

This Opinion is Not a
Precedent of the TTAB

Mailed: August 23, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re National Association to Advance Black Birth
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Serial No. 90581377
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Michele Berdinis of Berdinis Law P.C.,
for the National Association to Advance Black Birth.

Kim Teresa Moninghoff, Trademark Examining Attorney, Law Office 113,
Myriah Habeeb, Managing Attorney.
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Before Shaw, Pologeorgis and Allard,
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

The National Association to Advance Black Birth (“Applicant” or “NAABB”) seeks registration of the proposed mark BLACK BIRTHING BILL OF RIGHTS, in standard characters, on the Principal Register for services identified as:

Promoting public awareness of the rights and needs of Black women and birthing persons in connection with maternal and postpartum care by means of public advocacy; Promoting the interests of Black women and birthing persons in connection with maternal and post-

partum care by means of public advocacy,” in International Class 35.¹

The Trademark Examining Attorney refused registration of Applicant’s mark on the ground that it fails to function as a mark under Sections 1, 2, 3 and 45 of the Trademark Act, 15 U.S.C. §§ 1151, 1052, 1053 and 1127. The Examining Attorney also refused registration under Trademark Act Sections 1 and 45, 15 U.S.C. §§ 1051 and 1127, on the ground that Applicant’s specimens fail to show the mark in use in commerce in connection with the identified services.

When the refusal was made final, Applicant appealed and requested reconsideration. When the request for reconsideration was denied, the appeal resumed. Applicant and the Examining Attorney filed briefs. We reverse the refusals to register.²

I. Applicant

Applicant’s web page specimens explain that Applicant is a non-profit entity promoting improvements in Black maternal and infant health care.³ Applicant’s stated purpose lists the following four goals:⁴

1. Advocate for Black maternal-infant health through advocacy, research, educational programming, activism and policy change.

¹ Application Serial No. 90581377 was filed on March 16, 2021 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging a date of first use anywhere and in commerce of April 13, 2020. Applicant disclaims BLACK BIRTHING.

² All TTABVUE and Trademark Status and Document Retrieval (“TSDR”) citations reference 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.

³ Application of March 16, 2021, TSDR 5.

⁴ *Id.* at 6.

2. Work to equip birth workers (doulas, midwives, nurses, and doctors) and maternity institutions with the practical tools and education they need to improve outcomes for Black women and persons.
3. Develop and support innovative models of care that are sensitive to the cultural and social needs of Black families.
4. Partner with organizations that are connected to and can help advance our vision.

To further its stated goals, Applicant has created the BLACK BIRTHING BILL OF RIGHTS which identifies twenty “rights” to which all expecting Black women are entitled. These rights include concepts such as: being “listened to and heard,” being “informed,” having “the right to make medical decisions,” and having “the right to affordable care.” Applicant explains the purpose of its BLACK BIRTHING BILL OF RIGHTS as follows:

At NAABB we believe that all Black women and birthing persons are entitled to respectful, equitable, and high-quality pre – and postpartum care. The Black Birthing Bill of Rights is a resource for every black person that engages in maternity care. We want each black woman and birthing person to know their rights and to have the tools to confidently exercise these rights. The Bill of Rights also serves as guidance for government programs, hospitals, maternity providers and others as they transform their policies, procedures, and practices to meet the needs of Black birthing people.⁵

A partial excerpt of a graphic representation of the BLACK BIRTHING BILL OF RIGHTS appears below.

⁵ *Id.* at 17.

NATIONAL ASSOCIATION TO ADVANCE BLACK BIRTH

Black Birthing Bill of Rights

At NAABB we believe that all Black women and persons are entitled to equitable, comprehensive, and quality pre- and postpartum care in order to achieve their full birthing potential and thrive during the childbearing years. The Black Birthing Bill of Rights serves as a resource for individuals to become knowledgeable of their rights as a Black person in need of maternal care. It also serves as guidance to engage hospitals, health providers, government health agencies and others to change/improve their ethic, policies, and delivery approach to serving Black women and persons throughout the birthing process.

I AM SEEN AND HEARD
I have the right to be listened to and heard.

RECOGNIZE MY HUMANITY
I have the right to have my humanity recognized and acknowledged.

RESPECT ME
I have the right to be respected and to receive respectful care.

BELIEVE ME
I have the right to be believed and acknowledged that my experiences are valid.

INFORM ME OF MY PAIN RELIEF OPTIONS
I have the right to be informed of all available options for pain relief.

I DECIDE
I have the right to choose how I want to nourish my child and to have my choice be supported.

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Applicant uses social media to further its mission of promoting and advocating for improved Black maternal and infant health care. Applicant introduced a number of Instagram posts as substitute specimens for its services. One Instagram post encourages donations to supports its advocacy, stating:

It's giving Tuesday! #TheNAABB's advocacy and programming efforts such as, the Black Birthing Bill of Rights, is imperative to ensuring that each Black birthing person knows their rights and to have the tools to

⁶ *Id.* at 3.

confidently exercise these rights during this fearful #COVID19 season and into the future.⁷

Another Instagram post comments on, and links to, a post made by Lamaze International promoting the BLACK BIRTHING BILL OF RIGHTS as part of Lamaze's recognition of Black Maternal Health Week. Applicant's post states: "Check out @lamzechildbirth post on out Black Birthing Bill of Rights. We greatly appreciate your [Lamaze International's] support of the Rights. Continue to support us in advocating for Black birthing people by sharing and promoting the Black Birthing Bill of Rights."⁸

Yet another Instagram post advertises a "joint Instagram Live with @blkbfinweek [Black Breastfeeding Week] for our final event of Black Maternal Health Week 2020. We'll be discussing the Black Birthing Bill of Rights and infant feeding."⁹

An excerpt from Applicant's web page gives "posting guidelines" for third-party use of the BLACK BIRTHING BILL OF RIGHTS. It states, in part:

We ask that you follow the below guidelines when sharing BOR:

1. When reposting and sharing BOR, please do not edit, add filters or crop any of the text or images. Credit the NAABB (@the_naabb on Instagram and @thenaabb on Twitter) and tag us in the post. . . .¹⁰

⁷ February 28, 2022 Response to Office Action, TSDR 15.

⁸ *Id.* at 14.

⁹ *Id.* at 12.

¹⁰ *Id.* at 21.

II. Failure to function as a mark

“[A] proposed trademark is registrable only if it functions as an identifier of the source of the applicant’s goods or services.” *In re Yarnell Ice Cream, LLC*, 2019 USPQ2d 265039, at *16 (TTAB 2019) (quoting *In re DePorter*, 129 USPQ2d 1298, 1299 (TTAB 2019)). “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).

Slogans, phrases, and other terms that are considered to be merely informational in nature are generally not registrable. *See In re Eagle Crest Inc.*, 96 USPQ2d 1227, 1232 (TTAB 2010) (“ONCE A MARINE, ALWAYS A MARINE is an old and familiar Marine expression, and as such it is the type of expression that should remain free for all to use.”). *See also In re Volvo Cars of N. Am., Inc.*, 46 USPQ2d 1455, 1460-61 (TTAB 1998) (affirming refusal to register “Drive Safely” for automobiles because it would be perceived as an everyday, commonplace safety admonition). “The critical inquiry in determining whether a designation functions as a mark is how the designation would be perceived by the relevant public.” *Eagle Crest*, 96 USPQ2d at 1229. “To make this determination we look to the specimens and other evidence of record showing how the designation is actually used in the marketplace.” *Id.*

The Examining Attorney argues that, as used on Applicant’s specimens:

[T]he applied-for mark is used as a title with a list of rights accompanied by illustrations filling most of the page. In particular, the applicant’s website describes the list of rights as “a resource for every black person that engages in

maternity care,” which “serves as guidance for government programs, hospitals, maternity providers and others.” Additionally, the website includes an option to download a PDF of this list of rights. Thus, in this context, the wording BLACK BIRTHING BILL OF RIGHTS, especially associated with the PDF download option would be viewed as informational wording identifying the set of rights promoted by the applicant’s services, rights which, if the applicant’s efforts are successful, would be promoted and adopted by other sources, such as government programs, hospitals, and other maternity providers.¹¹

In addition to arguing that BLACK BIRTHING BILL OF RIGHTS is informational wording, the Examining Attorney takes particular issue with the fact that the proposed mark will be used by third parties. Such use, according to the Examining Attorney, fails to show Applicant as the source of the applied-for services of promoting public awareness of the rights and needs of expecting Black women:

[I]f the applicant’s public advocacy services are successful, multiple sources will offer the same list of rights to their patients, identified by the wording BLACK BIRTHING BILL OF RIGHTS. It is for this reason, namely, that the applicant is advocating widespread third-party use of BLACK BIRTHING BILL OF RIGHTS to identify a list of specific rights, that BLACK BIRTHING BILL OF RIGHTS cannot function as a source identifier for the applicant’s services.¹²

Applicant disagrees with the Examining Attorney that its mark fails to function as a trademark because the specimens identify the BLACK BIRTHING BILL OF

¹¹ Examining Attorney’s Br., pp. 4-5, 6 TTABVUE 4-5.

¹² *Id.* at 6, 6 TTABVUE 6.

RIGHTS as an informational resource. According to Applicant, it “uses its Mark on its specimens as a way to advocate and increase awareness[.]”¹³

In addition, Applicant argues that its use of the proposed mark is similar to other “bill of rights” marks that have registered. Applicant submitted seventy-eight TESS records of third-party “Bill of Rights” applications or registrations for a variety of goods and services.¹⁴ The following examples are relevant:

1. BIRTHING BILL OF RIGHTS (BIRTHING disclaimed) - Reg. No. 6548460 for “Education services, namely, developing curriculum for others, providing live and online training in the form of classes and seminars all in the fields of personal, spiritual and business development and the distribution of educational material in connection therewith,” in International Class 41.¹⁵
2. BORROWER BILL OF RIGHTS (BORROWER disclaimed) - Reg. No. 5108259 for “Financial services, namely, money lending; real estate agency services, namely, financing home loans, mortgage refinancing; debt consolidation,” in International Class 36.¹⁶
3. CAR BUYERS BILL OF RIGHTS (CAR BUYERS disclaimed) - Reg. No. 4734133 for “Automobile dealerships,” in International Class 35.¹⁷

¹³ Applicant’s Br., p. 5, 4 TTABVUE 9.

¹⁴ December 27, 2021 Response to Office Action, TSDR 11-123. The majority of TESS records submitted by Applicant consist of pending or abandoned applications, as well as cancelled registrations, none of which we have considered. Applications are not evidence of anything except that they were filed on a certain date. *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016). Similarly, cancelled registrations have no probative value. *In Re Ginc UK Limited*, 90 USPQ2d 1472, 1480 (TTAB 2007).

¹⁵ December 27, 2021 Response to Office Action, TSDR 92-94. This mark, while pending, was cited against Applicant’s mark as a potential bar to registration. October 21, 2021 Office Action. In response to the advisory refusal, Applicant obtained and submitted a coexistence agreement with the owner, consenting to use and registration of Applicant’s mark. December 27 2021 Response to Office action, TSDR 175-76. Following receipt of the agreement, the advisory refusal was withdrawn. December 30, 2021 Office Action.

¹⁶ December 27, 2021 Response to Office Action, TSDR 95-96.

¹⁷ *Id.* at 97-98.

4. CALIFORNIA CHILDREN'S OUTDOOR BILL OF RIGHTS (CALIFORNIA CHILDREN'S and OUTDOOR disclaimed) - Reg. No. 4555015 for "Recreational park services," in International Class 41.¹⁸
5. VACATION RENTAL BILL OF RIGHTS (VACATION RENTAL disclaimed) - Reg. No. 4297970 for "rental of vacation properties, homes, apartments, and villas," in International Class 36.¹⁹
6. MERCHANT BILL OF RIGHTS (MERCHANT disclaimed) - Reg. No. 3762235 for, inter alia, "Business advisory services, consultancy and information; public advocacy to promote awareness of credit, debit and payment card processing practices," in International Class 35.²⁰

We agree with Applicant that the specimens show BLACK BIRTHING BILL OF RIGHTS is used in rendering the identified services, and identifies Applicant as the source of those services. *See In re ICE Futures U.S. Inc.*, 85 USPQ2d 1664, 1669 (TTAB 2008) (noting that use in the "rendition" of services is an element of the "sale" of services under Section 45 of the Trademark Act). In particular, Applicant's social media posts featuring the BLACK BIRTHING BILL OF RIGHTS promote Black maternal and infant health care and are directed to the public at large, including both expectant mothers and care givers.

Moreover, the fact that at least six other "Bill of Rights" marks have registered for a variety of services—including one for "public advocacy to promote awareness of credit, debit and payment card processing practices"—suggests that there is nothing inherently unregistrable about these kinds of marks.

¹⁸ *Id.* at 99-111.

¹⁹ *Id.* at 112-113.

²⁰ *Id.* at 121-123.

The Examining Attorney cites to *In re Advert. & Mktg. Dev. Inc.*, 821 F.2d 614, 2 USPQ2d 2010 (Fed. Cir. 1987) for support. We agree that this case is relevant to the facts at hand, although we fail to see how it supports the Examining Attorney's arguments. In *Advert. & Mktg. Dev.*, the Federal Circuit reversed the Board's affirmance of an examining attorney's rejection of a specimen for promotional services. The court found that the applicant's use of its mark in correspondence with potential clients offering its promotional services was acceptable to show use for the purpose of registration for promotional services, even though its clients also used the mark in the advertisement of their own services. *Id.* at 2015. In other words, the fact that the applicant's mark, THE NOW GENERATION, was used by others to identify their goods or services did not prevent the applicant from using and registering the same mark for its services.

Here, Applicant is using the phrase BLACK BIRTHING BILL OF RIGHTS to identify its own activities promoting Black maternal and infant health care, as evidenced by the Instagram posts. That is, Applicant uses BLACK BIRTHING BILL OF RIGHTS to speak directly to expectant Black women and health care providers about Black maternal and infant health care rights. Applicant also is allowing others to use the phrase BLACK BIRTHING BILL OF RIGHTS as part of their campaigns to promote Black maternal and infant health care. The fact that Applicant allows others to use BLACK BIRTHING BILL OF RIGHTS does not diminish its rights in the mark for its promotional and advocacy services. Indeed, Applicant's "posting guidelines" for third-party use of the BLACK BIRTHING BILL OF RIGHTS seeks to

ensure that the proposed mark will be associated with Applicant's efforts to promote Black maternal and infant health care.

The Examining Attorney also relies on *In re Admark, Inc.*, 214 USPQ 302 (TTAB 1982) for support. In that case, the specimens showed that the applicant, an advertising agency, was licensing marks, such as the mark at issue, THE ROAD AUTHORITY, for use by clients in advertising campaigns for the clients' goods and services. The Board found that the specimen only showed use of the mark by the applicant's licensee to identify its services, retail tire and auto accessory store services, and not to identify an advertising service.

The facts before us are distinguishable from those in *Admark*. The totality of the record here establishes that the mark Applicant seeks to register is one Applicant uses to identify its own services, in particular, its promotion of Black maternal and infant health care. The record indicates that the mark, as used on the specimens, would be associated with Applicant, the National Association to Advance Black Birth, by itself, even though it may also be used by third parties.

For the foregoing reasons, we reverse the refusal to register the mark on the ground that it fails to function as a mark under Sections 1, 2, 3 and 45 of the Trademark Act, 15 U.S.C. §§ 1151, 1052, 1053 and 1127.

III. Specimen refusal

Inasmuch as we have found that the specimens of record establish that BLACK BIRTHING BILL OF RIGHTS functions as a mark when used in connection with Applicant's identified promotional and advocacy services, we reverse the refusal to

register the mark under Trademark Act Sections 1 and 45, 15 U.S.C. §§ 1051 and 1127, on the ground that Applicant's specimens fail to show the mark in use in commerce in connection with the identified services.

Decision: The refusal to register Applicant's mark BLACK BIRTHING BILL OF RIGHTS on the grounds that it fails to function as a service mark and that Applicant's specimens fail to show the mark in use in commerce in connection with the identified services is reversed.