

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: December 11, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re The RealReal, Inc.*  
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Serial No. 97232753  
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Andrew C. Palmer and Amir V. Adibi of Adibi IP Group, PC,  
for The RealReal, Inc.

Jacob Magit, Trademark Examining Attorney, Law Office 111,  
Chris Doninger, Managing Attorney.

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Before Goodman, Lebow and Stanley,  
Administrative Trademark Judges.

Opinion by Lebow, Administrative Trademark Judge:

Applicant, The RealReal, Inc., appeals the Trademark Examining Attorney's final refusal to register the term FIRST LOOK as a service mark on the Supplemental Register for use in connection with

Membership club services in the nature of providing discounts to members in the field of retail of luxury goods, in International Class 35,<sup>1</sup>

on grounds that it is generic and fails to function as a mark.

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<sup>1</sup> Application Serial No. 97232753 was filed on January 21, 2022 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant's claim of first use anywhere and in commerce since at least as early as May 17, 2012.

## I. Background

Applicant originally applied to register FIRST LOOK on the Principal Register, claiming acquired distinctiveness of the term under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), based on five or more years of substantially exclusive and continuous use in commerce.<sup>2</sup> However, the Examining Attorney refused registration on the ground that FIRST LOOK is merely descriptive, and Applicant's Section 2(f)-affidavit claiming acquired distinctiveness is insufficient to overcome the refusal "because the applied-for mark is highly descriptive of Applicant's services."<sup>3</sup>

After the original refusal and Section 2(f) objection were made final, Applicant amended the Application to seek registration on the Supplemental Register.<sup>4</sup> The Examining Attorney nevertheless maintained the descriptiveness refusal and added two new ones: genericness under Sections 23(c) and 45 of the Trademark Act, 15 U.S.C. §§ 1091(c), 1127, and failure to function under Sections 1, 2, 3, and 45 of the Trademark Act §§ 1051-1053, 1127.<sup>5</sup> Applicant argued against these new refusals, but the Examining Attorney was unpersuaded and thereafter maintained and made final only these new refusals.<sup>6</sup>

Applicant appealed, as noted above, and its request for reconsideration of the new

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<sup>2</sup> January 21, 2022 Application. Citations to the prosecution file are to the USPTO's Trademark Status & Document Retrieval ("TSDR") system. Citations to the appeal record are to TTABVUE, the Board's online docketing system. *See, e.g., Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

<sup>3</sup> June 27, 2022 Office Action.

<sup>4</sup> January 26, 2023 Final Office Action; February 15, 2023 Request for Reconsideration.

<sup>5</sup> June 23, 2023 Office Action.

<sup>6</sup> December 26, 2023 Office Action Response; January 27, 2024 Final Office Action.

refusals was denied.<sup>7</sup> The appeal then resumed; Applicant and the Examining Attorney filed their respective briefs; and the case is now ready for decision. For the reasons discussed below, we affirm the refusal based on failure to function and do not reach the genericness refusal.

## **II. Failure to Function**

### **A. Applicable Law**

“Consistent with trademark law’s basic purpose, the lead criterion for registration is that the mark in fact serves as a ‘trademark’ [or service mark] to identify and distinguish goods [or services].” *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 599 U.S. 189, 2023 USPQ2d 677, at \*11 (2023). Accordingly, the USPTO “is statutorily constrained to register matter on the Principal Register if and only if it functions as a mark.” *In re Brunetti*, 2022 USPQ2d 764, at \*15 (TTAB 2022) (affirming refusal to register the proposed mark FUCK for various goods and services because it failed to function as a mark), *appeal docketed*, No. 23-1539 (Fed. Cir. Feb. 27, 2023).

“One way a proposed mark fails to function is if consumers will view it as a merely informational slogan or phrase instead of something that ‘point[s] out distinctively the origin of the goods [or services] to which it is attached.’” *Id.* at \*16 (quoting *In re Bose Corp.*, 546 F.2d 893, 192 USPQ 213, 215 (CCPA 1976)). “Matter may be merely informational and fail to function as a trademark if it is a common term or phrase that consumers of the goods or services identified in the application are accustomed

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<sup>7</sup> 1 TTABVUE (Notice of Appeal); April 29, 2024 Request for Reconsideration; 4 TTABVUE (Request for Reconsideration).

to seeing used by various sources to convey ordinary, familiar, or generally understood concepts or sentiments.” *Id.*, at \*17. “Such widely used messages will be understood as merely conveying the ordinary concept or sentiment normally associated with them, rather than serving any source-indicating function.” *Id.*, at \*17-18 (citations omitted).

“The critical inquiry in determining whether a proposed mark functions as a trademark ... is how the relevant public perceives it.” *Id.*, at \*18 (quoting *Univ. of Ky. v. 40-0, LLC*, 2021 USPQ2d 253, at \*13 (TTAB 2021) (internal citation omitted)). When “there are no limitations on the channels of trade or classes of consumers of the [goods or services] identified in the application, the relevant consuming public comprises all potential purchasers of [such goods or services] ....” *In re Mayweather Promotions, LLC*, 2020 USPQ2d 11298, at \*7 (TTAB 2020)). Here, because there are no limitations on the services identified in the Application, “the relevant public comprises all potential purchasers of the goods or services.”<sup>8</sup> *See In re Team Jesus LLC*, 2020 USPQ2d 11489, at \*3 (TTAB 2020) (“In this case, because there are no limitations to the channels of trade or classes of consumers, the relevant consuming public comprises all potential purchasers of the identified goods and services.”).

To determine whether a proposed mark functions as a mark, “we look to [any] evidence of record showing how the designation is actually used in the marketplace.” *Brunetti*, 2022 USPQ2d 764, at \*18-19 (quoting *In re Texas With Love, LLC*, 2020 USPQ2d 11290, at \*5 (TTAB 2020) (quoting *In re Eagle Crest Inc.*, 96 USPQ2d 1227,

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<sup>8</sup> 8 TTABVUE 3 (Examining Attorney’s Brief).

1229 (TTAB 2010))). “Consumers ordinarily take widely-used, commonplace messages at their ordinary meaning, and not as source indicators, absent evidence to the contrary.” *Brunetti*, 2022 USPQ2d 764, at \*19 (quoting *In re Greenwood*, 2020 USPQ2d 11439, at \*6 (TTAB 2020)).

### **B. Evidence, Argument and Analysis**

To demonstrate that FIRST LOOK fails to function as a mark, the Examining Attorney first points to the MERRIAM-WEBSTER dictionary evidence of record, which shows that FIRST means “proceeding all others in time, or, or importance,” and LOOK means “the state or form in which something appears.”<sup>9</sup> Additional, and perhaps more appropriate, definitions of “look” provided by the same MERRIAM-WEBSTER evidence include “the act of looking” and “glance.”<sup>10</sup>

In addition, the Examining Attorney provides evidence from Wikipedia explaining that a “first-look deal” is a term of art referring to “any contract containing a clause granting ... a pre-emption right, right of first refusal, or right of first offer ... to another party, who then is given the first opportunity to buy outright ... something that is newly coming into existence or on the market for the first time or after an absence.”<sup>11</sup>

The Examining Attorney also provides Internet evidence showing use of the term FIRST LOOK by at least 31 third parties in their promotion of retail membership services, including (with emphasis added):

- Sixteen92 (sixteen92.com), which provides “Circle,” an “annual subscription services featuring a year of seasonal fragrance collections

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<sup>9</sup> *Id.* at 3 (citing June 27, 2022 Office Action, at TSDR 12).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* (citing June 27, 2022 Office Action, at TSDR 10).

delivered to your door” and “Exclusive **first-look access** to all four seasonal collections” with “20% off seasonal fragrance collections, plus additional exclusive savings and special deals on other items throughout the year”;<sup>12</sup>

○ Kulas Customs LLC, a CNC machine shop specializing in AR platforms which (as promoted on perksnpartners4u.com), provides “Member Discount: Exclusive **first look** access” to its pre-release inventory;<sup>13</sup>

○ MeUndies, an apparel provider which, as promoted on hellosubscription.com), provides a swim collection exclusively for members, and offers a savings of 15% on a first shop order where “Members get an exclusive **first look** at our newest collection”;<sup>14</sup>

○ Surfstich, an apparel provider, which sent its subscribers an email telling them “You’re A VIP – You Get **First Look**” providing them “VIP EARLY ACCESS” and “30% OFF ALMOST EVERYTHING”;<sup>15</sup>

○ Janie and Jack, a children’s apparel company that, on the website milled.com, promotes a “**First look**: sale on sale, extra 20% off”;<sup>16</sup>

○ Metrograph (metrograph.com), which offers a one-year gift membership for its curated streaming services that includes “Members only previews, exclusive invitations and **first-look** tickets” from its 7 Ludlow St. theater”;<sup>17</sup>

○ Lovesac (lovesac.com), a furniture provider, which promotes the benefits of its trade membership program that provides, among other things, a 20% discount with no minimum purchase and “new catalogs that showcase an exclusive **first look** at [its] new products”;<sup>18</sup>

○ Just For Men (justformen.com), a men’s hair care provider, promotes the benefits of its membership subscription services by providing early

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<sup>12</sup> June 27, 2022 Office Action, TSDR 5.

<sup>13</sup> *Id.* at 6.

<sup>14</sup> *Id.* at 7.

<sup>15</sup> *Id.* at 8.

<sup>16</sup> *Id.* at 9.

<sup>17</sup> January 26, 2023 Office Action, TSDR 6.

<sup>18</sup> *Id.* at 7.

savings, guided tips for hair, and “**First look** at new products & features”;<sup>19</sup>

○ Inside Golf (golf.com), which provides membership subscription services that includes, among other things, “Access to exclusive members only content,” “Access to members-only merchandise” and “Members-**first look** at exclusive product launches”;<sup>20</sup>

○ Einstein Bros (einsteinbros.com), a bagel retailer, which offers membership rewards with benefits that include points that may be redeemed for food and beverage, as well as certain free items, and “Members get the **first look** at the newest and best offers!”<sup>21</sup>

○ Crocs (crocs.com), a footwear provider, which invites customer to become a “Crocs Club member” to get “the **first look** at new collections,” exclusive discounts, early sale access, and special shipping offers”;<sup>22</sup>

○ Crate & Barrel (crateandbarrel.com), a furniture and home décor provider, which provides trade program membership that includes a dedicated design team, a 20% professional discount, and “a **first look** at new seasons with our Trade Program emails”;<sup>23</sup>

○ Bondi Sushi (bondisushi.com), a Japanese restaurant, offers membership to its loyalty program, with point rewards and accounts, and “You’ll also gain **first-look** access at all things Bondi, including limited-time specials, store openings and product launches”;<sup>24</sup>

○ American Craft Council (craftcouncil.org), which promotes the benefit of its membership services that include, among other things, various discounts and “**First-look** shopping opportunities in our pop-up marketplaces”;<sup>25</sup>

○ The Yuppie Closet (theyuppiecloset.co), an apparel provider, which promotes its “member-only experience” that includes exclusive

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<sup>19</sup> *Id.* at 8.

<sup>20</sup> *Id.* at 9.

<sup>21</sup> *Id.* at 10.

<sup>22</sup> *Id.* at 11.

<sup>23</sup> *Id.* at 12.

<sup>24</sup> *Id.* at 13.

<sup>25</sup> June 23, 2023 Office Action, TSDR 6-7.

discounts and “**FIRST LOOK** at new styles from established & emerging global brands”;<sup>26</sup>

○ Huck Finn Home (huckfinnhome.com), a furniture provider, which touts the benefits of its e-club by inviting customers to “[t]ake advantage of early access and exclusive members-only sales, **first-look** at limited-access products, special coupons, in-store discounts, and early registrations to events”;<sup>27</sup>

○ AJ Crimson Beauty (ajcrimson.com), a cosmetic provider, offers Crimson Elite members 40% off regularly-priced merchandise, free shipping and lipsticks, along with “**first-look** shopping opportunities on our newest releases before anyone else”;<sup>28</sup>

○ Williams Sonoma, a kitchen and houseware provider, which offers its credit card members exclusive benefits that include, among other things, “Member-only Offers,” “Early Access to Sales & Products,” and “New Collection **First Look**”;<sup>29</sup>

○ Table 22 (table22.com), which provides a service, Pantry Box, that offers members recipe guidance, discounts on in-store purchases, and “[a] **first look** at any upcoming events, collaborations or new subscription offerings”;<sup>30</sup>

○ Ava Rose Marketplace (avarosedesignsmarketplace.com), a women’s apparel, accessories and gift provider, which offers membership services that, among other things, provide “recurring annual discounts and a **first look** at all new items”;<sup>31</sup>

○ Gentle Giant (gentlegiantltd.com) an organization of collectors, which offers members benefits that include discounts, “First to Pre-Order ANY Exclusive,” and its “**First Look** Email Program”;<sup>32</sup>

○ Tommy Hilfiger (tommy-equestrian.com), an apparel provider, which

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<sup>26</sup> *Id.* at 8.

<sup>27</sup> *Id.* at 9.

<sup>28</sup> *Id.* at 10-11.

<sup>29</sup> *Id.* at 12-13.

<sup>30</sup> *Id.* at 14-15.

<sup>31</sup> *Id.* at 16-17.

<sup>32</sup> *Id.* at 18.



offers a membership program that includes various benefits, including “**FIRST LOOK** Receive personalized newsletters on our latest product drops,” “**MEMBER EXCLUSIVES**,” and “**EARLY ACCESS**”;<sup>33</sup>

○ Rose Hill Farm (rosehillferments.com), a winery, which offers its Ferments Club members benefits that allow members to “Gain Priority Access to Limited Releases,” where “Club members get **first look** at our limited production wines/ciders including exclusive club releases and estate ciders”; a “sneak peak of upcoming releases” and “an opportunity to stock-up with the club discount before we release to the public.”<sup>34</sup>

○ Tart Optical (tartoptical.com), an optical frame provider, which offers its Club48 members a “**first look** to exclusive offers, discounts and first pick at limited releases of frames”;<sup>35</sup>

○ Kids Art Spot (kidsartspot.com), which offers “Exclusive Discounts” to its premium art members, who “receive special discount codes for Kids Art Spot products as well as an exclusive **first-look** at any new courses developed”;<sup>36</sup>

○ Linen House (linenhouse.com), a linen, bedding and housewares provider, which offers its members various benefits, including discounts and vouchers, weekly member only offers, and “**FIRST LOOK** Log in as a member & Receive **first-looks** straight to your inbox of inspiring new arrivals and incredible sales events”;<sup>37</sup>

○ Prior Attire (shoppriorattire.com), an apparel provider, which offers its VIP member “**FIRST ACCESS** to items like Louis Vuitton, Lululemon, Patagonia, Chanel, Lilly Pulitzer, Tory Burch and MORE! You get **first look** at all of the items we can never keep in stock. Our Owner goes live every Thursday to show our newest Luxury/Hot List Items!”<sup>38</sup>

○ Rafaella (rafaellastyle.com), an apparel provider, which provides benefits to members of its Perfect Fit Rewards program, including

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<sup>33</sup> *Id.* at 19.

<sup>34</sup> *Id.* at 20.

<sup>35</sup> *Id.* at 21.

<sup>36</sup> *Id.* at 22.

<sup>37</sup> *Id.* at 23-24.

<sup>38</sup> January 27, 2024 Final Office Action, TSDR 6.

“Special Offers,” “Exclusive Early Access to Major Sales,” “**First Look** at New Arrivals,” and “Private Sales Events”;<sup>39</sup>

○ Shore (shorbrand.com), an apparel provider, which offers “Members-Only Benefits” that include “**FIRST LOOK** Be the first to shop our latest drops and special capsules”;<sup>40</sup> and

○ True Classic (trueclassictees.com), an apparel provider, which offers its Inside Club members benefits that include “Exclusive deals, early access, and **first look** at new products, right in your inbox.”<sup>41</sup>

This evidence, which shows similar use of this widely-used term across a variety of industries, provides ample support for the Examining Attorney’s contention that **FIRST LOOK** will be viewed by consumers as a term that merely provides information about Applicant’s services, rather than one that distinctly points to the origin of Applicant’s services. As the evidence clearly shows, **FIRST LOOK** is a widely-used term used to describe a particular benefit of membership services, namely, a benefit that provide members with a first look at new products or services, often with the opportunity to purchase them at exclusive membership discounts. Indeed, as the Examining Attorney points out, “Applicant acknowledges in its brief that ‘businesses seem to use ‘FIRST LOOK’ to identify a benefit/perk as part of their respective membership programs.’”<sup>42</sup>

As the Examining Attorney points out further, “this informational message is consistent with Applicant’s own use of the wording in its specimen [of use]” submitted

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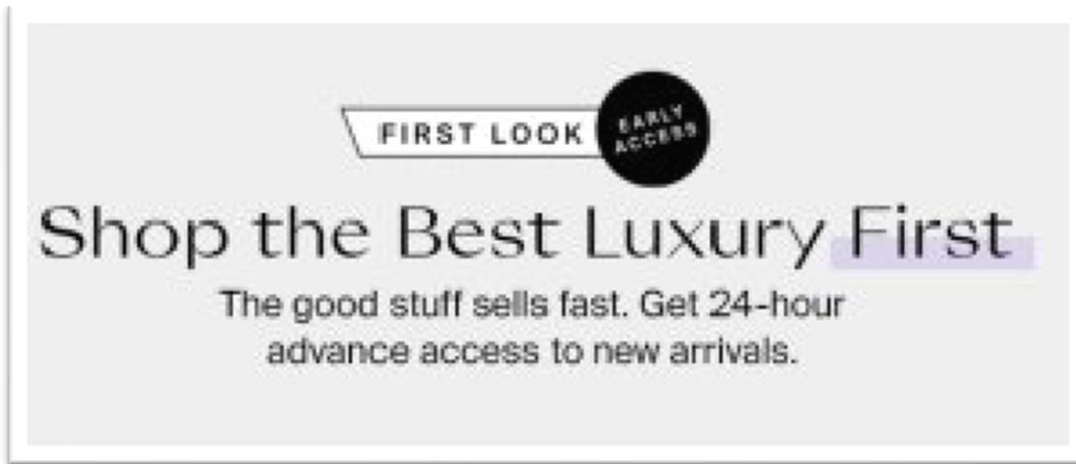
<sup>39</sup> *Id.* at 7-8.

<sup>40</sup> *Id.* at 9.

<sup>41</sup> *Id.* at 10-11.

<sup>42</sup> 8 TTABVUE 6 (Examining Attorney’s Brief); 6 TTABVUE 6 (Applicant’s Brief).

with the Application.<sup>43</sup> See *Eagle Crest*, 96 USPQ2d at 1229 (“We look to the specimens and other evidence of record showing how the designation is actually used in the marketplace.”). Specifically, “Applicant displays the wording ‘FIRST LOOK’ together with ‘EARLY ACCESS’ as a heading of the phrases ‘Shop the Best Luxury First’ and “Get 24-hour advanced access to new arrivals’,” as shown in the excerpt below:



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That Applicant may have intended the phrase FIRST LOOK to function as a mark does not make it so:

[T]he mere fact that applicant’s slogan appears on the specimens, even separate and apart from any other indicia which appear on them, does not make it a trademark. To be a mark, the term, or slogan, must be used in a manner calculated to project to purchasers or potential purchasers a single source or origin for the goods in question. Mere intent that a term function as a trademark is not enough in and of itself, any more than attachment of the trademark symbol would be, to make a term a trademark.

*In re Remington Prods. Inc.*, 3 USPQ2d 1714, 1715 (TTAB 1987). In any event, we

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<sup>43</sup> 8 TTABVUE 6 (Examining Attorney’s Brief).

<sup>44</sup> January 21, 2022 Application, TSDR 8.

agree with the Examining Attorney that Applicant's "use of the wording in this manner emphasizes the informational meaning to consumers that Applicant's memberships provide members the benefit of receiving early access to new offerings."<sup>45</sup>

Applicant, nevertheless, argues that Examining Attorney "does not provide evidence to support the phrase that the ordinary meaning of FIRST LOOK includes offering discounts for goods."<sup>46</sup> Applicant additionally asserts that:

Even if the ordinary meaning includes "discounts", FIRST LOOK is not merely informational because businesses use the phrase differently. Some business seem to provide discounts while others do not. Simply because a consumer has an opportunity to view or purchase an item first, does not mean that the item is discounted. Because of this, the evidence does not provide that the public is informed with reasonable accuracy whether or not discounts would be provided as a service of these businesses.<sup>47</sup>

These contentions, however, are misplaced because, as the Examining Attorney rightly notes,

the issue is not whether "FIRST LOOK" identifies a type of membership program, but whether consumers would view the wording as a service mark at all. In this case, the record shows that consumers would view the wording "FIRST LOOK" as informational, merely indicating that the benefits of Applicant's membership club services include the opportunity for members to purchase goods before the general public. "[I]t is the type of expression that should remain free for all to use." *In re Eagle Crest Inc.*, 96 USPQ2d at 1230.<sup>48</sup>

Applicant also argues that "the majority of the [Examining Attorney's] evidence

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<sup>45</sup> 8 TTABVUE 6 (Examining Attorney's Brief).

<sup>46</sup> 6 TTABVUE 8 (Applicant's Brief).

<sup>47</sup> *Id.*

<sup>48</sup> 8 TTABVUE 6-7 (Examining Attorney's Brief).

does not show how potential purchasers in the field of luxury goods would perceive ‘FIRST LOOK,’” and therefore, “the Examining Attorney has not shown how relevant potential consumers are accustomed to seeing this slogan as merely informational.”<sup>49</sup> We disagree and note, again, that the Examining Attorney’s evidence spans a variety of industries, including those that arguably fall within the field of luxury goods,<sup>50</sup> such as the evidence from Tommy Hilfiger, Williams Sonoma, Crate & Barrel and others.

### C. Conclusion

In sum, we agree with the Examining Attorney that “the slogan or term ‘FIRST LOOK’ would not be perceived as a mark that distinguishes Applicant’s services from those of others and identifies the source of Applicant’s services.”<sup>51</sup> Consequently, we conclude that FIRST LOOK fails to function as a mark for the identified services.<sup>52</sup>

**Decision:** The refusal to register FIRST LOOK in Application Serial No. 97232753 under Sections 1, 2, 3 and 45 of the Trademark Act is affirmed.

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<sup>49</sup> 9 TTABVUE 5 (Applicant’s Reply Brief).

<sup>50</sup> “Luxury goods” are “expensive things, such as jewelry and make-up, that are pleasant to have but are not necessary.” <https://dictionary.cambridge.org/dictionary/english/luxury-goods> (accessed December 11, 2024). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions, and we do so here. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *In re Omniome, Inc.*, 2020 USPQ2d 3222, at \*2 n.17 (TTAB 2019).

<sup>51</sup> 8 TTABVUE 7 (Examining Attorney’s Brief).

<sup>52</sup> Accordingly, we do not reach the Examining Attorney’s additional refusal that FIRST LOOK is generic for the identified services. *See Azeka Bldg. Corp. v. Azeka*, 122 USPQ2d 1477, 1478 (TTAB 2017) (the Board has “discretion to decide only those claims necessary to enter judgment and dispose of the case”) (quotation omitted).