

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: December 15, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Help the Persecuted, Inc.
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Serial No. 88323799
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James H. Johnson Jr. and Cameron C. Murphy of Eversheds Sutherland (US) LLP,
for Help the Persecuted, Inc.

Tara L. Bhupathi, Trademark Examining Attorney, Law Office 124,
Lydia Belzer, Managing Attorney.

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Before Kuhlke, Lynch, and Pologeorgis,
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

Help the Persecuted, Inc. (“Applicant”) seeks registration on the Principal Register of the proposed mark HELP THE PERSECUTED, in standard characters, for “charitable fundraising services” in International Class 36.¹

The Examining Attorney refused registration of Applicant’s proposed mark under Sections 1, 2, 3, and 45 of the Trademark Act, 15 U.S.C. §§ 1051-53 and 1127, on the

¹ Application Serial No. 88323799, filed on March 4, 2019, based on an allegation of use in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming July 1, 2018 as both the date of first use and the date of first use in commerce.

ground that it fails to function as a mark because it is an informational message commonly used in the marketplace and in Applicant's particular trade or industry.² When the Examining Attorney made the refusal final, Applicant appealed. Applicant and the Examining Attorney have filed briefs. For the reasons explained below, we affirm the refusal to register.³

I. Failure to Function

A. Legal Background

“The Trademark Act is not an act to register words but to register trademarks [or service marks]. Before there can be registrability, there must be a trademark (or a service mark) and, unless words have been so used, they cannot qualify for registration.” *In re Std. Oil Co.*, 275 F.2d 945, 125 USPQ 227, 229 (CCPA 1960). Section 45 of the Trademark Act defines “trademark” and “service mark” as “any word, name, symbol, or device, or any combination thereof ... used by a person ... to identify and distinguish” goods or services, respectively, “and to indicate the source” of the goods or services, “even if that source is unknown.” 15 U.S.C. § 1127; *see also In re Bose Corp.*, 546 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

² Examining Attorney's Brief, pp. 1-2; 9 TTABVUE 3-4. In the initial May 20, 2019 Office Action, the Examining Attorney also refused registration of Applicant's proposed mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that Applicant's proposed mark is merely descriptive of its identified services. The mere descriptiveness refusal, however, was withdrawn prior to appeal. *See* December 14, 2019 Final Office Action, TSDR p. 2.

³ The TTABVUE and Trademark Status & Document Retrieval (“TSDR”) citations refer to the docket and electronic file database for the involved application. All citations to the TSDR database are to the downloadable .pdf version of the documents.

is attached.”).

We must assess whether Applicant’s proposed mark, HELP THE PERSECUTED, functions as a mark based on whether the relevant public, i.e. consumers or potential consumers of charitable fundraising services, would perceive HELP THE PERSECUTED as identifying the source or origin of such services. *See e.g., In re Texas With Love, LLC*, 2020 USPQ2d 11290, at *2 (TTAB 2020) (“Whether the term ... falls within this definition and functions as a mark depends on whether the relevant public, i.e., purchasers or potential purchasers of Applicant’s goods [or services], would perceive the term as identifying the source or origin of Applicant’s goods [or services].”); *In re TracFone Wireless, Inc.*, 2019 USPQ2d 222983, at *1-2 (TTAB 2019) (“The key question is whether the asserted mark would be perceived as a source indicator for Applicant’s services.”); *In re Aerospace Optics, Inc.*, 78 USPQ2d 1861, 1862 (TTAB 2006) (“[T]he critical inquiry is whether the asserted mark would be perceived as a source indicator.”). In this case, because there are no limitations to the channels of trade or classes of consumers, the relevant consuming public comprises all potential purchasers of the identified services. *See In re Yarnell Ice Cream, LLC*, 2019 USPQ2d 265039, at *5 (TTAB 2019); *cf. CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983) (applying this principle in the likelihood of confusion context).

Matter that is widely used to convey ordinary or familiar concepts or sentiments, or social, political, religious, 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”); *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 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 an applicant’s specimens, as well as other evidence. *See, e.g., D.C. One Wholesaler, Inc.*, 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).

B. Evidence and Analysis

The Examining Attorney argues that the proposed mark HELP THE PERSECUTED is a commonplace message or expression that is widely used by a variety of sources, including in the context of charitable fundraising services such as Applicant's, to indicate that assistance or monetary donations are needed for victims of religious persecution, particularly Christians.

In support of her refusal, the Examining Attorney submitted evidence obtained from the Internet. A representative sample is provided below:

- Screenshot of an article from the website www.bethanygu.edu titled “5 Ways You Can **Help the Persecuted** Church From Home” discussing how to donate to help members of the persecuted church and advocate for religious freedom;⁴
- Screenshot of a webpage from Christian Solidarity International with the headline “**Help the Persecuted**” requesting prayers and donations to make a “life-saving impact for your Christian brothers and sisters facing intense persecution for their faith.”⁵
- Screenshot of a webpage from Blessing Bethlehem calling on others to donate to “**Help the Persecuted** Christian Community in the Birthplace of Christianity” and discussing Christian persecution in Bethlehem;⁶
- Screenshot of a webpage from Take Heart discussing how the entity “finds local churches and organizations wanting to truly **help the persecuted** Christians in their communities but are lacking resources... to make it happen”;⁷
- Screenshot of a webpage from Nasarean.Org discussing a fundraising dinner that raised “more than \$30,000 to directly **help the Persecuted**

⁴ May 20, 2019 Office Action; TSDR pp. 6-7.

⁵ *Id.*; TSDR p. 11.

⁶ *Id.*; TSDR p. 13.

⁷ *Id.*; TSDR p. 14.

Christians of the Middle East”;⁸

- Screenshot of an excerpt from an article from The Observer: University of Notre Dame discussing a speech at a dinner that concluded with suggestions on how “Christians in the West can **help the persecuted**” including encouraging donations;⁹
- Screenshot of an excerpt from an article from Abilene Reporter-News of Texas calling on readers to donate to Global Samaritan to “**help the persecuted** Christians in the refugee camps”;¹⁰
- Screenshot of a webpage from ChinaAid calling on others to “Make a Difference” by getting “involved to **help the persecuted** in China” through writing letters, signing petitions and donating;¹¹
- Screenshot of a webpage from WorldHelp calling on the congregation to “**help the persecuted church**” through donations;¹²
- Screenshot of a PayPal page describing a charity that seeks to “**help the persecuted**” in places where it is dangerous to follow Christ”;¹³
- Screenshot of a webpage from Hope for Iraqi Christians discussing the 2018 Fundraising Gala which raised funds “to **help the persecuted** poor in Iraq and the Middle East”;¹⁴
- Screenshot of a webpage from SGN indicating that when you donate to SGN, you “**help the persecuted**”;¹⁵
- Screenshot of a webpage from ANM calling on others to “Donate to **help the persecuted** and displaced”;¹⁶ and

⁸ *Id.*; TSDR pp. 15-16.

⁹ *Id.*; TSDR p. 17.

¹⁰ *Id.*; TSDR p. 18.

¹¹ December 14, 2019 Final Office Action; TSDR p. 4.

¹² *Id.*; TSDR p. 6.

¹³ *Id.*; TSDR p. 7.

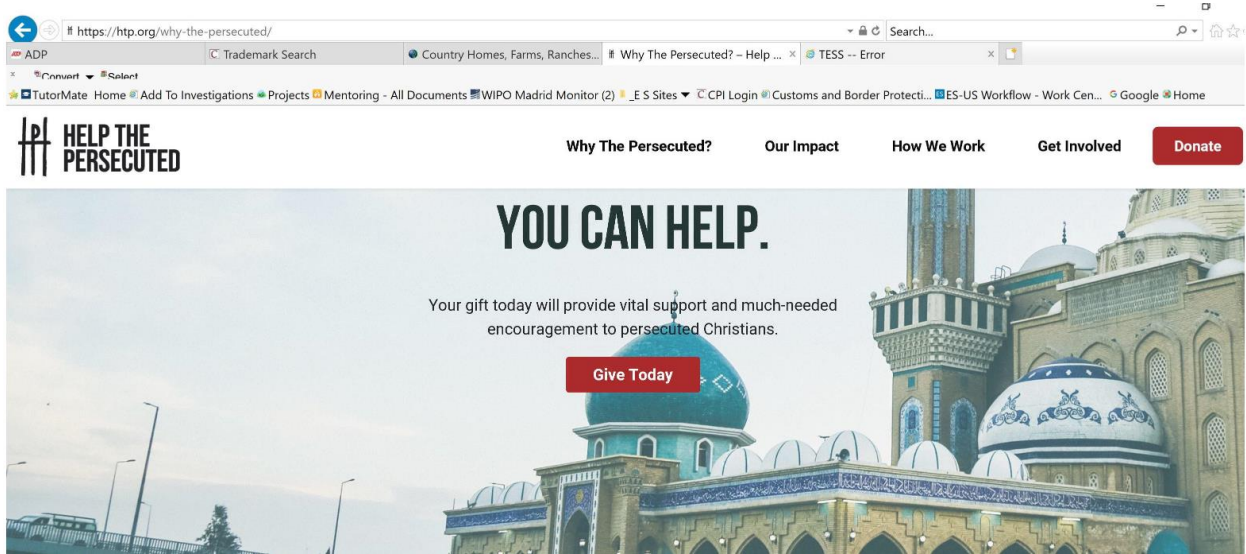
¹⁴ *Id.*; TSDR p. 8.

¹⁵ *Id.*; TSDR p. 10.

¹⁶ *Id.*; TSDR p. 11.

- Screenshot of a webpage from Hope for Mena requesting donations to “**help the persecuted.**”¹⁷

The Examining Attorney also notes that Applicant’s specimen shows the applied-for mark used on Applicant’s website advertising fundraising services to “provide vital support and much-needed encouragement to persecuted Christians.”¹⁸ Applicant’s specimen is displayed below:¹⁹



Based on the foregoing evidence, the Examining Attorney argues that because consumers are accustomed to seeing the phrase **HELP THE PERSECUTED** used in connection with requests for charitable donations, when it is applied to Applicant’s “charitable fundraising services,” consumers will not perceive it as pointing to one particular source. Thus, the Examining Attorney concludes that this phrase or expression would not be recognized as a mark that identifies the source of Applicant’s

¹⁷ *Id.*; TSDR p. 12.

¹⁸ Examining Attorney’s Brief, pp. 5-6; 9 TTABVUE 6-7

¹⁹ March 4, 2019 Specimen, TSDR p. 1.

services.

In challenging the refusal, Applicant contends that the evidence submitted by the Examining Attorney demonstrates that the wording “help the persecuted” is merely used as “simple words in text” and not used to convey facts or details about the services.²⁰ Additionally, Applicant maintains that the Examining Attorney’s withdrawal of the Section 2(e)(1) refusal during the prosecution of Applicant’s application shows that Applicant’s proposed mark is suggestive and, therefore, not informational.²¹

Applicant also contends that “an internet search of the term ‘help the persecuted’ returns the organization’s website, the organization’s LinkedIn page, a profile about the organization’s President and CEO, and news articles about the organization’s Summit in Washington, D.C., at which U.S. Vice President Mike Pence spoke.”²² Finally, Applicant argues that its proposed mark “functions as a trademark similar to other ‘HELP THE...’ marks registered by the United States Patent and Trademark Office.²³ Specifically, Applicant has submitted a list of the following purportedly registered marks:²⁴

HELP THE AFGHAN CHILDREN, Reg. No. 4630850
HELP THE HOO-HAHS, Reg. No. 3762083
HELP THE HOMELESS, Reg. no. 3762083
HELP THE CHILDREN, Reg. No. 1817205
HELP THE WORLD SEE, Reg. No. 2017197

²⁰ Applicant’s Appeal Brief, p. 2; 5 TTABVUE 3.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at pp. 2-3; 5 TTABVUE 3-4.

HELP THE EARTH FIGHT BACK!, Reg. No. 1640875

While acknowledging that some of the aforementioned registrations are no longer live, Applicant nonetheless argues that the USPTO's allowance of numerous "HELP THE..." marks is strong evidence that Applicant's proposed mark is not merely informational and, therefore, is entitled to registration.²⁵

We find Applicant's arguments unpersuasive. We initially find that although the Section 2(e)(1) refusal was withdrawn, the withdrawal does not equate to a conclusion that Applicant's proposed mark is registrable. Common phrases and slogans need not be descriptive or generic to be found informational. *See In re Ocean Tech., Inc.*, 2019 USPQ2d 450686 (TTAB 2019) (noting "[t]he standard for a failure to function refusal is not whether the proposed mark is suggestive rather than descriptive, but whether the relevant public will recognize it as a trademark identifying only one source.") (citing *In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1827 (TTAB 2012)). Here, the evidence shows that the wording "help the persecuted" is commonly used by third parties. Accordingly, consumers encountering the wording used for charitable fundraising services are likely to view the wording as a widely-used message, rather than as a source identifier.

Applicant's reliance on an "internet search" which purportedly retrieved Applicant's website, LinkedIn page, information about its President and CEO, and articles about Applicant and its fundraising services is also unavailing since Applicant did not submit the Internet search into the record. Accordingly, we give

²⁵ *Id.* at p. 3; 5 TTABVUE 4.

Applicant's argument based on this alleged Internet search no consideration. Regardless, the Examining Attorney's Internet evidence undermines the persuasiveness of Applicant's argument, even if it had evidentiary support.

As for the list of third-party registrations submitted by Applicant, we first note that the Examining Attorney did not object to Applicant's mere list of registrations during prosecution, which would have allowed Applicant to cure the deficiency of failing to submit copies of the registrations. Thus, any objection to this list by the Examining Attorney is forfeited on appeal. *See In re City of Houston*, 101 USPQ2d 1534, 1536 (TTAB 2012), *aff'd*, 731 F.3d 1326, 108 USPQ2d 1226 (Fed. Cir. 2013) (where the examining attorney failed to advise the applicant during prosecution of the insufficiency of a list of registrations, the Board deemed the examining attorney to have waived any objection to the list and considered it for whatever probative value it had). Accordingly, we consider the list of registrations for whatever probative value such evidence may have. *Id.*

That being said, Applicant's list of registrations has little, if any, probative value because Applicant did not include the actual goods or services associated with the respective registrations in its list. Without the actual goods and services, we must speculate as to reasons why these marks were allowed to be registered.²⁶ *See In re Eagle Crest, Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010) (a list of third-party

²⁶ As noted above, Applicant recognizes that some of the registrations are no longer live. In that regard, we note that expired or cancelled registrations generally are evidence only of the fact that the registrations issued. *In re Wal-Mart Stores, Inc.*, 129 USPQ2d 1148, 1159 (TTAB 2019).

registrations without the description of goods and services has no probative value); *In re 1st USA Realty Prof'ls. Inc.*, 84 USPQ2d 1581, 1583 (TTAB 2007) (a list of third-party registrations without the goods and services for which the marks are registered has no probative value). And even if Applicant had provided additional context or evidence of what was in the registration files of other, allegedly similar, registered marks, we must apply the law to the facts in every case before us, irrespective of what happened to other marks which, due to their being registered, we do not have the opportunity to review. *See, e.g., In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016) (“The PTO is required to examine all trademark applications for compliance with each and every eligibility requirement...”); *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (USPTO “must assess each mark on the record of public perception submitted with the application”). Thus, we are not persuaded by the list of third-party registrations submitted by Applicant.

Finally, we disagree with Applicant’s assessment that the evidence submitted by the Examining Attorney constitutes “simple words in text” and not used to convey facts or details about the services. In fact, Applicant’s argument appears to be a concession that the wording is commonly used by third parties, but merely lodges an objection to the evidence by arguing that it does not show sufficient contextual information about the services subject to the evidence. However, the evidence does, in fact, demonstrate that the wording is used by third parties to specify why donations are needed and how donations will be used.

For example, evidence from Bethany Global University discusses “Five Ways You Can Help the Persecuted Church,” including donating financial resources to the members of the persecuted church, and evidence from Christian Solidarity International shows use of “Help the Persecuted” to ask viewers to give a generous gift to “provide life-saving relief to Christians facing genocide for their faith.”²⁷ Thus, the evidence not only shows common use of HELP THE PERSECUTED by third parties, but also demonstrates that these third parties use the wording to convey information about the services provided, such as seeking donations to aid persecuted persons.

Here, the evidence as a whole shows that wording HELP THE PERSECUTED is a commonplace expression used by fundraising organizations, such as Applicant’s, which seek monetary donations to assist those who are purportedly persecuted based on their religious affiliation. *See Texas With Love*, 2020 USPQ2d 11290, at *3 (“It is clear from how the term is used by multiple third parties that [the term] merely conveys a well-recognized concept or sentiment.”). Other similar messages have been deemed unregistrable. For example, in *In re Team Jesus, LLC*, __ USPQ2d __, 2020 WL 7312021 (TTAB December 10, 2020), the Board held that TEAM JESUS for clothing and religious services did not function as a mark because “the evidence as a whole shows that TEAM JESUS is a commonplace message of Christian affiliation.” We find the evidentiary showing in this case analogous. Also, in *In re DePorter*, 129 USPQ2d 1298, 1302 (TTAB 2019), the Board held that #MAGICNUMBER108 failed

²⁷ May 20, 2019 Office Action; TSDR pp. 6-7 and 11.

to function as a mark based on “wide use of the proposed mark in a non-trademark manner to consistently convey information about the Chicago Cubs’ World Series appearance and win after a 108-year drought. This evidence is competent to suggest that upon encountering Applicant’s ‘mark,’ prospective purchasers familiar with such widespread non-trademark use are unlikely to consider it to indicate the source of Applicant’s goods.” *See also Texas With Love*, 2020 USPQ2d 11290, at *3 (finding that TEXAS LOVE did not function as a mark but instead would be perceived as a common message of “support for, or affiliation or affinity with the State of Texas,” a well-recognized concept of sentiment.).

Quite simply, the record in this case demonstrates the ubiquity of the phrase HELP THE PERSECUTED in connection with charitable fundraising services. In addition, Applicant’s own specimen reinforces the nature of HELP THE PERSECUTED as an expression commonly used in the context of charitable fundraising to request monetary donations or other assistance. In particular, we note that the specimen’s use of “You can help” and the reference to providing support and encouragement to “persecuted Christians” emphasizes that HELP THE PERSECUTED is an informational message. We therefore find that consumers will not perceive the commonly-used expression or phrase HELP THE PERSECUTED as distinguishing Applicant’s charitable fundraising services in commerce and indicating their source.

Decision: The refusal to register Applicant's proposed mark HELP THE PERSECUTED under Sections 1, 2, 3, and 45 of the Trademark Act, 15 U.S.C. §§ 1051-53 and 1127, on the ground that it fails to function as a mark is affirmed.