

# NOW & NEXT

## Intellectual Property Alert

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### Not Original? Nope. Ornamental? Yup. Protectable? 100%

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Viral hooks, lines, and verses that someone else authored can be trademarked.



#### What's the Impact

- / Artists may register their famous slogans and hooks, even if another coined the phrase.
- / Brands must be cautious when marking their goods and service with viral slogans, which consumers may attribute to someone else.

"I just took a DNA test, turns out I'm 100% that bitch," Lizzo sings in her hit single, "Truth Hurts." It turns out that the mark 100% THAT BITCH is also protectable. [In re Lizzo LLC \(TTAB 2023\)](#).

Lizzo applied to register 100% THAT BITCH in connection with clothing. But it was not to be—the Examiner refused registration because the slogan did not function as a mark and was rather, in the Examiner's judgment, "a commonplace expression widely used by a variety of sources to convey an ordinary, familiar, well-recognized sentiment" (*id.* at 2), which is "a message of self-confidence and female empowerment." *Id.* at 7.

The bedrock principle underlying trademarks is that a protectable mark must “indicate the source of the goods, even if that source is unknown.” *Id.* at 5. Marks that fail to convey a good’s source is [why competing brands may sometimes legally use another brand’s trademarked puns, rhymes, and catchphrases](#). Common slogans and phrases conveying “ordinary, familiar, or generally understood concepts of sentiments” do not serve any source-identifying function. *Id.* at 6. That is, until they do...

Here, Lizzo never disputed that another person coined the phrase and that she merely adopted it, or that third parties have been using the slogan in connection with their own goods. *Id.* at 8–31. However, Lizzo did present evidence that third parties using 100% THAT BITCH, themselves, attributed that slogan to Lizzo. *Id.* It did not matter that the mark was predominantly displayed in an ornamental manner (*id.* at 34) or that Lizzo agreed with the Examiner that the mark conveys an expression of female strength and empowerment. *Id.* at 36. What mattered is that consumers ultimately associated 100% THAT BITCH with Lizzo. *Id.* So, the Trademark Trial and Appeal Board reversed the Examiner’s refusal and allowed Lizzo to trademark 100% THAT BITCH.

## Takeaway

A fundamental difference between trademarks versus copyrights and patents is that original authorship and inventorship matter to copyright and patents, but not to trademarks. *Id.* at 37. (And for those keeping a tally of evolving trademark law, only a few years ago, the Board would have rejected 100% THAT BITCH as being scandalous, but such a rejection, today, violates the First Amendment.)

This decision makes clear that ornamental marks and/or widely used short phrases can derive the benefit of registration if “consumers encountering [such marks] associate the term” with the source. *Id.* at 39. The Board crucially held that “lyrics from songs are more likely to be attributed to the artists who sing, rap or otherwise utter them.” *Id.* at 37. Such a decision cuts two ways. In a positive development, trademark rights of artists and entertainers seeking registration of their famous hooks, verses, and lines are buoyed by this decision. (And artists should consider seeking trademark protection of viral hooks as part of their brand-building strategy.) But on the other hand, brands must heed caution when marking their products with famous slogans because such phrases may be attributed to a celebrity rather than the brand (as those third parties using the 100% THAT BITCH acquiesced) or be outright unprotectable for being ornamental or “fun.”

♪♪♪ #BlingBling, then I solve [problems], that’s the goddess in me. ♪♪♪

As always, Nixon Peabody LLP is continuing to monitor these developments and can provide practical considerations to brands and competitors when navigating intellectual property.

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