

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Hearing: August 28, 2024

Mailed: September 26, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Erik M. Pelton & Associates, PLLC

Serial No. 97325462

Denisse F. Garcia of Erik M. Pelton & Associates, PLLC,
for Erik M. Pelton & Associates, PLLC.

Kelly Ryan, Trademark Examining Attorney, Law Office 111,¹
Chris Doninger, Managing Attorney.

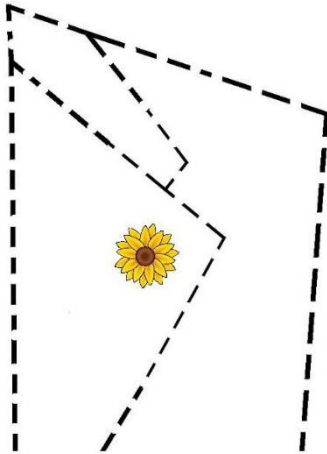
Before Adlin, Lynch, and Lavache,
Administrative Trademark Judges.

Opinion by Lavache, Administrative Trademark Judge:²

¹ The application was reassigned from the original examining attorney to the above-named examining attorney after the filing of the Examining Attorney's Brief.

² As part of an internal Board pilot program to broaden acceptable forms of legal citation in Board cases, 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). For opinions of the Board, this opinion cites to the Lexis legal database and cites only precedential decisions. Practitioners should also adhere to the practice set forth in TBMP § 101.03. Precedential decisions of the Board, and precedential decisions of the Federal Circuit involving Board decisions that issued January 1, 2008, or after may be viewed in TTABVUE by entering the proceeding number, application number, registration number, expungement/reexamination number, mark, party, or correspondent. Many precedential Board decisions that issued from 1996 to 2008 are available online from the TTAB Reading

Erik M. Pelton & Associates, PLLC (“Applicant”) seeks registration on the Principal Register of the proposed mark below, based on a claim of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f).



The application includes the following description of the proposed mark:

The mark consists of a sunflower lapel pin uniform feature, with yellow petals forming the outside of the sunflower and a brown center outlined in black; the dotted lines in the image are not part of the mark but to show placement of the sunflower uniform feature on a suit lapel.³

The identified services are:

Entertainment services, namely, providing podcasts in the field of intellectual property law; Providing continuing legal education courses; Providing online non-downloadable videos in the field of intellectual property law, in International Class 41.

Legal advisory services in the field of trademarks, trademark maintenance, trademark registrations, trademark clearance, trademark infringement, prosecution of trademark applications, in International Class 45.

Room by entering the same information. Most TTAB decisions that issued prior to 1996 are not available in USPTO databases.

³ Application Serial No. 97325462 was filed March 22, 2022, based upon Applicant’s allegation of use in commerce under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), claiming April 2015 as both the date of first use and the date first use in commerce for both classes. The application includes the following color claim: “The color(s) yellow, black and brown is/are claimed as a feature of the mark.”

The Trademark Examining Attorney refused registration of Applicant's proposed mark under Trademark Act Sections 1, 2, 3, and 45, 15 U.S.C. §§ 1051, 1052, 1053, 1127, on the ground that, as used on the specimens of use, the proposed mark does not function as a service mark for Applicant's services and it has not acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f). The Examining Attorney also refused registration under Trademark Act Sections 1 and 45, 15 U.S.C. §§ 1051, 1127, on the ground that the specimens of use fail to show a direct association between the proposed mark and the identified services. After the Examining Attorney issued a final refusal on all grounds, Applicant filed an appeal, which has been fully briefed. An oral hearing before this panel was held on August 28, 2024.

Based on the arguments in the record and those presented at the oral hearing, we construe the Examining Attorney's position to be that the proposed mark fails to function as a service mark because it is nondistinctive trade dress and Applicant has not established that it has acquired distinctiveness for Applicant's services.⁴ For the reasons explained below, we affirm the refusal. We therefore do not reach the refusal

⁴ We reject Applicant's arguments as to the alleged vagueness of the Examining Attorney's basis for refusal (*see* Appeal Brief, 6 TTABVUE 14), as Applicant had a fair opportunity to argue for registrability. The Examining Attorney referred to Applicant's proposed mark as failing to function as a source indicator, under Trademark Act Sections 1, 2, 3, and 45. 15 U.S.C. §§ 1051, 1052, 1053, and 1127. However, the prosecution record as a whole, the arguments by the Examining Attorney, and Applicant's own arguments, including those made at the oral hearing in this case, all make clear that the asserted "failure to function" stemmed from the proposed mark's status as trade dress lacking inherent distinctiveness and for which acquired distinctiveness was not established. The Examining Attorney cited the correct statutory grounds for a nondistinctive trade dress refusal, and at no point did the Examining Attorney indicate that the nature of the refusal foreclosed a claim of acquired distinctiveness. Rather, the Examining Attorney repeatedly considered Applicant's Section 2(f) claim, but found it insufficient. Accordingly, we find that the reasons for the refusal were sufficiently specified.

on the ground that Applicant's specimens of use fail to show a direct association between the proposed mark and the identified services. *See, e.g., In re Suuberg*, Ser. No. 88234650, 2021 TTAB LEXIS 459, at *11-12 (TTAB 2021) (exercising discretion to decline consideration of second ground for refusal where the affirmed ground was sufficient for refusing registration).

I. Nature of the Proposed Mark

To facilitate our analysis, we first address the nature of Applicant's proposed mark. *See, e.g., In re Palacio Del Rio, Inc.*, Ser. No. 88412764, 2023 TTAB LEXIS 183, at *4 (TTAB 2023); *Kohler Co. v. Honda Giken Kogyo K.K.*, Opp. No. 91200146, 2017 TTAB LEXIS 450, at *54 (TTAB 2017); *In re Heatcon, Inc.*, Ser. No. 85281360, 2015 TTAB LEXIS 360, at *14 (TTAB 2015).

Applicant is a law firm that provides legal advisory services and related entertainment and educational services. According to Applicant, the proposed mark consists of a lapel pin in the shape of a sunflower, which Applicant's employees wear as a "uniform feature" or "work attire" in the course of performing these services.⁵ Excerpts from two of the specimens of record⁶ are reproduced below. These excerpts include photographs of Applicant's founder and lead attorney wearing the lapel pin; other evidence of record shows similar use.

⁵ Appeal Brief, 6 TTABVUE 9.

⁶ March 22, 2022 Application at TSDR 12, 13.

EMP&A
Erik M Pelton & Associates, PLLC

[Meet
ERIK & TEAM](#)

[Core
SERVICES](#)

[Valuable
RESOURCES](#)

[iPelton
BLOG](#)

[Featured
CLIENTS](#)

[Our
STORE](#)

[Connect
WITH US](#)



MEET
ERIK & TEAM



ERIK PELTON

Founder and Lead Attorney

Erik is all about energy, whether he's representing clients, addressing workshop or conference goers, volunteering with Falls Church City's Economic Development Authority, testing his mettle in a triathlon, drumming up support for charity, or wrangling kids on Bike to School Day. His superpower is making complicated subjects clear, using real-world examples to illustrate his points in an engaging—sometimes-hilarious—way. And as an early-adopter gadget freak, the exploding world of technology and associated intellectual property laws is to Erik familiar and fun rather than intimidating. Erik got his start as a trademark examiner for the USPTO and, in the years since, has grown his law practice with the enduring ideals of customer service, affordability, and clarity. If you're looking to work with someone who will care about your company brand as passionately as you do, [you've come to the right place.](#)

Did you know that Erik also owns several trademark registrations himself, such as [IPELTON®](#), [MAKING TRADEMARKS BLOOM SINCE 1999®](#), and [THE NONTRADITIONAL TRADEMARK LAWYERS®](#)? Erik believes that the best advisors must practice what they preach!

[More About Erik >](#)

[Featured Article on Erik >](#)

[Learn What I Preach >](#)

[Brochure Download >](#)

[About the Team >](#)




How Are We Different from Other Law Firms and Trademark Services?

- **Experience:** Lead Attorney Erik Pelton has been in the field of trademarks for more than 20 years, worked as an Examiner at the USPTO, registered more than 2,500 trademarks, and has been actively involved in a variety of intellectual property organizations.
- **Flat fees:** Every trademark application filed by EMP&A since 1999 has been handled via an all-inclusive flat fee covering the entire application process with no hidden costs.
- **Technology:** We leverage technology to streamline the application process. Over the years, we have developed proprietary software, free monitoring websites, an iOS app, and more.

[Meet Erik & Team!](#)

A former trademark examiner at the US Patent and Trademark Office, Erik Pelton shares his background helping businesses big and small protect their brands.

[Watch Erik >](#)



The Trademark Act “takes a very flexible approach to the question of what constitutes a service mark.” *In re Eagle Fence*, Ser. No. 73463319, 1986 TTAB LEXIS 57, at *7 (TTAB 1986). This is reflected in its definition of “service mark,” which includes not just “any word [or] name,” but also any “symbol, or device” used “to identify and distinguish the services of one person, including a unique service, from the services of others and to indicate the source of the services, even if the source is unknown.” 15 U.S.C. § 1127. Consistent with this definition, Applicant’s proposed nontraditional service mark is a “symbol” or “device,” which Applicant intends to use as trade dress for its services. *Wal-Mart Stores v. Samara Bros.*, 529 U.S. 205, 209

(2000) (concluding that “trade dress constitutes a ‘symbol’ or ‘device’ for purposes of the relevant sections [of the Trademark Act]”).

Originally, “trade dress” referred to just the packaging for a physical product, but over time the term has expanded to include the design of a product itself (i.e., product configuration), as well as a variety of other source-indicating visual, physical, or environmental elements associated with goods or services. *See, e.g., Wal-Mart*, 529 U.S. at 209 (noting that “‘trade dress’ . . . originally included only the packaging, or ‘dressing,’ of a product, but in recent years has been expanded by many courts of appeals to encompass the design of a product”); *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 765 (1992) (involving trade dress for restaurant services in the form of a Mexican restaurant’s interior and exterior decorative and architectural elements); *In re Chippendales USA, Inc.*, 622 F.3d 1346 (Fed. Cir. 2010) (involving trade dress for exotic dancing services in the form of a “Cuffs & Collar” costume worn by dancers); *In re Seminole Tribe of Fla.*, Ser. No. 87890892, 2023 TTAB LEXIS 184 (TTAB 2023) (involving trade dress in the form of a guitar-shaped building for casino, hotel, bar, and restaurant services); *In re Frankish Enters. Ltd.*, Ser. No. 85494703, 2015 TTAB LEXIS 28 (TTAB 2015) (involving trade dress for monster truck exhibition services in the form of a prehistoric-animal-themed monster truck body). Thus, in *Wal-Mart*, the Supreme Court observed that, in addition to product packaging (e.g., the box for a pair of shoes) and product design (e.g., the “configuration” of the shoes themselves), trade dress could involve “some tertium quid,” or third thing, akin to product

packaging for services (e.g., the retail environment of a shoe store). *See* 529 U.S. at 215.

At the oral hearing, Applicant asserted that its proposed mark falls under the “tertium quid” category. We agree. Because the lapel pin depicted in the mark drawing is not the product Applicant is offering, the proposed mark is not product design trade dress. Likewise, the proposed mark is not the packaging or “dressing” for goods and so it cannot be traditional product packaging trade dress. Therefore, the proposed mark is best characterized as trade dress akin to product packaging for services. *See id.* (noting that the restaurant décor in *Two Pesos* was “akin to product packaging” for restaurant services).

Often, the type of trade dress at issue will dictate whether it can be considered inherently distinctive, i.e., whether, by its intrinsic nature, it can serve to identify a particular source. *See Wal-Mart*, 529 U.S. at 210-211. Specifically, product packaging trade dress and trade dress for services can be inherently distinctive, but product design can never be and thus may not be registered on the Principal Register without a showing of acquired distinctiveness. *See id.* at 212, 216.

In this case, however, the inherent distinctiveness of the proposed mark is not at issue, because Applicant seeks registration under Trademark Act Section 2(f) and thus the proposed mark’s lack of inherent distinctiveness is deemed an established fact. *See Yamaha Int’l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 1577 (Fed. Cir. 1988) (“Where, as here, an applicant seeks a registration based on acquired distinctiveness under Section 2(f), the statute accepts a lack of inherent

distinctiveness as an established fact. . . . The only remaining issue under Section 2(f) relating to the proposed mark itself is acquired distinctiveness.”); *In re GJ & AM, LLC*, Ser. No. 86858003, 2021 TTAB LEXIS 203, at *38-39 (TTAB 2021) (“For procedural purposes, a claim of distinctiveness under § 2(f), whether made in the application as filed or in a subsequent amendment, may be construed as conceding that the matter to which it pertains is not inherently distinctive and, thus, not registrable on the Principal Register absent proof of acquired distinctiveness. . . . For the purposes of establishing that the subject matter is not inherently distinctive, the examining attorney may rely on this concession alone.” (quoting TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1212.02(b) (May 2024))).

Accordingly, we presume that Applicant’s proposed mark is trade dress that does not, by its intrinsic nature, serve to identify a particular source for Applicant’s identified services.

II. Acquired Distinctiveness

While Applicant has conceded that the proposed mark is not inherently distinctive, it is at least capable of serving as a service mark.⁷ However, as one noted commentator on trademarks has observed, “[t]o state that something is capable of trade dress protection is hardly the same as concluding that it is likely to or has become valid and legally protectable trade dress.” 1 MCCARTHY ON TRADEMARKS AND

⁷ The record shows that the Examining Attorney has never explicitly or even implicitly found the proposed mark to be incapable. Indeed, when asked to clarify the nature of the refusal at the oral hearing, the Examining Attorney confirmed that it is the Office’s position that the mark is capable, but nondistinctive as used on the specimen of record, and Applicant has not met its burden to establish that the mark would be perceived as an indicator of source for the identified services.

UNFAIR COMPETITION § 8:4 (5th ed.). Thus, we must now assess whether Applicant has established that the mark has acquired distinctiveness as a source indicator in the minds of the relevant consumers.

Under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), matter that is not inherently distinctive may nonetheless be registered on the Principal Register if the evidence of record establishes that the proposed mark has acquired distinctiveness (also known as “secondary meaning”) among the relevant purchasers as used in connection with Applicant’s services in commerce. *See Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1378-79 (Fed. Cir. 2012); *Mini Melts, Inc. v. Reckitt Benckiser LLC*, Opp. No. 91173963, 2016 TTAB LEXIS 151, at *53 (TTAB 2016). Here, the relevant purchasers are consumers or potential consumers of legal advisory services in the field of trademarks, podcasts in the field of intellectual property law, continuing legal education courses, and online non-downloadable videos in the field of intellectual property law.

The onus is on Applicant to prove acquired distinctiveness. *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 1335 (Fed. Cir. 2015). “The amount and character of evidence required to establish acquired distinctiveness depends on the facts of each case and the nature of the mark sought to be registered.” *In re Gen. Mills IP Holdings II, LLC*, Ser. No. 86757390, 2017 TTAB LEXIS 262, at *6 (TTAB 2017) (citing *Roux Labs., Inc. v. Clairol Inc.*, 427 F.2d 823, 829 (CCPA 1970)). But “[i]t is axiomatic that ‘the lesser the degree of inherent distinctiveness, the heavier the burden to prove that [a mark] has acquired distinctiveness.’” *In re Jasmin Larian, LLC*, Ser. No. 87522459,

2022 TTAB LEXIS 99, at *45 (TTAB 2022) (quoting *In re UDOR U.S.A., Inc.*, Ser. No. 78867933, 2009 TTAB LEXIS 61, at *27 (TTAB 2009)).

In this case, we find that Applicant faces a heavy burden because the mark consists of a lapel pin, and the evidence of record shows what may generally be taken for granted: lapel pins, including those featuring flowers, are common accessories for professional attire in many fields, including the legal industry.⁸ *See Yamaha*, 840 F.2d at 1581 (indicating that the burden of proving acquired distinctiveness becomes more difficult to meet as the proposed mark's non-distinctiveness increases). Applicant argues that it is uncommon for attorneys to wear lapel pins, specifically sunflower lapel pins, to promote and indicate the source of their legal services and related educational and entertainment services.⁹ Applicant suggests that this works in its favor, making it more likely that consumers would view Applicant's proposed mark as a unique source identifier.¹⁰ Thus, Applicant contends, "a lower level of

⁸ *See* June 3, 2022 Office Action at TSDR 2-3, 7-14; September 15, 2023 Office Action at TSDR 6-13, 15-43. Applicant also argues that "no evidence that establishes that wearing sunflower lapel pins as a decorative element is a common practice—or a practice by anyone other than Applicant—in Applicant's industry." Appeal Brief, 6 TTABVUE 13. However, the point is that the evidence shows that decorative lapel pins are common fashion accessories generally. Sunflower lapel pins are, of course, a particular type of decorative lapel pin.

⁹ *See* Appeal Brief, 6 TTABVUE 13 ("None of the evidence provided by the Examining Attorney includes third-party use of sunflower lapel pins in connection with entertainment, educational, informational, or legal services. . . . The Examining Attorney has provided no evidence that establishes that wearing sunflower lapel pins as a decorative element is a common practice—or a practice by anyone other than Applicant—in Applicant's industry.")

¹⁰ *See id.* ("The lack of evidence put forth by the Examining Attorney supports the conclusion that Applicant's Mark is a unique source identifier.")

evidence should be required to establish that Applicant's Mark has acquired distinctiveness."¹¹

We disagree. Because of the manner in which lapel pins are commonly used, consumers are predisposed to view lapel pins as ornamental accessories, so they are less likely to perceive them (particularly those featuring typically decorative elements like flowers) as indicators of source for legal services and related entertainment and educational services. *Cf., e.g., D.C. One Wholesaler, Inc. v. Chien*, Opp. No. 91199035, 2016 TTAB LEXIS 536, at *20-21 (TTAB 2016) ("The evidence shows that in the relevant field of goods, and especially in the field of such goods marketed as souvenirs, the marketplace is awash in products that display the term I [heart] DC as a prominent ornamental feature of such goods, in such a way that the display itself is an important component of the product and customers purchase the product precisely because it is ornamented with a display of the term in an informational manner, not associated with a particular source."); *In re Eagle Crest, Inc.*, Ser. No. 77114518, 2010 TTAB LEXIS 346, at *9 (TTAB 2010) ("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."); *compare Palacio Del Rio*, 2023 TTAB LEXIS 183, at *4 (indicating that "mere refinements of commonly-adopted and well-known forms of ornamentation for hotel

¹¹ *Id.* at 19.

buildings” less likely to be perceived as a service mark), *with Frankish*, 2015 TTAB LEXIS 28, at *4-5, 10-14 (finding a monster truck body design would be perceived as a service mark for monster truck exhibition services, where the design was unique and the evidence showed that it was typical for each monster truck to have its own design).

Of course, we are mindful that a designation can both provide ornamentation and serve as an indicator of source. *See In re Hudson News Co.*, Ser. No. 74441602, 1996 TTAB LEXIS 16, at *30 (TTAB 1996) (“We readily recognize that there is no prohibition against a trade dress mark both functioning to indicate source and being aesthetically pleasing.”). However, Applicant bears the burden of proving that, in addition to providing ornamentation, the proposed mark indicates source. *See In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 1124 (Fed. Cir. 1985) (“While ornamentation is not incompatible with trademark function, ‘unless the design is of such nature that its distinctiveness is obvious, convincing evidence must be forthcoming to prove that in fact the purchasing public does recognize the design as a trademark which identifies the source of the goods.’”) (quoting *In re David Crystal, Inc.*, 296 F.2d 771, 773, (CCPA 1961)).

To that end, the following six factors inform whether a proposed mark has acquired secondary meaning:

- (1) association of the trade dress with a particular source by actual purchasers (typically measured by consumer surveys);
- (2) length, degree, and exclusivity of use;
- (3) amount and manner of advertising;

- (4) amount of sales and number of customers;
- (5) intentional copying; and
- (6) unsolicited media coverage of the product embodying the mark.

Converse, Inc. v. Int’l Trade Comm’n, 909 F.3d 1110, 1120 (Fed. Cir. 2018). “[N]o single factor is determinative.” *In re Steelbuilding.com*, 415 F.3d 1293, 1300 (Fed. Cir. 2005). Rather, “[a]ll six factors are to be weighed together in determining the existence of secondary meaning.” *Converse*, 909 F.3d at 1120.

In this case, Applicant relies on the following to establish acquired distinctiveness:

- A declaration from Applicant’s founding attorney, attesting to at least five years of substantially exclusive and continuous use of the proposed mark by Applicant;¹²
- Copies of social media posts made mostly by Applicant or its founding attorney, showing Applicant’s founder wearing a sunflower lapel pin and/or otherwise referencing the lapel pin;¹³
- Excerpts from Applicant’s website that include photographs of the sunflower lapel pin being worn by Applicant’s founding attorney and some of Applicant’s other attorney employees;¹⁴

¹² March 22, 2022 Application at TSDR 1.

¹³ *Id.* at 3-6, 9, 18, 21, 24, 27; July 20, 2023 Response to Office Action at TSDR 23, 39, 47-52. Three of the posts appear to have been made by third parties; one was made by the official USPTO Twitter account.

¹⁴ March 22, 2022 Application at TSDR 7-8, 12-16. We note that not all of the employee attorneys featured on the website are wearing the sunflower lapel pin.

- Photographs featuring Applicant’s founding attorney and other attorneys wearing the sunflower lapel pin at USPTO headquarters, before or after arguing before the TTAB, or while attending legal conferences;¹⁵
- An excerpt from apple.com, showing descriptions of Applicant’s podcast episodes and featuring a photograph of Applicant’s founding attorney wearing the sunflower lapel pin;¹⁶
- An excerpt from the Howard University Law School website, featuring the bio of Applicant’s founding attorney, along with a photograph of the founding attorney wearing the sunflower lapel pin;¹⁷
- Screenshots from websites or videos featuring Applicant’s courses, presentations, or interviews, showing Applicant’s founding attorney wearing the sunflower lapel pin;¹⁸
- A copy of Applicant’s registration for MAKING TRADEMARKS BLOOM SINCE 1999¹⁹ and photos of sunflower seeds and business cards featuring a sunflower image;²⁰ and
- Copies of various third-party registrations for marks consisting of “work attires and uniform features,” in which, according to Applicant, the

¹⁵ *Id.* at 22, 25-26; December 5, 2022 Response to Office Action at TSDR 4-6; July 20, 2023 Response to Office Action at TSDR 53.

¹⁶ March 22, 2022 Application at TSDR 10.

¹⁷ *Id.* at 20.

¹⁸ *Id.* at 11, 17, 19, 23; July 20, 2023 Response to Office Action at TSDR 24-38, 40-46.

¹⁹ December 5, 2022 Response to Office Action at TSDR 141.

²⁰ *Id.* at 11.

applicants “successfully asserted acquired distinctiveness by providing (in some cases, solely) a sworn statement of five years of continuous and exclusive use.”²¹

Under Section 2(f), proof of five years of substantially exclusive and continuous use of a mark **may** be accepted as prima facie evidence that the mark has acquired distinctiveness. *See* 15 U.S.C. § 1052(f). However, the Examining Attorney is not required to accept such a claim as prima facie evidence, nor is the Board. *In re Guaranteed Rate, Inc.*, Ser. No. 87054820, 2020 TTAB LEXIS 265, at *22-23 (TTAB 2020) (“The USPTO and the Board have discretion to find such a use claim insufficient.”). And where the proposed mark is not inherently distinctive because it is comprised of common features in the relevant field or is typically used or perceived as ornamentation, length of use alone generally is not sufficient to satisfy the elevated burden of proving acquired distinctiveness. *See, e.g., Owens-Corning*, 774 F.2d at 1124 (indicating that “convincing evidence” was required to show that the color pink served as a source indicator for insulation); *Nextel Commc’ns, Inc. v. Motorola, Inc.*, Opp. No. 91164353, 2009 TTAB LEXIS 443, at *26 (TTAB 2009) (“[T]he evidence required is in proportion to the degree of non-distinctiveness of the mark at issue. . . . Thus, even long periods of substantially exclusive use may not be sufficient to demonstrate acquired distinctiveness.”). In the present case, because lapel pins are typically used as ornamental accessories, they are less likely to be perceived as source

²¹ July 20, 2023 Response to Office Action at TSDR 55-75.

indicators. Thus, as Applicant appears to concede in its appeal brief,²² actual evidence that the sunflower lapel pin is perceived as a service mark is necessary to establish acquired distinctiveness. *See* TMEP §§ 1202.02(b)(ii), 1212.05(a).

Applicant's evidence demonstrates the manner and extent of Applicant's advertising efforts. Virtually all of this evidence shows one or more of Applicant's attorney employees (usually the founding attorney) wearing the sunflower pin either while advertising Applicant's services (e.g., on its website) or when rendering those services (e.g., in excerpts from courses or presentations). This evidence, as a whole, demonstrates some effort by Applicant to use the proposed mark as a service mark. However, "[t]he ultimate test in determining whether a designation has acquired distinctiveness is Applicant's success, rather than its efforts, in educating the public to associate the proposed mark with a single source." *Mini Melts*, 2016 TTAB LEXIS 151, at *54; TMEP § 1212.06(b).

Here, we have little information to enable us to discern the scale or impact, and thus the success, of Applicant's efforts in educating the relevant public about its proposed mark. For instance, the record does not include: any customer surveys or declarations from actual purchasers attesting to their association of Applicant's proposed mark with Applicant as the source of its services; any specific evidence of sales figures or numbers of clients; any conference attendance estimates indicating how many people may have encountered the proposed mark; any indication of the

²² Appeal Brief, 6 TTABVUE 16.

geographic reach of Applicant’s activities; or any data relating to Applicant’s website traffic, course participation, or podcast listenership.

We can only make an educated guess as to the reach and impact of Applicant’s efforts, based on the social media engagement information provided in some of the evidence itself. For instance, three of Applicant’s Twitter posts show fewer than 10 “likes”; an Instagram post was “liked” by 20 users;²³ a Facebook post shows 84 “People Reached”;²⁴ an apple.com excerpt shows that 10 users had rated Applicant’s podcast;²⁵ the views of Applicant’s YouTube videos range from eight views to 28 views;²⁶ and Applicant’s TikTok posts received from two to 24 “likes.”²⁷ While Applicant has provided us no additional context or basis for comparison to evaluate these engagement numbers, it is safe to assume that, to the extent these numbers reflect actual engagement in connection with Applicant’s efforts to associate its mark with its services, the reach and impact of those efforts are relatively limited.

Applicant also directs our attention to two social media excerpts, reproduced below, which it describes as “look-for” evidence.²⁸

²³ July 20, 2023 Response to Office Action at TSDR 18.

²⁴ *Id.* at 9.

²⁵ *Id.* at 10.

²⁶ July 20, 2023 Response to Office Action at TSDR 24, 26-38, 40-46.

²⁷ *Id.* at 39, 47-52. In the TikTok excerpts, “likes” appear to be represented by a heart icon.

²⁸ Appeal Brief, 6 TTABVUE 18.



While we acknowledge that these show Applicant's attempts to associate the proposed mark with Applicant's services, their probative value is tempered by the small number of such attempts and, more importantly, we do not know how many relevant consumers actually viewed these posts. The image on the right indicates that the post received five "likes," while the image on the left does not include any engagement information.

"Look for" advertising is crucial evidence of secondary meaning, where, as here, the proposed mark is nontraditional trade dress and lacks inherent distinctiveness,

consumers are not accustomed to viewing the subject matter of the proposed mark as a source indicator, and there is no direct evidence of consumer recognition of the proposed mark. *See Kohler*, 2017 TTAB LEXIS 450, at *163-165 (“The sort of advertising that can demonstrate that a trade dress has acquired distinctiveness is commonly referred to as ‘look for’ advertising; that is, advertising that directs the consumer to ‘look for’ the particular feature(s) claimed as a trademark.”). Although evidence of “look for” advertising does not necessarily prove consumer recognition, an applicant’s extensive use of “look for” advertising may make consumer recognition more likely because it “directs the potential consumer in no uncertain terms to look for a certain feature to know that it is from that source” rather than “simply includ[ing] a picture of the product or tout[ing] a feature in a non-source identifying manner.” *Id.* at 163 (quoting *Stuart Spector Designs Ltd. v. Fender Musical Instruments Corp.*, Opp. No. 91161403, 2009 TTAB LEXIS 132, at *67-68 (TTAB 2009)).

Here, though, almost all of Applicant’s submitted evidence, with very few exceptions, merely shows Applicant’s attorneys wearing a sunflower lapel pin, without any attempt to draw consumers’ attention to it as an indicator of source. *See id.* at 162 (“When advertisements are submitted as evidence of acquired distinctiveness, they must demonstrate the promotion and recognition of the specific configuration embodied in the applied-for mark and not of the goods in general.”) (quoting *AS Holdings, Inc. v. H & C Milcor, Inc.*, Opp. No. 91182064, 2013 TTAB LEXIS 388, at *34 (TTAB 2013)).

We acknowledge Applicant’s efforts to associate its services with the sunflower by using a sunflower motif on its website and business cards, and by distributing sunflower seeds to “countless colleagues, clients, and prospective clients.”²⁹ Again, however, Applicant has not provided any specific data that would allow us to gauge the potential impact of these efforts (e.g., where and how many seed packets were distributed) or any other information that would suggest that these efforts have been successful in creating an association between the proposed mark and Applicant’s services.

We also assign little probative value to the single item reproduced below that Applicant characterizes as “unsolicited acknowledgments by third parties,” which we assume is offered as unsolicited media coverage.³⁰



²⁹ *Id.* at 19.

³⁰ *Id.* at 18.

We do not know how much exposure this single social media post provided to Applicant's proposed mark or whether such an abbreviated reference to Applicant's service mark application would necessarily result in recognition of Applicant's proposed mark as an indicator of source among those relevant consumers who did view the post. Thus, we cannot reasonably conclude that it had any significant effect on the perception of the proposed mark in the marketplace for legal services and related entertainment and education services.

As Applicant points out,³¹ acquired distinctiveness may be established by “[c]ircumstantial evidence . . . from which such consumer perception might be inferred, such as years of continuous and substantially exclusive use, sales and advertising data, and any similar evidence showing wide exposure of the mark to consumers in a manner that would educate consumers to view the proposed mark as a source indicator.” *In re Keep A Breast Found.*, Ser. No. 85316199, 2017 TTAB LEXIS 259, at *19-20 (TTAB 2017). The record in this case simply does not provide enough information for us to infer that there has been wide exposure of the mark to the relevant consumers such that they have come to view the proposed mark as a service mark for Applicant's services. The information we do have suggests that, in fact, the relevant consumers' exposure to the proposed mark has been limited and thus we cannot find, based on this record, that the proposed mark will be perceived as a service mark.

³¹ *Id.* at 16.

Lastly, as to the third-party registrations submitted by Applicant, we reiterate, as many prior Board decisions have, that “[e]ach application for registration must be considered on its own merits.” *In re Merrill Lynch, Pierce, Fenner & Smith Inc.*, 828 F.2d 1567, 1569 (Fed. Cir. 1987); *see also In re Cordua Rests., Inc.*, 823 F.3d 594, 600 (Fed. Cir. 2016) (“The [USPTO] is required to examine all trademark applications for compliance with each and every eligibility requirement.”); *Eagle Crest*, 2010 TTAB LEXIS 346, at *5 (“It has been said many times that each case must be decided on its own facts.”). We further note that none of the marks in these registrations are similar to the proposed mark here, as none feature a lapel pin or any other subject matter that could be considered comparable. Even if they were similar, we are not bound by prior decisions of examining attorneys to register other marks. *In re Nett Designs Inc.*, 236 F.3d 1339, 1342 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to [Applicant’s] application, the [USPTO’s] allowance of such prior registrations does not bind the Board or this court.”).

To summarize, having reviewed and weighed all of the secondary meaning factors for which there is evidence,³² we find that the evidence, considered as a whole, falls short of satisfying Applicant’s heavy burden in establishing that its proposed sunflower lapel pin trade dress has acquired distinctiveness as an indicator of source for Applicant’s identified services among the relevant purchasers.

³² As noted above, the record does not contain any evidence of Applicant’s sales figures or number of customers under the fourth *Converse* factor. Nor has Applicant claimed or provided evidence of intentional copying of its proposed mark under the sixth *Converse* factor.

III. Conclusion

We have carefully considered all of the arguments and evidence of record and find that the proposed mark fails to function as a service mark because it is nondistinctive trade dress and Applicant has not established that it has acquired distinctiveness for Applicant's services.

Decision: We affirm the refusal to register Applicant's proposed mark under Trademark Act Sections 1, 2, 3, and 45, 15 U.S.C. §§ 1051, 1052, 1053, 1127. We do not reach the refusal under Trademark Act Sections 1 and 45, 15 U.S.C. §§ 1051, 1127, on the ground that Applicant's specimens of use fail to show a direct association between the proposed mark and the identified services