

**This Opinion is Not a
Precedent of the TTAB**

Mailed: February 3, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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*In re Sarah Marie Duncan
d/b/a Loved by Hannah and Eli, Inc.*
—

Serial No. 86923714
—

Paul W. Reidl of Law Office of Paul W. Reidl,
for Sarah Marie Duncan d/b/a Loved by Hannah and Eli, Inc.

Steven W. Ferrell Jr., Trademark Examining Attorney, Law Office 121,
Richard White, Managing Attorney.

—

Before Kuhlke, Dunn and Hudis,
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

Sarah Marie Duncan d/b/a Loved by Hannah and Eli, Inc. (“Applicant”) seeks registration on the Principal Register of the proposed mark MAMA BEAR (in standard characters) for (as amended): “Shirts; Hooded sweat shirts; Knit shirts; Long-sleeved shirts; Polo shirts; Short-sleeved or long-sleeved t-shirts; Sleep shirts; Sweat shirts; T-shirts; Tee shirts; none of the foregoing intended for babies or

children” in International Class 25.¹ Below are the specimens of use filed with the application:



The Examining Attorney refused registration of Applicant’s proposed mark under Trademark Act Sections 1, 2 and 45, 15 U.S.C. §§ 1051, 1052 and 1127, on the ground that it fails to function as a trademark to indicate the source of Applicant’s goods and to identify and distinguish them from the goods of 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. The appeal is fully briefed. We affirm the refusal to register.

I. Legal Background – Failure to Function

“The Trademark Act is not an act to register words but to register trademarks. Before there can be registrability, there must be a trademark ... and, unless words have been so used, they cannot qualify for registration.” *In re Std. Oil Co.*, 275 F.2d

¹ Application Serial No. 86923714 was filed on February 29, 2016, under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere at least as early as August 26, 2013, and first use in commerce since at least as early as September 14, 2013.

945,125 USPQ 227, 229(CCPA 1960); *In re Vox Populi Registry Ltd.*, 2020 USPQ2d 11289, *4 (TTAB 2020). Trademark Act Section 45 defines a “trademark” as “any word, name, symbol, or device, or any combination thereof ... used by a person ... to identify and distinguish his or her goods ... 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; *see also In re Bose Corp.*, 46 F.2d 893, 192 USPQ 213, 215(CCPA 1976) (“[T]he classic function of a trademark is to point out distinctively the origin of the goods to which it is attached.”). “Matter that does not operate to indicate the source or origin of the identified goods or services and distinguish them from those of others does not meet the statutory definition of a trademark and may not be registered....” *In re AC Webconnecting Holding B.V.*, 2020 USPQ2d 11048, *2-3 (TTAB 2020). Therefore, “a proposed trademark is registrable only if it functions as an identifier of the source of the applicant’s goods or services.” *In re The Ride, LLC*, 2020 USPQ2d 39644, *5 (TTAB 2020).

We consider whether Applicant’s proposed mark, MAMA BEAR, functions as a trademark based on whether the relevant public, i.e. purchasers or potential purchasers of the identified clothing goods, would perceive MAMA BEAR as identifying the source or origin of such goods. *See e.g. In re Team Jesus LLC*, 2020 USPQ2d 11489, at *2 (TTAB 2020) (“We must assess whether Applicant’s proposed mark ... functions as a mark based on whether the relevant public ... would perceive TEAM JESUS as identifying the source or origin of ... [Applicant’s] goods and services.”); *In re Texas With Love, LLC*, 2020 USPQ2d 11290, at *2 (TTAB 2020); *In*

re TracFone Wireless, Inc., 2019 USPQ2d 222983, at *1-2 (TTAB 2019); *In re Aerospace Optics, Inc.*, 78 USPQ2d 1861, 1862 (TTAB 2006).

In this case, because there are no limitations to the channels of trade, nor on the classes of consumers (except to exclude babies and children), the relevant consuming public comprises all potential purchasers of the identified goods intended to be worn by adults. See *In re Yarnell Ice Cream, LLC*, 2019 USPQ2d 265039, at *5 (TTAB 2019) (“[T]he identification does not represent that the goods will be marketed ... to any particular class of customers.... Accordingly ..., we must assess the registrability of Applicant’s proposed mark for ... [goods] consumed by members of the general public.”) (internal quotations omitted).

Matter that is widely used to convey ordinary or familiar concepts or sentiments, or similar informational messages that are in common use, would not be perceived as indicating source and is not registrable as a mark. See *In re Mayweather Promotions, LLC*, 2020 USPQ2d 11298, at *1 (TTAB 2020) (addressing the proposed mark PAST PRESENT FUTURE and noting that “[w]idely used commonplace messages are those that merely convey ordinary, familiar concepts or sentiments and will be understood as conveying the ordinary concept or sentiment normally associated with them, rather than serving any source-indicating function”); *In re Texas With Love*, 2020 USPQ2d 11290, at *2 (holding that proposed mark TEXAS LOVE “does not perform the desired trademark function and does not fall within the [Trademark] Act’s definition of a mark, including because it would be perceived not as a source identifier, but instead as a widely-used phrase that merely conveys a well-recognized

and commonly expressed concept or sentiment”); *see also D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d 1710, 1716 (TTAB 2016) (I ♥ DC was found not to function as a mark for clothing items because it would be perceived merely as an expression of enthusiasm for the city).

For the failure-to-function analysis, we consider all the evidence of record, including Applicant’s use and third-party uses of the term, to determine how consumers are likely to perceive the term as used in general parlance. *See, e.g., In re Team Jesus*, 2020 USPQ2d 11489, at *5-6 (Board’s review of “[t]he evidence as a whole” consisted of Applicant’s specimen of use as well as third-party uses); *In re Wal-Mart Stores, Inc.*, 129 USPQ2d 1148, 1150 (TTAB 2019) (“[W]e look to the specimens and other evidence of record showing the phrase used in the marketplace.”); *In re D.C. One Wholesaler*, 120 USPQ2d at 1716 (considering third-party use evidence as well as the applicant’s specimens and other examples of use); *In re Eagle Crest, Inc.*, 96 USPQ2d 1227, 1230 (TTAB 2010) (affirming informational refusal of ONCE A MARINE, ALWAYS A MARINE where third-party evidence showed widespread use of the phrase and use on “applicant’s specimens as well as its other materials would likely reinforce the perception” of the proposed mark as informational in the sense of expressing support, admiration or affiliation with the Marines). *See generally* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1202.04(b) (Oct. 2018) (listing various sources of evidence “showing the applicant’s manner of use and the manner of use by third parties.”).

II. Evidentiary Record

The evidence made of record by Applicant and the Examining Attorney, to which we now turn, consists of dictionary definitions, uses of MAMA BEAR in literature, Applicant's specimens of use (shown above) and her other uses, third-party use of the term on clothing, and registrations issued to Applicant and third parties containing the term.

A. Dictionary Definitions

The record contains the following definitions:

- MAMA BEAR – (informal noun) “a female bear currently rearing one or more cubs”; (slang) “a woman, especially a mother, who is extremely protective of a child or children” (WIKTIONARY).²
- MAMA BEAR – “a mom who can be cuddly and lovable but also has a ferocious side when it's necessary to protect her cubs. [She] can be [a] biological mom, or the head of a group.” A “tough, aggressive, and protective mother. Often going to extreme lengths to protect her child, usually her son, and herself.” (URBAN DICTIONARY).³
- MAMA BEAR – (adjective) “characteristic of protective maternal behavior”; (noun) “a female bear currently rearing one or more cubs”; (slang) “a woman, especially a mother, who is extremely protective of a child or children” (YOUR DICTIONARY).⁴

² WIKTIONARY definitions of MAMA BEAR submitted with the Office Action Response of September 21, 2018 at TSDR 107-108, and the Office Action of May 10, 2019 at TSDR 11-12. Page references herein to the application record refer to the online database of the USPTO's Trademark Status & Document Retrieval (“TSDR”) system. All citations to documents contained in the TSDR database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. *See, e.g., In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 n.4 (TTAB 2018). References to the briefs on appeal refer to the Board's TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable.

³ URBAN DICTIONARY definitions of MAMA BEAR submitted with the Office Action of May 10, 2019 at TSDR 63-64.

⁴ YOUR DICTIONARY definitions of MAMA BEAR submitted with Denial of Request for Reconsideration of July 1, 2020 at TSDR 1-2.

So, literally, MAMA BEAR connotes a female bear rearing a bear cub or bear cubs. The slang definition of the term refers to a woman who is extremely protective of her child or children.

B. References in Literature

References to MAMA BEAR in literature also were submitted during prosecution of the Application:

- Applicant refers us to the 19th-century fairy tale, THE STORY OF GOLDILOCKS AND THE THREE BEARS” (relevant portions produced below):
Once upon a time, there was a little girl named Goldilocks. ...
“Someone’s been eating my porridge,” said the **Mama bear**. ...
“Someone’s been sitting in my chair,” said the **Mama bear**. ...
“Someone’s been sleeping in my bed, too” said the **Mama bear**. ...⁵

The Goldilocks fairy tale picks up, in an anthropomorphic writing style, on the literal connotation of a MAMA BEAR as a female bear rearing her cub.

The Examining Attorney refers us to other uses of MAMA BEAR in literature:

- “The Problem with ‘Mama Bear’ Syndrome”, PARENTING magazine (discussing the mom as a “mighty ursine protector” of her children).⁶
- “How Embracing Mama Bear Energy has Changed My Life”, GRACE AND MAGIC blog (discussing “mama bear energy” and defining a “mama bear” as “an incredible inner strength and sense of courage, often previously unbeknownst to the subject before having children, unleashed when any child, not necessarily his/her own, is considered to be at risk of injury or harm”).⁷
- “The Mama Bear Instinct”, A MOTHER FAR FROM HOME blog (written by a mother discussing the “clear thought” that she would “do absolutely

⁵ THE STORY OF GOLDILOCKS AND THE THREE BEARS submitted with the Office Action Response of September 21, 2018 at TSDR 104-106.

⁶ Portion of PARENTING magazine book, submitted with the Office Action of May 10, 2019 at TSDR 69-72.

⁷ Portion of GRACE AND MAGIC blog, *Id.* at 73-80.

anything for the good of [her] children” and that the “mama bear instinct” “says to run over anyone or anything in the path to the cub’s safety”).⁸

- “The True Meaning of a Mama Bear”, THE LIFE OF A MAMA BEAR blog (discussing that “a true mama bear doesn’t just watch out for her cubs, but for everyone that she truly loves”).⁹
- “What is the Mama Bear Effect?”, THE MAMA BEAR EFFECT blog (discussing and the “concept of a mama bear” and stating that “our focus is protecting an innocent child, whether it’s our own or someone else’s, from danger” and “the claws come out and we go after whatever is threatening that child” and defining a “mama bear” as “an incredible inner strength/rage and sense of courage, often previously unbeknownst to the subject before having children, unleashed when any child, not necessarily his/her own, is considered to be at risk of injury or harm” and “any person who sees a child in pain, feels their pain, and is willing to go above and beyond to protect the children of this world”).¹⁰
- Book titled STFU PARENTS by Blair Koenig (discussing the term “Mama Bear” as “used for ages but became popularized when Sarah Palin talked about mama grizzlies protecting their cubs by attacking people who pose a threat. Since then, women have used ‘Don’t mess with the mama bear!’ as an excuse to do everything from gossiping to hair pulling to face beating in the unfortunate instance that another adult or child looks at her ‘cub’ [child] the wrong way.”).¹¹

The discussion of MAMA BEAR in the literature picks up on the slang definition of the term as referring to an extremely protective woman over her child or children.

C. Applicant’s Uses of MAMA BEAR

In addition to her specimens of use, Applicant made of record other examples of her use of MAMA BEAR, on her merchandise and on her website:¹²

⁸ Portion of A MOTHER FAR FROM HOME blog, *Id.* at 81-89.

⁹ Portion of THE LIFE OF A MAMA BEAR blog, *Id.* at 90-92.

¹⁰ Portion of THE MAMA BEAR EFFECT blog, *Id.* at 93-95.

¹¹ Portion of book STFU PARENTS, *Id.* at 96-98.

¹² Examples of Applicant’s use of MAMA BEAR, submitted with the Office Action Response of September 21, 2018 at TSDR 20, 21, 27, 28.



LOVED BY HANNAH AND ELI™
Mama Bear™

Cart
"MAMA BEAR" CAMO UNISEX FIT TEE

Log in [LOVEDBYHANNAHANDELI](#)

\$ 35.00

Home Page

All Items

Mama Bear™

The Bear Tri

Man Cub®

It's A Mama E
Thing™

Rainbow Mar
Bear™

Accessories

Maternity Tees

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LOVED BY HANNAH AND ELI™
BLACK SLEEVE "MAMA BEAR" RAGLAN PLAID INK
LOVEDBYMAMABEAR.COM

\$ 42.00



Size:

XS

[Add to Cart](#)

This item is technically unisex. It does run longer in length. Its in True To Size for a relaxed/loose women's fit. For a more fitted look, women may want to size down from their original size.

Poly-Cotton 60% Polyester / 40% Combed-Cotton construction

Regular 5/8 sleeves

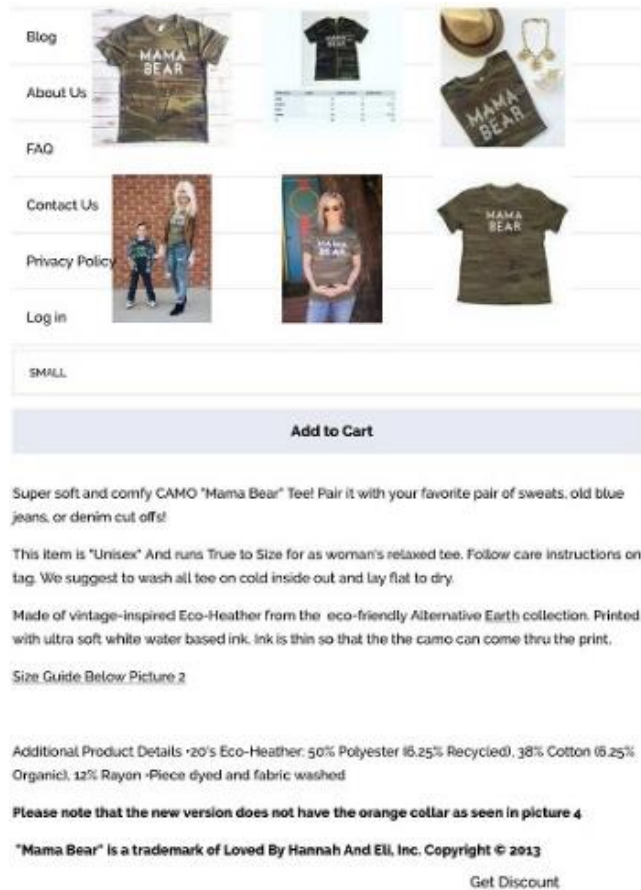
Light ink fading may occur. We recommend to wash on cold inside out and air dry.

"Mama Bear" is a trademark of Loved By Hannah And Eli, Inc. Copyright © 2013



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D. Third-Party Uses of MAMA BEAR on Clothing

Applicant and the Examining Attorney both submitted into evidence numerous examples of third-party uses of MAMA BEAR emblazoned in large letters on the front of clothing, particularly t-shirts, long-sleeved shirts, and sweatshirts, as well as other personal items such as jewelry, cups, bags and hats, at the websites of: Target, Walmart, Life is Good, Palmetto Moon, The Belmont Store, Burlington, Bealls, Etsy, Fairy Season, The Bee & the Fox, Redbubble, Bass Pro Shops, Six Eleven, Ali Express, The UCA (University of Central Arkansas) Bookstore, Brown (University) Bookstore, Bear Basics (University of California at Berkeley), Belle Lilly,¹³ Amazon,

¹³ Third-party uses submitted with Office Action of May 10, 2019 at TSDR 13-62, 99-202.

Williams-Sonoma, Awesomethreadz, A Pea in the Pod and Expression Tees.¹⁴ Several of the clothing examples shown arguably were unisex. Where human models were pictured wearing the merchandise, the vast majority were women or pregnant women. Representative examples of these third-party uses follow below:



Walmart



Burlington



Bealls



Fairy Season



Target



Bass Pro Shops



Awesomethreadz



Etsy



Ali Express



The Bee & the Fox

¹⁴ Third-party uses submitted with Office Action Response of November 8, 2019 at TSDR 14-23 and 46-49.

Amazon listings for 'Mama Bear' apparel:

- HDLTE**: Women's Mama Bear Floral-Printed Short-Sleeve T-Shirt, \$10.99, 4.5 stars.
- Exquisite file**: Mama Bear & Baby Bear Black T-Shirt, \$4.99, 4.5 stars.
- InScylish**: Women's Mama Bear Printing Long Sleeve T-Shirt, \$16.99, 4.5 stars.
- Pink Queen**: Women's Loose Crew Neck Batwing Sleeve T-Shirt, \$19.99, 4.5 stars.
- Ersvip**: Mama Bear Print T-Shirt, \$12.99, 4.5 stars.
- Promotion & Beyond**: Mama Bear Text Funny Gift Women's T-Shirt, \$6.99, 4.5 stars.
- Seriah**: Women's Hooded Mama Bear Tees, \$12.99, 4.5 stars.
- TeelMixed**: Mama Bear Shirt Women Flowy Loose T-Shirt, \$19.99, 4.5 stars.
- Shop4Ever**: Mama Bear Women's V-Neck T-Shirt, \$9.99, 4.5 stars.
- TufiAllen**: MAMA BEAR Casual Long Sleeve Crew Neck T-Shirt, \$12.99, 4.5 stars.
- WLLW**: Women's Sleeveless Round Neck Mama Bear T-Shirt, \$11.99, 4.5 stars.
- Lique Family**: Mama Bear T-shirt Mothers Day Family Maternity, \$19.99, 4.5 stars.

Amazon



Expression Tees



Walmart



Redbubble


E. MAMA BEAR U.S. Registrations issued to Applicant and Others


Throughout the course of prosecution, Applicant and the Examining Attorney made of record filed applications and issued registrations for marks comprising or including the term “MAMA BEAR”. We do not consider any of the applications that did not issue as registrations. Third-party applications are evidence only of the fact that they have been filed, *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1270 n.8 (TTAB 2009), and have no other probative value, *Interpayment Services Ltd. v. Doctors & Thiede*, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003). Abandoned applications have “no probative value other than as evidence that the applications [were] filed.” *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1403 n.4 (TTAB 2010) (quoting *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1049 n.4 (TTAB 2002)).




We also do not consider any of the registrations that have expired or have been cancelled. A cancelled registration is not evidence of any existing rights in the mark. *See Action Temp. Servs. v. Labor Force*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989). An expired or cancelled registration is evidence of nothing but the fact that it once issued. *Sunnen Prods. Co. v. Sunex Int’l Inc.*, 1 USPQ2d 1744, 1747 (TTAB 1987).

The registrations issued by the USPTO are as follows (all of which registered on the Principal Register and none of which include a disclaimer of “MAMA BEAR”):¹⁵

¹⁵ Response to Office Action of September 21, 2018 at TSDR 74-81, 86-99; Response to Office Action of November 8, 2019 at TSDR 64-65, 76-87, 99-100; Response to Office Action of June 11, 2020 at TSDR 9-10.

Mark	Reg. No.	Goods/Services	Owner
MAMA BEAR	5395412	Providing personal support services, namely, companionship and emotional support for individuals that have suffered traumatic life events ... Cl. 45	Mama Bear Life Coach, LLC
MAMA BEAR	5329819	Small arms ammunition, Cl. 13	Velocity Manufacturing Company LLC
MAMABEAR	5313636	Day planners; blank lesson plan books; educational publications, namely, educational learning cards, flash cards, activity cards, workbooks, textbooks, ... Cl. 16; Providing on-line training seminars in the field of dyslexia, parenting, mom self-care, ... Cl. 41	Project Dyslexia, LLC
MAMA BEAR CANDLES	5221640	Candles, Cl. 4; On-line retail store services featuring candles; Cl. 35	Moonbase3 LLC
MAMA BEAR PORTFOLIO	5049521	Investment advice; Providing information, commentary and advice in the field of finance, financial investments and financial valuations, Cl. 36	Publica Press LLC
MAMA BEAR STUDIOS	5004608	Entertainment media production services for motion pictures, television and Internet; Entertainment services in the nature of development, creation, production and post-production services of multimedia entertainment content ..., Cl. 41	Fancy Rhino Pictures, LLC
MAMA BEAR'S SOUR CHERRY PIE	4992094	Beer, Cl. 32	Crooked Stave, LLC
 MAMA BEAR EFFECT	4925315	Printed publications, ... in the field of identification and prevention of child sexual abuse, Cl. 16; Promoting public awareness of child sexual abuse, Cl. 35; providing a website featuring blogs and non-downloadable publications ... in the field of identification and prevention of child sexual abuse, Cl. 41; Providing online information in the field of identification and prevention of child sexual abuse, Cl. 45	The Mama Bear Effect, Inc.
THE MAMA BEAR EFFECT	4921344	Printed publications, ... in the field of identification and prevention of child sexual abuse, Cl. 16; Promoting public	The Mama Bear Effect, Inc.

Mark	Reg. No.	Goods/Services	Owner
		awareness of child sexual abuse, Cl. 35; providing a website featuring blogs and non-downloadable publications ... in the field of identification and prevention of child sexual abuse, Cl. 41; Providing online information in the field of identification and prevention of child sexual abuse, Cl. 45	
MAMA BEAR'S BREW	4923591	Flavored beers, Cl. 32	MB Beverage Co., LLC
MAMABEAR	4351472	Mobile application software ... for providing customer-defined generated content and content of others automatically selected and customized based on the known or estimated geographical location of mobile telephone, Cl. 9	Grom Holdings Inc.
IT'S A MAMA BEAR THING	5778302	Shirts; Tank-tops; Hooded sweat shirts; Short-sleeve shirts; Short-sleeved or long-sleeved t-shirts; Sleep shirts; Sweat shirts; T-shirts; Tee shirts; Tee-shirts; none of the foregoing intended for babies or children, Cl. 25	Sarah Marie Duncan d/b/a Loved by Hannah and Eli, Inc.
MAMA BEAR COFFEE	5798895	Coffee; Coffee beans; Roasted coffee beans, Cl. 30	San Diego Coffee, Tea & Spice, Inc.
	5675310	Diaper pail liners in the form of a plastic film within a cassette which functions as a bag when inserted into a diaper disposal pail; plastic bags for disposable diapers, Cl. 16	Amazon Technologies, Inc.
MAMA BEAR APOLOGETICS	5785059	On-line journals, namely, blogs featuring articles in the field of Christian apologetics, Cl. 41	Ferrer, Hillary M. d/b/a Mama Bear Apologetics
MAMA BEAR SKIN CARE	5742375	Body butter; hair oil; baby balm, namely, non-medicated preparations for the care of baby skin; baby balm in the nature of non-medicated diaper rash ointments; baby balm, namely, body balm for babies; lip balm; salve, namely, non-medicated preparations for the care of skin; and body spray, Cl. 3	Amazon Technologies, Inc.

Mark	Reg. No.	Goods/Services	Owner
	5687647	Baby diapers; baby food, Cl. 5	Amazon Technologies, Inc.
MAMA BEAR SHARE	5395420	Providing ... companionship and emotional support for individuals that have suffered traumatic life events; providing ... companionship and emotional support for individuals that have suffered traumatic life events, via a website, Cl. 45	Mama Bear Life Coach, LLC
	5731716	Providing online legal forms for the parent child relationship, Cl. 45	Mama Bear Legal Forms, Inc.
	5980632	Laundry detergent, Cl. 3	Amazon Technologies, Inc.

III. Arguments

Applicant argues that, in rejecting Applicant’s MAMA BEAR application as compared to Applicant’s IT’S A MAMA BEAR THING and other third-party “MAMA BEAR” registrations, the USPTO has acted in an inconsistent and arbitrary manner.¹⁶ Applicant also says that her proposed MAMA BEAR mark is not merely informational because, to be rejected on this basis, her proposed mark must have no purpose other than to convey information about a general cause or concept.¹⁷ Applicant further contends that her proposed MAMA BEAR mark functions as a mark because it is used on hang tags, a printed label on the neck of the goods, packaging for the goods, and invoices for the goods where the consumer would expect

¹⁶ Applicant’s Brief, 6 TTABVUE 10-14.

¹⁷ *Id.* at 15-18.

to find the mark.¹⁸ Applicant additionally claims that third parties who are using MAMA BEAR emblazoned on shirts and other clothing items are print-to-order copyists or outright infringers of her trademark rights.¹⁹

The Examining Attorney argues that Applicant's proposed MAMA BEAR mark is a commonplace message or expression that is widely used by a variety of sources, especially when emblazoned in an ornamental manner on clothing. The proposed mark merely conveys an ordinary, familiar, well-recognized concept or sentiment that the person wearing such clothing is fiercely protective of children. As such the proposed mark does not function as a trademark to indicate the source of Applicant's goods.²⁰

The Examining Attorney further says that prior decisions and actions of other examining attorneys in applications for other marks have little evidentiary value and are not binding upon the USPTO or the Board. This appeal should be decided on its own facts, and Applicant's proposed mark should stand on its own merits. Moreover, many of the third-party registrations to which Applicant refers contain matter distinguishing them from Applicant's proposed mark. The fact that Applicant claims to be the first user of a ubiquitous designation is not dispositive on the issue of registrability where, as here, the evidence shows that the proposed mark is ubiquitous.²¹

¹⁸ *Id.* at 18-19.

¹⁹ *Id.* at 19-21.

²⁰ Examining Attorney's Brief, 10 TTABVUE 4-9, 17-18.

²¹ *Id.* at 9-15.

The Examining Attorney also contends that Applicant's purported trademark use of MAMA BEAR, for example on hangtags, in addition Applicant's ornamental use, does not conclusively show that consumers will perceive it as a mark. In fact, says the Examining Attorney, Applicant uses the proposed mark in the exact same ornamental manner as it used by countless other third parties.²²

IV. Discussion and Analysis

The USPTO's policy regarding the registrability of widely used messages may be summarized as follows:

“Widely used messages” include slogans, terms, and phrases used by various parties to convey ordinary or familiar concepts or sentiments, as well as social, political, religious, or similar informational messages that are in common use or are otherwise generally understood. The more commonly a term or phrase is used in everyday speech or in an associational or affinitive manner by various sources, the less likely consumers will perceive the matter as a trademark or service mark for any goods and services.

* * *

Messages that merely convey ordinary, familiar concepts or sentiments that are used by a variety of sources in the marketplace are considered commonplace and will be understood as conveying the ordinary concept or sentiment normally associated with them, rather than serving any source-indicating function.

TMEP § 1202.04(b) (internal citations omitted).

The dictionary evidence of record shows that the literal definition of MAMA BEAR is a female bear rearing one or more of her cubs. The colloquial (slang) definition the term is a woman, especially a mother, who is extremely protective of a child or

²² *Id.* at 18-19.

children. The discussion of MAMA BEAR in the literature of record picks up on this colloquial definition of the term. People, particularly women, who wish to associate themselves with this term are projecting the social message to others that they are fiercely protective parents.

Ubiquitous use of MAMA BEAR, emblazoned in an ornamental manner on the front of t-shirts and sweatshirts by Applicant and many third parties, supports a finding that the phrase MAMA BEAR will be perceived as a widely used message, and not as a unique source identifier. As demonstrated by these marketplace examples, dictionary definitions and the literature, target consumers who purchase and wear this merchandise express to others that they exude protective maternal behavior. MAMA BEAR is therefore a common, widely used and generally understood term to convey a messages of an ordinary or familiar concept or sentiment – aggressive protective parenting. It therefore does not serve as a designation of source for Applicant’s clothing products and as such is unregistrable. *In re Hulting*, 107 USPQ2d 1175, 1177 (TTAB 2013) (“[C]ommon ... phrases or statements that would ordinarily be used in business or in the particular trade or industry ... are not registrable.”).

As noted, Applicant argues that MAMA BEAR cannot be refused registration as an informational expression because only terms that have no purpose other than to convey information about something can be refused on this basis. This is an incorrect statement of the law. *See e.g. In re Team Jesus*, 2020 USPQ2d 11489, at *8 (affirming

refusal to register TEAM JESUS for clothing and educational services as a ubiquitous message of affiliation by referring to Christians generally as part of “Team Jesus.”).

Applicant’s argument that, compared to Applicant’s IT’S A MAMA BEAR THING and other third-party “MAMA BEAR” registrations, the USPTO has acted in an inconsistent and arbitrary manner is not persuasive. As the U.S. Court of Appeals for the Federal Circuit stated in *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001):

[Registrability] depend[s] on context and any other factor[s] affecting public perception. The Board must decide each case on its own merits. (citation omitted). Even if some prior registrations had some characteristics similar to ... [the] application [at issue], the [US]PTO’s allowance of such prior registrations does not bind the Board or ... [the Federal Circuit]. ... Needless to say, ... [the Federal Circuit] encourages the [US]PTO to achieve a uniform standard for assessing registrability of marks. Nonetheless, the Board (and ... [the Federal Circuit] in its limited review) must assess each mark on the record of public perception submitted with the application.

In re Nett Designs, 57 USPQ2d at 1566.

In addition to the overall guidance provided by *In re Nett Designs*, we give Applicant’s and third-party registrations made of record low probative value for other reasons. Applicant’s registered IT’S A MAMA BEAR THING mark is a unitary phrase containing three additional word elements, distinguishing it from the proposed mark MAMA BEAR mark standing alone. Proof that MAMA BEAR is widely used by third parties does not translate to evidence that IT’S A MAMA BEAR THING is also ubiquitous.

The registered third-party marks made of record by Applicant also are distinguishable from the proposed MAMA BEAR mark. Like Applicant’s IT’S A

MAMA BEAR THING mark, the third-party marks contain additional matter (words or designs) making these marks distinct from MAMA BEAR standing alone. All of the third-party marks, moreover, are registered in connection with goods and services other than clothing (Applicant's goods in issue) presenting a different context.

Applicant claims that the third-party uses of MAMA BEAR made of record by the Examining Attorney were not in existence when she started her business in 2013, and that every one of the sellers cited by the Examining Attorney are vendors who copied her.²³ That Applicant may have been the first user of the ubiquitous MAMA BEAR designation is not dispositive on the issue registrability where, as here, the evidence shows that the term indeed is ubiquitous. *See KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 122 (2004) (one cannot own a term that does not function as a trademark merely by "grabbing it first."); *In re Fantasia Dist., Inc.*, 120 USPQ2d 1137, 1141 (TTAB 2016) (being the first user of an alleged mark does not establish distinctiveness as a trademark); *see also See In re Empire Tech. Dev. LLC*, 123 USPQ2d 1544, 1549 (TTAB 2017) (quoting *In re Greenliant Sys. Ltd.*, 97 USPQ2d 1078, 1083 (TTAB 2010)) (where evidence establishes a term or phrase is incapable of functioning as a source identifier, it does not matter whether the applicant is the first user).

Applicant also argues that her use of the proposed MAMA BEAR mark as a designation of source on hang tags, neck labels and product packaging demonstrates

²³ Declaration of Sarah Marie Duncan, ¶¶ 1, 13, provided with Office Action Response of September 21, 2018.

that it functions as a trademark for Applicant's goods. This argument is not persuasive. "Not every designation adopted with the intention that it perform a trademark function necessarily accomplishes that purpose, even if labeled as a trademark." *In re Wal-Mart Stores*, 129 USPQ2d at 1158 (citing *In re Eagle Crest*, 96 USPQ2d at 1229). Moreover, "when [the] evidence shows, as it does here, that others besides an applicant are using a phrase in an informational manner, the burden on the applicant claiming exclusive ownership and a right to exclude others from use increases." *Id.* (citing *In re Tilcon Warren, Inc.*, 221 USPQ 86, 88 (TTAB 1984).

As noted by the Examining Attorney,²⁴ in addition to appearing on her hang tags (or on neck labels or packaging), Applicant's specimens of use and other evidence she made of record show the proposed mark used in the exact same ornamental manner as done by many other third parties. Further, Applicant's hang tag usage appears only as a description of the phrase on her clothing—first, the front of the tag shows another ornamental use of the mark on a different article of clothing; second, other marks appear as source indicators on the tag such as LOVED BY HANNAH AND ELI, INC and a design of two teepees at the bottom of the tag. The phrase "MAMA BEAR" appears in quotes on the tag to indicate the message on the clothing. Thus, Applicant's purported trademark uses of the proposed mark do not counter the record evidence of pervasive ornamental and message-conveying use of identical term MAMA BEAR by others.

²⁴ Examining Attorney's Brief, 10 TTABVUE 19.

V. Conclusion

The evidence of record – dictionary definitions, uses of MAMA BEAR in literature, Applicant’s specimens of use and her other uses, and pervasive third-party use of the term on clothing – support our finding that MAMA BEAR is a widely used and generally understood term that conveys a message of aggressive protective parenting. Applicant’s evidence and arguments do not persuade us to the contrary. On this record, the term does not serve as a designation of source for Applicant’s clothing. It fails to function as a trademark and therefore is unregistrable.

Decision:

The refusal to register Applicant’s proposed mark MAMA BEAR under Trademark Act Sections 1, 2 and 45 on the ground that it fails to function as a trademark is affirmed.