

This Opinion is not a  
Precedent of the TTAB

Mailed: June 28, 2019

**UNITED STATES PATENT AND TRADEMARK OFFICE**

---

**Trademark Trial and Appeal Board**

---

*In re Trivia Today, LLC*

---

Serial No. 86745391

---

Daniel S. Polley of Daniel S. Polley PA,  
for Trivia Today, LLC

Lauren E. Burke, Trademark Examining Attorney, Law Office 106,  
Mary I. Sparrow, Managing Attorney.

---

Before Wellington, Heasley and Pollogeorgis,  
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Trivia Today, LLC (“Applicant”) seeks registration on the Principal Register of the  
mark QUESTION OF THE DAY (in standard characters) for:

Providing a website featuring trivia questions in the fields of entertainment, history, literature, music, arts, culture, sports and celebrities; providing a website featuring trivia questions, and trivia information in the nature of general facts, historical facts tied to the day, notable or famous people’s birthdays on that day and factual information concerning the correct answer to trivia questions, all in the fields of entertainment, history, literature, music, arts, culture, sports and celebrities, all accessed by a link delivered by email; providing a website featuring trivia questions, and

trivia information in the nature of general facts, historical facts tied to the day, notable or famous people's birthdays on that day and factual information concerning the correct answer to trivia questions, all in the fields of entertainment, history, literature, music, arts, culture, sports and celebrities, all accessed by a link delivered daily by email; entertainment services, namely, providing a website featuring a daily trivia question in the fields of entertainment, history, literature, music, arts, culture, sports and celebrities, and trivia information in the fields of entertainment, history, literature, music, arts, culture, sports and celebrities, in the nature of general facts, historical facts, notable or famous people's birthdays on that day and factual information concerning the correct answer to trivia questions; entertainment services, namely, providing a website featuring a daily trivia question in the fields of entertainment, history, literature, music, arts, culture, sports and celebrities, and trivia information in the fields of entertainment, history, literature, music, arts, culture, sports and celebrities, in the nature of general facts, historical facts, notable or famous people's birthdays on that day and factual information concerning the correct answer to trivia questions, accessed by a link delivered by email; entertainment services accessed by a link delivered through email, namely, providing an online computer game featuring trivia questions, general facts, historical facts tied to the day, notable or famous people's birthdays on that day and factual information concerning the correct answer to trivia questions; entertainment services accessed by a link delivered daily through email, namely, providing an on-line computer game featuring trivia questions, general facts, historical facts tied to the day, notable or famous people's birthdays on that day and factual information concerning the correct answer to trivia questions; entertainment services, namely, providing an on-line computer game featuring a daily trivia question, a general fact, a historical fact tied to the day, notable or famous people's birthdays on that day and factual information concerning the correct answer to the trivia question; providing an online computer game featuring trivia questions in International Class 41.<sup>1</sup>

---

<sup>1</sup> Application Serial No. 86745391 was filed on Sept. 2, 2015, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant's claim of first use anywhere and use in commerce since at least as early as July 21, 2010.

The Trademark Examining Attorney refused registration of Applicant's mark under Sections 1, 2, 3, and 45 of the Trademark Act, 15 U.S.C. §§ 1051-1053, 1127, on the ground that it fails to function as a service mark. When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal resumed. We affirm the refusal to register.

### I. Evidentiary Issue

Before proceeding to the merits of the refusal, we address an evidentiary matter. In its request for reconsideration, Applicant submitted a list of registered and applied-for marks containing the phrase "OF THE DAY," obtained from the USPTO Trademark Electronic Search System ("TESS") database.<sup>2</sup> The Examining Attorney points out that the mere submission of such a list of marks does not make them part of the record.<sup>3</sup>

We agree. The TESS listing submitted by Applicant did not make the underlying registrations and applications listed of record. *In re Compania de Licores Internacionales S.A.*, 102 USPQ2d 1841, 1843 (TTAB 2012); *see also Edom Labs. Inc.*

---

Page references to the application record are to the downloadable .pdf version of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs, motions and orders on appeal are to the Board's TTABVUE docket system.

<sup>2</sup> Request for Reconsideration, 4 TTABVUE 4-7.

<sup>3</sup> Examining Attorney's brief, 19 TTABVUE 8. *In re Lorillard Licensing Co., LLC*, 99 USPQ2d 1312, 1314-15 n.3 (TTAB 2011) (examining attorney was not required to advise applicant that reference to a third-party registration was insufficient to make the registration of record when reference was made for the first time in a request for reconsideration that was denied).

*v. Lichter*, 102 USPQ2d 1546, 1550 (TTAB 2012). To make third party registrations part of the record, Applicant should have submitted copies of the registrations, or the complete electronic equivalent from the USPTO's automated systems, prior to appeal. *In re Star Belly Stitcher, Inc.*, 107 USPQ2d 2059, 2064 (TTAB 2013); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1208.02 (June 2019); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 710.03 (Oct. 2018). Applicant did not comply with this evidentiary prerequisite. The Examining Attorney's objection is therefore sustained, and the list will be given no consideration.

We turn now to the merits of the appeal.

## II. Applicable Law

“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) *quoted in In re DePorter*, 129 USPQ2d 1298, 1299 (TTAB 2019) (“A proposed trademark is registrable only if it functions as an identifier of the source of the applicant's goods or services”). To function as a service mark, a proposed mark must, by definition, “identify and distinguish the services of one person ... from the services of others and ... indicate the source of the services, even if that source is unknown.” 15 U.S.C. § 1127. The critical inquiry in determining whether a designation functions as a mark is how it would be perceived by the relevant public. *In re Tracfone Wireless, Inc.*, 2019 WL 2511861, at \*2, \_\_ USPQ2d \_\_ (TTAB 2019). “Thus, a threshold issue in some cases (like this one) is whether the phrase in

question in fact functions to identify the source of the services recited in the application and distinguish them from the services of others or, instead, would be perceived merely as communicating the ordinary meaning of the words to consumers.” *In re Wal-Mart, Inc.*, 129 USPQ2d 1148, 1149 (TTAB 2019). To determine how consumers likely would perceive the phrase sought to be registered, we look to the specimen and to other evidence of record showing the phrase as used in general parlance. *Id.* at 1150.

Applicant’s specimen of use is as follows:



Applicant argues:

Applicant’s specimen of use (filed on September 2, 2015) shows the mark emphasized with a pink banner in connection with a daily trivia question. ...

Here, consumers register to receive a daily trivia question from Applicant and an extra daily trivia question (with the emails and website pages prominently displaying and emphasizing QUESTION OF

THE DAY with a pink banner/background) and the consumers obviously know that the trivia email services are from the same single source.<sup>4</sup>

The Examining Attorney maintains, however, that Applicant's "mark as shown on the specimen of record, does not function as a service mark because the wording 'QUESTION OF THE DAY' is used to convey information to consumers that a question is being presented, but does not convey any information about the entity providing the question."<sup>5</sup>

We agree, and find that it fails to function as a service mark. "Mere intent that a word, design, symbol, or slogan function as a trademark, or the mere fact that such designation appears on the specimen, is not enough in and of itself to make it a trademark." *In re DePorter*, 129 USPQ2d at 1299. To be a mark, it must be readily perceived by purchasers as identifying and distinguishing a single source or origin of the services. *See In re Roberts*, 87 USPQ2d 1474, 1478 (TTAB 2008); TMEP § 1301.02(a). But here, the record supports a finding that QUESTION OF THE DAY as used on the specimen will be perceived as a merely informational slogan conveying the information that the question below it is the daily trivia question. *See In re Tracfone Wireless*, 2019 WL 2511861, at \*3 (UNLIMITED CARRYOVER merely

---

<sup>4</sup> Applicant's brief, 16 TTABVUE 3. Applicant also alludes to emails by which it sent the daily trivia question to consumers, representative samples of which were adduced in Applicant's Application Serial Nos. 86746147 and 86760554, for the applied-for marks TRIVIA QUESTION OF THE DAY and BONUS TRIVIA QUESTION OF THE DAY. These emails are not properly of record in the present appeal, but even if they were, their presence would not affect the outcome. The Examining Attorney's refusals to register those two applications were affirmed on the same ground as here: failure to function as marks. *See In re Trivia Today, LLC*, 2019 WL 931662 (TTAB 2019) (non-precedential decision). Applicant also attempts to rely upon the TESS listing of applications and registrations containing the phrase OF THE DAY, 16 TTABVUE 3-4, but as indicated above, that list has not been introduced into the record properly, and will be given no consideration.

<sup>5</sup> Examining Attorney's brief, 19 TTABVUE 7.

conveys information about carrying over unlimited data in telecommunications billing cycles). The phrase's position immediately above the daily trivia question to which it alludes, and the multiple-choice answers appearing immediately under the trivia question, reinforces the perception that its function is informational, rather than source-indicating. *Id.* at \*2 (citing *In re Keep a Breast Found.*, 123 USPQ2d 1869, 1881 (TTAB 2017)). “[I]f a mark consists entirely of a slogan that is ... merely informational, or that is otherwise not being used as a mark, registration must be refused.” TMEP § 1213.05(b)(i).

Beyond that, QUESTION OF THE DAY is a commonly used phrase, as the third-party evidence cited by the Examining Attorney demonstrates:

- Trivia Cafè “Question of the Day” “Today’s Trivia Question”<sup>6</sup>
- West Virginia Culture and History “Question of the Day”<sup>7</sup>
- Knowledge Master “Subscribe to the Question of the Day and automatically receive a different question every morning”<sup>8</sup>
- Muck Rack Daily “Question of the Day” “We took a short break from our daily trivia game, but getting back to Thursday’s **Question of the Day**...”<sup>9</sup>

---

<sup>6</sup> TriviaCafe.com/dailytrivia/ July 25, 2016 Office Action TSDR 4.

<sup>7</sup> WVCulture.org 7/25/2016, July 25, 2016 Office Action TSDR 5.

<sup>8</sup> GreatAuk.com July 25, 2016 Office Action TSDR 6.

<sup>9</sup> Muckrack.com/daily/2013/10/01/question-of-the-day/ 10/1/2013 July 25, 2016 Office Action TSDR 7.

- WYTV's "Daybreak Question of the Day Contest" "When Len Rome asks the 'Question of the Day', visit this page and enter the correct answer...."<sup>10</sup>

"Common use of a phrase by third parties merely for the purpose of imparting information makes it less likely that the public will perceive it as identifying a single commercial source and less likely that it will be recognized by purchasers as a trademark." *In re Wal-Mart, Inc.*, 129 USPQ2d at 1153. "The more commonly a phrase is used, the less likely that the public will use it to identify only one source and the less likely that it will be recognized by purchasers as a trademark." *In re Eagle Crest, Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010) *quoted in In re Hulting*, 107 USPQ2d 1175, 1177 (TTAB 2013) and *In re DePorter*, 129 USPQ2d at 1299. *See also D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d 1710, 1714-16 (TTAB 2016); *In re First Union Nat'l Bank*, 223 USPQ 278, 280 (TTAB 1984) (virtually impossible for commonly used phrases such as "Sale Today" or "We Sell at Low Prices" to be perceived as identifying and distinguishing services).

In sum, because the applied-for mark is merely informational, it fails to indicate the source of the services, and because it is commonly used by multiple sources, it does not identify and distinguish Applicant's services from those of others. *See generally* TMEP § 1202.04. It must accordingly remain in the public domain, available to all competitors. *In re Volvo Cars of N. Am., Inc.*, 46 USPQ2d 1455, 1460 (TTAB 1998). As McCarthy puts it, "as a matter of competitive policy, it should be

---

<sup>10</sup> WYTV.com/2014/06/17/daybreak-question-of-the-day-contest/ June 17, 2014 July 25, 2016 Office Action TSDR 8.

close to impossible for one competitor to achieve exclusive rights” in such a common phrase. 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 7:23 (5<sup>th</sup> ed. June 2019 update).

### III. Conclusion

Accordingly, we find that QUESTION OF THE DAY fails to identify or distinguish Applicant’s services from the services of others, or to indicate the source of those services. It fails to function as a service mark, and is, in consequence, ineligible for registration under Trademark Act Sections 1, 2, 3, and 45. 15 U.S.C. §§ 1051, 1052, 1053, and 1127.

**Decision:** The refusal to register Applicant’s mark QUESTION OF THE DAY is affirmed.