

This Opinion is not a
Precedent of the TTAB

Mailed: February 8, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Trivia Today, LLC
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Serial Nos. 86760550 and 86745338
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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.

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Before Shaw, Heasley, and Pologeorgis,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Trivia Today, LLC (“Applicant”) seeks registration on the Principal Register of the marks CONGRATULATIONS! YOU ARE CORRECT! and OOPS! WRONG ANSWER. (both in standard characters) for the following services in International Class 41:

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.¹

¹ Application Serial No. 86760550, for CONGRATULATIONS! YOU ARE CORRECT!, was filed on Sept. 17, 2015, based upon Applicant's claim of first use anywhere and use in commerce since at least as early as July 21, 2010. Application Serial No. 86745338, for OOPS! WRONG ANSWER., was filed on Sept. 2, 2015, based upon Applicant's claim of first use anywhere and use in commerce since at least as early as July 21, 2010.

The Trademark Examining Attorney has refused registration of Applicant's proposed marks under Sections 1, 2, 3, and 45 of the Trademark Act, 15 U.S.C. §§ 1051-1053, and 1127, on the ground that they fail to function as service marks.

When the refusals were made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the requests for reconsideration, the appeals were resumed. We affirm the refusals to register.

I. Appeals Consolidated

The *ex parte* appeals before the Board in these co-pending applications involve common issues of law and fact, and are presented on closely related records and briefs. The Board, upon its own initiative, may order the consolidation of the appeals for final decision. *See e.g., In re Anderson*, 101 USPQ2d 1912, 1915 (TTAB 2012) (Board *sua sponte* consolidated two appeals); *In re Country Music Ass'n, Inc.*, 100 USPQ2d 1824, 1827 (TTAB 2011); *In re Bacardi & Co. Ltd.*, 48 USPQ2d 1031, 1033 (TTAB 1997) (Board *sua sponte* considered appeals in five applications together and rendered single opinion). *See also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 1214 (2018).

Based upon the foregoing, we consolidate these appeals for purposes of final decision.²

II. Applicable Law

"The Trademark Act is not an act to register mere words, but rather to register

² Page references to the applications of record are to the .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.

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 Keep A Breast Found.*, 123 USPQ2d 1869, 1879 (TTAB 2017). 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 service mark is how it would be perceived by the relevant public. *D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d 1710, 1713 (TTAB 2016). “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 phrases sought to be registered, we look not only to the specimens, but to other evidence of record showing the phrases as used in general parlance. *Id.* at 1150.

The Examining Attorney maintains that Applicant’s applied-for marks, CONGRATULATIONS! YOU ARE CORRECT! and OOPS! WRONG ANSWER., convey information that a question has been answered correctly or incorrectly, but do not indicate the entity asking the question.³ The wording is, in fact, commonly used,

³ Examining Attorney’s brief, 17 TTABVUE 7, in both appeals.

she notes, as illustrated by the following representative samples obtained from various third-party websites:

- “[C]ongratulations! You are correct!” in answering online trivia question about Billie Holiday, winning tickets to play *The United States v. Billie Holiday*;⁴
- “[C]ongratulations you are correct!!!” in answering online trivia question about Ball State University;⁵
- “Congratulations you are correct!” in answering online trivia question about plant life in Minnesota;⁶
- “Oops! Wrong answer” to online trivia question about the Howdy Doody show;⁷
- “Oops wrong answer!” to Applebee’s quiz “How many squares are in the picture?”⁸
- “Oops wrong answer!” in *The 80’s Game With Martha Quinn*, a trivia game featuring questions about the 80’s;⁹

Applicant argues that the Examining Attorney’s examples do not show the wording CONGRATULATIONS! YOU ARE CORRECT! or OOPS! WRONG

⁴ USv.Billie.blogspot.com, Oct. 2, 2011, July 25, 2016 Office Action TSDR at 4, Application Serial No. 86760550.

⁵ Twitter.com/cardinal_life/status/ April 14, 2015, July 25, 2016 Office Action TSDR at 6, Application Serial No. 86760550.

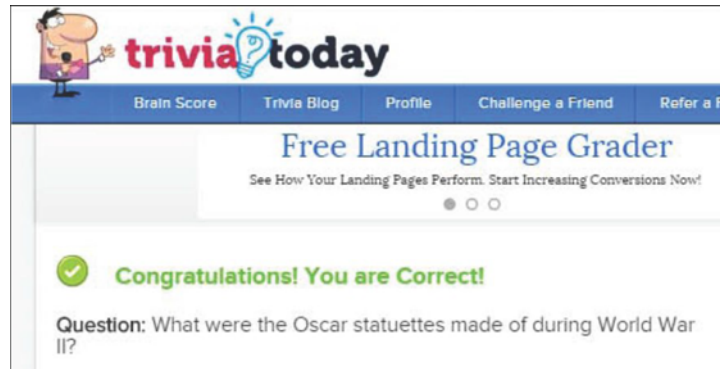
⁶ TwinCitiesNaturalist.com, Sept. 25, 2009, July 25, 2016 Office Action TSDR at 9, Application Serial No. 86760550.

⁷ AlansKitchen.com/TV-Shows/H/howdy_doody/0018-TV_Trivia.htm, July 25, 2016 Office Action TSDR at 5, Application Serial No. 86745338.

⁸ Twitter.com April 21, 2014, July 25, 2016 Office Action TSDR at 6, Application Serial No. 86745338.

⁹ MobyGames.com, July 25, 2016 Office Action TSDR at 8, Application Serial No. 86745338.

ANSWER. prominently appearing by themselves or in different font colors,¹⁰ as they do in Applicant’s specimens of use:





Applicant also argues that TESS printouts of registrations for marks containing “CONGRATULATIONS” or “OOPS”, followed by additional language, show that marks containing those terms can function as source identifiers.¹³ E.g.:

¹⁰ Applicant’s brief, 15 TTABVUE 3 in both appeals.

¹¹ Specimen, Application Serial No. 86760550, Sept. 17, 2015.

¹² Specimen, Application Serial No. 86760554, Sept. 2, 2015.

¹³ Request for Reconsideration, 4 TTABVUE in both appeals.

Mark	Reg. No.	Pertinent Goods and Services
	4969419	Real estate mortgage banking and lending services.
	4969420	Real estate mortgage banking and lending services.
CONGRATULATIONS	4154921	Computer and software products; Book series, stationery; Seminars for advice, vocational guidance, career counseling; Advisory services in field of self-improvement.
OOPS, WE'VE DROPPED OUR PRICES!	4572763	Promoting the goods or services of others using online video, audio and textual material.
OOPS! TALKING DIET SCALE	4542102	Scales and balances.
OOPS! IT IS FROZEN YOGURT	4548787	Frozen yogurt shop services in the nature of a restaurant.
OOPS! OCCASIONAL OVERDRAFT PRIVILEGE SERVICE	4503959	Financial services in the nature of discretionary approval and payment of account overdrafts.

On consideration of these arguments, however, we find that the applied-for marks fail to function as service marks.

The applied-for marks are informational, indicating that a question has been answered correctly or incorrectly. “[T]erms and expressions that merely convey an

informational message are not registrable.” *In re DePorter*, 129 USPQ2d 1298, 1299 (TTAB 2019) (citing *In re Eagle Crest, Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010)). This is because informational phrases or slogans are not typically perceived as source indicators. *E.g.*, *In re Standard Oil Co.*, 275 F.2d 945, 125 USPQ 227 (CCPA 1960) (GUARANTEED STARTING found to be ordinary words that convey information about the services, not a service mark for the services of “winterizing” motor vehicles); *In re Melville Corp.*, 228 USPQ 970 (TTAB 1986) (BRAND NAMES FOR LESS found to be informational phrase that does not function as a mark for retail store services). “[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.” TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMEP”) § 1213.05(b)(i) (Oct. 2018).

The applied-for marks, moreover, consist of commonly used wording, as the third-party website evidence cited by the Examining Attorney demonstrates. “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. Applicant argues that the wording “Congratulations, you are correct” often appears in the comments section of the websites, submitted by readers.¹⁴ But that only serves to show how commonplace the wording is. “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

¹⁴ Applicant’s brief, 15 TTABVUE 3, concerning Application Serial No. 86760550.

purchasers as a trademark.” *In re Eagle Crest*, 96 USPQ2d at 1229 quoted in *In re Hulting*, 107 USPQ2d 1175, 1177 (TTAB 2013). See also *D.C. One Wholesaler*, 120 USPQ2d at 1714-16.

Applicant’s display of its applied-for marks in varying font colors does not overcome their common, informational nature. First, Applicant’s proposed marks are in standard characters. The rights associated with a standard character mark reside in the wording per se and not in any particular font style, size, or color. See *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011). Applicant could choose to present its applied-for marks in a much smaller size type or in a much less conspicuous font or color than depicted in its specimens. See *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018). Second, the size, font, and color in which Applicant depicts its proposed marks in its specimens are not so distinctive as to create a commercial impression separate and apart from their commonplace, functional wording. See *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1639 (Fed. Cir. 2016) (citing *In re Sadoru Grp., Ltd.*, 105 USPQ2d 1484, 1486 (TTAB 2012)). In other words, there is no indication that the manner in which Applicant has depicted its applied-for marks has in any way created a likelihood that they would be perceived as source-indicating. “In every case, the question is not whether the mark has been associated with the goods [or services] 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 [or services] sold or offered for sale.” *In re Paramount Pictures Corp.*, 213 USPQ

1111, 1115 (TTAB 1982). 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).

Applicant's evidence of third-party registrations also fails to demonstrate the registrability of its applied-for marks. True, the registered third-party marks contain the words "CONGRATULATIONS" and "OOPS," but there the similarity ends. Most have additional wording or designs that engender a commercial impression enabling them to function as source indicators. *See In re Integrated Embedded*, 120 USPQ2d 1504, 1512-13 (TTAB 2016) (third-party registrations have additional wording and design elements). And all have different services—services for which their respective marks may be suggestive or arbitrary. *Id.*; *cf. In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (disregarding third-party registrations for other types of goods where the proffering party had neither proven nor explained that they were related to the goods in the cited registration). None are similar to the subject applications, where the wording of the proposed marks, CONGRATULATIONS! YOU ARE CORRECT! and OOPS! WRONG ANSWER., functions as a part of the services, indicating whether one's answers to a trivia guessing game are correct or incorrect.

In sum, because Applicant's applied-for marks are merely informational, they fail to indicate the source of the services, and because they are commonly used by multiple sources, they do not identify and distinguish Applicant's services from those of others. *See generally* TMEP § 1202.04. They 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 close to impossible for one competitor to achieve exclusive rights” in common phrases or slogans. 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 7:23 (5th ed. Nov. 2018 update).

III. Conclusion

Accordingly, we find that CONGRATULATIONS! YOU ARE CORRECT! and OOPS! WRONG ANSWER. fail to identify or distinguish Applicant’s services from the services of others, or to indicate the source of those services. They fail to function as service marks, and are ineligible for registration under Trademark Act Sections 1, 2, 3, and 45. 15 U.S.C. §§ 1051, 1052, 1053, and 1127.

Decision: The refusals to register Applicant’s applied-for marks CONGRATULATIONS! YOU ARE CORRECT! and OOPS! WRONG ANSWER. are affirmed.