

**THIS OPINION IS NOT A
PRECEDENT OF
THE TTAB**

Mailed: October 11, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Schalk

Serial No. 86183499

Steven Schalk, *pro se*.¹

Alison F. Pollack, Trademark Examining Attorney, Law Office 106
Mary Sparrow, Managing Attorney.

Before Zervas, Ritchie, and Heasley,
Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Steven Schalk (“Applicant”) seeks registration on the Principal Register of the mark shown below for “bumper stickers,” in International Class 16²:



NOT SAFE ANYMORE

¹ Applicant was represented by counsel through the completion of briefing.

² Application Serial No. 86183499, filed on February 4, 2014, based on Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), asserts dates of first use and first use in commerce on January 14, 2014.

The description reads:

The mark consists of two concentric circles outlined in red next to a phrase. The largest concentric circle features a white filler with the wording "NATIONAL SECURITY AGENCY" in black curving along the top of the inner circle and "UNITED STATES OF AMERICA" in black curving along the bottom. Each phrase has a small, silver star separating it from the previous phrase. Within the smaller circle is an eagle, wings open, set against a blue background holding a silver key with a dark gray shade in its talons. The eagle is colored in brown with black striping, gold feet with black striping, a gold beak with a white face and black eye. The center of the eagle features a shield with a blue vertical bar above red and white alternating vertical stripes. Crossing the entirety of the symbol is a red "no" symbol with the letters "NSA" printed on top in black. To the right of the symbol is the phrase "NOT SAFE ANYMORE" in black font.

The Trademark Examining Attorney has refused registration under Sections 1, 2, and 45 of the Trademark Act on the ground that the applied-for mark as used on the specimen of record is merely a decorative or ornamental feature of the goods and does not function as a trademark to indicate the source of Applicant's goods and to identify and distinguish them from others.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed.³ For the reasons discussed herein,

³ The Examining Attorney made final an additional ground for refusal under Section 2(b), which was withdrawn on appeal. The Examining Attorney also made final a refusal under Section 2(a) of the Trademark Act on the ground that the applied-for mark consists of or includes matter which may disparage or bring into contempt or disrepute person, institutions, beliefs, or national systems. Due to this refusal, the Board suspended this appeal pending consideration and decision by the Supreme Court in *Matal v. Tam*, 137 S.Ct. 1744, 122 USPQ2d 1757 (2017). Pursuant to the Court's ruling in that case, the Section 2(a) disparagement refusal is now moot.

we affirm the refusal under Sections 1, 2, and 45 that that the applied-for mark is merely ornamental and fails to function as a mark.

I. Mere Ornamental Matter Lacking Trademark Significance

As noted, the Examining Attorney has refused registration under Sections 1, 2, and 45 on the ground that the applied-for mark as used on the specimen of record is merely an ornamental feature of the goods that does not function as a trademark. The question we must consider is whether the public would perceive the applied-for mark as an indication of source. *See In re Lululemon Athletica Canada Inc.*, 105 USPQ2d 1684 (TTAB 2013).

In evaluating whether Applicant's applied-for mark is merely ornamental, we evaluate the significance of the applied-for mark to the public in relation to the identified goods. *In re Pro-Line Corp*, 28 USPQ2d 1141, 1142 (TTAB 1993). As the Board observed in *Pro-Line*, "Not every word, name, phrase, symbol or design, or combination thereof which appears on a product functions as a trademark. ... Mere intent that a phrase function as a trademark is not enough in and of itself to make it a trademark." *Id.* In that decision, the Board found that the slogan BLACKER THE COLLEGE SWEETER THE KNOWLEDGE appearing on t-shirts "essentially conveys a message or opinion," that "would be viewed merely as an informational message or slogan devoid of trademark significance." *Id.*

The Board may look to the "size, location, dominance, and significance of the alleged mark" in order to determine whether it is primarily an

Serial No. 86183499

ornamental slogan, the principal function of which is to convey a message, rather than to indicate a source. *See In re Right-On Co.*, 87 USPQ2d 1152, 1156 (TTAB 2008); *In re Dimitri's Inc.*, 9 USPQ2d 1666, 1667 (TTAB 1988). As the Examining Attorney observes, Applicant's applied-for mark, as shown on the specimen, comprises the entirety of the display on the identified "bumper stickers." 12 TTABVUE 14.



Applicant argues that its applied-for mark is not merely ornamental "in the sense that it is capable of identifying the Applicant as the source of the goods in question...." 10 TTABVUE 12. Applicant goes on to say:

Bumper stickers with Applicant's mark may be ornamental, yet remain capable of distinguishing the secondary source of the goods just as t-shirts with NYU logos on the front are capable of

distinguishing their source, if not the original manufacturer.
TMEP § 1202.03.

In the instant case, as the Applicant's trademark is coined it is likely that it would be perceived as a source identifier and not merely ornamental akin to the t-shirt from a university or otherwise.

Id.

Here, the applied-for mark essentially conveys a message or opinion that consumers are likely to perceive as informational rather than source-identifying. *See In re Hulting*, 107 USPQ2d 1175 (TTAB 2013) (Political slogan "No More RINOs!" was not registrable as a trademark for bumper stickers, t-shirts and political pins. RINO is an abbreviation for "Republican in Name Only," a slogan of the conservative wing of the Republican Party.) As we observed in that case, "[C]onsumers will not perceive this wording as applied to applicant's goods as a source indicator pointing uniquely to applicant. ... [W]e find that applicant's proposed mark as used on the specimens conveys a political slogan devoid of source-identifying significance and therefore fails to function as a trademark." *Id.* at 1179, 1181. *See also In re Manco, Inc.*, 24 USPQ2d 1938, 1941 (TTAB 1992) (THINK GREEN and design not registrable because it would be perceived only as an informational slogan encouraging environmental awareness and not as a trademark for weather stripping and paper products); *In re Tilcon Warren, Inc.*, 221 USPQ 86 (TTAB 1984) (safety slogan WATCH THAT CHILD, used on bumper of construction vehicles, was not used as a trademark for "construction material.") There too, the Board noted that the applied-for mark was really

an informational slogan, and would be perceived as such, and thus did not function as a mark.

Although we find that Applicant's applied-for mark is not inherently distinctive, our case law has explained that an ornamental design may, in some cases, inform the purchasing public of "the source of the [goods], not the source of the manufacture, but the secondary source." See *In re Olin Corp.*, 181 USPQ 182, (TTAB 1973) (referring to such wording or designs as indicating "secondary source."). In the context of an ornamentation refusal, "secondary source' simply means that the use of the design or words would be perceived by the consumer as an indicator of source due to the applicant's prior use or registration of the mark for other goods or services (not the applied-for goods)." *In re Lululemon Athletica Canada*, 105 USPQ2d at 1690 n. 4. Despite the arguments in his brief, Applicant has not offered any examples of prior use or registration of the applied-for mark that could be used to indicate secondary source. As such, the exception does not apply here.

II. Conclusion

As the Federal Circuit has made clear, "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) (cites omitted). The applied-for mark does not meet this fundamental standard. Since we find that consumers are likely to perceive

Serial No. 86183499

Applicant's applied-for mark as informational rather than source-identifying, and since Applicant has not submitted any evidence of acquired distinctiveness or secondary source, we affirm the refusal to register under Sections 1, 2, and 45 on the ground that the applied-for mark as used on the specimen of record is merely an ornamental or informational feature of the goods and does not function as a trademark to indicate the source of Applicant's goods and to identify and distinguish them from others.

Decision: The refusal to register pursuant to Sections 1, 2, and 45 on the ground of mere ornamentation and failure to function as a mark is affirmed.