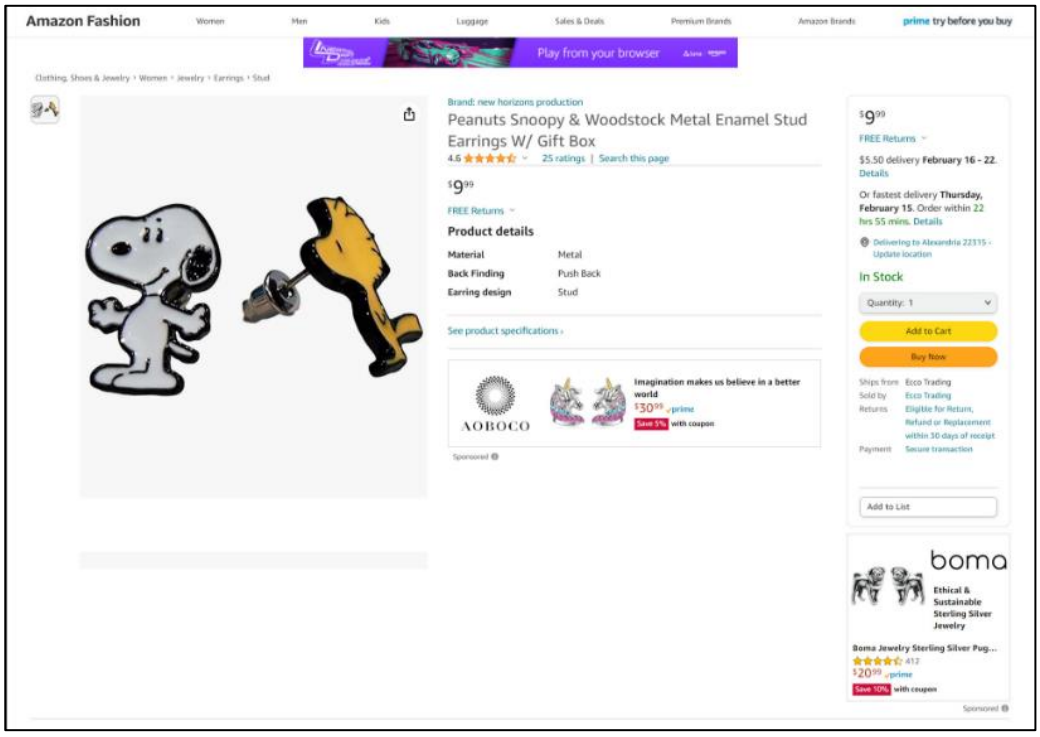
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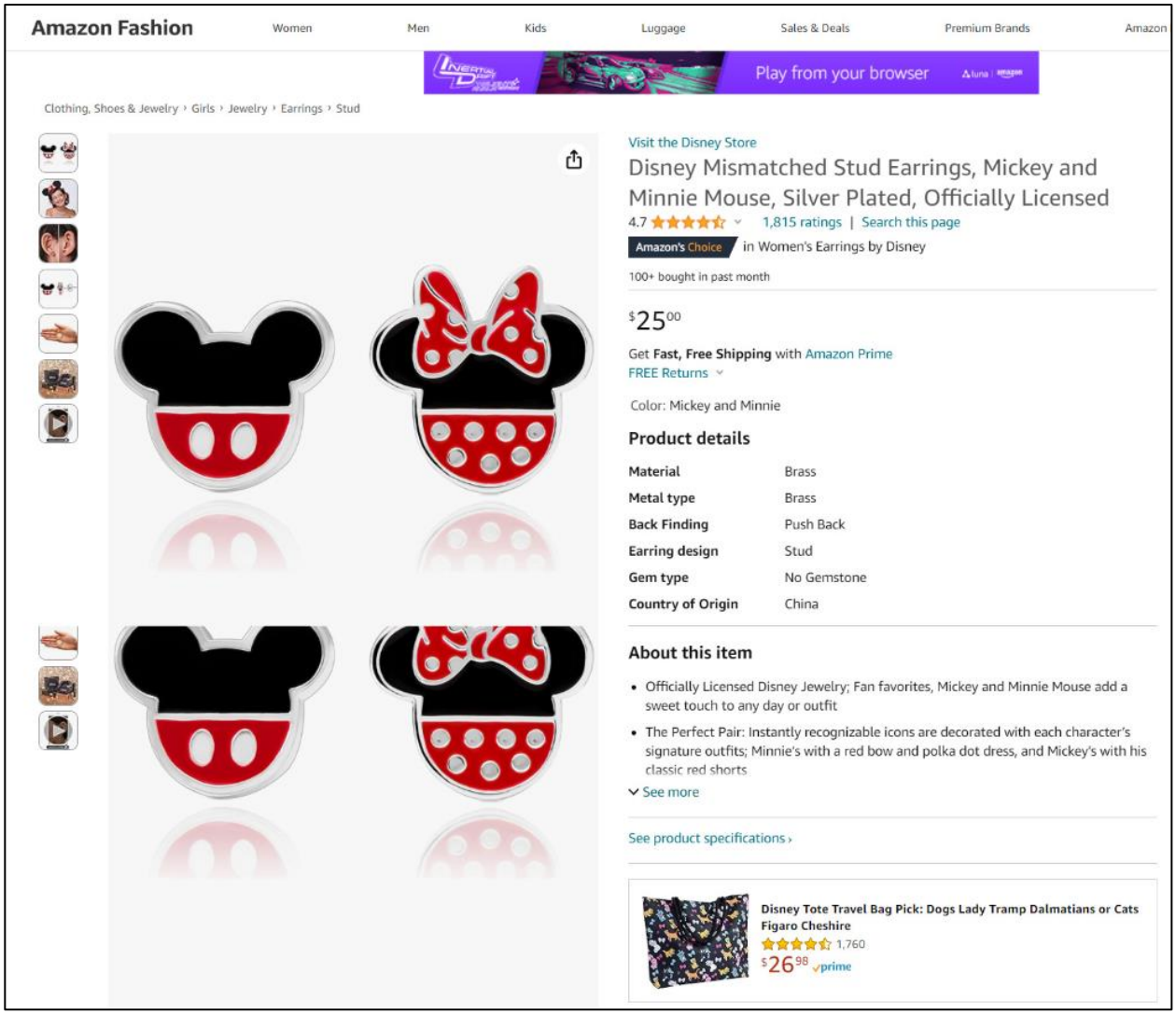

We reject the Examining Attorney's contention that any of the goods displayed in these examples, or any other examples in the record, feature designs similar to the proposed mark. While Applicant's description of the mark does state that it features an "arrow-like design," that element is highly stylized and deeply integrated into the overall design of the proposed mark. Thus, it bears only a passing resemblance to an arrow and is different than the arrows displayed in the examples. Moreover, none of the marketplace evidence depicts jewelry designs that are remotely similar to the proposed mark.

However, we do agree with the Examining Attorney that this evidence is relevant and probative to our ornamentation analysis because it supports the general proposition that clothing and jewelry commonly feature prominently displayed ornamentation or design elements. Thus, consumers may be predisposed to perceiving such elements as something other than indicators of source on such goods and may purchase the goods because of their appearance rather than because they come from a particular source. *Cf. Eagle Crest*, 2010 TTAB LEXIS 346, at *9 ("It is clear that clothing imprinted with this slogan [in the proposed mark] will be purchased by consumers for the message it conveys."). So, while the design of the proposed mark may be deemed unique as compared to the other designs in evidence, the manner in which Applicant applies the proposed mark to shirts and jewelry (i.e., a prominently displayed design serving as the sole decorative element of the goods) is nonetheless a mere refinement of a common form of ornamentation for such goods. *See, e.g.*, *In re Gen. Tire & Rubber Co.*, 404 F.2d at 1398; *Peace Love World Live*, 2018 TTAB LEXIS 220, at *9-10.

We acknowledge that some of the examples above and otherwise in the record appear to show ornamental designs that may also serve as indicators of secondary source. That is, the ornamental designs in these examples may be recognized as trademarks, or as including trademarks, because of the relevant mark owner's non-ornamental use of the relevant matter on other goods or services. *See, e.g.*, *Pro-Line*, 1993 TTAB LEXIS 24, at *3 ("The 'ornamentation' of a T-shirt can be of a special nature which inherently tells the purchasing public the source of the T-shirt, not the

source of manufacture but the secondary source. Thus, the name 'New York University' and an illustration of the Hall of Fame, albeit it will serve as ornamentation on a T-shirt will also advise the purchaser that the university is the secondary source of that shirt."). Nonetheless, this evidence supports the general proposition that clothing and jewelry typically feature ornamentation and design elements, and are purchased for that reason.

Relatedly, Applicant asserted during prosecution that the proposed mark "is not random artwork but is instead a distinctive symbol for fans of Brandon Sanderson's fantasy books," noting that "[t]here is no reason to believe that a person would want to use this symbol as mere decorative artwork for a t-shirt or jewelry."[18] This argument appears be based on the secondary source concept, in that Applicant seems to suggest that consumers familiar with the books will recognize the proposed mark on the clothing and jewelry as pointing to the source of Brandon Sanderson's books. However, Applicant has not actually claimed or provided any evidence of secondary source.[19] Nor does the record contain any evidence establishing Applicant's

[18] March 28, 2023 Response to Office Action at TSDR 2.

[19] "To show that a proposed mark that is used on the goods in a decorative or ornamental manner also serves a source-indicating function, the applicant may submit evidence that the proposed mark would be recognized as a mark through its use with goods or services other than those being refused as ornamental. To show secondary source, the applicant may show: (1) ownership of a U.S. registration on the Principal Register of the same mark for other goods or services based on use in commerce under §1 of the Trademark Act; (2) ownership of a U.S. registration on the Principal Register of the same mark for other goods or services based on a foreign registration under §44(e) or §66(a) of the Trademark Act for which an affidavit or declaration of use in commerce under §8 or §71 has been accepted; (3) non-ornamental use of the mark in commerce on other goods or services; or (4) ownership of a pending use-based application for the same mark, used in a non-ornamental manner, for other goods or services." TMEP § 1202.03(c).

relationship to Brandon Sanderson or his books, or that Applicant is the source of those books. In the absence of such evidence we cannot conclude that consumers, even those familiar with the books, will view the proposed mark as an indicator of secondary source.[20] Even if the record were to include such evidence, we note that Applicant's identification of goods contains no restrictions as to types of purchasers and thus Applicant's goods may be purchased by consumers who are unaware of these books or their author, and instead simply like the design featured on the goods.

II. Conclusion

We have carefully considered all of the arguments and evidence of record and find that Applicant's proposed mark  , as used in the specimens of record, would be perceived as mere ornamentation and thus fails to function as a trademark for the identified goods in International Classes 14 and 25.

Decision: We affirm the refusal to register Applicant's proposed mark under Sections 1, 2 and 45 of the Trademark Act.

[20] We also note that, during prosecution, the Examining Attorney construed Applicant's statement about the mark being a "distinctive symbol for fans of Brandon Sanderson's fantasy books" as a potential claim of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f). *See* June 5, 2023 Office Action at TSDR 2. However, Applicant clarified that it was "not at this time arguing for acquired distinctiveness because Applicant strongly believes that the mark as used in the submitted specimens is inherently distinctive." September 7, 2023 Petition to Revive Abandoned Application at TSDR 5.