

This Opinion is Not a
Precedent of the TTAB

Mailed: June 24, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Snowflake Enterprises, LLC

Serial No. 87496454

Snowflake Enterprises, LLC, pro se.

Kevin G. Crennan, Trademark Examining Attorney, Law Office 113,
Myriah A. Habeeb, Managing Attorney.¹

Before Cataldo, Lykos, and Larkin,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Snowflake Enterprises, LLC (“Applicant”), appearing pro se,² seeks registration on the Principal Register of the proposed standard character mark NIGGA for “Athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic

¹ Managing Attorney Habeeb initially examined the involved application as a Senior Attorney. The United States Patent and Trademark Office (“USPTO” or “Office”) reassigned the application during prosecution to Trademark Examining Attorney Crennan, who issued the final office action that is the subject of this appeal and who filed the USPTO’s brief. We will refer to Ms. Habeeb as the “Senior Examining Attorney” and to Mr. Crennan as the “Examining Attorney.”

² As discussed below, Applicant was advised during prosecution that it should consider hiring trademark counsel to represent it on this application, but it elected not to do so.

uniforms; Bottoms as clothing; Head wraps; Headbands for clothing; Hoodies; Hoods; Jackets; Jerseys; Shifts as clothing; Tops as clothing; Wristbands as clothing,” in International Class 25.³

The Examining Attorney has refused registration of Applicant’s proposed mark under Sections 1, 2, and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052, and 1127, on the ground that Applicant’s proposed mark fails to function as a mark for the goods identified in the application because the proposed mark is a commonplace term widely used by a variety of sources that merely conveys an ordinary, familiar, and well-recognized concept or sentiment. Applicant appealed when the Examining Attorney made the refusal final, and Applicant and the Examining Attorney have filed briefs.⁴ We affirm the refusal to register.

³ Application Serial No. 87496454 was filed on June 19, 2017 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce. Applicant’s mark appears on the drawing page as “Nigga,” with an initial capital letter, but Applicant retains a claim as to standard characters and not special form. *See* Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a); *see also In re Calphalon Corp.*, 122 USPQ2d 1153, 1158-61 (TTAB 2017) (applicant’s amendment of drawing of mark from SHARPIN to SharpIn did not transform mark from standard character to special form). Our references to Applicant’s proposed mark in this opinion in all uppercase letters reflects the fact that a term registered as a mark in standard character format is not limited to any particular type case, font style, size, or color.

⁴ Applicant also filed a reply brief. Reply briefs on appeals must be filed “within twenty days from the date of mailing of the brief of the examining attorney,” Trademark Rule 2.142(b)(1), 37 C.F.R. § 2.142(b)(1), but Applicant’s was filed nearly two months after the filing of the Examining Attorney’s brief, and three weeks after the case was submitted for final decision. Because Applicant’s reply brief is untimely, we have given it no consideration. *In re Randall & Hustedt*, 226 USPQ 1031, 1033 n.2 (TTAB 1985).

Citations in this opinion to the briefs and other docket entries on appeal refer to TTABVUE, the Board’s online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page number(s) of the docket entry where the cited materials appear. Applicant’s appeal brief appears at 4 TTABVUE and the Examining Attorney’s brief appears at 6 TTABVUE.

I. Introduction

As discussed below, Applicant acknowledges—indeed fervently argues—that the proposed mark NIGGA is a racial epithet for a Black person,⁵ and that it is derived from the word “nigger,” which Applicant notes has been described as “the most vile racial epithet.” 4 TTABVue 8-9. Applicant also acknowledges that the use of these words is deeply offensive to many Americans of all races. For many decades, portions of Section 2(a) of the Trademark Act prohibited the registration of marks that “may disparage . . . persons, living or dead . . . or bring them into contempt or disrepute,” or that “[c]onsist[] of or comprise[] immoral . . . or scandalous matter.” 15 U.S.C. § 1052(a). Recently, however, the United States Supreme Court has held that these portions of Section 2(a) are unconstitutional, and thus are no longer valid grounds on which to refuse registration, because they violate the Free Speech Clause of the First Amendment to the United States Constitution. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2019 USPQ2d 232043 (2019) (immoral or scandalous marks); *Matal v. Tam*, 137 S. Ct. 1744, 122 USPQ2d 1757 (2017) (disparaging marks).

Accordingly, despite the acknowledged aversion to the proposed mark and its antecedent on the part of the general public or Black Americans, in reaching our decision, we have considered the nature of the proposed mark only to the extent that its nature bears on the question of registrability of the proposed mark under the different statutory provisions that the Examining Attorney found to require refusal

⁵ We will follow the modern convention in this opinion and capitalize “Black” when referring to an African-American person.

of registration. We alert the reader, however, that it has been necessary to use and discuss both “nigga” and “nigger” throughout the opinion and to display numerous items bearing the word “nigga.”

II. Evidentiary Issue

Before proceeding to the merits of the refusal, we address the Examining Attorney’s evidentiary objection that “Applicant has referenced new evidence in its appeal brief in footnote 7 on page 9, the table on page 20, and footnote 14 on page 20.” 6 TTABVUE 4. These references are to alleged registrations of the marks “BITCH, QUEER, REDNECK, CRACKER, and BASTARD, and many others in addition,” 4 TTABVUE 10 n.7, alleged registrations of, and one application to register, numerous “racial and ethnic slurs,” as set forth in the table in Applicant’s brief, *id.* at 21, and a link to a WIKIPEDIA entry regarding a list of ethnic slurs. *Id.* at n.14. The Examining Attorney “objects to their reference and requests that the Board disregard them” because “Applicant did not submit these third-party applications and registrations and website prior to the appeal.” 6 TTABVUE 4.

Rule 2.142(c) of the Trademark Rules of Practice, 37 C.F.R. § 2.142(c), provides that the “record in an application should be complete prior to the filing of an appeal” and that “[e]vidence should not be filed with the Board after the filing of an appeal.” Because Applicant did not make the referenced materials of record during prosecution, Applicant’s references to them for the first time in its appeal brief are

improper.⁶ We sustain the Examining Attorney's untimeliness objection,⁷ and have given Applicant's references to these materials no consideration. *See, e.g., In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1744 (TTAB 2018), *aff'd mem.*, 777 F. App'x 516 (Fed. Cir. Sept. 13, 2019).

III. Prosecution History and Record on Appeal⁸

We briefly summarize below the prosecution history of the application because it provides useful background to our analysis of the final refusal to register and Applicant's constitutional arguments.

Applicant filed its application on June 19, 2017. On February 28, 2018, Senior Examining Attorney Habeeb issued a Suspension Notice in which she noted a prior pending application to register NIGGA for various goods and services that was a prospective bar to registration under Section 2(d) of the Trademark Act,⁹ and advised Applicant that registration of its proposed mark might also be refused because it was vulgar, and thus immoral under Section 2(a) of the Act, which was then at least

⁶ The proper procedure to make registrations or other evidence of record after an examining attorney's denial of an applicant's request for reconsideration is to timely file a separately captioned request for remand, with a showing of good cause, for further examination of the involved application, preferably prior to briefing of the appeal. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) Sections 1205.01 and 1207.02 (June 2021). *Cf. In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at *2 (TTAB 2020) (discussing hierarchy of preferences regarding timing of filing of a proposed amendment to the identification in an application).

⁷ The Examining Attorney also made substantive objections to certain of these materials, but we need not address them given our finding of untimeliness.

⁸ Citations in this opinion to the application record are to pages in the USPTO's Trademark Status & Document Retrieval ("TSDR") database.

⁹ February 28, 2018 Suspension Notice at TSDR 1.

potentially still a valid ground on which to refuse registration.¹⁰ She noted, however, that the constitutionality of that portion of Section 2(a) was under review following the Federal Circuit's decision in *In re Brunetti*, 877 F.3d 1330, 125 USPQ2d 1072 (Fed. Cir. 2017), which had held that portion to be unconstitutional, and she suspended further examination of the application pending the disposition of the *Brunetti* litigation.¹¹ She made of record USPTO electronic records regarding the prior pending application,¹² definitions of "nigga,"¹³ "nigger,"¹⁴ and the term "N-word,"¹⁵ a list from the BuzzFeed website of "The 68 Words You Can't Say in TV," which included "nigger,"¹⁶ and various articles in which the use of the words "nigger" and "nigga" was discussed.¹⁷

Subsequently, the application was reassigned to Examining Attorney Crennan, who issued an Office Action that advised Applicant of the Supreme Court's decision in *Brunetti* and the abandonment of the noted prior application,¹⁸ and refused registration of the proposed mark under Sections 1, 2, and 45 of the Trademark Act on the ground that NIGGA failed to function as a mark because it was a commonplace

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at TSDR 2.

¹³ *Id.* at TSDR 3 (WIKTIONARY).

¹⁴ *Id.* at TSDR 4 (webster-dictionary.org/definition/nigger).

¹⁵ *Id.* at TSDR 5-6 (MERRIAM-WEBSTER DICTIONARY, OXFORD DICTIONARIES).

¹⁶ *Id.* at TSDR 7-11.

¹⁷ *Id.* at TSDR 12-33.

¹⁸ October 9, 2019 Office Action at TSDR 1.

term.¹⁹ He made of record another dictionary definition of “nigga,”²⁰ and Internet webpages offering for sale or displaying various articles of clothing and other goods bearing the word “nigga” or its plural, or the word “nigger.”²¹

Applicant argued against the new ground for refusal and made of record USPTO electronic records regarding third-party registrations of various marks, including the mark THE SLANTS that was at issue in *Tam*,²² and the mark FUCT that was at issue in *Brunetti*,²³ as well as the marks APPLE, DUDE, HOMIE, OLD FRIEND, FRIENDS, BROTHER, HEY-BROTHER, HAVE A NICE DAY, AFRICAN AMERICAN, CERTIFIED WHITEBOY, CATERPILLAR, MADONNA, and MAKE AMERICA GREAT AGAIN.²⁴

The Examining Attorney then issued a final Office Action, making of record additional dictionary definitions of “nigga,”²⁵ a WIKIPEDIA entry regarding the word,²⁶

¹⁹ *Id.* Examining Attorney Crennan also advised Applicant that “[b]ecause of the legal technicalities and strict deadlines of the trademark application process, applicant may wish to have a private attorney who specializes in trademark matters to assist in the process,” *id.*, and provided a link to a webpage regarding hiring a U.S.-licensed trademark attorney. This webpage also includes information on options for seeking free or reduced-fee legal services. He repeated this recommendation in the March 17, 2020 Final Office Action at TSDR 1.

²⁰ October 9, 2019 Office Action at TSDR 2 (MERRIAM-WEBSTER DICTIONARY).

²¹ *Id.* at TSDR 3-11.

²² March 5, 2020 Response to Office Action at TSDR 22-25.

²³ *Id.* at TSDR 90-94.

²⁴ *Id.* at TSDR 26-89.

²⁵ March 17, 2020 Final Office Action at TSDR 2-4, 7, 27.

²⁶ *Id.* at TSDR 5-6.

and additional Internet webpages and social media pages displaying clothing and other goods bearing the word “nigga” or its plural, or #nigga.²⁷

IV. Analysis of Refusal

A. Applicant’s Arguments That the Supreme Court’s Decision in *Tam* Requires Registration of Applicant’s Proposed Mark

Before we discuss the failure-to-function refusal per se, we address Applicant’s arguments for registration based on the Supreme Court’s decision in *Tam*. Applicant invokes *Tam* like a talisman throughout its appeal brief,²⁸ which begins with the following statement:

The question of whether a common racial epithet can function as a trademark was decided by a unanimous Supreme Court in *Matal v. Tam* – a common racial epithet, because it has an expressive component, does function as a trademark and must register. The Final Office Action, dated March 17, 2020, completely ignores *Matal v. Tam*, clearly the most analogous mark, a common racial epithet, in the most analogous and legally binding case. The subject mark, NIGGA, must register for the same reasons the mark THE SLANTS was found to have a trademark function and was registerable in *Matal v. Tam*. The Final Office Action ignores *Matal v. Tam* and the clear legal proposition that common racial slurs contain expressive content and therefore function as trademarks. The Office has conjured a back-door around the unconstitutional ban on marks it finds offensive, arguing now that a mark is not offensive but rather ***so commonly offensive*** it can never function as a trademark. This new so-called “***commonality*** of offense” test is no path around *Matal v. Tam*, but still runs headlong into the Supreme Court’s

²⁷ *Id.* at TSDR 8-26.

²⁸ As discussed below, Applicant repeatedly cites *Tam* in its arguments against the failure-to-function refusal and in support of its claims of viewpoint discrimination and disparate treatment.

recognition that common racial slurs have an expressive component and function as trademarks.

Id. at 2-3 (emphasis in original).

Applicant further argues that “[t]his case could not be more closely analogous to *Matal v. Tam*, where a clear, longstanding, offensive, common, dictionary-defined, universally known and used racial slur was ‘reclaimed’ for use and function as a federally registered trademark,” and that NIGGA “can be ‘reclaimed’ to function as a trademark and should be allowed to register, for all the reasons ‘THE SLANTS’ was allowed to register as a result of *Matal v. Tam*.” *Id.* at 6. According to Applicant, “‘NIGGA’ is no different substantively than ‘THE SLANTS’ other than being directed to a different group of people,” *id.* at 7, and “Applicant is reclaiming this racial slur for use and function as a trademark, as the Supreme Court unanimously held in *Matal v. Tam* was appropriate under the First Amendment for racial epithets having an expressive component.” *Id.*

Applicant claims that in *Tam*, the Supreme Court “knew and accepted that this mark would register,” *id.* because the Court “had before it the express proposition that this specific mark could and would register as functioning as a trademark if the mark ‘THE SLANTS’ was allowed to register,” *id.* at 8, and because the parties and the numerous *amici curiae* discussed the possible registration of “‘nigger’ and its derivatives” to “illustrate minority groups re-appropriating terms considered disparaging, transforming slurs into empowering speech.” *Id.* at 8-9 n.4. Applicant also notes that Mr. Tam’s brief to the Supreme Court referred to prior registrations of marks containing the word “nigger,” *id.* at 10, and claims that the Supreme Court

“was fully informed that racial epithets were commonly used both to cause offense and as a ‘badge of pride’ ‘defiantly appropriated and revalued’, neither of which could be used to deny registration because they both contained an expressive component,” *id.*, and was “fully aware when it decided *Matal v. Tam* that common racial epithets served a trademark function because they had an expressive component, and that the present mark could and would register if and when it found that the First Amendment applied to the Lanham Act.” *Id.* at 11.

Applicant also contends that in the case of an offensive mark like NIGGA, *Tam* essentially forecloses the USPTO’s assertion of any other statutory grounds for a refusal to register:

After the Supreme Court’s decision, the Office made no second pseudo-argument that “THE SLANTS” was “common” in its offensiveness or non-offensiveness, because it was clear what the Supreme Court ruled relating to common racial epithets used as trademarks – the Lanham Act requires they be allowed to register, in part because the “expressive component” served a trademark function. *Matal v. Tam* would be meaningless if the Office’s newly fashioned “*commonality* of offense” test was adopted as an end-run around unconstitutional refusals of common racial epithets.

Id. at 8 (emphasis in original).

According to Applicant,

it is obvious the Office is stretching to find *any reason* to deny this mark registration because *that* “N-word” is so unspeakable, so disparaging, so offensive, so scandalous, so controversial, so laden in unmentionable taboo, so politically incorrect, so full of expression and viewpoint that it is “bad” and unregistrable – but the Supreme Court flatly said the First Amendment requires otherwise. Giving offense is an expressive viewpoint. No federal trademark registration may be denied under any part of the Lanham

Act that contradicts the First Amendment. The mark NIGGA has an expressive component that serves a trademark function.

Id. at 12 (emphasis in original). Applicant claims that “the Supreme Court said common racial epithets contain an expressive component. That ought to end the inquiry. The mark NIGGA comprises an expressive component.” *Id.* at 15.

Applicant concludes that

Matal v. Tam requires that NIGGA become a federally registered trademark. Here, as a result of *Matal v. Tam*, common racial epithets have source identification and an expressive component that functions as a trademark, and a continued refusal is improper. The Final Office Action simply ignored this entire first line of argument and did not once mention the *Matal v. Tam* case. Accordingly, on this evidentiary record, the Office has not met its burden, including to distinguish binding precedent of *Tam*, and the subject mark must register.

Id. at 11.

The Examining Attorney responds that in *Tam*

the Supreme Court held “that the disparagement clause violates the Free Speech Clause of the First Amendment” and found that particular section of the Trademark Act to be unconstitutional. . . . Notably, the Supreme Court did not decide that disparaging, scandalous, or immoral marks must be registered regardless of the circumstances given that such marks may be refused on other legal grounds other than Section 2(a). Here, the Applicant’s mark was refused registration because it fails to function as a commonplace term pursuant to Sections 1, 2, and 45 of the Trademark Act, 15 U.S.C. §§1051-1052, 1127, not Section 2(a). As such, this refusal does not involve the Applicant’s allegations of viewpoint discrimination or First Amendment concerns. . . . [E]ven if the Applicant’s mark “conveys an expressive message,” expressive messages still may be refused registration as a commonplace term, message, or expression pursuant to Sections 1, 2, and 45 of the Trademark Act, 15 U.S.C. §§1051-1052, 1127.

6 TTABVUE 8.

We agree with the Examining Attorney that *Tam* does not dictate the result here. Applicant is correct only to the extent that *Tam* and *Brunetti* prohibit the USPTO from refusing to register a proposed mark consisting of a racial epithet on the basis of any scandalous, offensive or disparaging connotations it may possess, if it is otherwise eligible for registration under the statute. To be very clear on this issue, the Supreme Court has ruled that the USPTO may not refuse registration of a proposed mark under the invalidated viewpoint-discriminatory provisions of Section 2(a) of the Trademark Act, which were held to violate the First Amendment, but neither *Tam* nor *Brunetti* requires the USPTO to register a term simply because it is a racial epithet if it is otherwise unregistrable under any other provisions of the statute.

Applicant's core arguments that "a common racial epithet, because it has an expressive component, does function as a trademark and must register," 4 TTABVUE 2, and that "common racial slurs contain expressive content and therefore function as trademarks," *id.* at 3, get it backwards. In *Tam*, the mark THE SLANTS was in use in connection with the applicant's band, and there was no dispute that THE SLANTS functioned as a mark, or any discussion of third-party uses of the words in connection with entertainment services or otherwise that might have suggested that THE SLANTS did not signify a single source of such services. *Tam*, 122 USPQ2d at 1763 (discussing Tam's use of THE SLANTS as a mark); *In re Tam*, 808 F.3d 1321, 117 USPQ2d 1001, 1005-06 (Fed. Cir. 2015) (en banc) (same); *In re Tam*, 108 USPQ2d

1305, 1306-08 (TTAB 2013), *rev'd on other grounds*, 808 F.3d 1321, 117 USPQ2d 1001 (Fed. Cir. 2015) (same). In language quoted by Applicant, 4 TTABVUE 8, the Supreme Court noted that Mr. Tam and his *amici curiae* had argued that “many, if not all, trademarks do not simply identify the source of a product or service but go on to say something more, either about the product or service or some broader issue,” *Tam*, 122 USPQ2d at 1770, and that Mr. Tam’s mark THE SLANTS “illustrates this point” because it “**not only** identifies the band but expresses a view about social issues.” *Id.* (emphasis added). The Court did not hold, however, that THE SLANTS “identifie[d] the band,” and thus functioned as a mark, **because** it “expresse[d] a view about social issues.”

We agree with Applicant that in *Tam*, the “Supreme Court made clear the function of a trademark is not limited solely to identifying the source of a product, finding the ‘expressive component’ of a mark to be a function of the mark,” 4 TTABVUE 8, but the fact that a proposed mark is a racial epithet, and thus has an “expressive component,” does not *ipso facto* make it registrable. As discussed below, every word or phrase must first function as a mark or it is not registrable, whether or not it “say[s] something more, either about the product or service or some broader issue,” *Tam*, 122 USPQ2d at 1770, and racial epithets and other offensive words or phrases are no exception.

As explained above, nothing in *Tam* or *Brunetti* prohibits the USPTO from refusing to register an offensive or vulgar term if the term is ineligible for registration under provisions of the Trademark Act other than the specific ones invalidated in

those cases. Indeed, in *Brunetti*, the Court expressly recognized that there are multiple grounds on which the Trademark Act “directs the PTO to ‘refuse[] registration’ of certain marks” in addition to the invalidated grounds, *Brunetti*, 2019 USPQ2d 232043, at *2,²⁹ and did not “say anything about how to evaluate viewpoint-neutral restrictions on trademark registration.” *Id.*, at *7 n.*.³⁰ See also *In re ADCO Indus. — Techs., L.P.*, 2020 USPQ2d 53786, at *10-11 (TTAB 2020) (“While the Supreme Court recently struck down provisions in Section 2(a) on the grounds that they were viewpoint discriminatory, the Supreme Court pointedly refrained from extending its holdings to any provisions of the Lanham Act that do not discriminate based on the applicant’s viewpoint.”) (citing *Brunetti*, 2019 USPQ2d 232043, at *7 n.*). We agree with the Examining Attorney that after *Tam* and *Brunetti*, “expressive messages still may be refused registration as a commonplace term, message, or expression pursuant to Sections 1, 2, and 45 of the Trademark Act, 15 U.S.C. §§1051-1052, 1127.” 6 TTABVue 8. Applicant has no constitutional right to register NIGGA if it is otherwise ineligible for registration under the Trademark Act. See *In re Int’l Flavors & Fragrances Inc.*, 183 F.3d 1361, 51 USPQ2d 1513, 1518 (Fed. Cir. 1999) (“There is no constitutionally protected right to federal registration of any mark.”).

²⁹ One of the grounds noted by the Supreme Court was likelihood of confusion under Section 2(d), *Brunetti*, 2019 USPQ2d 232043, at *2, a ground that Senior Examining Attorney Habeeb noted as a possible bar to registration during initial examination of the application. February 28, 2018 Suspension Notice at TSDR 1.

³⁰ We discuss below Applicant’s argument that the failure-to-function refusal is viewpoint-discriminatory.

B. Failure-to-Function Refusal

1. Applicable Law

A failure-to-function refusal involves first principles of trademark registration law under Sections 1, 2, and 45 of the Trademark Act. *See In re The Ride, LLC*, 2020 USPQ2d 39644, at *5 (TTAB 2020). The “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 Vox Populi Registry Ltd.*, 2020 USPQ2d 11289, at *4 (TTAB 2020), *appeal docketed*, No. 21-1496 (Fed. Cir. Jan. 6, 2021), (quoting *In re Bose Corp.*, 546 F.2d 893, 192 USPQ 213, 215 (CCPA 1976)). “An applicant’s proposed mark must, by definition, ‘identify and distinguish his or her goods . . . from those manufactured or sold by others and . . . indicate the source of the goods, even if that source is unknown.” *Univ. of Ky. v. 40-0, LLC*, 2021 USPQ2d 253, at *24 (TTAB 2021) (quoting 15 U.S.C. § 1127). “Hence, a proposed trademark is registrable only if it functions as an identifier of the source of the applicant’s goods or services.” *Id.* “Matter that does not operate to indicate the source or origin of the identified goods or services and distinguish them from those of others does not meet the statutory definition of a trademark and may not be registered.” *Id.* (quoting *In re AC Webconnecting Holding B.V.*, 2020 USPQ2d 11048, at *2-3 (TTAB 2020)).

“The critical inquiry in determining whether a proposed mark functions as a trademark is how the relevant public perceives it.” *Id.* (citing *In re Greenwood*, 2020 USPQ2d 11439, at *2 (TTAB 2020)). “To make this determination, we look to [any]

specimens and other evidence of record showing how the designation is actually used in the marketplace.” *In re Texas With Love, LLC*, 2020 USPQ2d 11290, at *2 (TTAB 2020) (quoting *In re Eagle Crest Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010)). “Because there are no limitations on the channels of trade or classes of consumers of the [clothing] identified in the [involved] application, the relevant consuming public comprises all potential purchasers of [clothing].” *40-0*, 2021 USPQ2d 253, at *24 (citing *In re Mayweather Promotions, LLC*, 2020 USPQ2d 11489, at *3 (TTAB 2020)). Shirts, pants, jackets, footwear, and hats and caps, which are among the clothing items identified in the involved application, are worn in some form by virtually every person in the United States, so the relevant consuming public consists of the general public.

“Matter that is widely used to convey ordinary or familiar concepts or sentiments, or social, political, religious, or similar informational messages that are in common use, would not be perceived as indicating source and is not registrable as a mark.” *In re Team Jesus LLC*, 2020 USPQ2d 11489, at *3 (TTAB 2020). “The more commonly a phrase 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.” *Greenwood*, 2020 USPQ2d 11439, at *2 (quoting *Eagle Crest*, 96 USPQ2d at 1229 (quoted in *In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 (TTAB 2018))).

2. Record Evidence

In determining whether NIGGA functions as Applicant's mark, "we consider all the evidence of record, including an applicant's specimens, as well as other evidence."

Team Jesus, 2020 USPQ2d 11489, at *3.³¹ We summarize that evidence below.

a. Applicant's Alleged Uses of the Proposed Mark

Applicant was not required to submit a specimen of use during prosecution, but in the section of its brief containing its viewpoint discrimination argument, Applicant argues that it

advertises for sale and uses the mark on a t-shirt, an article within the class of goods specified, proudly displaying words from *Matal v. Tam*, "Reclaim' and 'take ownership' of stereotypes – U.S. Supreme Court, June 2017." This apparel bears the applied-for mark as a type of label to indicate the source of the goods, Snowflake Enterprises, LLC. There is no doubt the mark is used in a trademark sense, to identify the source of goods offered for sale. The use of the mark has nothing to do with merely conveying an informational message, but rather here is part of a branding effort and an educational campaign touting the importance of the First Amendment and free speech, including the ruling of *Matal v. Tam*.

4 TTABVue 19.

In the same section, Applicant also discusses an "on-line sales portal," which Applicant claims "also clearly uses 'NIGGA' as part of a logo, showing the word is in

³¹ Applicant's application was filed on the basis of intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. Section 1051(b), and as of the time of the appeal, Applicant had not submitted a specimen of use. A failure-to-function refusal may be asserted on an intent-to-use application if "the drawing and description of the mark are dispositive of the failure to function without the need to consult a specimen . . ." TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPE) Section 1202 (Oct. 2018). *See, e.g., Vox Populi Registry*, 2020 USPQ2d 11289, at *7 (affirming failure-to-function refusal against application class with an intent-to-use filing basis on basis of third-party use evidence).

use in a trademark sense to sell the named goods.” *Id.* We reproduce below the logo as it appears in Applicant’s appeal brief:



Id.

During prosecution, Applicant did not make the referenced t-shirt, label, or on-line sales portal of record, but the Examining Attorney did not object in his brief to Applicant’s arguments based on “how its mark is being used,” 6 TTABVUE 10, so we will consider the alleged uses as shown and described in Applicant’s appeal brief for whatever probative value they may have.

Applicant argues that in its alleged logo, the word NIGGA “is in use in a trademark sense to sell the named goods” because

[t]he “NIGGA” mark is prominently displayed, it is displayed with a distinctive typeface, it exhibits an attention-getting quality, it is used in conjunction with a superscript “TM” to indicate it is intended to function as a trademark and source identifier, it is used with a separate “strong, proud lion” logo having its own separate superscript “TM”, and it is used in conjunction with the words “brand goods” to indicate the word “NIGGA” is serving as a brand and source identifier of certain goods.

4 TTABVUE 19.

These arguments miss the mark because Applicant does not seek to register NIGGA “as part of a logo,” or together with the words “Reclaim’ and ‘take ownership’

of stereotypes – U.S. Supreme Court, June 2017,” *id.*, but rather by itself.³² As the Examining Attorney put it during prosecution, the elements referenced by Applicant “appear nowhere in the mark drawing” and “[t]his refusal is based on the mark as it appears in the drawing, not on extrinsic use.”³³ The alleged composite mark and logo shown and described above tell us nothing about how consumers would perceive NIGGA alone.

In addition, it is axiomatic that “[n]ot every word, name, phrase, symbol or design, or combination thereof which appears on a product functions as a trademark,’ and ‘[m]ere intent that a phrase function as a trademark is not enough in and of itself to make it a trademark.” *Texas With Love*, 2020 USPQ2d 11290, at *2-3 (quoting *In re Pro-Line Corp.*, 28 USPQ2d 1141, 1142 (TTAB 1993)).³⁴ As shown and discussed in

³² We express no opinion regarding the possible registrability of either the logo or any composite mark containing the references to the *Tam* case, or the suitability of the alleged label or logo as a specimen of use of the proposed standard character mark.

³³ March 17, 2020 Final Office Action at TSDR 1.

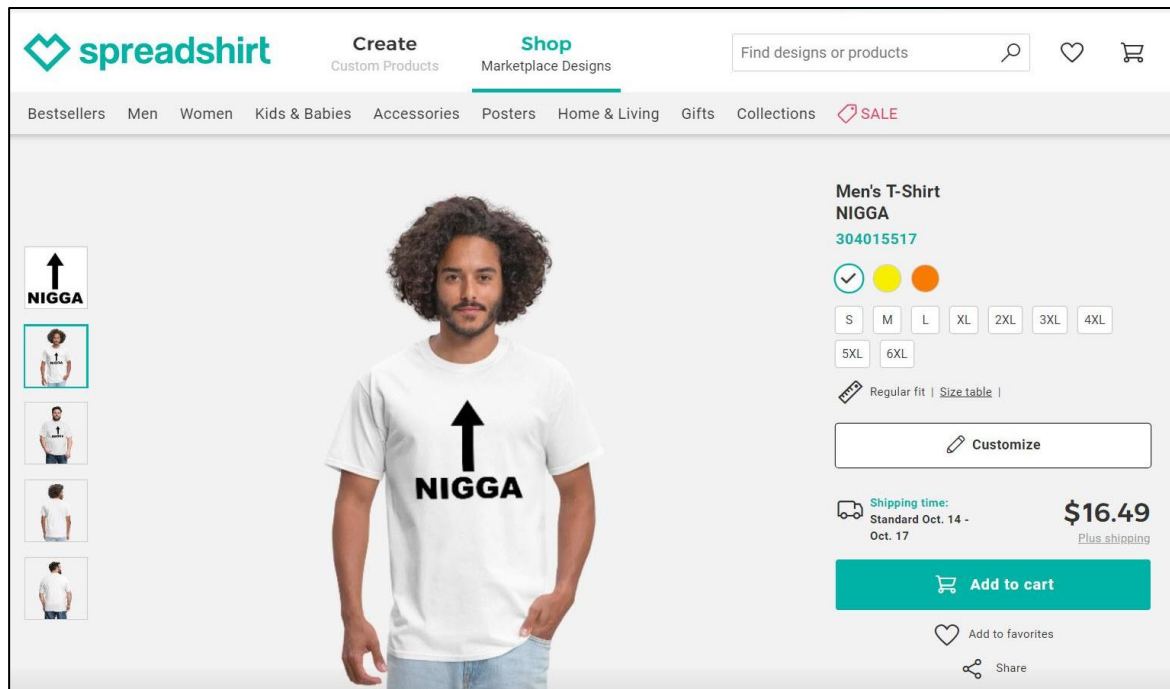
³⁴ *See also, e.g., In re Standard Oil Co.*, 275 F.2d 945, 125 USPQ 227, 229 (CCPA 1960) (“Whatever may have been the intention of the applicant in using [the words GUARANTEED STARTING], their use has not accomplished what the applicant wished to do. Hence, they are not a service mark.”). Indeed, it is well-settled throughout trademark law that a party’s **intentions** about how consumers will perceive a mark are irrelevant, and that the only thing that matters is what the evidence shows about how consumers do or will perceive the mark. *See, e.g., Anthony’s Pizza Holding Co. v. Anthony’s Pizza & Pasta Int’l, Inc.*, 415 F. App’x 222, 225 (Fed. Cir. 2010) (“APHC’s good faith in adopting its marks does not change the likelihood of confusion among members of the public”) (citation omitted); *Seabrook Foods, Inc. v. Bar-Well Foods Ltd.*, 568 F.2d 1342, 196 USPQ 289, 291-92 (CCPA 1977) (“Seabrook contends that it ‘intentionally selected this mark because its distinctiveness would enable the design to distinguish its products from those of others.’ However, *regardless of Seabrook’s intentions*, it is the association, by the *consumer*, of the ‘oval’ design with Seabrook as the source that is determinative.”) (emphasis in original) (citation omitted); *Hydra Mac, Inc. v. Mack Trucks, Inc.*, 507 F.2d 1399, 184 USPQ 351, 351 (CCPA 1975) (“the commercial impression *intended* by the user of a mark is entitled to very little consideration in resolving the issue of likelihood of confusion, etc., where, as the board here found, the *actual* impression created by the mark is different from the impression allegedly intended by the user”) (emphasis in original).

the next section below, NIGGA is used on clothing sold by third parties, and Applicant's possible use on a label of the word and the other elements discussed above does not make the word function as a mark. *Team Jesus*, 2020 USPQ2d 11489, at *5; *Texas With Love*, 2020 USPQ2d 11290, at *6; *D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d 1710, 1716 (TTAB 2016). Nor does Applicant's claimed "use of the 'TM' symbol[, which]" cannot transform an otherwise unregistrable designation into a registrable mark." *40-0*, 2021 USPQ2d 253, at *32 (citing *Eagle Crest*, 96 USPQ2d at 1231). We find that the depictions and descriptions of Applicant's alleged uses of the proposed mark do not show that NIGGA, standing alone, functions as a trademark, and we turn now to a description of the third-party use evidence on that issue.

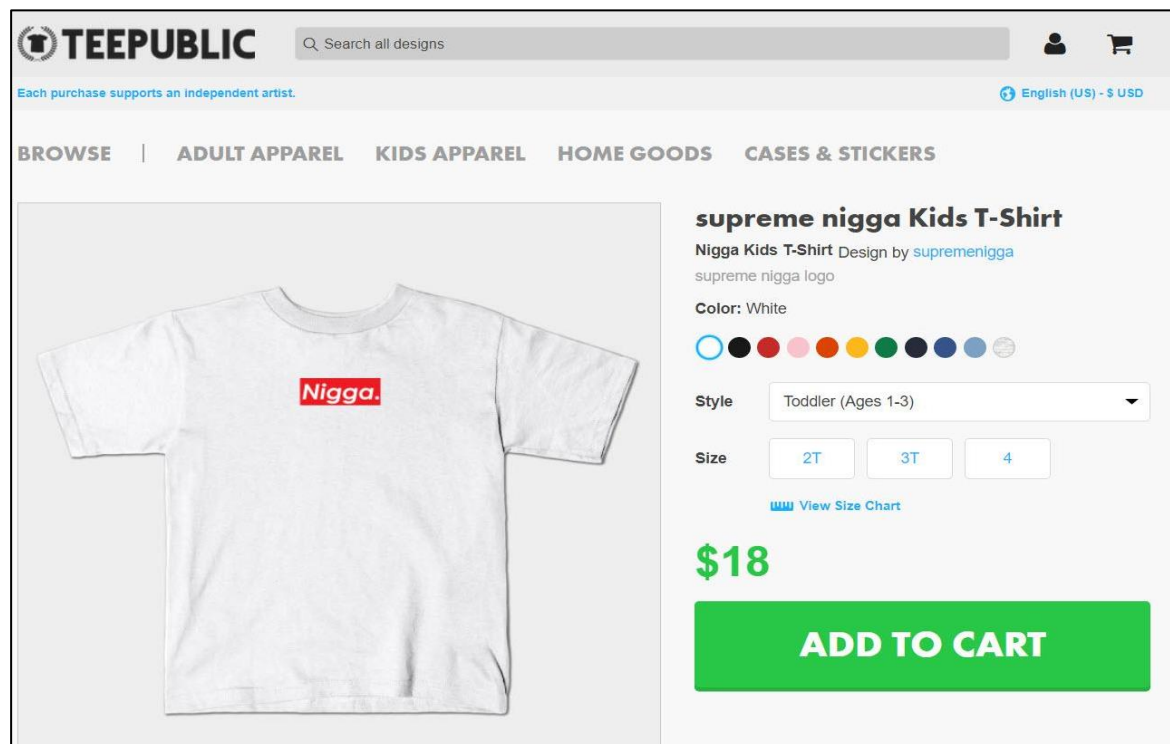
b. Third-Party Uses³⁵

The Examining Attorney made of record webpages displaying clothing and other goods bearing the word "nigga" in both the singular and the plural, a webpage and a social media page displaying clothing bearing the word "nigger," and social media pages displaying "#nigga." We reproduce below all of the webpages displaying the word "nigga" and samples of the social media pages displaying "#nigga":

³⁵ As noted above, third-party use evidence is relevant to show that a term in an intent-to-use application fails to function as a mark because it is a commonplace term widely used by others. See *Vox Populi Registry*, 2020 USPQ2d 11289, at *6-8 (discussing third-party use of .SUCKS).



36



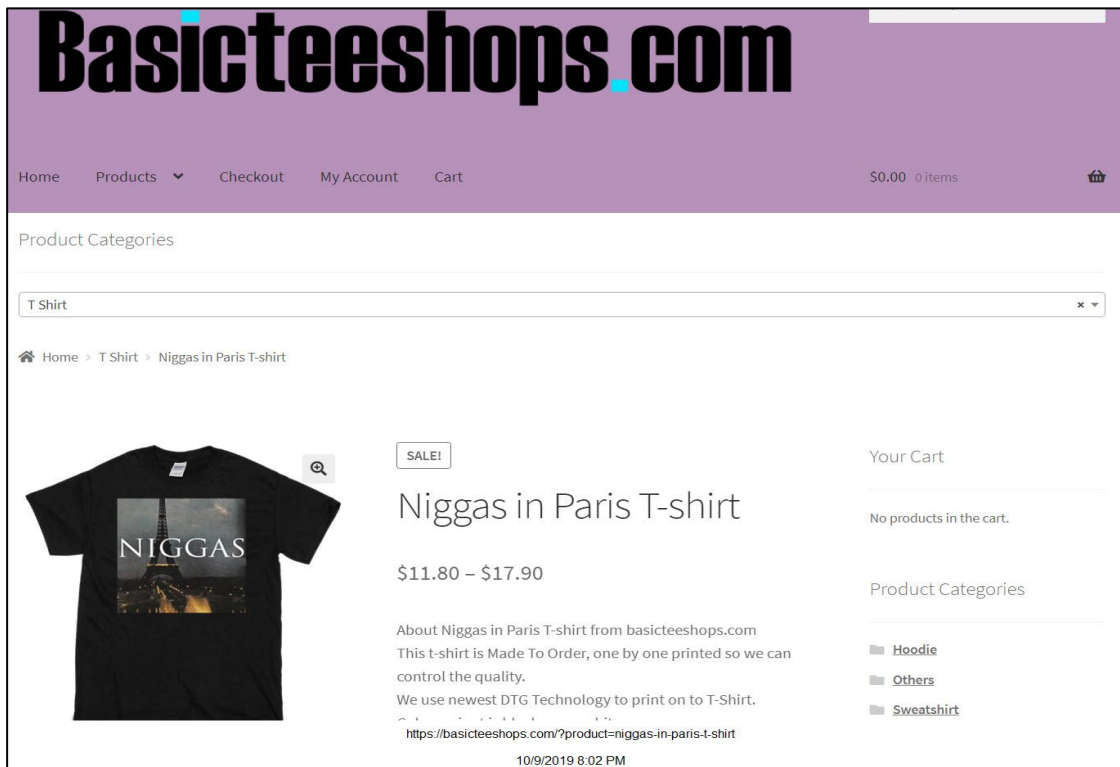
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³⁶ October 9, 2019 Office Action at TSDR 3.

³⁷ *Id.* at TSDR 4.




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³⁸ *Id.* at TSDR 6.

³⁹ *Id.* at TSDR 7-8.



Nigga Tee. - Two Percent Shop!! - Skreened T-shirts, Organic Shirts, Hoodies, Kids Tees, Baby One-Pieces and Tote Bags Custom T-Shirts, Organic Shirts, Hoodies, Novelty Gifts, Kids Apparel, Baby One-Pieces | Skreened - Ethical Custom Apparel

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Quantity [Save Money! Order In Bulk](#)

1

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Share

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About Specs Sizing


Estimated 10 business days production time + shipping time, unless coupled with products that have a longer stated production time.

NEED SOMETHING FAST? SHOP READY TO SHIP.


41

⁴⁰ *Id.* at TSDR 11.

⁴¹ March 17, 2020 Final Office Action at TSDR 8.



[Home](#) [Catalog](#)



The "Nigga" Snapback Hat

\$26.99


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[BUY IT NOW](#)

This hat is structured with a classic fit, flat brim, and full... The adjustable snap closure makes it a comfortable, one-most hat.

- 80% acrylic, 20% wool (green camo is 60% cotton, 40% polyester)
- Structured, 6-panel, high-profile
- Plastic snap closure
- Green under visor
- Head circumference: 21 1/2" - 23 1/2" (54.9 cm to 60 cm)







42



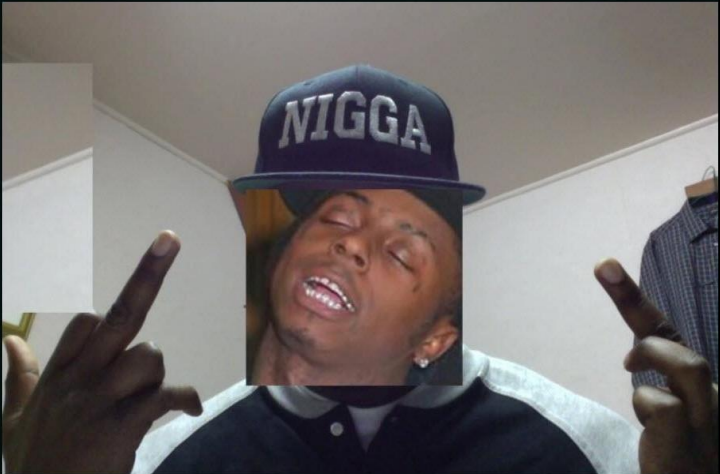
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43

⁴² *Id.* at TSDR 10.

⁴³ *Id.* at TSDR 11.

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44



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Nigga Bracelet by kawaiipalace on Etsy

\$17.99 from kawaiipalace on Etsy

Save Buy

#dope #amen #uglyyy

Saved to

!!!, Everyday clothes, birthday, Rave gear, accessories and socks, Things I'll Get For Others, corn circus, awesome, Accessories and Shoes, Summer

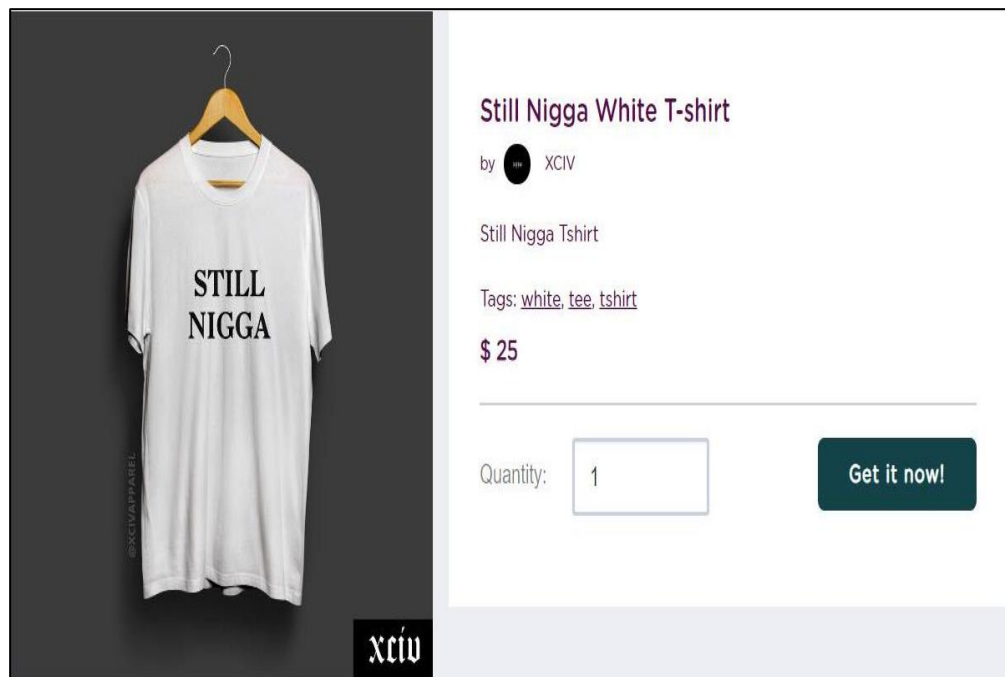
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⁴⁴ *Id.* at TSDR 13.

⁴⁵ *Id.* at TSDR 15. The involved application does not cover jewelry, but relevant “evidence of third-party use may be in connection with products other than the identified goods” *Texas With Love*, 2020 USPQ2d 11290, at *3.



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⁴⁶ *Id.* at TSDR 16.

⁴⁷ *Id.* at TSDR 17.



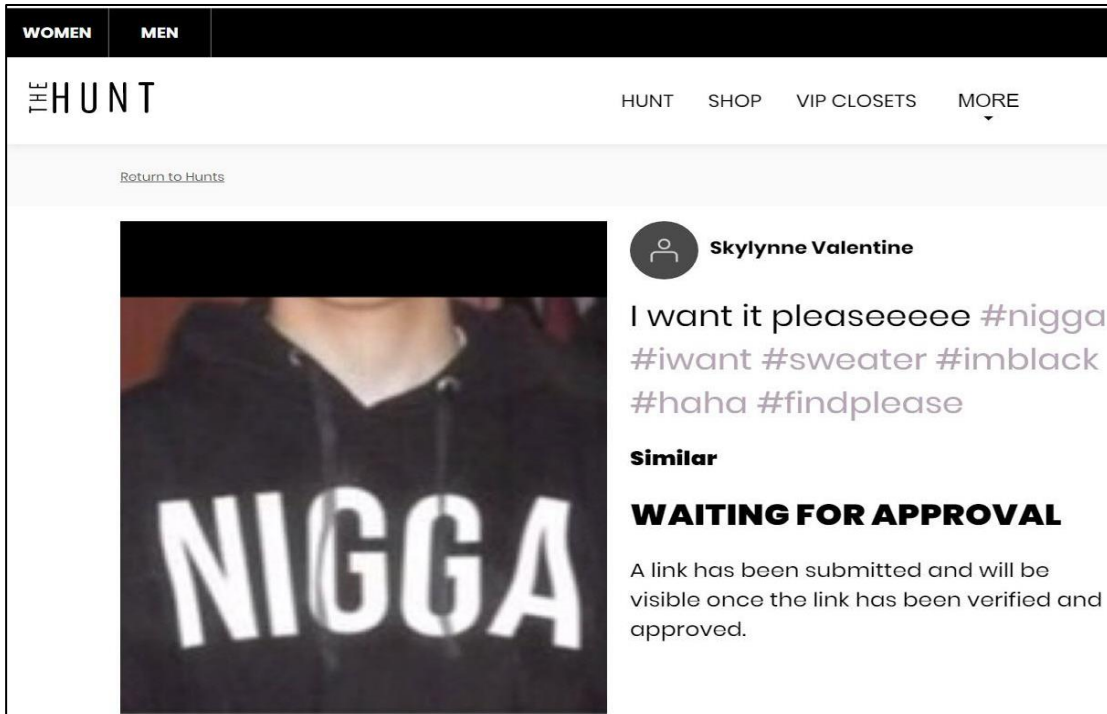
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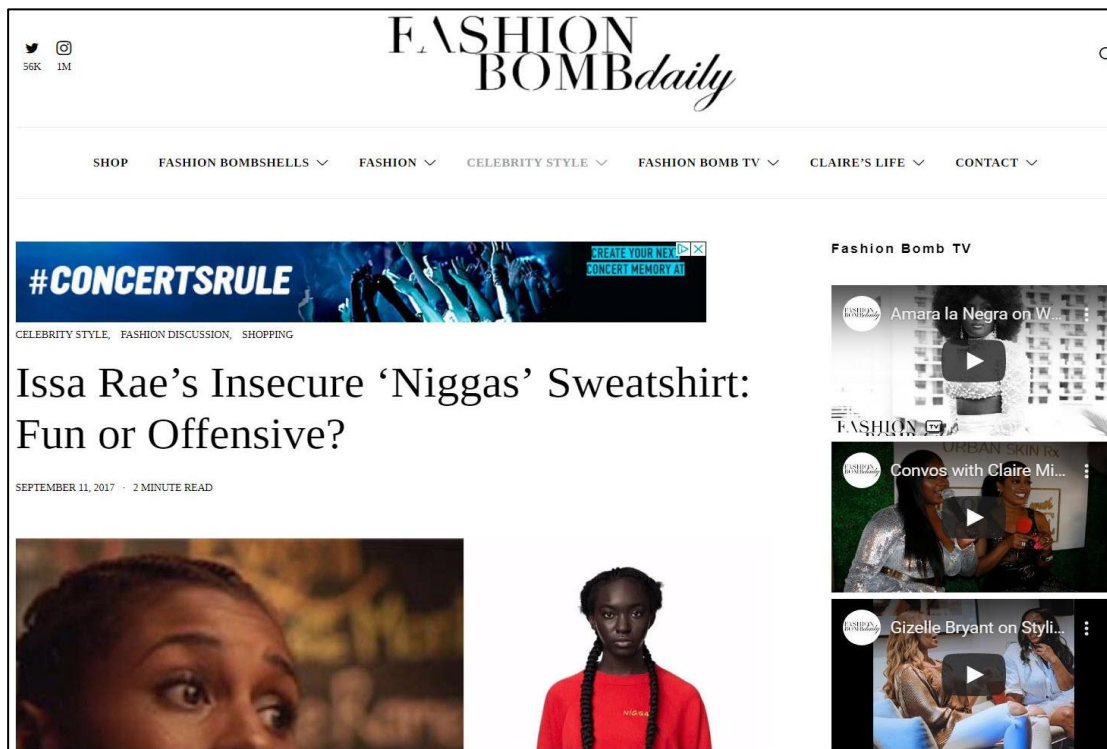
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⁴⁸ *Id.* at TSDR 18.

⁴⁹ *Id.* at TSDR 19.



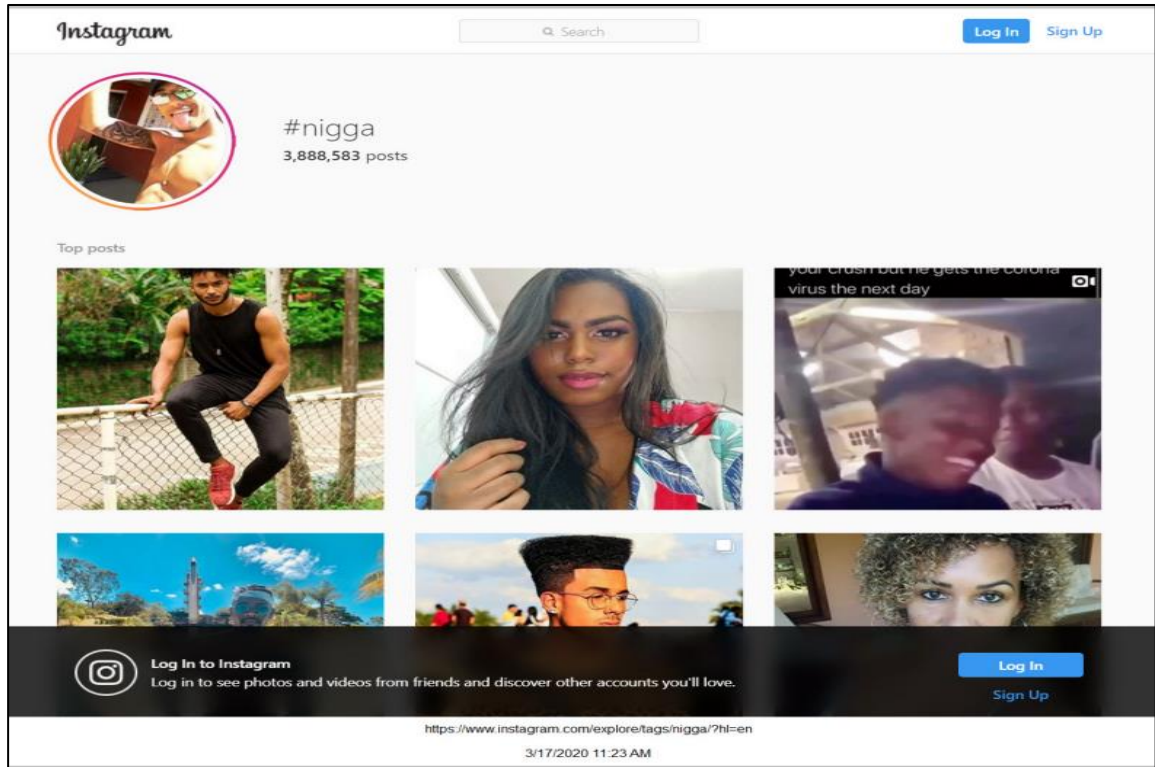
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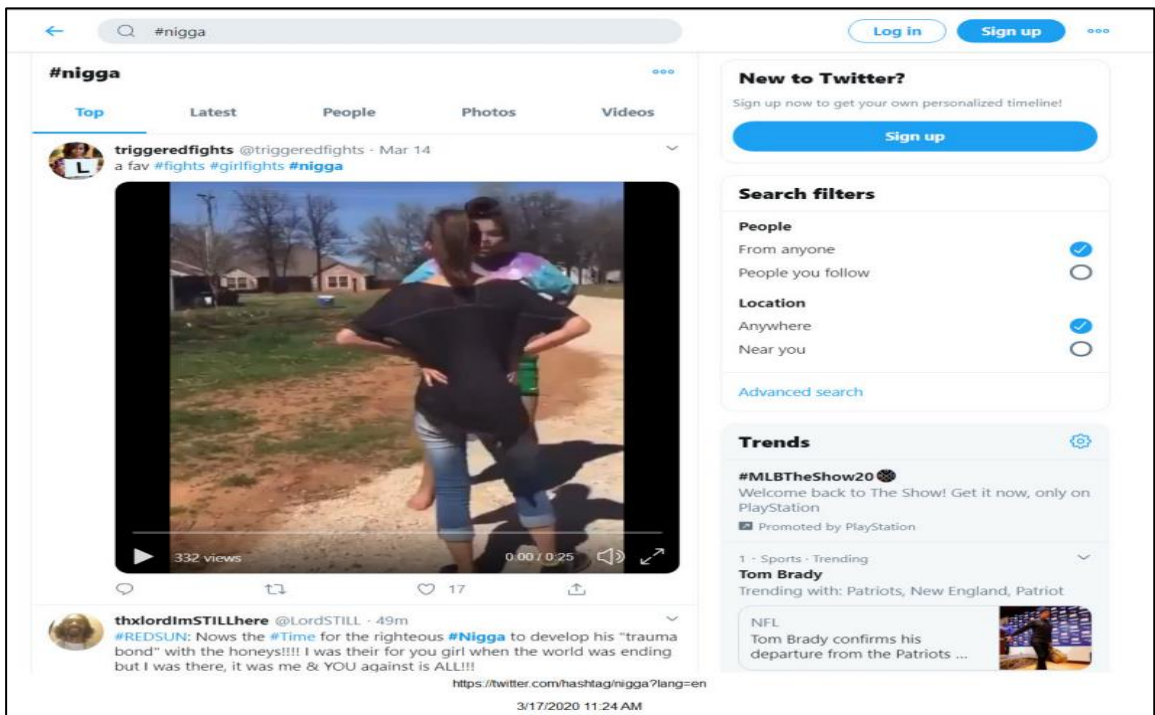
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⁵⁰ *Id.* at TSDR 20.

⁵¹ October 9, 2019 Office Action at TSDR 9-10.



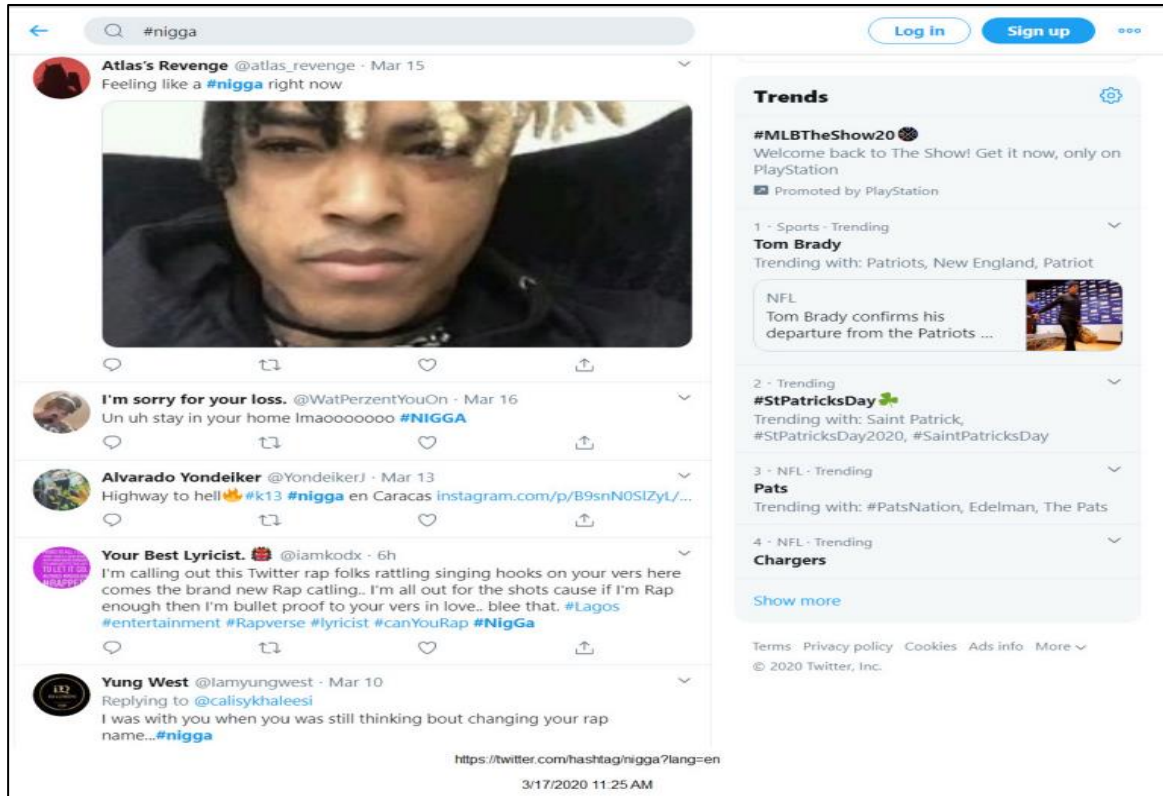
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⁵² *Id.* at TSDR 21.

⁵³ *Id.* at TSDR 22.



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3. Summary of Arguments

a. Applicant

Applicant argues that the Final Office Action “purports to be a ‘failure to function refusal and says, ‘Terms that merely convey an informational message are not registrable.’ The Final Office Action cited ‘DRIVE SAFELY’ and ‘PROUDLY MADE IN USA’, but the racial epithet ‘THE SLANTS is more closely analogous and *Tam* controls here.” 4 TTABVUE 11-12. According to Applicant, “[c]ommon racial epithets, after *Matal v. Tam*, clearly contain an expressive component that serves a trademark function and are not ‘merely an informational message,’” *id.*, and “there is no

⁵⁴ *Id.* at TSDR 24.

informational message nor any ‘common message’ conveyed by the word NIGGA as it relates to the recited class of goods.” *Id.* at 12.

Applicant claims that the USPTO changed positions during prosecution regarding the message conveyed by the word NIGGA. Applicant notes that Senior Examining Attorney Habeeb initially asserted, in support of the possible refusal under Section 2(a), that “the vulgar and scandalous meaning of NIGGA will be the only perceived connotation of that term when used in connection with the identified goods and services,” *id.* (emphasis in original),⁵⁵ and Applicant argues that “[n]ow, the Office asserts all possible meanings of the word hoping one will stick, including the ‘sometimes offensive’ secondary dictionary definition, which depends on the race of the speaker and remains the very viewpoint discrimination prohibited in *Matal v. Tam.*” *Id.* (emphasis in original).⁵⁶

Applicant argues that there are three reasons why the “Examining Attorney has not provided substantial evidence that the mark does not function as a trademark.”

⁵⁵ February 28, 2018 Suspension Notice at TSDR 1.

⁵⁶ TMEP Section 704.01 provides that the “examining attorney’s first Office Action must be complete, so the applicant will be advised of all requirements for amendment and all grounds for refusal,” with the exception of “use-related issues that are considered for the first time in the examination of an amendment to allege use under 15 U.S.C. § 1051(c) or a statement of use under 15 U.S.C. § 1051(d) in an intent-to-use application,” and that “[e]very effort should be made to avoid piecemeal prosecution, because it prolongs the time needed to dispose of an application.” When she issued the February 28, 2018 Suspension Notice, Senior Examining Attorney Habeeb did not include a failure-to-function advisory refusal, but that was not a first office action. While it might have been preferable to have included such an advisory, Senior Examining Attorney Habeeb was not obligated to do so. *See also* TMEP Section 1202 (“in a §1(b) application, for which no specimen has been submitted, if the examining attorney anticipates that a refusal will be made on the ground that the matter presented for registration does not function as a mark, the potential refusal should be brought to the applicant’s attention in the first Office action. This is done strictly as a courtesy.”)

Id. The first is that “the Examining Attorney provides no actual evidence that the mark does not function as a trademark, but rather offers only mere speculation and conjecture.” *Id.* at 13. According to Applicant, the Final Office Action “says the mark ‘**may convey** to the average American consumer a message ‘mean[ing] dude, homie or friend, primarily by people of African American descent” and that “[an undefined set of] consumers are **likely to purchase** the applicant’s goods not because it is a brand but rather because of the aforementioned message.’ This is nothing more than conclusory speculation, not substantial evidence of what the mark **does convey** to the public for this class of goods specifically.” *Id.* (emphasis in original).

Applicant also once again relies on *Tam* to argue that

The reasoning of the Final Office Action contradicts that of *Matal v. Tam* [because] [i]f a consumer is “likely to purchase the applicant’s goods . . . because of the aforementioned message” (for example using a broader social issue of associating NIGGA with “friend” to prompt a sale and to identify a source of goods or services), that **is** a trademark function favoring registration, aligning a purchase decision with an expressive component of a mark that is a source identifier.

Id. (emphasis in original).

The second reason is that the Examining Attorney’s Internet webpages showing third-party use of NIGGA on clothing and other goods “are not authenticated as bearing a date before the June 19, 2017 filing date of the present application, and therefore do not provide substantial evidence of anything within the relevant time period,” *id.* at 14, which Applicant defines as prior to its filing date. *Id.* at n.10. Applicant argues that “the Examining Attorney’s ‘Attachments’ do not as a whole

constitute a prima facie case showing, supported by substantial evidence, that the mark does not function as a trademark.” *Id.* at 14-15.

The third reason is that “the Final Office Action does not provide substantial evidence to conclude there is one ‘informational message’ in the mark, as opposed to an expressive component” because the “Final Office Action merely posits *all* possible meanings of the mark NIGGA, hoping the shotgun approach would constitute substantial evidence of some informational message and not any expressive component.” *Id.* at 15 (emphasis in original). Applicant claims that “[s]aying a dictionary is ‘providing various definitions for this term’ does nothing to show there is no expressive component in the subject mark. The Office Action merely points to all possible meanings.” *Id.*

Applicant concludes that there is no “substantial evidence to show this mark does not contain an expressive component.” *Id.* Applicant again claims that “the reasoning of *Matal v. Tam* – that common racial epithets contain an expressive component – unquestionably detracts from the agency’s decision here, and outright legally forbids it.” *Id.* According to Applicant, “[n]o reasonable fact finder could have arrived at the agency’s decision.” *Id.*

b. The Examining Attorney

The Examining Attorney argues that “Applicant’s mark is a commonplace term widely used by a variety of sources that merely conveys a familiar and well-recognized message or expression.” 6 TTABVUE 5. He argues that the record shows that “the mark and slight variations thereof are routinely used in the marketplace as well as on or in connection with clothing, the identified goods, and other fashion accessories,

such as bracelets,” *id.* at 6, and that “[b]ecause consumers are accustomed to seeing the mark commonly used in everyday speech by many different sources, they would not perceive it as a mark identifying the source of Applicant’s goods but rather as only conveying an informational term.” *Id.* at 7. He claims that the proposed mark “conveys to the average American consumer a message ‘mean[ing] dude, homie or friend, primarily by people of African American descent,” and that the “mark also may be ‘used by some black people to refer to themselves or to another black person in a neutral or positive way,” or “to identify ‘[a] close and loyal friend,” “to express ‘solidarity or affection,” or “as a friendly term of address.” *Id.* at 8. He concludes that “consumers are likely to purchase the Applicant’s clothing not because they perceive the mark to be a brand or source of clothing but rather because of the aforementioned messages they wish to convey to others by wearing the goods.” *Id.* at 9.

The Examining Attorney also argues that the record evidence of dictionary definitions and third-party uses is sufficient in quantity to show that “it is unlikely that consumers when confronted with various uses of the Applicant’s mark on clothing and other goods will be able to distinguish the Applicant’s use from those by third parties,” such that “Applicant’s mark cannot serve as a source-identifier.” *Id.* He rejects Applicant’s argument based on the fact that the record evidence does not predate Applicant’s filing date because “there does not appear to be such time constraints for evidence to be deemed acceptable and properly submitted so long as

the evidence is submitted prior to appeal,” and it would be a practical impossibility to collect such evidence until after applications are filed. *Id.*⁵⁷

4. Analysis

a. The Word “Nigga” Conveys a Readily Understood Message

As noted above, the basis for the failure-to-function refusal under Sections 1, 2, and 45 of the Trademark Act is that Applicant’s proposed mark is a “commonplace term widely used by a variety of sources that merely conveys an ordinary, familiar, well-recognized concept or sentiment.”⁵⁸ “Matter that is widely used to convey ordinary or familiar concepts or sentiments, or social, political, religious, or similar informational messages that are in common use, would not be perceived as indicating source and is not registrable as a mark.” *Team Jesus*, 2020 USPQ2d 11489, at *3. The Examining Attorney’s position is that NIGGA “conveys to the average American consumer a message ‘mean[ing] dude, homie or friend, primarily by people of African American descent,’” and that the “mark also may be ‘used by some black people to refer to themselves or to another black person in a neutral or positive way,’” or “to identify ‘[a] close and loyal friend,’” “to express ‘solidarity or affection,’” or “‘as a friendly term of address,’” 6 TTABVUE 8, while Applicant’s position is that “there is

⁵⁷ The Examining Attorney also responds to Applicant’s argument that one of the third-party uses of NIGGA in the record has “simply vanished,” 4 TTABVUE 14, and that “the product does not appear to be available on the website,” *id.* at n.11, by arguing that “Applicant does not argue that all or even a majority of the evidence is unavailable, which is why the evidence should be evaluated as a whole to answer the question of whether the mark functions,” and that this is “especially important when accounting for the fact that a lengthy period of time generally elapses between the filing of a trademark application for registration and any appeal before the Trademark Trial and Appeal Board and its reviewing courts.” *Id.* at 10.

⁵⁸ March 17, 2020 Final Office Action at TSDR 1.

no informational message nor any ‘common message’ conveyed by the word NIGGA as it relates to the recited class of goods,” 4 TTABVUE 12, and that there is no “one ‘informational message’ in the mark, as opposed to an expressive component,” but rather many possible meanings. *Id.* at 15. We will thus begin by addressing the meaning of the word “nigga.”

The MERRIAM-WEBSTER DICTIONARY characterizes the word as “*offensive*—used as pronunciation spelling of *nigger*,” and “*sometimes offensive*—used by some black people to refer to themselves or to another black person in a neutral or positive way.”⁵⁹

The entry goes on to state that

Nigga originated as a variant of the infamous racial slur *nigger*, reflecting one of its pronunciations, and for many people it is an equally offensive word. Since the late 20th century, however, the two forms have been diverging in use among some African Americans, with *nigga* becoming the preferred term for neutral and positive self-referential uses, such as those associated with the world of hip-hop. Those uses are themselves controversial, and despite their prevalence in hip-hop, a music and culture whose millions of fans span all races and ethnicities, the use of *nigga* by a person who is not black—in any context—is considered highly offensive.⁶⁰

The VOCABULARY.COM online dictionary defines “nigga” as an “(ethnic slur) extremely offensive name for a Black person” and gives as an example of use the sentence “only a Black can call another Black a nigga.”⁶¹

⁵⁹ October 9, 2019 Office Action at TSDR 2 (emphasis in original).

⁶⁰ *Id.* (emphasis in original).

⁶¹ March 17, 2020 Final Office Action at TSDR 2.

The DICTIONARY.COM online dictionary defines “nigga” as “a term used to refer to or address a black person,” and characterizes it as “Slang: Usually Disparaging and Offensive.”⁶² DICTIONARY.COM also provides a “Usage Alert About Nigga,” which states that

Nigga is used mainly among African Americans, but also among other minorities and ethnicities, in a neutral or familiar way and as a friendly term of address. It is also common in rap music. However, nigga is taken to be extremely offensive when used by outsiders. Many people consider this word to be equally offensive as nigger. The words nigger and nigga are pronounced alike in certain dialects, and so it has been claimed that they are one and the same word.⁶³

The MACMILLAN DICTIONARY describes “nigga” as a “Noun Very Informal,” and defines it as “used to mean dude, homie or friend, primarily by people of African American descent. This word is potentially very offensive, especially when used by someone who is not black.”⁶⁴

The WIKTIONARY⁶⁵ defines “nigga” as:

1. “(offensive, ethnic slur, vulgar, dated)” and the “[e]ye dialect spelling of **nigger**.”

⁶² *Id.* at TSDR 7.

⁶³ *Id.*

⁶⁴ *Id.* at TSDR 27.

⁶⁵ Because WIKTIONARY and WIKIPEDIA are open content sources that may be edited by anyone, they are not as reliable as traditional dictionaries. *See In re IP Carrier Consulting Grp.*, 84 USPQ2d 1028, 1032 (TTAB 2007) (“Our consideration of Wikipedia evidence is with the recognition of the limitations inherent with Wikipedia (*e.g.*, that anyone can edit it and submit intentionally false or erroneous information.”). We note, however, that the meaning of “nigga” as discussed in WIKTIONARY and WIKIPEDIA does not differ materially from the meaning in the more traditional dictionaries discussed above, and WIKTIONARY and WIKIPEDIA thus serve to corroborate that dictionary evidence.

2. *“(vulgar, slang, often offensive, but also often used affectionately in African-American Vernacular English)” as a “close and loyal friend,” with the use example “I’d never betray you, cuz, you my nigga, man.”*
3. *(vulgar, slang, often offensive, but tolerated in African American Vernacular English). A black person (usually male), especially an African American. As soon as I walked into the class and saw that sea of white faces, I felt alone, so I sat next to the only other **nigga** there.*
4. *(vulgar, slang, often offensive, chiefly African American Vernacular English). Any person, though chiefly male.*
*White **niggas** be like, this is too spicy.*
*All these freshman **niggas** are so annoying.*
*The **niggas** out here bein’ fake.*
5. *(vulgar, slang, often offensive, but tolerated in African American Vernacular English). A male as opposed to a female.⁶⁶*

The WIKTIONARY further notes that

[t]here have been efforts by those of African descent to reclaim the word **nigger**, especially in this form (**nigga**, and its variants such as *niggah*), but these efforts are controversial, and some people do not believe it is able to be reclaimed, due to its fraught history and continued derogatory usage. Usage by non-blacks is almost invariably highly offensive.⁶⁷

⁶⁶ March 17, 2020 Final Office Action at TSDR 3-4 (emphasis in original).

⁶⁷ *Id.* at TSDR 4 (emphasis in original).

A WIKIPEDIA entry entitled “Nigga” explains that it is “about the colloquial slang” word, and refers readers looking for information about “the racial slur” to a “Nigger” entry, which is not of record.⁶⁸ The “Nigga” entry describes the word as “a colloquial term used in African-American Vernacular English that began as an eye-dialect form of the word nigger, an ethnic slur against black people.”⁶⁹ A portion of the entry entitled “Usage” states that the “use and meaning” of “nigga” are “heavily dependent on context,”⁷⁰ that “[t]here is conflicting popular opinion on whether there is any meaningful difference between ‘nigga’ and ‘nigger’ as a spoken term,”⁷¹ and that “[m]any people consider the terms to be equally pejorative, and the use of ‘nigga’ both in and outside black communities remains controversial.”⁷² The entry notes that some commentators believe that the use of the term is a sign of disrespect, and that the “National Association for the Advancement of Colored People, a civil rights group, condemns use of both ‘nigga’ and ‘nigger.’”⁷³

The entry continues that “[s]ome African-Americans only consider ‘nigga’ offensive when used by people of other races, seeing its use outside a defined social group as an unwelcome cultural appropriation.” Consistent with the dictionary definitions discussed above, the entry states that “[u]sed by blacks, the term may

⁶⁸ *Id.* at TSDR 5.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

indicate ‘solidarity or affection’, similar to the usage of the words ‘dude,’ ‘homeboy’, and ‘bro’,” while “[o]thers consider ‘nigga’ non-offensive except when directed from a non-African-American towards an African-American,” and still others “have derided this as hypocritical and harmful, enabling white racists to use the word and confusing the issue over *nigger*.”⁷⁴ The entry also notes the cultural influence of hip-hop music on the term, states that the phrase “nigga, please” is “now heard routinely in comedy routines by African Americans,”⁷⁵ and mentions unsuccessful prior attempts to register the word, including one by comedian Damon Wayans.⁷⁶

The record also contains several online articles that, like the dictionary definitions, discuss the use of “nigger” and “nigga” in the American vernacular, and the debate over the appropriateness of the use of “nigga” by Blacks.⁷⁷

The record as a whole shows that “nigga” is generally understood by Americans to be a slang reference to a Black person and a derivative of the racial slur “nigger.” The record also shows, as Applicant notes, that the exact “meaning of the expression depends both on who utters the word ‘nigga’ and who the intended listener is, among several other contexts, including the relationship between the speaker and listener as well as the intent of the speaker and context of the interaction,” 4 TTABVUE 15-16, but that is of no moment in our analysis. The dictionary definitions, other source

⁷⁴ *Id.*

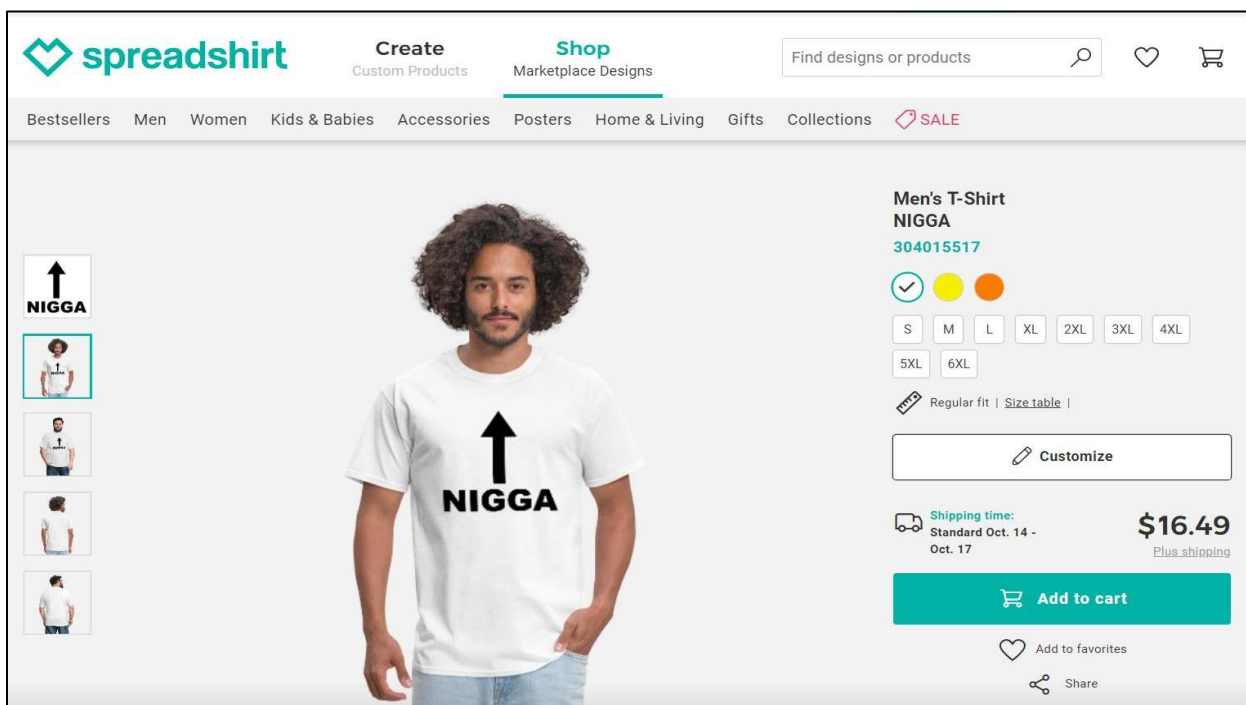
⁷⁵ *Id.* at TSDR 5-6.

⁷⁶ *Id.* at TSDR 6.

⁷⁷ February 28, 2018 Suspension Notice at TSDR 12-33.

materials, and social media pages⁷⁸ collectively show that in the American vernacular, the word “nigga” is widely understood to convey a malign racist sentiment when used by whites to address or refer to Blacks,⁷⁹ but a possibly benign sentiment when used by Blacks self-referentially or to address or refer to other Blacks.


Most of the third-party clothing bearing NIGGA displays the word in the latter context of being “used by some black people to refer to themselves or to another black person in a neutral or positive way.” 6 TTABVUE 8 & n.30.⁸⁰ We depict several such uses below:





⁷⁸ “Nigga” is used with a hashtag on the social media pages, and “[w]here a hashtag is used as part of an online social media search term, it generally serves no source-identifying function, because it ‘merely facilitate[s] categorization and searching within online social media.’” *In re DePorter*, 129 USPQ2d 1298, 1303 (TTAB 2019) (quoting TMEP Section 1202.18).

⁷⁹ Applicant acknowledges that “nigga” is “commonly offensive and used as a racial epithet.” 4 TTABVUE 23.



⁸⁰ October 9, 2019 Office Action at TSDR 2 (MERRIAM-WEBSTER DICTIONARY).



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Applicant's arguments that "there is no informational message nor any 'common message' conveyed by the word NIGGA as it relates to the recited class of goods," and that there is no "one 'informational message' in the mark, as opposed to an expressive component," 4 TTABVue 12, 15, are unavailing because "[a] term may still fail to function as a mark even if it does not convey information about the goods." *Mayweather Promotions*, 2020 USPQ2d 11298, at *4. The third-party clothing shows "use of [NIGGA] in an ornamental manner, such as the t-shirts shown above with the word[] emblazoned across the front, presumably offered for consumers who want to convey" a message that belittles the racist meaning of "nigga" through humor or derision, including, in one example, by literally giving it the finger. *Team Jesus*, 2020

USPQ2d 11489, at *5.⁸¹ It appears that “[i]n the clothing industry, this common message is used on t-shirts [and hats] as a feature such that the display itself is an important component of the product and customers purchase the product not associating it with a particular source but because of the message.” *Id.*, at *5-6 (quoting *Mayweather Promotions*, 2020 USPQ2d 11298, at *4). *See also Greenwood*, 2020 USPQ2d 11439, at *3 (“the record indicates that the phrase GOD BLESS THE USA is displayed, not as a source indicator, but as an expression of patriotism, affection, or affiliation with the United States of America”); *Texas With Love*, 2020 USPQ2d 11290, at *5 (uses of TEXAS LOVE or variations thereof on clothing and other goods were not uses “to refer to the sources of the products offered,” but rather were uses of the phrase “in a manner that will only be perceived by consumers as conveying ‘support for, or affiliation or affinity with the State of Texas,’ a well-recognized sentiment.”).

The record shows that NIGGA is a “commonplace term” with widely understood meanings, “both in general parlance and on the goods at issue,” *40-0*, 2021 USPQ2d 253, at *25, “that merely conveys . . . familiar, well-recognized concept[s] or

⁸¹ The majority of the third-party clothing items in the record are modeled by Blacks, or are displayed with, or otherwise depict, Blacks. A few appear to be modeled by whites. Given the meaning of the word “nigga” when used by Blacks, and the uses on clothing displayed in the record, we can reasonably infer that Blacks are likely to purchase and wear clothing bearing NIGGA for the purpose of mocking the word’s racist meaning. We can only speculate as to the reasons why non-Blacks would purchase and wear clothing bearing the word. Whatever a particular consumer’s motivation may be, however, “[i]t is clear that [clothing] provided in connection with this term will be purchased by consumers for the message it conveys,” *Mayweather Promotions*, 2020 USPQ2d 11298, at *6, not because of the source of the goods it identifies.

sentiment[s].”⁸² “As a result, consumers will not perceive [NIGGA] appearing on [clothing] as pointing uniquely to Applicant as a single source,” *Peace Love World Live*, 127 USPQ2d at 1403-04, and it thus fails to function as a mark for those goods for this reason alone.

b. The Word “Nigga” is Widely Used on Clothing

In addition, “widespread use of a term or phrase may be enough to render it incapable of functioning as a trademark, regardless of the type of message.” *Texas With Love*, 2020 USPQ2d 11290, at *7. The Examining Attorney made of record more than a dozen examples of the ornamental use of NIGGA on t-shirts, hats, and jewelry offered by numerous sellers.⁸³ The quantity and quality of the Examining Attorney’s evidence are comparable to those in other cases finding that terms failed to function as marks because of widespread use, and the evidence is sufficient to show that the proposed mark is widely used in connection with clothing. *See Texas With Love*, 2020 USPQ2d 11290, at *1-7 (finding that proposed mark TEXAS LOVE was both widely-recognized and widely-used based on 12 third-party uses of TEXAS LOVE in various forms); *Mayweather Promotions*, 2020 USPQ2d 11298, at *6 (finding on basis of 14 uses of PAST PRESENT FUTURE on t-shirts that “the marketplace evidence shows that consumers have been exposed to PAST PRESENT FUTURE used on t-shirts to

⁸² March 17, 2020 Final Office Action at TSDR 1.

⁸³ Because the record shows that the public understands “nigga” to be a racial slur except when used by a Black person, and that its use is controversial even in that context, it is not surprising that the marketplace does not appear to be “awash in products that display the term” *D.C. One Wholesaler*, 120 USPQ2d at 1716 (finding that the expression I ♥ DC was used by a “large number of merchandisers, as an expression of enthusiasm, affection or affiliation with respect to the city of Washington, D.C.”).

convey a common message, which reinforces our finding that consumers are unlikely to associate that term with a particular source for t-shirts.”). Such “widespread ornamental use of the phrase by third parties ‘is part of the environment in which the [term NIGGA] is perceived by the public and . . . may influence how [NIGGA] is perceived.” *D.C. One Wholesaler*, 120 USPQ2d at 1716 (quoting *In re Hulting*, 107 USPQ2d 1175, 1178 (TTAB 2013) and *In re Tilcon Warren Inc.*, 221 USPQ 86, 88 (TTAB 1984)).

Applicant’s three challenges to the sufficiency of this evidence are all meritless. Applicant’s first argument that “the Examining Attorney provides no actual evidence that the mark does not function as a trademark, but rather offers only mere speculation and conjecture,” 4 TTABVUE 13, based on certain language in office actions, fails because the Examining Attorney is not required to prove to a moral certainty that consumers will not perceive NIGGA to function as Applicant’s mark. It is enough that the third-party use evidence here “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.**” *Team Jesus*, 2020 USPQ2d 11489, at *6 (emphasis added) (quoting *DePorter*, 129 USPQ2d at 1302).

Applicant’s second argument is that the third-party use evidence is “not authenticated as bearing a date before the June 19, 2017 filing date of the present application, and therefore do[es] not provide substantial evidence of anything within the relevant time period.” 4 TTABVUE 14. Applicant cites no authority for the

proposition that all of the Examining Attorney's evidence must be disregarded for this reason. The Board's failure-to-function cases do not impose such a requirement, and they have invariably considered evidence of third-party use that post-dated the filing dates of the subject applications.⁸⁴ As discussed above, the "critical inquiry in determining whether a proposed mark functions as a trademark is how the relevant public perceives it," *40-0*, 2021 USPQ2d 253, at *24, and the public's perception is not "frozen" as of the arbitrary filing date of an application.⁸⁵

Applicant's third argument that "the Final Office Action does not provide substantial evidence to conclude there is one 'informational message' in the mark, as

⁸⁴ See, e.g., *Team Jesus*, 2020 USPQ2d 11489, at *1 n.1, 5 (displaying and discussing third-party use evidence downloaded from the Internet on July 8, 2019, after the applicant's filing date of September 5, 2018); *In re Wal-Mart Stores*, 129 USPQ2d 1148, 1149 n.2, 1153-54 nn.9-14, 20-22, 26-27 (TTAB 2019) (discussing third-party use evidence dated September 24, 2015, December 12, 2015, July 2015, June 15, 2016, July 7, 2016, February 27, 2017, and March 3, 2017, after the applicant's filing date of April 24, 2014); *Texas With Love*, 2020 USPQ2d 11290, at *1 & n.1 (displaying third-party use evidence downloaded on September 17, 2018, after the applicant's filing date of February 12, 2018); *Peace Love World Live*, 127 USPQ2d at 1401 n.1, 1402-03 nn.7-13 (displaying and discussing third-party use evidence made of record on December 1, 2016, after the applicant's filing date of July 25, 2015). In *Wal-Mart Stores*, the Board also considered articles that pre-dated the applicant's filing date. Such evidence may, of course, also be probative on a failure-to-function refusal, but it is not required.

⁸⁵ The Board similarly has considered evidence that post-dated the filing date of an application in non-failure-to-function cases involving the issue of consumer perception of a proposed mark. See, e.g., *In re Guaranteed Rate, Inc.*, 2020 USPQ2d 10869, at *4-6 (TTAB 2020) (considering evidence of acquired distinctiveness submitted by both the applicant and the examining attorney that both pre-dated and post-dated the applicant's filing date); *In re Empire Tech. Dev. LLC*, 123 USPQ2d 1544, 1560-64 (TTAB 2017) (considering evidence of genericness in the form of articles published after the applicant's filing date); cf. *Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc.*, 107 USPQ2d 1750, 1763 (TTAB 2013) ("To determine if a mark is generic, we examine the evidence up through the time of trial."), *aff'd mem.*, 565 F. App'x 900 (Fed. Cir. 2014).

opposed to an expressive component,” 4 TTABVUE 15, is unavailing for the reasons addressed above in our analysis of the meaning of the word “nigga.”

We find that the Examining Attorney’s third-party use evidence establishes that when the word NIGGA appears on clothing, consumers are unlikely to view it as identifying Applicant as the sole source of such goods.

The uses of NIGGA in various forms on the clothing shown above by a multitude of third parties are incompatible with Applicant’s exclusive appropriation of the term as its trademark. Applicant claims that through its intended use of NIGGA, it is “reclaiming this racial slur for use and function as a trademark,” *id.* at 7, but several of the third-party users of NIGGA on clothing appear to be doing exactly the same thing. They and the other sellers of clothing bearing the word would instantly become potential infringers if Applicant obtained a registration of NIGGA and the “exclusive right to use the registered mark in commerce or on in connection with the [clothing] . . . specified in the” registration. 15 U.S.C. § 1057(b).⁸⁶ As a result, “[g]ranting the registration Applicant seeks ‘would achieve the absurd result of hampering others in their use of the common’ phrase [NIGGA] for clothing and other products.” *Texas With*

⁸⁶ Applicant argues that a “refusal of the mark NIGGA deprives African-Americans from reclaiming a commonly offensive racial slur.” 4 TTABVUE 24. Applicant does not explain, however, why it alone is entitled to act as the vicarious avenger for African-Americans, to the exclusion of all others, including those who already appear to be using the word on clothing for the purpose of reclaiming it. Nor does Applicant explain why it must receive a registration to reclaim the slur given the existence of the third-party uses and the fact that a refusal to register “does not prevent [A]pplicant from using [NIGGA] on its merchandise or from advertising that merchandise through any advertising message of its choosing.” *ADCO Indus. — Techs.*, 2020 USPQ2d 53786, at *10.

Love, 2020 USPQ2d 11290, at *7 (quoting *In re Schwauss*, 217 USPQ 361, 362 (TTAB 1983)).

The record shows that NIGGA is “too commonly used by too many third parties in a variety of forms for it to identify the source of Applicant’s goods,” *id.*, and “Applicant should not be able to deny potential competitors (who according to the record also use the [word]) the right to use it freely.” *Id.* NIGGA thus fails to function as Applicant’s mark for clothing for this separate reason.

C. Applicant’s Other Constitutional and Disparate Treatment Claims

In addition to its arguments based on *Tam* discussed above, Applicant asserts other claims purportedly grounded in the United States Constitution. They are nominally organized into two argument sections captioned “The Final Office Action improperly refused the subject mark based on the alleged viewpoint of the speech. This is unconstitutional under the First Amendment,” 4 TTABVue 16, and “In light of *Matal v. Tam*, common racial slurs can be reclaimed to function as trademarks, and if not the test for ‘failure to function as a trademark’ is arbitrary and vague and therefore unconstitutional and void.” *Id.* at 21. In reality, they devolve into two basic claims: (1) the USPTO violated the First Amendment by “us[ing] unconstitutional viewpoint discrimination as an improper basis for rejection” of Applicant’s proposed mark, *id.* at 17, and (2) “[s]imilar marks must be treated similarly under *Matal v. Tam*.” *Id.* at 22. To the extent that the latter claim is anything more than a mere recasting of Applicant’s viewpoint discrimination claim, it asserts that the USPTO

has engaged in disparate treatment of Applicant's mark because the USPTO has been inconsistent in registering offensive and racially tinged marks.

"While the Trademark Trial and Appeal Board is an administrative tribunal, not an Article III court, and is not empowered to strike down a statute as contrary to the Constitution," *ADCO Indus. — Techs.*, 2020 USPQ2d 53786, at *9 (citations omitted), "in addressing a constitutional challenge, an agency may properly address the statutes that it administers." *Texas With Love*, 2020 USPQ2d 11290, at *7 n.8 (quoting *ADCO Indus. — Techs.*, 2020 USPQ2d 53786, at *9). *See also* TBMP Section 102.01 ("Where a party raises a constitutional claim, the Board may address the claim or issues raised by the claim, including any factual or statutory premises underlying the claim.").

1. Applicant's Viewpoint Discrimination Claim

Applicant argues that

[t]o get to the alleged "informational message" of the subject mark, the Office is being viewpoint discriminatory, evaluating whether the message conveyed is "good" or "bad," which is transparent since the Office admits it intended to reject the mark as being "scandalous/immoral" on the factual basis stated in the February 28, 2018 Office Action, which asserted as fact, "Here, the vulgar and scandalous meaning of NIGGA will be *the only perceived connotation* of that term when used in connection with the identified goods and services." Now, the Office asserts all possible meanings of the word hoping one will stick, including the "sometimes offensive" second dictionary definition, which depends on the race of the speaker and remains the very viewpoint discrimination prohibited in *Matal v. Tam*.

4 TTABVue 12 (emphasis in original).

Applicant further argues that the “Final Office Action attributes a certain type of speech – that it is ‘sometimes offensive’ – to Applicant’s mark and thereafter uses unconstitutional viewpoint discrimination as an improper basis for rejection,” 4 TTABVue 17, and that the “Final Office Action makes the same unconstitutional argument that the Office made in Serial No. 85472044 for the mark ‘THE SLANTS,’ the subject of *Matal v. Tam*,” specifically, an argument

made under the guise of an “ordinary, familiar, well-recognized concept or sentiment” but the unconstitutional line of reasoning is the same – because the viewpoint of the speech contained in this mark is commonly known to be “hate” of a race or ethnicity or “love” of a race or ethnicity it cannot be registered (the same principle as the “immoral or scandalous” and “disparaging” provisions of the Lanham Act that were found unconstitutional under the First Amendment).

Id.

Applicant also contends that a “refusal to register based on ‘ideas that offend,’ such as ‘hate’ or giving offense to one or more racial groups, discriminates based on viewpoint, in violation of the First Amendment, *id.* at 16, that a “federal trademark registration cannot be denied based on the speech’s expressive features under any portion of the Lanham Act, and to do so is unconstitutional under the First Amendment,” *id.*, and that the final refusal “has attempted to undergird its argument based on the ‘viewpoint’ of the speech the Office associates with the mark, but ‘viewpoint discrimination’ is forbidden.” *Id.* at 18.

Applicant’s arguments misapprehend the nature of the failure-to-function refusal. The refusal is grounded in the statutory definition of a trademark and focuses on whether the matter sought to be registered would be perceived as a mark for the

identified goods. Applicant's proposed mark NIGGA happens to be a racial epithet, but it was not refused registration **because** it is a racial epithet or because of any views that it may express. It was refused because it is a **commonly understood word** that is **so commonly used** by others in connection with clothing that consumers will not perceive it as a means to distinguish Applicant's clothing from clothing offered by others and to identify Applicant as the sole source of clothing bearing the word NIGGA. The evidence shows that NIGGA does not function as a mark for the goods and therefore cannot be registered.

Applicant also offers no evidence that due to the offensive nature of Applicant's proposed mark, the USPTO applied a different failure-to-function analysis in refusing registration of NIGGA from the one that it has applied in other failure-to-function cases, or that it otherwise treated NIGGA differently from the proposed marks in those cases. A review of our recent failure-to-function cases shows just the opposite.

Within the past several years alone, the Board has affirmed failure-to-function refusals involving proposed marks expressing a wide range of sentiments, including (1) GOD BLESS THE USA, an invocation that has surely crossed the lips of millions of Americans as well as those of Presidents of both political parties, who have regularly uttered it at the end of speeches, because it was displayed "not as a source indicator, but as an expression of patriotism, affection, or affiliation with the United States of America," *Greenwood*, 2020 USPQ2d 11439, at *3; (2) TEXAS LOVE, which served to "convey[] support for, or affiliation or affinity with, the State of Texas," a sentiment undoubtedly shared by millions of residents of the country's second-most

populous state, “rather than [to function] as a mark signifying a particular source of hats and shirts,” *Texas With Love*, 2020 USPQ2d 11290, at *5-6; (3) TEAM JESUS, “a commonplace message of Christian affiliation,” *Team Jesus*, 2020 USPQ2d 11489, at *6, an affiliation shared by many millions of Americans, because “consumers will not perceive the widely-used message TEAM JESUS as distinguishing Applicant’s goods and services in commerce and indicating their source,” *id.* at *7, and (4) INVESTING IN AMERICAN JOBS, a statement “to convey support for American-made goods,” *Wal-Mart Stores*, 129 USPQ2d at 1152, because it “would not be recognized as indicating source.” *Id. See also Peace Love World Live*, 127 USPQ2d at 1403-04 (the “phrase ‘I LOVE YOU’ conveys a term of endearment” and thus “consumers will not perceive I LOVE YOU appearing on bracelets as pointing uniquely to Applicant as a single source.”).

In assessing the registrability of the proposed marks in these cases and in the Board’s other failure-to-function cases, the Board did not consider whether, in Applicant’s words, “the message conveyed [was] ‘good’ or ‘bad,’” 4 TTABVUE 12, but instead determined whether each proposed mark functioned as an indicator of source solely in view of the understood meaning of each proposed mark and the record evidence of its use by third parties. Here, the USPTO similarly (and properly) determined that NIGGA does not function as a mark for clothing, and we reject Applicant’s viewpoint discrimination claim as legally and factually meritless.

2. Applicant’s Disparate Treatment Claim

Applicant suggests that the USPTO has engaged in some form of discrimination in refusing to register NIGGA. Applicant argues that a “refusal of the mark NIGGA

deprives African-Americans from reclaiming a commonly offensive racial slur, while the Office, and the Supreme Court, has allowed other common racial slurs to be reclaimed to function as a trademark if directed toward people of Asian descent, or Native American Indians, or Jews,” and that “[t]here is no reason to treat African-Americans differently.” 4 TTABVUE 24.⁸⁷ Applicant further argues that “[o]ther than the group toward which the slur is directed, there exists no substantive difference between the subject mark NIGGA and the marks THE SLANTS (a commonly offensive racial epithet, directed toward people of Asian descent), REAL NIGGAS (comprising a commonly offensive racial epithet), KIKE (a commonly offensive racial epithet, directed toward Jews), HEEB (a commonly offensive racial epithet, directed toward Jews), and REDSKINS (a commonly offensive racial epithet, directed toward people of American Indian descent).” *Id.* at 22. Finally, Applicant admonishes the USPTO that it “must carefully avoid participation in systemic racism,” *id.*, and concludes that “the Office appears mired in racial bias.” *Id.*⁸⁸

The equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution requires the USPTO, as a federal agency, not to discriminate against applicants based on their race or their

⁸⁷ We note that this argument is contrary to the record, which reflects many usages of the term NIGGA on goods within the identification in this application in ways that are consistent with “reclaiming” this term from reflecting only a slur. As noted above, Applicant, like these third parties, is not precluded from using the term on the identified goods for whatever purpose Applicant wishes merely because a registration was not obtained.

⁸⁸ With regard to this claim against the agency of very serious misconduct, we find that the handling of the application demonstrates its review on the basis of trademark principles and only such principles.

membership in another protected class. *See In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009) (affirming Board’s rejection of claim brought by a member of the Shinnecock Indian Nation that the refusal of his application under Section 2(a) on the ground that his mark falsely suggested a connection with the Nation denied him equal protection because registrations of other marks involving Indian tribe names had issued to non-Indians); *cf. Texas With Love*, 2020 USPQ2d 11290, at *7 (rejecting equal protection claim that in denying registration of TEXAS LOVE in the face of registrations of FLORIDA LOVE, CALIFORNIA LOVE, VERONA LOVE, BURMA LOVE, SOUTHERN LOVE, EAST COAST LOVE, EAST COAST LOVE, and WAIKIKI LOVE, owned by citizens of Florida, California, Nevada, Maine, and Hawaii, “the USPTO treats Texas citizens like [the applicant] differently from those of Florida, California, Nevada, Maine and Hawaii in ‘contextually identical’ situations.”).

The gist of Applicant’s disparate treatment claim, however, involves the USPTO’s treatment of its mark vis-à-vis other marks, not the USPTO’s treatment of Applicant specifically, or African-Americans generally, vis-à-vis other applicants. Applicant argues that the USPTO “appears to have singled out this NIGGA mark specifically for disparate treatment because of its **offensiveness**.” *Id.* at 23 (emphasis added). Applicant claims that “[f]rom all appearances, this mark NIGGA seems to have been targeted for disparate treatment, especially compared to other similar common racial epithets that have registered,” *id.* at 24, and that “[b]ecause the Office has articulated **no reason** to treat NIGGA differently than the other similar and common racial

epithets allowed and registered (even REAL NIGGAS), there is no substantial evidence to support a different treatment of the standalone NIGGA mark.” *Id.* at 25 (emphasis in original). Notwithstanding Applicant’s accusation that the USPTO appears to be “mired in racial bias,” Applicant’s discrimination claim is based on the USPTO’s alleged disparate treatment of different marks, not different persons or groups of persons, as illustrated in part by Applicant’s citation of the registration of REAL NIGGAS.

Applicant provides a table of “racial and ethnic slurs” that have been registered, *id.* at 21, and argues that “[s]imilar marks must be treated similarly under *Matal v. Tam*,” and that the USPTO and the Board “are required to register marks, including common racial epithets, with an expressive component functioning as a trademark, despite the Final Office Action noting that prior decisions and actions of other trademark examining attorneys in registering other marks have little evidentiary value and are not binding” on the USPTO or the Board. *Id.* at 22.

As discussed above, we have given no consideration to the specific registrations listed in the table because they were not timely made of record, but Applicant did make of record Mr. Tam’s registration of the mark THE SLANTS.⁸⁹ Applicant argues that “[o]ther than the group toward which the slur is directed, there exists no substantive difference between the subject mark NIGGA and the mark[] THE SLANTS (a commonly offensive racial epithet, directed toward people of Asian descent),” *id.*, and that “[i]f there is a difference between the mark NIGGA” and other

⁸⁹ March 5, 2020 Response to Office Action at TSDR 22-25.

racial slurs such as THE SLANTS, “the difference is arbitrary and the standard for differentiation so vague that it has not been and cannot be articulated by the [USPTO].” *Id.*⁹⁰

Applicant claims that the USPTO’s “treatment of common racial epithets appears, at best, arbitrary and rife with inconsistency and, at worst, the Office appears to have singled out this NIGGA mark specifically for disparate treatment because of its offensiveness.” *Id.* at 23. Applicant’s arguments again miss the mark. As explained above, *Tam* does not require the USPTO to register every racial slur simply because of its nature, and with respect to prior registrations of THE SLANTS and other offensive or racially tinged terms, the USPTO “must assess each mark on the record of public perception submitted with the application.” *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). The USPTO’s registration of other offensive or racially tinged terms, on the basis of records and circumstances that are not before us in this case, does not bind either the Examining Attorney or us.⁹¹ *Id.*;

⁹⁰ Applicant argues that “[a]rbitrariness is inherent in a racial epithet being determined ‘offensive’ versus ‘commonly offensive,’” 4 TTABVUE 22, and that the “inarticulable, arbitrary, vague standard – to arbitrarily declare one common racial epithet directed to ‘Group A’ contains an expressive component and functions as a trademark, while another common racial epithet directed to ‘Group B’ contains ‘no’ expressive component and cannot function as a trademark – is therefore unconstitutional.” *Id.* at 23. As explained above, the issue is not whether NIGGA contains an “expressive component,” but rather whether it functions as a mark—as required by the statute—in view of the common understanding of the word and its widespread use in connection with the identified goods, applying the analysis set forth clearly in multiple Board cases and articulated by the Examining Attorney as whether the word constitutes a “commonplace term widely used by a variety of sources that merely conveys an ordinary, familiar, well-recognized concept or sentiment.” 6 TTABVUE 5.

⁹¹ Applicant “specifically notes that the subject NIGGA mark has been refused, while the marks identified in the chart of **Section 5**, above, have registered, including later-filed REAL NIGGAS.” 4 TTABVUE 24 (emphasis in original). We agree with the Examining Attorney that it is “insufficient to point to applications or registrations that happen to contain the

cf. Texas With Love, 2020 USPQ2d 11290, at *7-8 (rejecting applicant’s reliance on prior registrations because they did not reveal, inter alia, “how the marks are used in connection with the registrants’ goods and services; whether third parties use the same or similar marks, and, if so, how; whether the marks convey particular meanings or commercial impressions, and if so what those meanings or impressions are,” and that “without that information, there is no support for Applicant’s contention that the refusal of its application was rendered in a situation that is “contextually identical” to the circumstances leading to the allowance of these other registrations..”). While we recognize that consistency in examination “is highly desirable,’ . . . consistency in examination is not itself a substantive rule of trademark law, and a desire for consistency with the decisions of prior examining attorneys must yield to proper determinations under the Trademark Act and rules.” *Ala. Tourism Dep’t*, 2020 USPQ2d 10485, at *11 (quoting *In re Am. Furniture Warehouse Co.*, 126 USPQ2d 1400, 1407 (TTAB 2018)). In any event, “[w]e do not believe that our decision here is inconsistent with the registration of the third-party marks cited by Applicant, but to the extent that it is, it is the decision required under the statute on the record

Applicant’s mark but that also include additional matter, such as the Applicant’s reference to REAL NIGGAS, given that such marks are different and, thus, would and should be treated differently.” 6 TTABVue 11 (footnote omitted). Moreover, the fact that the referenced marks registered without refusals of their applications cannot bind us in determining the registrability of NIGGA on the record before us on this appeal. *See, e.g., In re Ala. Tourism Dep’t*, 2020 USPQ2d 10485, at *9-11 (TTAB 2020). Finally, as previously noted, this argument appears to focus on disparate treatment of allegedly similar marks, not disparate treatment of applicants based on criteria that would trigger heightened constitutional scrutiny.

before us.” *Id.* We reject Applicant’s disparate treatment and examination inconsistency claims as legally and factually meritless.

D. Summary

There is no constitutional right under the Supreme Court’s decision in *Tam* or otherwise to register a racial epithet merely because of its offensive and expressive nature. The record shows that “nigga” is a commonly understood slang term in the United States English vernacular that refers to Black persons either negatively or (in the view of some persons) positively, depending on context, and that it has been widely used in an ornamental fashion on clothing offered by multiple third parties. We find, based on the ample evidence in this record, that NIGGA does not function to identify Applicant as the sole source of clothing bearing the word under Sections 1, 2, and 45 of the Trademark Act, and we further hold that the refusal to register did not violate the First Amendment because it did not discriminate against the message conveyed by the proposed mark. The fact that various USPTO examining attorneys have allowed registration of other racial epithets does not require the USPTO to register this one where, on the record in this case, the evidence shows, the Examining Attorney determined, and we now find, that NIGGA would not be perceived as designating a single source for the identified goods.

Decision: The refusal to register is affirmed.