

This Opinion is a
Precedent of the TTAB

Mailed: January 29, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re DePorter
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Serial No. 87229711
—

Charles T. Riggs Jr. of Law Office of Charles T. Riggs Jr.,
for Grant DePorter.

Kim Teresa Moninghoff, Trademark Examining Attorney, Law Office 113,
Odette Bonnet, Managing Attorney.

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Before Kuhlke, Kuczma and Larkin,
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

Grant DePorter (“Applicant”) seeks registration on the Principal Register of
#MAGICNUMBER108 (in standard characters) for:

Shirts; Shirts and short-sleeved shirts; Graphic T-shirts;
Short-sleeve shirts; Short-sleeved shirts; T-shirts; Tee
shirts; Tee-shirts; Wearable garments and clothing,
namely, shirts in International Class 25.¹

¹ Application Serial No. 87229711 was filed on November 8, 2016, under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and first use in commerce since at least as early as October 17, 2016.

The Trademark Examining Attorney refused registration on the ground that #MAGICNUMBER108 is informational matter that 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 under Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052 and 1127.

When the refusal was made final, Applicant appealed and requested reconsideration. After the request for reconsideration was denied, the appeal was resumed and Applicant and the Examining Attorney submitted briefs. For the reasons forth below, the refusal to register is affirmed.

I. Discussion

Applicant's proposed mark #MAGICNUMBER108 was refused registration under §§ 1 and 2 of the Trademark Act, 15 U.S.C. §§ 1051 and 1052, which require that the subject matter presented for registration be a "trademark," defined in § 45 of the Trademark Act, 15 U.S.C. § 1127, as follows:

The term "trademark" includes any word, name, symbol, or device, or any combination thereof—

(1) used by a person, or

(2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter,

to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.

The Court of Customs and Patent Appeals, the predecessor to our primary reviewing court, the Court of Appeals for the Federal Circuit, observed that "[t]he

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) citing *In re Standard Oil Co.*, 275 F.2d 945, 125 USPQ 227, 229 (CCPA 1960). “Words are not registrable *merely* because they do not happen to be descriptive of the goods or services with which they are associated.” *Standard Oil*, 125 USPQ at 229. The mere fact that Applicant’s phrase appears on the specimens does not make it a trademark. To be a mark, the phrase must be used in a manner which indicates to purchasers or potential purchasers a single source or origin for the goods. *In re Volvo Cars of N. Am. Inc.*, 46 USPQ2d 1455, 1459 (TTAB 1998). Thus, terms and expressions that merely convey an informational message are not registrable. *In re Eagle Crest, Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010).

Determining whether a term or expression functions as a trademark or service mark depends on how it would be perceived by the relevant public. *Eagle Crest*, 96 USPQ2d at 1229; *In re Aerospace Optics, Inc.*, 78 USPQ2d 1861, 1862 (TTAB 2006). “The more commonly a [term or expression] 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 Hulting*, 107 USPQ2d 1175, 1177 (TTAB 2013) (quoting *Eagle Crest*, 96 USPQ2d at 1229). 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. See *In re Manco*,

Inc., 24 USPQ2d 1938, 1941 (TTAB 1992) (citing *In re Remington Prods. Inc.*, 3 USPQ2d 1714, 1715 (TTAB 1987)).

A proposed trademark is registrable only if it functions as an identifier of the source of the applicant's goods or services. 15 U.S.C. §§ 1051, 1052, 1127. In this case, the Examining Attorney refused registration of Applicant's proposed mark on the ground that the public will not perceive the term as a trademark that identifies the source of Applicant's goods but rather only as conveying an informational message.

In support of the refusal of registration, the Examining Attorney submits evidence showing that numerous third parties have used #MAGICNUMBER108 as part of messages posted on social media sites, including Twitter and Instagram, during and after the 2016 World Series. According to the Examining Attorney, the use of the wording #MAGICNUMBER108 in these messages identifies the subject matter of these tweets and posts as relating to and expressing support for the Chicago Cubs and their World Series win.²

Below is a representative list of the third-party tweets on which the Examining Attorney relies, together with the Examining Attorney's comments regarding them:³

Jeff Corder 25¢. "@cubs ...Sooooo much better than that "other" hat! ;) #MtCGA #GoCubsGo #MagicNumber108 #FlyTheW #cubsparade #WorldSeries #CubsWin." *Office Action, 2/16/2017, TSDR at 17* (Examining Attorney: "This tweet, with a photo of a hat showing a bear with a baseball bat and the wording 'Make the Cubs Great Again,'

² Examining Attorney's Appeal Brief at 9 TTABVUE 7. References to the briefs refer to the Board's TTABVUE docket system.

³ See February 16, 2017 Office Action, TSDR at 16-28, for additional examples. Page references herein to the application record refer to the downloadable .pdf version of the USPTO's Trademark Status & Document Retrieval (TSDR) system.

includes the hashtag in the context of several relating to the Cubs and their World Series win and would be perceived as also relating to that win.).

Carlos: “It is celebration time in chi-town. #cubsworldserieschamps #magicnumber108.” *Office Action, 2/16/2017, TSDR at 17* (Examining Attorney: “Like the hashtag that precedes it, the hashtag #magicnumber108 would be viewed as a reference to the Cubs’ win.”).

hiram: “Was it a dream, Ask Chely Wright, IT WAS REAL, IT WAS MAGIC, The #ChicagoCubs WORLD CHAMPS #MagicNumber108.” *Office Action, 2/16/2017, TSDR at 17-18* (Examining Attorney: “Again, in this context, and combined with a photo of the Wrigley Field sign, the hashtag #magicnumber108 would be viewed as a reference to the Cubs’ World Series win.”).

Joe Woschitz: “#FlyTheW And 108 years later the Chicago Cubs are World Series Champions again! #MagicNumber108 #GoCubsGo #LetsGo #WorldSeries.” *Office Action, 2/16/2017, TSDR at 18* (Examining Attorney: “Here, the hashtag #magicnumber108 would be viewed as a reference to the Cubs’ World Series win, for the first time in 108 years, as stated in the text of the tweet.”).

Lili Mirojnick: “I have tears in my eyes. And I’m a @Yankees fan. Congrats Chi-Town...#MagicNumber108.” *Office Action, 2/16/2017, TSDR at 19* (Examining Attorney: “Here, again, the hashtag #magicnumber108 would be viewed as a reference to the Cubs’ World Series win.”).

Samantha K.: “The #magicnumber108 was correct! Congrats to the @Cubs for winning @MLB #2016worldseries.” *Office Action, 2/16/2017, TSDR at 19* (Examining Attorney: “Here, the hashtag #magicnumber108 would be viewed as a reference to the Cubs’ World Series win, for the first time in 108 years.”).

Malcolm Chapman: “DRoss hits a BIG home run in his final game, game 7. @Cubs up 6-3 #magicnumber108 #WorldSeries #Cubs.” *Office Action, 2/16/2017, TSDR at 20* (Examining Attorney: “Here, the hashtag

#magicnumber108 would be viewed as a reference to the imminent Cubs' World Series win.”).

Chris Hill: “Game 7 of the World Series! Go @Cubs! #magicnumber108 #FallClassic.” *Office Action, 2/16/2017, TSDR at 20* (Examining Attorney: “Again, the hashtag #magicnumber108 would be viewed as a reference to the imminent Cubs' World Series win.”).

AccuData: 108 years ago, the #Cubs beat the #Tigers in Game 5 to win their last world series. Will you be watching tonight? #MagicNumber108.” *Office Action, 2/16/2017, TSDR at 28.*⁴

Samples of Instagram posts showing the hashtag “#magicnumber108” used by third parties to refer to the Cubs' World Series win were also noted by the Examining Attorney, a sampling of which is provided:⁵

@ruiz.favela: “World Series Champs! . . . #celebrate #magicnumber108.” *Office Action, 5/25/2017, TSDR at 13.*

@merlepalmer: “Celebrating with the best #worldserieschamps2016 #GoCubsGo #FlytheW #MagicNumber108.” *Office Action, 5/25/2017, TSDR at 13.*

@nicoleshareeimagery: “10th Inning + 8 runs = 108 years later, the curse is lifted!!! #cubs #gocubs #gocubsgo ... #magicnumber108 ...” *Office Action, 5/25/2017, TSDR at 13.*

@livelearnnyoga: “I believe in Miracles #MagicNumber108.” *Office Action, 5/25/2017, TSDR at 13.*

@n0.limitz: “Round 2 !!!!! Let's Go Cubs . . . #MagicNumber 108.” *Office Action, 5/25/2017, TSDR at 15.*

⁴ The foregoing are cited in the Examining Attorney's Appeal Brief at 9 TTABVUE 7-10.

⁵ See May 25, 2017 Office Action, TSDR at 11-18, for additional examples.

@grillamentary: “##MagicNumber4 | MagicNumber108 – it’s been 108 years since we won. This #MagicNumber is ironically the total amount of outs the @Cubs need to get on defense to clinch the #WorldSeries. Let’s get it, #CUBS fan!” *Office Action, 5/25/2017, TSDR at 15.*

@elischeesecake: “Grant DePorter of @harrycarays is counting on a W! #flythew #magicnumber108.” *Office action, 5/25/2017, TSDR at 16.*

@npr92sea: “Nothing better than champagne soaked W’s #FlytheW #WorldSeriesBound #MagicNumber108 #NLchamps @cubs.” *Office action, 5/25/2017, TSDR at 17.*⁶

The Examining Attorney also identifies social media posts from entities associated with Applicant (ChicagoSportsMuseum and Harry Caray’s restaurant, which TheStreet article indicates are associated with Applicant⁷) that likewise convey information about the Chicago Cub’s World Series success:

Chicago Sports Museum. We’re putting together a great exhibit to celebrate the Cubs’ World Series victory! #GoCubsGo #MagicNumber108.” *Office Action, 2/16/2017, TSDR at 16* (Examining Attorney: “Thus, both hashtags would be viewed as relating to the Cubs’ World Series win, not to any goods or services provided by the museum.”).

Harry Caray’s: HOLY COW! So many happy and excited fans in Harry’s bar tonight! #GoCubsGo #FlytheW #MagicNumber108.” *Office Action, 2/16/2017, TSDR at 23* (Examining Attorney: “Similar to the above ChicagoSportsMuseum tweet, all three hashtags would be viewed as relating to the Cubs’ playing in Game 3 of the World Series, not to any goods or services provided by the restaurant.”).

⁶ The foregoing are cited in the Examining Attorney’s Appeal Brief at 9 TTABVUE 10-11.

⁷ February 16, 2017 Office Action, TSDR 11.

Harry Caray's: Doors are open! Breakfast is served! We're ready for game 3! LET'S GO CUBS! #magicnumber108. *Office Action, 2/16/2017, TSDR at 26* (Examining Attorney: "This tweet includes a photo of a reporter, a fan wearing a Cubs jersey, and fans holding W flags. The wording #magicnumber108 in this tweet would be viewed as a hope that the Cubs would win the World Series after 108 years.").

@harrycarays: "The 2016 World Series winning @cubs are getting their championship rings tonight at Wrigley as they take on the @dodgers! . . . [D]on't miss this iconic ceremony! The last one was 108 years ago!!! . #GoCubsGo #Cubs #RingNight #MagicNumber108 #HarryCarays." *Office Action, 5/25/2017, TSDR at 11.*

@chicagosportsmuseum: "The Cubs open the season at Wrigley today as the reigning World Champs for the first time in 108 years. Relive the memories with our World Series exhibit today! #MagicNumber108 #Chicago #chicagocubs #ThatsCub #baseball #mlb #OpeningDay." *Office Action, 5/25/2017, TSDR at 11.*

@harrycarays: "[S]omeday, the Chicago Cubs are going to be in the World Series.' #MagicNumber108 #FlytheW #GoCubsGo." *Office Action, 5/25/2017, TSDR at 16.*

The Examining Attorney also argues that evidence in the record establishes that "[A]pplicant compiled a list of appearances of the number 108 in baseball in general (such as 108 stitches on a baseball) and in relation to the Chicago Cubs baseball team in particular (such as the distance to foul poles in Wrigley field in meters) to predict that the Chicago Cubs baseball team would win the 2016 World Series, 108 years after their previous World Series win." According to the Examining Attorney, such evidence did not reference any goods sold by Applicant that featured the proposed mark or the wording "Magic Number 108." Thus, the Examining Attorney concludes that "Magic Number 108" was used in news articles solely to refer to appearances of

the number 108 and the associated prediction by Applicant that the Chicago Cubs would win the 2016 World Series.⁸

Based on the evidence, the Examining Attorney concludes that due to the widespread use of #MAGICNUMBER108 to express affiliation with the Chicago Cubs baseball team and their 2016 World Series win after 108 years, the proposed mark would not be perceived as identifying a particular source when used on goods.

Applicant contends that his proposed mark does not convey general information about the goods and is not a common phrase or message that would ordinarily be used in advertising or the relevant industry.⁹ Applicant maintains that the tweets and other social media postings in the record featuring #MAGICNUMBER108 do not establish #MAGICNUMBER108 as a common phrase or message that customers are accustomed to seeing in everyday speech from a variety of sources because Applicant is the only user of #MAGICNUMBER108 in commerce.¹⁰ While Applicant and the

⁸ Examining Attorney's Appeal Brief at 9 TTABVUE 6-7. Applicant, who is the President and Managing Partner of Harry Caray's Restaurant Group, according to the articles submitted by the Examining Attorney, may be the world's leading expert in Cubs numerology. As set forth in the articles, he wrote a book on the subject, and a huge display in his restaurant documents the significance of the number 108. See, e.g., John Garcia, ABC 7 Eyewitness News October 13, 2016, *Magic Number 108? Cubs Numerologist Says all Signs Point to this Year*, <http://abc7chicago.com/sports/magic-number-108-cubs-numerologist-saysall-signs-point-to-this-year/1554415/>, February 16, 2017 Office Action, TSDR at 7-8; PR Newswire, TheStreet October 20, 2016, *Magic Number 108 Appears Everywhere 108 Years After Cubs Last Won World Series*, <https://www.thestreet.com/13861280/1/magic-number-108-appears-everywhere-108-years-after-cubs-last-won-world-series.html>, February 16, 2017 Office Action, TSDR at 9-12; ThePostGame 11/3/2016 *Cubs Magic Number Was 108* <http://www.thepostgame.com/cubs-magic-number-108-world-series-win>, February 16, 2017 Office Action, TSDR 13-15.

⁹ Applicant's Appeal Brief pp. 2-3 (7 TTABVUE 3-4).

¹⁰ Applicant's Appeal Brief p. 3 (7 TTABVUE 4).

Examining Attorney agree that the term “magicnumber108” was first used by or in relation to Applicant,¹¹ they disagree as to whether it comprises a mark in use as #MAGICNUMBER108.

In order to maintain the Examining Attorney’s refusal, we need not find that the evidence shows third-party use of the alleged mark on goods “in commerce.”¹² Although Applicant distinguishes *D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d 1710, 1716 (TTAB 2016),¹³ which included evidence of the applied-for mark used by a large number of merchandisers (i.e., “the marketplace is awash in products that display the term...”), it was the consumer perception of the message that determined whether or not the proposed mark could identify a single source and thus be registrable. Therefore, *any* evidence demonstrating widespread use of the wording is relevant, including, in this case specifically, social media tweets and posts of the type the Examining Attorney made of record in this application. TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1202.04(b) (“TMEP”) (Oct. 2018).¹⁴ Neither *D.C. One*

¹¹ Applicant’s Appeal Brief p. 2 (7 TTABVUE 3) (“Applicant’s mark is a completely arbitrary and fanciful mark which Applicant made up, and which, upon information and belief, never existed at any time in the entire history of the world.”); see also Examining Attorney’s Appeal Brief at 9 TTABVUE 6.

¹² See Applicant’s Appeal Brief pp. 3-4 (7 TTABVUE 4-5).

¹³ Applicant’s Appeal Brief p. 3 (7 TTABVUE 4).

¹⁴ TMEP § 1202.04(b) (emphasis added):

“Messages that are used by a variety of sources to convey social, political, religious, or similar sentiments or ideas are likely to be perceived as an expression of support for, or affiliation or affinity with, the ideas embodied in the message rather than as a mark that indicates a single source of the goods or services.

...

Wholesaler, nor the TMEP, specifies a “goods used in commerce” requirement for evidence provided in support of this refusal. See *In re Manco Inc.*, 24 USPQ2d 1938 (TTAB 1992) (affirming a refusal for two THINK GREEN marks for a variety of goods, including boxes, adhesive tape, and weather-stripping, where the evidence consisted solely of news articles showing THINK GREEN used to express concern for the environment, with no evidence of third-party use of the mark in commerce). The evidence provided by the Examining Attorney shows 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.

In light of the significant social media use evidence in the record, this finding is reinforced by the presence of the hash mark in Applicant’s proposed-mark. When used in social media, a hash mark is often combined with a word or phrase to form a hashtag. In the social media context, a hashtag “is a word or phrase preceded by a

Any evidence demonstrating that the public would perceive the wording merely as conveying the ordinary meaning of the message, or enthusiasm for, affinity with, or endorsement of the message, supports this refusal. In addition to dictionary or encyclopedia entries showing the meaning or significance of wording, supporting evidence may include materials (e.g., website pages, Internet search results lists if sufficient surrounding text is included, social-media pages, product fact sheets, and other promotional materials) showing the applicant’s manner of use and the manner of use by third parties.”

hash mark (#), used within a message to identify a keyword or topic of interest and facilitate a search for it.”¹⁵ Evidence in the record establishes that Applicant’s proposed mark #MAGICNUMBER108 has been used extensively as a hashtag to identify the Chicago Cubs’ World Series appearance and win. We are careful to note that our conclusion that #MAGICNUMBER108 would be perceived as a hashtag is tied to the particular evidence of this case. That is not to say that every combination of a hash mark and word or phrase is or will be a hashtag. Each case must be decided on its own facts.

Where a hashtag is used as part of an online social media search term, it generally serves no source-indicating function, because it “merely facilitate[s] categorization and searching within online social media,” TMEP § 1202.18. Therefore, the addition of the term HASHTAG or the hash symbol (#) to an otherwise unregistrable term typically will not render the resulting composite term registrable. *Cf. In re Hotels.com, L.P.*, 573 F.3d 1300, 91 USPQ2d 1532, 1537 (Fed. Cir. 2009) (“hotel” and “.com” in combination have a meaning identical to the common meaning of the separate components); *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1374 (Fed. Cir. 2004) (finding that the addition of a top-level domain to an otherwise unregistrable mark does not typically add any source-identifying

¹⁵ Dictionary.com, search of “hashtag,” <<http://dictionary.reference.com/browse/hashtag>> (Jan. 25, 2019) (citing *Random House Dictionary*). The Board may *sua sponte* take judicial notice of dictionary definitions. *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including definitions in online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016). See also TBMP § 1208.04 (June 2018).

significance); *Interactive Prods. Corp. v. a2z Mobile Office Sols., Inc.*, 326 F.3d 687, 66 USPQ2d 1321, 1327-28 (6th Cir. 2003) (finding that the post-domain path of a URL does not typically signify source).

Applicant argues that his proposed mark was never used in everyday speech or any speech prior to Applicant coining that term, nor is it now used in everyday speech. Unlike the cases cited in the Office Actions and in the Examining Attorney's brief, involving terms, slogans or sayings which are "commonly used" or "old and familiar" or "used in everyday speech," Applicant maintains his proposed mark is different because it is arbitrary and fanciful. While Applicant argues that cases such as *Hulting*, and *Eagle Crest*, which was cited by the Examining Attorney for the general proposition that "[t]he more commonly a term or slogan is used in everyday speech, the less likely the public will use it to identify only one source and the less likely the term or slogan will be recognized by purchasers as a trademark," are not applicable.¹⁶ However, "[t]he 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. That the applied-for mark is arbitrary or fanciful does not necessarily mean that the public perceives it as an indication of source. *Cf.* TMEP § 1202.03(a) ("Common expressions and symbols" including "the peace symbol [and] 'smiley face'" "are normally not perceived as marks."). Here, the evidence of record establishes that the consumer perception of the phrase is as a widely-used message to convey information about the Chicago Cubs baseball team.

¹⁶ Request for Reconsideration, TSDR at 2.

Despite the foregoing evidence produced by the Examining Attorney, Applicant contends that hashtags can be used as marks to promote product awareness in addition to facilitating categorization and searching of social media postings, citing Dina Roumiantseva & Aaron Rubin's article, "#Trademarks?: Hashtags as Trademarks," published by SOCIALLY AWARE THE LAW AND BUSINESS OF SOCIAL MEDIA. In addressing hashtag marketing campaigns, the article notes:

[T]he makers of Mucinex have registered #blamemucus, which allows potential consumers to commiserate about their colds through social media, as well as spread the word about Mucinex and participate in drawings for prizes. The #blamemucus registration covers both the pharmaceutical products themselves (with a store display bearing the mark as a specimen of use) and services consisting of information in the field of respiratory and pulmonary conditions via the Internet (with the company website as a specimen).¹⁷

However, Applicant has not used #MAGICNUMBER108 in this manner. While Applicant argues that, like the makers of Mucinex, he "encourages people to use Applicant's hash tag [to] create product awareness," other than the specimen showing use of the term on the front of a t-shirt, Applicant has not identified or produced copies of any methods he used to create such awareness. Nor do the examples of third-party use of "#MAGICNUMBER108" that have been submitted show use of the proposed mark in support of product awareness of Applicant's goods, such as in tweets under the hashtag #MAGICNUMBER108 containing photos of consumers wearing one of Applicant's shirts bearing his proposed mark. To the extent goods were shown

¹⁷ Request for Reconsideration, Attachment 2, TSDR at 7, 69-70, from <http://www.sociallyawareblog.com/2015/05/13/trademarks-hashtags-as-trademarks/>.

in connection with the #MAGICNUMBER108 hashtag, they were not the goods for which Applicant has applied to register his proposed mark.¹⁸ For example, Harry Caray's —an entity associated with Applicant —displayed a third party's footwear (see below):



in a social media post that employed the #MAGICNUMBER108 hashtag.

Another example of third-party goods shown with #MAGICNUMBER108 is shown in a Google search for “#magicnumber108 shirts” which identified third-party Palmer Place Restaurant’s Facebook page regarding the “Palmer Place Cubs Fan T shirts and Sweatshirts” it offers for sale²⁰:

¹⁸ Advertisement alone is, of course, insufficient to establish trademark use for goods. See Trademark Act § 45, 15 U.S.C. § 1127. Such use does not preclude other trademark use, but use of a hashtag qua hashtag, i.e., as an identifier in the social media context, generally will be insufficient to demonstrate trademark use of a term or phrase because such use does not occur at the point of sale.

¹⁹ February 16, 2017 Office Action, TSDR at 25. As noted above, articles submitted by the Examining Attorney refer to Applicant as the President and Managing Partner of Harry Caray's Restaurant Group.

²⁰ Request for Reconsideration Denied, TSDR at 17; “#magicnumber108” appears in the third line of text.



as well as the Facebook listing advertising the shirts²¹:

Palmer Place Restaurant and Biergarten added 2 new photos — feeling optimistic.

October 30, 2016 ·

We love the Cubs & there is a W coming tonight!! \$2. Domestic bottles during the game. \$1 Cubby Blue Bubble Gum Shots. \$4 Pints Revolution Oktoberfest. Our Palmer Place Cubs Fan T shirts & Sweatshirts are in stop by to buy one while we have them. Go Cubs Go We Believe in you guys!! #flythew #magicnumber108 #palmerslagrange #gocubsgo #lagrangeil #truebluecubfans

“. . . Our Palmer Place Cubs Fan T shirts & Sweatshirts are in stop by to buy one while we have them. Go Cubs Go We Believe in you guys!! #flythew #magicnumber108 #palmerslagrange #gocubsgo #lagrangeil #truebluecubfans”)

The hashtag #MAGICNUMBER108 as used in these contexts was and is no doubt associated with the Chicago Cubs’ then-upcoming World Series win.

In support of the registrability of his proposed mark, Applicant submits an article entitled “Proving Ownership Online . . . and Keeping It: The Internet’s Impact on Trademark Use and Coexistence” published in THE TRADEMARK REPORTER. Specifically, Applicant quotes the following:

Username or trademark mentions on sites like Twitter, Tumblr or Instagram could promote a trademark as well, depending on content, but should be accompanied by proof of actual sales under the mark.²²

²¹ Request for Reconsideration Denied, TSDR at 7, *Palmer Place Restaurant and Biergarten*, 899033/?type=3&video_source=pages_video_set (as it appeared on Sep-03-2017, 17:42:59 GMT).

²² See Request for Reconsideration After Final Action, TSDR at 28, Anne Gilson LaLande and Jerome Gilson, *Proving Ownership Online . . . and Keeping It: The Internet’s Impact on Trademark Use and Coexistence*, 104 THE TRADEMARK REPORTER 1275, 1291 (November-December, 2014).

Although acknowledging that such mentions *could* promote a trademark, the authors do not contend that any and all use on those sites automatically constitutes trademark use. Consistent with TMEP § 1202.18, the article says that whether a hashtag can function as a mark depends on how it is used. But even in those instances, the addition of the hashmark is usually devoid of source-identifying significance. We do not hold that hashtags can never be registered as trademarks. To be registrable, a hashtag — like any other matter — must function as a trademark. Here, the evidence shows that #MAGICNUMBER108 is perceived as part of an online social media trend related to the phrase “magic number 108,” expressing affiliation with the Chicago Cubs baseball team and their 2016 World Series win after 108 years rather than as an identification of source for the goods identified in the application.

II. Conclusion

Having considered all of the evidence of record, we find that due to the widespread use of #MAGICNUMBER108 to express affiliation for the Chicago Cubs baseball team and their pursuit of a 2016 World Series win 108 years after their last one, Applicant’s proposed mark would not be perceived as identifying a particular source of goods. That Applicant may have been the first to use the phrase and/or hashtag does not change the fact that the evidence shows widespread use of #MAGICNUBMER108 to informationally convey reference to the Chicago Cubs’ World Series appearance. Moreover, that widespread, informational message is consistent with Applicant’s own use. Accordingly #MAGICNUMBER108 fails to function as a trademark for Applicant’s goods.

Decision: The refusal to register Applicant's proposed mark #MAGICNUMBER108 is affirmed.