

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: May 30, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Tynsy Foster

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Serial No. 77011825

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James R. Head, Esq. for Tynsy Foster.

David Reihner, Trademark Examining Attorney, Law Office 111  
(Craig D. Taylor, Managing Attorney).

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Before Hairston, Walters and Holtzman, Administrative  
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Tynsy Foster seeks registration on the Principal  
Register of the mark MIRACLE BEAR, in standard character  
form, for "soft sculptures in the nature of stuffed fabric  
bears," in International Class 20.<sup>1</sup> The application  
includes a disclaimer of BEAR apart from the mark as a  
whole.

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<sup>1</sup> Serial No. 77011826, filed October 2, 2006. The application is based on use of the mark in commerce under Trademark Act Section 1(a), 15 U.S.C. §1051(a), alleging first use and use in commerce as of September 26, 2006.

At issue in this appeal is the Trademark Examining Attorney's final refusal to register applicant's mark on the ground that the identified goods are not goods in trade. See Trademark Act Sections 1 and 45, 15 U.S.C. §1051 and 1127. The appeal is fully briefed. After careful consideration of the evidence and arguments of record, we reverse the refusal.

In his brief, the examining attorney has provided an excellent synopsis of the facts and record in this case. Thus, we repeat his statement below:

[On] March 12, 2007, [applicant submitted] (what appeared to be) a card with the mark affixed. In her remarks applicant indicated that she was involved in receiving clothing or other fabric items from her customers, making from the fabric soft sculptures in the nature of stuffed fabric bears, and then returning the finished bears to the customers. This was confirmed in applicant's response dated May 18, 2007, in which copies of both sides of applicant's card submitted March 12, 2007, were submitted. The reverse side of the card states "I'm only a bear, I'm made out of clothes from someone so dear who from loving memory will always be here, so when you hug me up close to you ... just remember \_\_\_\_\_ loved you too!" Applicant then submitted April 1, 2007, an advertisement featuring a photograph of a bear made with striped fabric and a testimonial. Along with the picture and testimonial applicant explained that the bears were made "using fabrics associated with deceased persons to clothe [ ] stuffed bear[s]." (Applicant's response dated April 1, 2007, proposed recitation of goods). Applicant further stated that her "customers will send [her] clothing from, usually a deceased person they want to remember" and applicant will "dress the polyester filled bears with the

clothing or articles submitted." (Applicant's response dated April 21, 2007, pg. 1, pars. 6 &7).

Applicant then submitted July 19, 2007, an internet advertisement ... showing stuffed fabric bears in a variety of fabric coverings. Finally, applicant submitted November 25, 2007, eight pictures of stuffed fabric bears each composed with a different fabric design, which did not show the mark MIRACLE BEAR in use in commerce.

The examining attorney contends that "Applicant's bears are the result of a custom service provided by applicant. Without the service the bears would not exist." He states that "[t]he stuffed fabric bears produced by applicant are not fungible. Each bear produced is unique and desired by only one customer. Correspondingly, applicant's stuffed fabric bears are not goods or commodities in trade because the stuffed fabric bears are the essence of applicant's service and are unique to each customer." (Brief)

The examining attorney contends that this case is analogous to *In re Shareholders Data Corporation*, 181 USPQ 722 (CCPA, 1974). In that case, the Court noted that applicant's financial reporting services were in the form of customized portfolio reports sent to customers. The Court concluded that the reports were the "essence" of applicant's services, not "goods in trade"; that the reports had no independent value apart from the services

provided. The examining attorney argues that, in the case before us, "applicant custom makes fabric bears for either the enjoyment or consolation of particular customers, that is, those who submit to applicant keepsake fabrics of loved ones."

Applicant contends that, unlike the cases cited by the examining attorney, her goods are not merely incidental to a service. Applicant notes that in each of the cited cases, the purported goods were all items that were merely adjuncts to the offered services and not sold separately. Applicant states that, in this case, the bears are "a result of an arm's length order and sale of goods manufactured, tagged and shipped in commerce by applicant." (Brief.) Applicant notes that the bears and the clothing for the bears are all identical; they differ only by the fabric, supplied by the customer, from which the clothing is made. Applicant contends that this is no different from ordering a washing machine of a certain color or an automobile with certain features. Applicant notes that the tag affixed to each bear is also identical, with a blank space to fill in the name of a loved one.

Applicant argues that, even if she may also render a service, the bears are not merely incidental to any such

service and they constitute goods identified by the mark MIRACLE BEAR in their own right.

The term "trademark," as defined in the relevant part of Section 45 of the Trademark Act, means "any word, name, symbol, or device, or any combination thereof used by a person 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." A critical element in determining whether a term is a trademark is the impression the term makes on the relevant public. To determine what the perception of a term is, we must look to the specimens of record which show how the term is used in the marketplace. *In re Walker Research, Inc.*, 228 USPQ 691 (TTAB 1986).

In the case before us, the record includes a specimen as well as other examples of applicant's use of the mark, her bears and her website. The examining attorney has not argued that the specimen of use is not a good trademark specimen; rather, that the record shows that applicant renders services rather than sells goods. In any event, we find that the specimen is a good trademark specimen. The specimen consists of a tag and a photograph shows the tag affixed to a bear. Another photograph shows numerous bears with tags. The bears are identical but for the fabric from

which the bears and/or their jackets are made. As noted previously, the tag is folded and, on its front, has the words MIRACLE BEAR within a heart. The back of the tag lists "Tynsy's Miracle Bears" with an address and phone number; and the inside of the folded tag contains the statement "I'm only a bear, I'm made out of clothes from someone so dear who from loving memory will always be here, so when you hug me up close to you ... just remember \_\_\_\_\_ loved you too."

We conclude that the evidence supports the finding that the bears are goods in trade and they are identified by the trademark MIRACLE BEAR. Everything about these bears is "stock" or "identical" except for the fact that, when she receives an order for a bear, applicant also receives fabric that she uses to make the bear or a jacket for the bear. While the bears are individualized in this way for the customer, all the bears are otherwise the same. The bear itself has a set cost and it is this object that is being bought.

Decision: The refusal to register is reversed.