

100% That Lizzo (Again): Another IP Win

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In re Lizzo is a precedent setting decision by the U.S. Patent and Trademark Office (USPTO) Trademark Trial and Appeal Board (TTAB).¹ The ruling favors performing artists who popularize phrases in their song lyrics. When the artist can meet certain criteria, the decision will allow even the non-author to trademark a lyric or phrase when attached to specific goods and services. Whether a trademark will be approved by the USPTO stems, in part, upon an analysis of whether the artist has elevated the phrase to a more memorable status.² This article will examine the decision of the TTAB and the impact this may have on musical artists and creators who may have further commercial aspirations for their creative intellectual property.

Rapper, singer, songwriter and actress Lizzo has numerous popular songs, but one of her most famous is “Truth Hurts,” which was released in 2017 and went to the top of the Billboard pop charts. Included in the song is the lyric, “I just took a DNA test, turns out I’m 100% that bitch.” Lizzo was inspired to use the phrase after seeing it in a popular meme, but the meme was originally inspired by a tweet authored by British singer Mina Lioness.³ After learning the origins of the phrase, Lizzo gave Lioness a songwriting credit on the song.⁴

Lizzo then sought to register trademark in “100% That Bitch” in International Class 25 for use with clothing and apparel, but the trademark examining attorney refused registration on the basis that “100% That Bitch” is a commonplace expression widely used by a variety of sources to convey an ordinary, familiar, well-recognized sentiment.”⁵ In response to the initial denial, Lizzo claimed that she adopted and had used the proposed mark in connection with her musical-artist related goods and services, such as clothing, and the phrase is definitively associated with her.⁶ Lizzo was unable to persuade the trademark examining attorney with this argument, the denial was finalized and an appeal followed which led to the TTAB’s reversal of the USPTO examining attorney’s refusal to register.

Can a Slogan or Song Lyric Be a “Source Identifier?”

Many artists and songwriters look to expand their brands and their merchandise offerings by putting song or album titles and memorable lyrics on t-shirts and accessories offered for sale as artist related “merch.” However, turning a lyric into a brand name that is protected through trademark registration requires that the lyric or key phrase act as a so called “source identifier.” The USPTO TTAB and its reviewing courts long have held that slogans, phrases or terms that consumers perceive as “merely informational in nature . . . are not registrable.”⁷ This prevents random people from registering and owning trademarks in frequently used phrases, even if they affiliate them with song lyrics and subsequently place them on the front of t-shirts or other mass-produced products.⁸ At what point does a catchy song lyric or popular phrase serve to identify a “source of the goods” rather than just a lyric people sing at karaoke or post with images on social media?

If Lizzo Didn't Write the Lyric, How Did She Win the Right to Register the Mark?

The answer to the above question may be just because Lizzo is 100% That Bitch — literally, regarding the branding of the phrase and the source of the attitude! This is not to say that others also can't achieve that status, but her distinctive personality, popularity and positive imaging help identify Lizzo as the source of the goods.

The USPTO examining attorney had argued against registration based on the common use of the phrase: "The evidence of record indicates that consumers will not view applicant's mark as a trademark indicating the source of the clothing only sold by applicant, but instead as a message of self-confidence and female empowerment used by many different entities in a variety of settings."⁹

In the context of clothing, where the evidence shows that the wording in the mark is commonly used in an informational and ornamental manner on clothing and other retail items produced and sold by others, the mark is likely to be seen for the meaning of its wording and not as a source indicator.¹⁰

This is further reinforced by the fact that Lizzo did not originate the term "100% That Bitch," but merely popularized it.

As evidence, the examiner presented images of clothing and other merchandise that included the phrase, which included some from Lizzo's own merchandise offerings. The Examining Attorney also submitted screenshots from more than a dozen third-party commercial web pages showing the wording "100% That Bitch" appearing, most often in an ornamental manner, on a variety of goods including various items of clothing, key chains, mugs, stickers, bandanas for dogs, lip balm, wall art, patches, drinking glasses and balloons.¹¹

Lizzo's argument for registration flipped the script on the USPTO examiner by using the evidence presented by the examiner as proof that Lizzo's iconic use of the phrase within the song created all the demand that triggered the plethora of merch all over the internet and on shopping websites such as Etsy. Lizzo's counsel argues that the evidence presented by the examining attorney proves that "100% That Bitch" functions precisely the way a trademark is supposed to function. Namely, it identifies Lizzo as the source of goods, which is the sole reason why those attempting to trade off Lizzo's fame, notoriety and goods will have elected to use the term to sell unauthorized merchandise. That often not only includes the identical mark "100% That Bitch," but also often relies upon other unauthorized allusions to Lizzo, including her name, song titles and other Lizzo references.

Additionally, in the argument Lizzo presents that she was harmed by the examiner's refusal. She argues that the refusal to register a mark that is so clearly being used by others to create a false association with Lizzo, and to trade off of her goodwill in connection with the sale of unauthorized and unlicensed merchandise, is directly at odds with the fundamental principles of the Lanham Act, which exists in order to protect consumers and the owners of source identifying-marks from unauthorized, infringing uses by third parties.¹²

As further evidence in support of registration, Lizzo's counsel introduced copies of take-down requests sent by Lizzo's representatives to Etsy and other online retailers regarding alleged infringing third-party uses of "100% That Bitch" on merchandise and correspondence from these retailers, further demonstrating that Lizzo has been monitoring and policing her brand.¹³ Lizzo's counsel includes responses to these take down requests in the

argument, where many of the respondents acknowledged the Lizzo affiliation with the phrase and agreed to remove the offending merchandise out of respect for Lizzo, further reinforcing Lizzo's connection to the source of the goods.

The essence of the examining attorney's refusal here, that "100% That Bitch" is a common expression that will not be perceived by consumers as a trademark, is contradicted by the evidence that shows "100% That Bitch" appearing in an ornamental manner on various goods, as well as entertainment and retail services. Significantly, much of this evidence references Lizzo, her music and lyrics from "Truth Hurts."

The evidence presented by both parties also establishes that there was little demand for the phrase or related merchandise prior to 2017. Once Lizzo used the phrase in a Billboard No. 1 hit single, there was subsequent value created in the phrase through the association with Lizzo and her song, video and performances.¹⁴ This is despite the argument that Lizzo did not originate the phrase and subsequently granted a writing credit for her song "Truth Hurts" to its originator.¹⁵ Lyrics from songs are more likely to be attributed to the artists who sing, rap or otherwise utter them, rather than the songwriters or producers, who may be different from the individuals receiving varying degrees of writing credit.

The court found that all the evidence of record regarding third-party use of "100% That Bitch" is from 2017 or later. Thus, the evidence is contemporaneous with or after the release of "Truth Hurts." There is no evidence of use of the term "100% That Bitch" prior to 2017, so we have no indication that the proposed mark already was "widely used, over a long period of time and by a large number of merchandisers" before Lizzo popularized it.¹⁶

The third-party use specifically seeks to associate the goods emblazoned with "100% That Bitch" with Lizzo, her music and the lyrics from "Truth Hurts." In addition, evidence of record indicates that third-party retailers responding to take down notices from applicant's counsel recognize that "100% That Bitch" is associated with Lizzo and her music.¹⁷

The Bottom Line

For Tennessee attorneys seeking to advise their artist client with regard to building their brand and merchandise line, *In re Lizzo* provides precedent to show that the performing artist does have a right to trademark and regulate their brand and the unique phrases they help elevate to "memorable status" within the culture, even if the artist themselves did not write the specific lyric being elevated. This is especially important for Nashville-based artists who often work with multiple writers and song pluggers to find the right song to record. Trademark applications frequently take a year or more to file, process and register, but artist branding opportunities are time sensitive with regard to an artist's tour dates and music release schedules. Tennessee attorneys can now look to *In re Lizzo* as a standard to advise their clients in determining if a lyrical phrase is ripe for merchandising and can survive a trademark challenge.

Through her unique talent, strength of her personality and message of empowerment to women and girls, Lizzo elevated the phrase "100% That Bitch" to a more memorable status. Specifically, the evidence here does not show that consumers recognize "100% That Bitch" merely as a lyric in one of Lizzo's popular songs. Rather, the evidence presented on appeal shows that consumers encountering "100% That Bitch" on the clothing identified in the application associate the term with Lizzo and her music.

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¹ This article was developed with input from McGlinchey’s Summer Associate Ian Joseph.

² In re Lizzo, No. 88466264, 2023 WL 1507238 (Feb. 2, 2023).

³ In re Lizzo, No. 88466264, 2023 WL 1507238, at *11 (Feb. 2, 2023).

⁴ Truth Hurts: Lizzo credits writer of ‘DNA Test’ tweet, BBC News (Oct. 24, 2019), [Truth Hurts: Lizzo credits writer of ‘DNA test’ tweet – BBC News](#).

⁵ Id.

⁶ In re Lizzo, No. 88466264, 2023 WL 1507238, at *1 (Feb. 2, 2023).

⁷ Id.

⁸ In re Lizzo, No. 88466264, 2023 WL 1507238, at *5 (Feb. 2, 2023) (citing 10 TTABVUE 4).

⁹ Id.

¹⁰ In re Lizzo, No. 88466264, 2023 WL 1507238, at *7 (Feb. 2, 2023) (citing 6 TTABVUE 2).

¹¹ In re Lizzo, No. 88466264, 2023 WL 1507238, at *8 (Feb. 2, 2023) (citing November 24, 2020 Response to second Office Action at 110-309).

¹² In re Lizzo, No. 88466264, 2023 WL 1507238, at * 11 (Feb. 2, 2023) (citing August 11, 2021 final Office Action at 19-23).

¹³ Id.

¹⁴ Id. (citing August 11, 2021 final Office Action at 110-309).

¹⁵ Id. See *Hole In 1 Drinks Inc. v. Lajtay*, 2020 USPQ2d 10020, at *9 (TTAB 2020) (“[T]rademark rights are not gained by creating a mark, but through use of the mark.”).

¹⁶ See *D.C. One Wholesaler Inc.*, 120 USPQ2d at 1716.

¹⁷ Id. (citing Aug. 11, 2021 final Office Action at 110-309).

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