

This Opinion is Not a
Precedent of the TTAB

Hearing: January 31, 2024

Mailed: May 22, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Kirill's Big Brain LLC
—

Serial No. 97359799
—

Claire F. Hawkins and Benjamin Hodges of Foster Garvey P.C.,
for Kirill's Big Brain LLC.

Gabrielle Marotta,¹ Trademark Examining Attorney, Law Office 103,
Stacy Wahlberg, Managing Attorney.

—
Before Lynch, Acting Deputy Chief Administrative Trademark Judge, and
Zervas and Cohen, Administrative Trademark Judges.

Opinion by Cohen, Administrative Trademark Judge:²

¹ The Application was originally assigned to Examining Attorney Jacob Vigil during prosecution. Examining Attorney Gabrielle Marotta was later assigned the Application and was present at the oral hearing. We refer to both generally as the Examining Attorney.

² As part of an internal Board pilot citation program on possibly broadening acceptable forms of legal citation in Board cases, this decision varies from the citation form recommended in the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (2023). This decision cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board and the Director, this decision includes the serial or proceeding numbers and employs citations to the WESTLAW (WL) database. To facilitate broader research, the proceeding or application number for cited Board decisions is listed. Decisions issued prior to 2008 may not be available in TTABVUE. Until further notice, however, practitioners should continue to adhere to the practice set forth in TBMP § 101.03.

Applicant Kirill's Big Brain LLC seeks registration of the proposed stylized mark

**ASSHOLES
LIVE
FOREVER**

on the Principal Register for services identified as: "online retail store services featuring clothing, jewelry, bags, gifts, home goods, hats, blankets, mugs, belts, branded gift bags, floor mats, keychains, novelty toys for playing jokes, and pillows," in International Class 35.³ Among Applicant's specimens of use (described by Applicant as a "screenshot from Applicant's website showing the mark in use with the services")⁴ are the following:

³ Application Serial No. 97359799 was filed on April 12, 2022 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), with a claim of first use anywhere and first use in commerce since at least as early as August 14, 2020. The proposed mark is described as consisting of the phrase ASSHOLES LIVE FOREVER in stylized font; color is not claimed as a feature of the proposed mark.

⁴ April 12, 2022 Application at TSDR 1. Citations to the application record are to the TRADEMARK STATUS AND DOCUMENT RETRIEVAL ("TSDR") online database. Citations to the briefs and other materials in the appeal record refer to the Board's TTABVUE online docket system.

4/12/22, 12:54 PM BEST SELLERS - Page 1 - LINDA FINEGOLD

Privacy Policy Terms

ASSHOLES LIVE FOREVER

ACCOUNT HELP CENTER FAQ CATEGORIES SALE SHIT SIZING CHARTS

FREE USA SHIPPING ON ORDERS OVER \$99

SECRET CODE VAULT CLICK HERE TO UNLOCK

PLAY RHINO JUMPER AND WIN FREE PRIZES









@LINDAFINEGOLD FOLLOW HER ON INSTA

@KIRILLAGAIN AKA SLUT WHISPERER

SHHH... WE HAVE A FREE OnlyFans

28 products

Featured Items

 <p>SOLD OUT</p> <p>ASSHOLES LIVE FOREVER BLACK SHOTGUN TOOL \$18.00</p>	 <p>Size SELECT A SIZE</p> <p>ASSHOLES LIVE FOREVER BLACK HOODIE \$65.00</p>	 <p>Size SELECT A SIZE</p> <p>ASSHOLES LIVE FOREVER BLACK TEE \$35.00</p>	 <p>SOLD OUT</p> <p>ALF ZIPPER BLACK FACEMASK \$20.00 \$10.00</p>
 <p>Size SELECT A SIZE</p> <p>NORTHERN LIGHTS TIE DYE HOODIE \$80.00</p>	 <p>Size SELECT A SIZE</p> <p>NORTHERN LIGHTS TIE DYE SWEATPANTS \$80.00</p>	 <p>Size SELECT A SIZE</p> <p>ASSHOLES LIVE FOREVER BLACKOUT HOODIE \$65.00</p>	 <p>ADD TO CART</p> <p>MAKES AMERICA NOT A BUNCH OF GUY'S OFFENDED BY SOMETHING AGAIN RED SNAPBACK \$40.00</p>

LINDA'S POVERTY CLUB









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<https://lindafinegold.com/best-sellers>

;⁵ and

⁵ April 12, 2022 Application at TSDR 3.

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 <p>Size <input type="button" value="v"/> <input type="button" value="SELECT A SIZE"/></p> <p>ANTI SOCIAL BUTTERFLY BLACK HOODIE \$65.00</p>	 <p>Size <input type="button" value="v"/> <input type="button" value="SELECT A SIZE"/></p> <p>ASSHOLES LIVE FOREVER GREY HOODIE \$70.00</p>	 <p>Size <input type="button" value="v"/> <input type="button" value="SELECT A SIZE"/></p> <p>ANTI SOCIAL BUTTERFLY BLACK TEE \$35.00</p>	 <p>Size <input type="button" value="v"/> <input type="button" value="SELECT A SIZE"/></p> <p>ASSHOLES LIVE FOREVER BLACKOUT TEE \$35.00</p>
 <p>Size <input type="button" value="v"/> <input type="button" value="SELECT A SIZE"/></p> <p>ASSHOLES LIVE FOREVER RED HOODIE \$70.00</p>	 <p>Size <input type="button" value="v"/> <input type="button" value="SELECT A SIZE"/></p> <p>ASSHOLES LIVE FOREVER \$45.00</p>	 <p>Size <input type="button" value="v"/> <input type="button" value="SELECT A SIZE"/></p> <p>ASSHOLES LIVE FOREVER BLACK TEE \$35.00</p>	 <p>Size <input type="button" value="v"/> <input type="button" value="SELECT A SIZE"/></p> <p>WARRIOR DON'T GET COLD BLACK HOODIE \$65.00</p>

<https://indafinegold.com/best-sellers> 2/3
6

The Examining Attorney refused registration of Applicant's proposed mark on the ground that it fails to function as a trademark under Sections 1, 2 and 45 of the

⁶ *Id.* at 4.

Trademark Act, 15 U.S.C. §§ 1151, 1052 and 1127⁷ because ASSHOLES LIVE FOREVER is “a commonplace term, message or expression widely used by a variety of sources that merely conveys an ordinary, familiar, well-recognized concept or sentiment.”⁸

When the failure to function refusal was made final, Applicant appealed and requested reconsideration. The request for reconsideration was denied and the appeal resumed. The case is fully briefed. An oral hearing was held before this panel on January 31, 2024. We affirm the refusal to register.

I. Initial Matter - The Board’s Prior Decision

The Examining Attorney noted the Board’s decision involving Applicant’s abandoned application for the phrase ASSHOLES LIVE FOREVER for a variety of goods. *See In re Kirill’s Big Brain, LLC*, Ser. No. 90033810, 2023 WL 334625 (TTAB 2023) (non-precedential). In that case, the Board affirmed the refusal to register ASSHOLES LIVE FOREVER for various goods including clothing. Applicant did not appeal the Board’s decision.

Applicant correctly asserts that each case must be decided on its own facts, and each proposed mark stands on its own merits.⁹ *See, e.g., In re Nett Designs, Inc.*, 236

⁷ The Examining Attorney also refused registration on the ground that the identification of services was indefinite. August 16, 2022 Office Action at TSDR 1. This refusal was withdrawn after Applicant’s amendment to the recitation of services to the recitation set forth above. *See* February 16, 2023 Response to Office Action at TSDR 2; March 9, 2023 Final Office Action at TSDR 2.

⁸ March 9, 2023 Final Office Action at TSDR 2.

⁹ 9 TTABVUE 6.

F.3d 1339, 1342 (Fed. Cir. 2001). We make clear that our decision – as was the Examining Attorney’s refusal – is based on an analysis of the evidence of record in this proceeding and pertinent law.

II. Failure to function as a mark¹⁰

The [Trademark] Act conditions the registrability of any mark on its ability to distinguish an applicant’s goods and services from those of others. *See* 15 U.S.C. §§ 1052, 1053. In other words, it is a threshold requirement of registrability that the mark “identify and distinguish” the goods and services of the applicant from those of others, as well as “indicate the source” of those goods and services. [15 U.S.C.] § 1127; *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 146, 143 S. Ct. 1578, 216 L. Ed. 2d 161 (2023) (“[A] trademark is not a trademark unless it identifies a product’s source (this is a Nike) and distinguishes that source from others (not any other sneaker brand).”); *Abitron Austria GmbH v. Hetronic Int’l, Inc.*, 600 U.S. 412, 429, 143 S. Ct. 2522, 216 L. Ed. 2d 1013 (2023) (Jackson, J., concurring) (“It is clear beyond cavil that what makes a trademark a trademark under the Lanham Act is its source-identifying function.”).

In re Go & Assocs., LLC, 90 F.4th 1354, 2023 USPQ2d 1337, at *2 (Fed. Cir. 2024).

“Not every designation adopted with the intention that it perform a trademark function necessarily accomplishes that purpose.” *In re Lizzo LLC*, Ser. No. 88466264, 2023 WL 1507238, at *3 (TTAB 2023) (quoting *In re Brunetti*, Ser. No. 88308426, 2022 WL 3644733, at *5 (TTAB 2022); *In re Tex. With Love, LLC*, Ser. No. 87793802, 2020 WL 6689657, at *4 (TTAB 2020) (quoting *In re Pro-Line Corp.*, Ser. No. 74174721, 1993 WL 398575, at *2 (TTAB 1993) (“Mere intent that a phrase function

¹⁰ Applicant “urges the U.S. Trademark Office to re-evaluate its approach to ‘merely informational’ refusals, as its current use is overly subjective, produces inconsistent results, and unfairly requires applicants to prove their marks are perceived as source identifying.” February 16, 2023 Office Action Response at TSDR 12; *see* 6 TTABVUE 25. The Board is an administrative tribunal of limited jurisdiction and in this appeal, we only determine whether Applicant can obtain a registration for its applied-for trademark. *See* TBMP § 102.01.

as a trademark is not enough in and of itself to make it a trademark.”)); *D.C. One Wholesaler, Inc. v. Chien*, Opp. No. 91199035, 2016 WL 7010638, at *6 (TTAB 2016) (granting petition to cancel registration on the Supplemental Register where “the marketplace is awash in products that display the term.”). Slogans, phrases or terms that consumers perceive as “merely informational in nature ... are not registrable.” *Brunetti*, 2022 WL 3644733, at *5 (quoting *In re Eagle Crest, Inc.*, Ser. No. 77114518, 2010 WL 3441109, at *2 (TTAB 2010)). “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 to seeing used by various sources to convey ordinary, familiar, or generally understood concepts or sentiments. 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 *7; see also *In re Mayweather Promotions, LLC*, Ser. No. 86753084, 2020 WL 6689736, at *1 (TTAB 2020) (“Widely used commonplace messages are those that merely convey ordinary, familiar concepts or sentiments and will be understood as conveying the ordinary concept or sentiment normally associated with them, rather than serving any source-indicating function”); *Tex. With Love*, 2020 WL 6689657, at *10 (holding that TEXAS LOVE would be perceived not as a source identifier, but instead as a widely-used phrase that merely conveys a well-recognized and commonly expressed concept or sentiment); *D.C. One Wholesaler*, 2016 WL 7010638, at *7 (finding I ♥ DC failed to function as a mark for clothing because it would be perceived merely as an expression of enthusiasm for the city).


“In analyzing whether a proposed mark functions as a source identifier,” the Board focuses on “consumer perception.” *In re Vox Populi Registry Ltd.*, 25 F.4th 1348, 1351 (Fed. Cir. 2022); see *Univ. of Ky.*, 2021 WL 839189, at *13 (“The critical inquiry in determining whether a proposed mark functions as a trademark is how the relevant public perceives the term sought to be registered.”) (citing *In re Greenwood*, Ser. No. 87168719, 2020 WL 7074687, at *2 (TTAB 2020)). “To make this determination we look to the specimens and other evidence of record showing how the designation is actually used in the marketplace.” *Eagle Crest*, 2010 WL 3441109, at *2. “Where the evidence suggests that the ordinary consumer would take the words at their ordinary meaning rather than read into them some special meaning distinguishing the goods and services from similar goods and services of others, then the words fail to function as a mark.” *In re Ocean Tech., Inc.*, Ser. No. 87405211, 2019 WL 6245131, at *4 (TTAB 2019) (internal punctuation omitted).

We assess whether Applicant’s proposed mark, ASSHOLES LIVE FOREVER, functions as a mark based on whether the relevant public, i.e. potential consumers of the identified retail store services, would perceive ASSHOLES LIVE FOREVER as identifying the source or origin of such services. See e.g. *Tex. With Love*, 2020 WL 6689657, at *3 (“Whether the term ... falls within this definition and functions as a mark depends on whether the relevant public, i.e., purchasers or potential purchasers of Applicant’s goods [or services], would perceive the term as identifying the source or origin of Applicant’s goods [or services].”). Where, as here, “there are no limitations on the channels of trade or classes of consumers of the [services] identified in the

application, the relevant consuming public comprises all potential [consumers of such services].” *Univ. of Ky.*, 2021 WL 839189, at *13; *In re Team Jesus, LLC*, Ser. No. 88105154, 2020 WL 7312021, at *3 (TTAB 2020).

The Examining Attorney argues that the evidence of record shows that the proposed mark ASSHOLES LIVE FOREVER “is commonly used as a rallying cry of sorts for those who self-describe as or otherwise embrace the ‘asshole’ moniker. The phrase is one of celebration and means that they will be noticed and remembered and that they or those like them will always exist.”¹¹ In support, the Examining Attorney introduced examples of the phrase ASSHOLES LIVE FOREVER used by others including:

¹¹ March 9, 2023 Final Office Action at TSDR 1.



Brand: Funny Asshole Shirts Profanity Quotes Studio

Funny Sarcastic Gift Sarcasm Quote Assholes Live Forever T-Shirt

★★★★☆ 42 ratings

\$13.98

Get Fast, Free Shipping with Amazon Prime


FREE Returns

amazon merch on demand [Learn more](#)

Fit Type: Men

Men Women

Color: Black



Size:

- Solid colors: 100% Cotton; Heather Grey: 90% Cotton, 10% Polyester; All Other Heathers: 50% Cotton, 50% Polyester
- Imported
- Pull On closure
- Machine Wash
- Funny asshole shirts for men. Cute asshole shirts for women. Asshole tshirt. Sarcastic funny tshirt joke. Funny cuss word shirts for men. Sarcastic quote shirt for women with sayings. Sarcastic tshirts for women adult humor. Sarcastic tshirt sayings men.
- Asshole husband shirt. Funny asshole gifts for husbands & boyfriends. Sarcastic gifts for men. Sarcastic gift ideas sarcasm sayings. Sarcastic gifts for women coworkers. Sarcastic gift idea for men. Cuss word gifts for women. Funny curse word gift for men.
- Lightweight, Classic fit, Double-needle sleeve and bottom hem

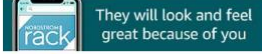
To buy, select Size

Add to Cart

Add to List


Men		Small	Medium	Large	X-Large	XX-Large	3X-Large	4X-Large	5X-Large	6X-Large
US Size		S	M	L	XL	XXL	3XL	4XL	5XL	6XL
Chest (inch)		35-37	39-40	42-44	46-48	50-52	54-56	58-60	62-64	66-68
Waist (inch)		29-31	32-34	36-38	40-42	44-46	48-50	52-54	56-58	60-62

Men's Big and Tall		Built for customers 6'7" or taller					
		2X Tall	3X Tall	4X Tall	5X Tall	6X Tall	
US Size		2XLT	3XLT	4XLT	5XLT	6XLT	
Neck (inch)		16-18.5	19-19.5	20-20.5	21-22	23-24	
Chest (inch)		50-52	54-56	58-60	62-64	66-68	
Waist (inch)		46-48	50-52	54-56	58-60	62-64	



More products with this design

Page 1 of 2



Galaxy S10 Funny Sarcastic Gift Sarcasm Quote Assholes Live Forever Case

★★★★★ 3

\$13.98



Mens Funny Sarcastic Gift Sarcasm Quote Assholes Live Forever Premium T-Shirt

★★★★★ 3

\$19.98



Funny Sarcastic Gift Sarcasm Quote Assholes Live Forever PopSockets Grip and Stand for Phones and Tablets

★★★★★ 1

\$13.98



iPhone 11 Funny Sarcastic Gift Sarcasm Quote Assholes Live Forever Case

★★★★★ 35

\$29.98



Funny Sarcastic Gift Sarcasm Quote Assholes Live Forever Pullover Hoodie

★★★★★ 9

\$15.98

Get it as soon as **Wednesday**,



Funny Sarcastic Gift Sarcasm Quote Assholes Live Forever Tank Top

★★★★★ 9

\$15.98

Get it as soon as **Wednesday**,



Womens Funny Sarcastic Gift Sarcasm Quote Assholes Live Forever V-Neck T-Shirt

★★★★★ 1

\$25.98

Get it as soon as **Wednesday**,




Funny Sarcastic Gift Sarcasm Quote Assholes Live Forever Sweatshirt

★★★★★ 1

\$25.98

Get it as soon as **Wednesday**,

¹² *Id.* at 6.



Brand: Funny Asshole Shirts Profanity Quotes Studio
Funny Gag Gift Sarcasm Saying Cute Assholes Live Forever Pullover Hoodie
 ★★★★★ 19 ratings
 \$27⁹⁸
 FREE Returns
amazon merch on demand Learn more
 Fit Type: Unisex
 Color: Black
 Size: Select ▾
 • Solid colors: 80% Cotton, 20% Polyester; Heather Grey: 78% Cotton, 22% Poly; Dark Heather: 50% Cotton, 50% Polyester
 • Imported
 • Machine Wash
 • Funny asshole shirts for men. Cute asshole shirts for women. Asshole tshirt. Sarcasm funny tshirt joke. Funny cuss word shirts for men. Sarcasm quote shirt for women with sayings. Sarcastic tshirts for women adult humor. Sarcastic tshirt sayings men.
 • Asshole husband shirt. Funny asshole gifts for husbands & boyfriends. Sarcastic gifts for men. Sarcastic gift ideas sarcasm sayings. Sarcastic gifts for women coworkers. Sarcastic gift idea for men. Cuss word gifts for women. Funny curse word gift for men.
 • 8.5 oz; Classic fit, Twill-taped neck

To buy, select Size
 Add to Cart
 Add to List

They will look and feel great because of you

Sizing Chart: Pullover Hoodie
 Adult Unisex

More products with this design



Galaxy S10 Funny Gag Gift Sarcasm Saying Cute Assholes Live Forever Case \$14.00
 Funny Gag Gift Sarcasm Saying Cute Assholes Live Forever PopSockets Grip and Stand for Phones and Tablets
 Funny Gag Gift: Sarcasm Saying Cute Assholes Live Forever Tank Top \$15.98
 Funny Gag Gift: Sarcasm Saying Cute Assholes Live Forever Long Sleeve T-Shirt ★★★★★ 2 \$14.00
 iPhone 11 Funny Gag Gift: Sarcasm Saying Cute Assholes Live Forever Case \$14.00
 Funny Gag Gift: Sarcasm Saying Cute Assholes Live Forever Sweatshirt \$25.98
 Funny Gag Gift: Sarcasm Saying Cute Assholes Live Forever T-Shirt ★★★★★ 1 \$17.00
 Mens Funny Gag Gift: Sarcasm Saying Cute Assholes Live Forever Premium T-Shirt \$19.00

13

Help their budget go farther Shop gift cards

Back to results



Assholes Live Forever 3' x 5' Flag
 Visit the Toothsome Studios Store
 ★★★★★ 5 ratings
 \$16⁹⁹
 Get Fast, Free Shipping with Amazon Prime
 FREE Returns
 Get \$50 off instantly: Pay \$0.00 \$16.99 upon approval for the Amazon Rewards Visa Card. No annual fee.
 Brand: Toothsome Studios
 Occasion: Independence Day
 Material: Polyester
 Product Dimensions: 60"L x 36"W
 Fabric Type: 100% Polyester

Roll over image to zoom in

Let your neighbors know that Assholes Live Forever when you proudly display this flag
 • Indoor or outdoor decor measures approximately 3 by 5 feet and is 100% polyester
 • Makes a great gag gift for any sarcastic friend or family member
 • Makes a perfect addition to any man cave, garage or dorm room
 • Comes with 2 grommets pre attached for quick hanging on any pole, wall space or door and ships new in manufacturers packaging

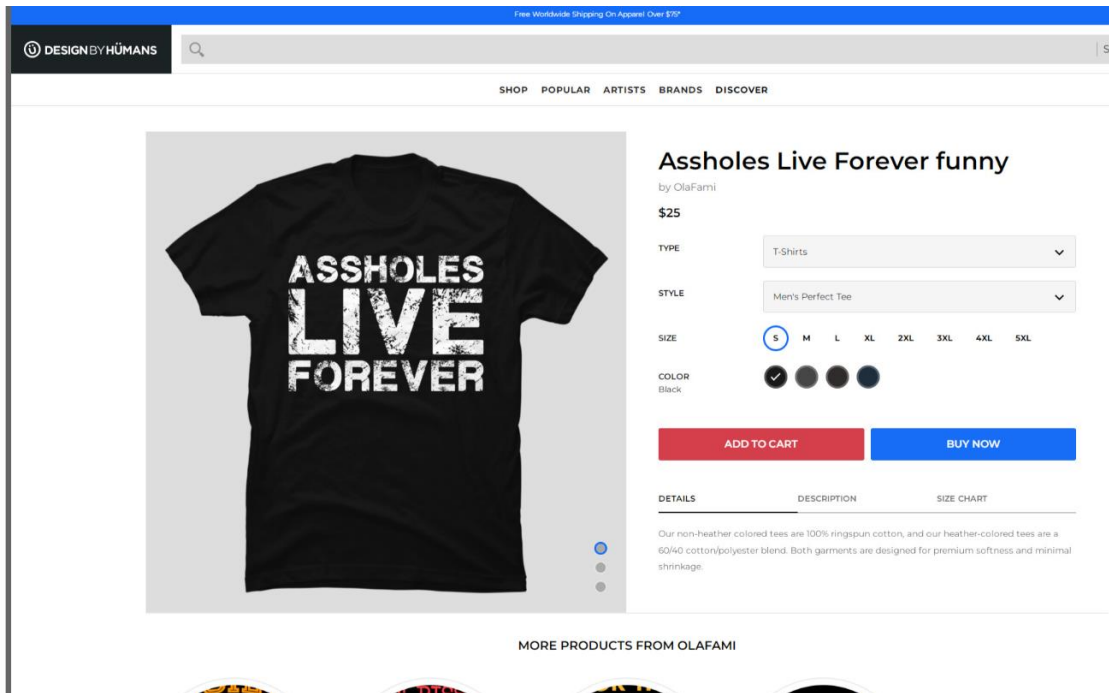
Additional Details
 Small Business
 This product is from a small business brand. Support small. Learn more

\$16⁹⁹
 Get Fast, Free Shipping with Amazon Prime
 FREE Returns
 FREE delivery Wednesday, March 15 on \$25 of items shipped by Amazon
 Or fastest delivery Saturday, March 11. Order within 7 hrs 7 mins
 Select delivery location
 In Stock
 Qty: 1 ▾
 Add to Cart
 Buy Now
 Secure transaction
 Ships from Amazon
 Sold by Toothsome Studios
 Return policy: Eligible for Return, Refund or Replacement within 30 days of receipt
 Enjoy fast, FREE delivery, exclusive deals and award-winning

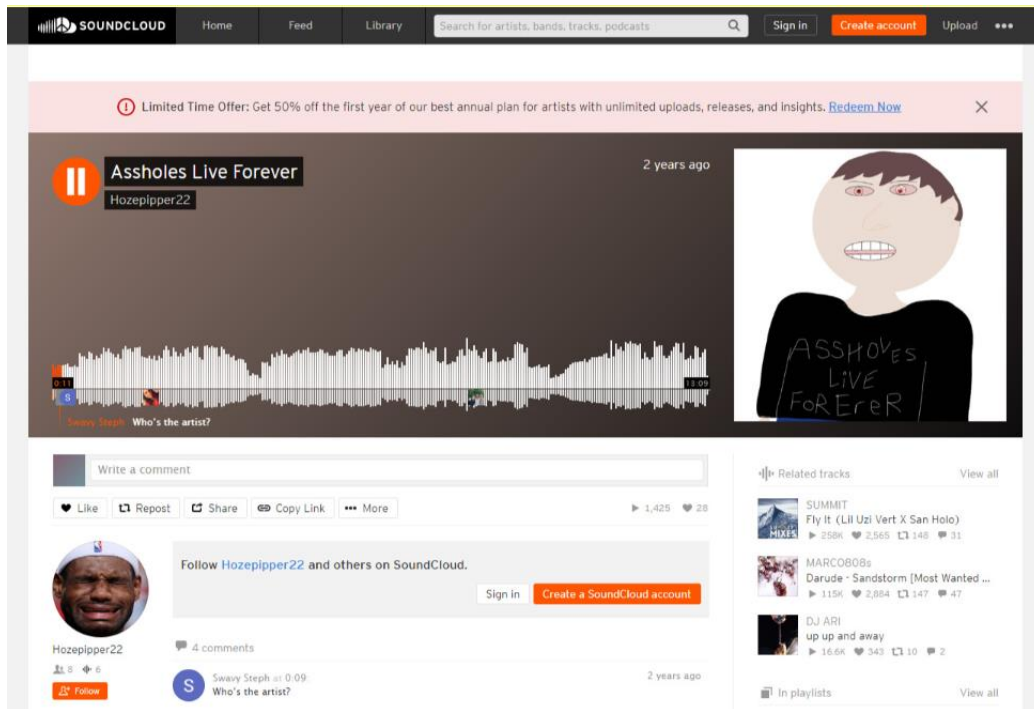
14

13 *Id.* at 17.

14 *Id.* at 23.



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¹⁵ *Id.* at 30.

¹⁶ *Id.* at 34.



Assholes Live Forever - RA ft. (Chambers x Carelessajii)

Unlisted

Ruben Campos
207 subscribers

Subscribe

17

Share

Save

More options

1K views · 1 year ago · #RASHITONLY

#RASHITONLY

Instagram: Show more

5 Comments · Sort by



Add a comment...

@sharkcitykeys 1 year ago

🔥🔥🔥

1 · Reply

@uniquelymza 1 year ago

Go nephew we love you asshole-Aunt Tuda

1 · Reply

;17

¹⁷ *Id.* at 36.

triggerlibz

Home Shop

Home > Assholes Live Forever - Men's Cotton Crew Tee



Printify Assholes Live Forever - Men's Cotton Crew Tee



\$23.99



Pay in 4 interest-free installments for orders over \$50.00 with [shop Pay](#) [Learn more](#)

Color

Solid Red

Size

L

Add to Cart

Buy with [shop Pay](#)

;18



Adjustable Apron

★★★★★ 4.6 (317 reviews)

Funny Sarcastic Gift Sarcasm Quote Assholes Live F

by [RitaHuber](#)

[Customize](#)

\$28.99

Plus shipping

Color: black



Add to cart

Add to favorites

Shipping time: [Standard Mar. 16 - Mar. 22](#)

;19

¹⁸ *Id.* at 38.

¹⁹ *Id.* at 44-45.

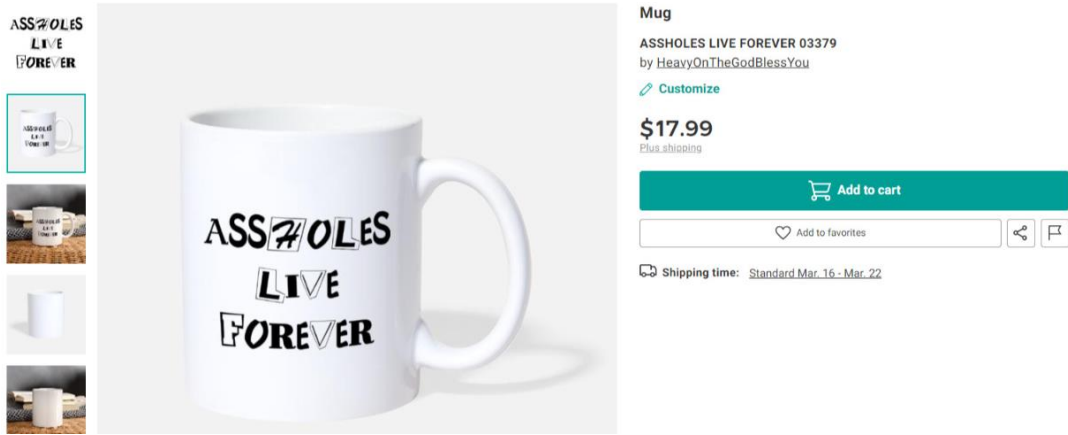
Travel Mugs
ASSSHOLES LIVE FOREVER 45
by HeavyOnTheGodBlessYou
[Customize](#)
\$22.99
Plus shipping
Color: silver
Choose an option:
Travel Mug with Handle \$22.99 Travel Mug \$26.99
Size table
Add to cart
Add to favorites
Shipping time: Standard Mar. 16 - Mar. 22
Add to cart
Add to favorites
Shipping time: Standard Mar. 16 - Mar. 22

Get this design on other products

Men Women Accessories **Home & Living** Stickers

Throw Pillow Cover 18" x 18" \$18.99
Kids' Apron \$19.99
Stainless Steel Pint Cup \$22.99
Panoramic Mug \$20.99
Artisan Apron \$28.99

²⁰ *Id.* at 51.



ASSHOLES
LIVE
FOREVER

Mug
ASSHOLES LIVE FOREVER 03379
by HeavyOnTheGodBlessYou
[Customize](#)

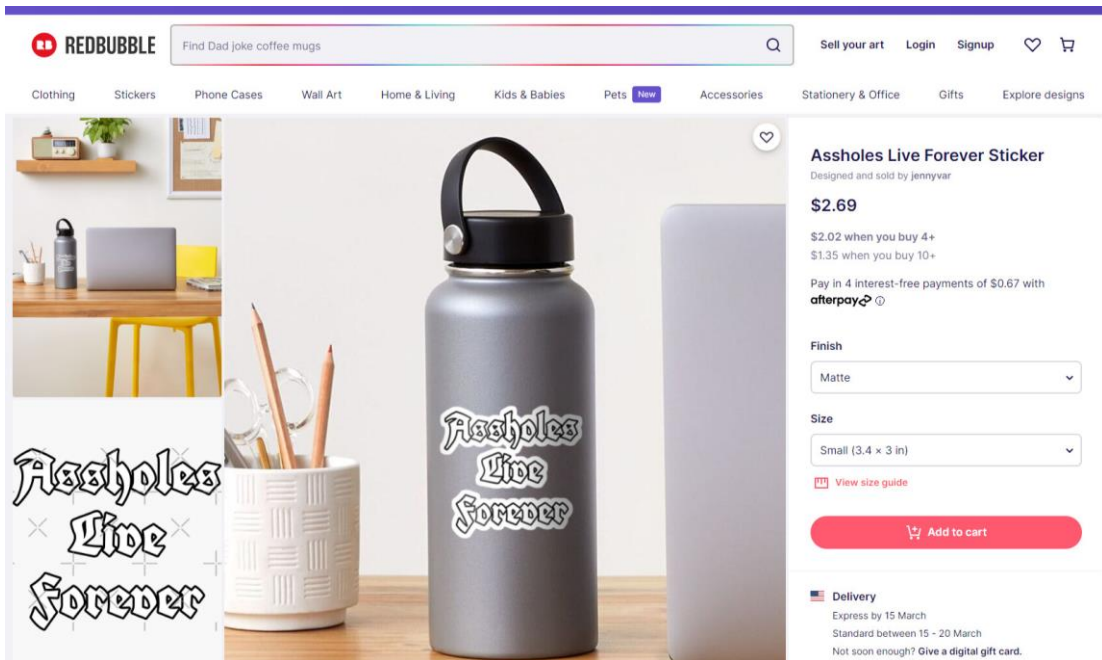
\$17.99
Plus shipping

[Add to cart](#)

[Add to favorites](#)

Shipping time: Standard Mar. 16 - Mar. 22

;21



REDBUBBLE Find Dad joke coffee mugs

Clothing Stickers Phone Cases Wall Art Home & Living Kids & Babies Pets **New** Accessories Stationery & Office Gifts Explore designs

Assholes Live Forever Sticker
Designed and sold by Jennyvar

\$2.69
\$2.02 when you buy 4+
\$1.35 when you buy 10+

Pay in 4 interest-free payments of \$0.67 with **afterpay**

Finish:

Size:

[View size guide](#)

[Add to cart](#)

Delivery
Express by 15 March
Standard between 15 - 20 March
Not soon enough? Give a digital gift card.

;22

²¹ *Id.* at 55-56.

²² *Id.* at 63.

The screenshot shows a Redbubble product page for a black zipper pouch with the text "Assholes Live Forever" in white, gothic-style font. The product is priced at \$13.54, with a note that it's \$11.51 when you buy 2+. It offers a 4-payment interest-free option with Afterpay. The page includes a search bar, navigation menu, and a delivery section indicating express shipping by March 16th.

REDBUBBLE Explore mind-warping wall art

Sell your art Login Signup

Clothing Stickers Phone Cases Wall Art Home & Living Kids & Babies Pets Accessories Stationery & Office Gifts Explore designs

Assholes Live Forever Zipper Pouch
Designed and sold by jennyvar
\$13.54
\$11.51 when you buy 2+
Pay in 4 interest-free payments of \$3.39 with afterpay

Size
Small (6 x 4 in)

Add to cart

Delivery
Express by 16 March
Standard between 16 - 21 March
Not soon enough? Give a digital gift card.

;23

The screenshot shows the Anchor by Spotify podcast page for "Bunker Fly" by Nick Pavano and Dave Gregory. The page features a podcast cover image, a description of the show as a "fly on the wall" for cringeworthy internet content, and a "Listen on Spotify" button. Below the main content, there are social media links and a "WHERE TO LISTEN" section with various platform icons. At the bottom, a specific episode titled "Assholes Live Forever - #50" is highlighted with a play button and a share icon.

Anchor by Spotify Make your own podcast for free

BUNKER FLY PODCAST

Bunker Fly
By Nick Pavano and Dave Gregory

Join self-proclaimed a**holes Nick Pavano and Dave Gregory as they delve into the internet's most cringeworthy content. With a lust for the awkward and uncomfortable and nothing off-limits—become a fly on the wall as they share uncut, unfiltered, and oftentimes unsavory stories of their lives, interview the obscure, and berate the deserving. New episodes drop bi-weekly.
— On Twitter @thebunkerfly

Listen on Spotify Message

WHERE TO LISTEN

Assholes Live Forever - #50
Bunker Fly • Jun 09, 2020


Share

;24

²³ *Id.* at 78.

²⁴ August 16, 2022 Office Action at TSDR 18.

HAMMERED BY PIA Home Catalog



Assholes live forever bracelet

\$20.00

[ADD TO CART](#)

ASSHOLES LIVE FOREVER bracelet

fuck yeah they do, can't climb to the top without stepping on some heads, right?!

Aluminum.
Tarnish free/hypo allergenic.
1/3 the weight of silver, cost friendly!
Universal.
Adjustable (but please don't bend too often, as with any metal, will make a crease.)


.25

Inspired attire: get 25% off [clothing](#) with code **INSPIRED** thru Aug. 19.

REDBUBBLE Search designs and products

Sell your art Login Signup

Clothing Stickers Masks Phone Cases Wall Art Home & Living Kids & Babies Pets **Now** Accessories Stationery & Office Gifts Explore designs



Assholes Live Forever Canvas Print

Designed and sold by Jennyvvr

\$55.46

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Standard between 23 - 29 August.

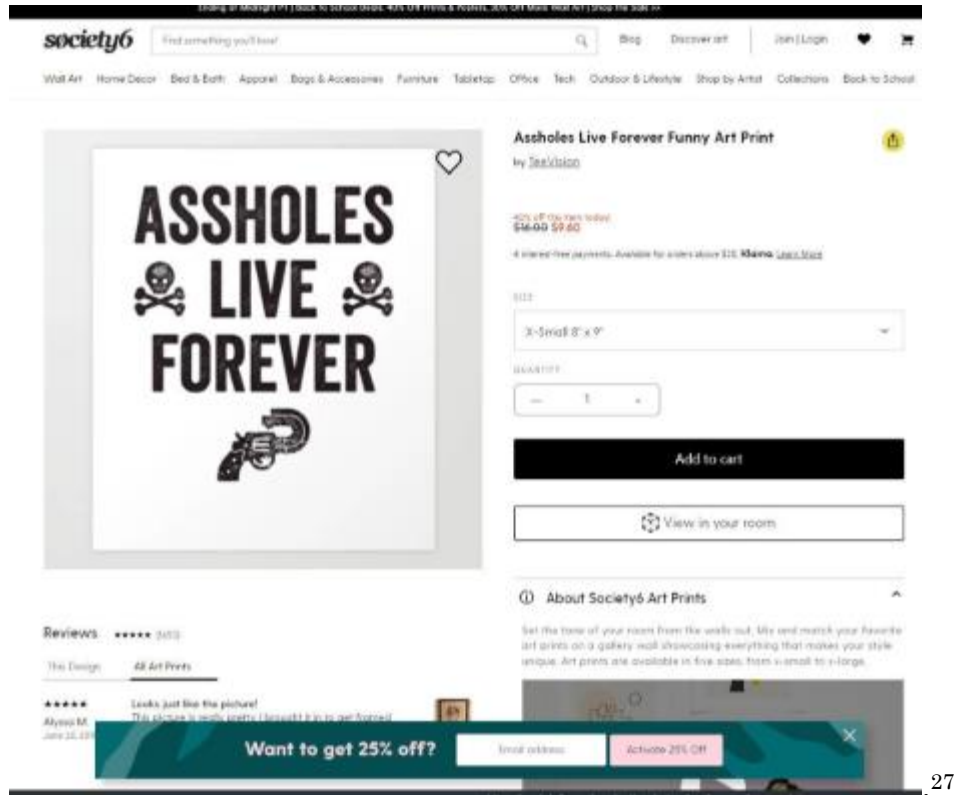
Returns are free and easy
Exchange or money back guarantee for all orders

10:30:31 AM 8/16/2022 <https://www.redbubble.com/canvas-prints/Assholes-Live-Forever-by-jennyvvr/41184840-579/V7>

.26 and

²⁵ *Id.* at 17.

²⁶ *Id.* at 16.



Applicant argues that the Examining Attorney’s evidence is limited and does not rise “to the level of ‘ubiquitous’ that is the Examiner’s burden,” as was present in other cases such as *D.C. One Wholesaler*, 2016 WL 7010638. We disagree. First, the Examining Attorney need only establish a reasonable predicate that the phrase fails to function as a mark; the Examining Attorney is not required “to prove to a moral certainty” that the phrase would not be perceived as a source-indicator. *Brunetti*, 2022 WL 3644733, at *19. “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 [or services].” *Id.* (cleaned up).

²⁷ *Id.* at 15.

Second, we find this evidence sufficient to show that consumers have been exposed to numerous third-party uses of ASSHOLES LIVE FOREVER. Several of these third-party uses refer to the phrase as “sarcastic” or “funny” or as a quotation – they support the Examining Attorney’s position – and teach consumers – that the phrase is an understood, common message.


In addition, the Examining Attorney submitted over a dozen examples of ASSHOLES LIVE FOREVER, from numerous websites, used on various goods and used as titles of podcasts and a song from different third-parties illustrating the phrase is commonly used as an expression conveying an irreverent message.²⁸

Applicant also asserts that the Examining Attorney’s evidence shows use of ASSHOLES LIVE FOREVER “in an ornamental fashion ... as ... a parody or mash-up with other memes, a clear lament ...”²⁹ This is the Examining Attorney’s point. ASSHOLES LIVE FOREVER would be perceived as a common message whether described as a parody, meme or lament; it does not indicate the source of Applicant’s services. A consumer is likely to buy the goods or services that prominently display the phrase because of the message conveyed. *Eagle Crest*, 2010 WL 3441109, at *3.

Applicant also argues that it is “using [the proposed mark] in a source-identifying way based on the size, stylization, location, dominance, and significance of the [proposed mark] as displayed in connection with Applicant’s online retail store

²⁸ See 8 TTABVUE 6.

²⁹ February 16, 2023 Office Action Response at TSDR 5.

services.”³⁰ Although Applicant’s proposed mark appears in a stylized script, we find that the stylization is of minimal significance and unlikely to transform the common message of the wording into a source-indicator by leaving a separate and distinct impression upon consumers. *See In re Serial Podcast, LLC*, Ser. Nos. 86454420, 2018 WL 1522217, at *12 (TTAB 2018) (depiction of word SERIAL in nondescript *sans serif* capital letters such as displayed in the composite logos  and  reflect very little stylization); *In re Sadoru, LTD*, 2012 WL 3875730, at *6 (TTAB 2012) (stylization in **SADORU** does not create a separate and inherently distinctive commercial impression apart from the word itself).

The fact that Applicant has applied for service mark registration does not mean that the refusal is improper – the question is whether the proposed mark is a commonplace expression that it would not be perceived a source indicator. *In re Wal-Mart Stores, Inc.*, Ser. No. 86261962, 2019 WL 193990, at *2 (TTAB 2019). Because of the nature and ubiquity of the phrase ASSHOLES LIVE FOREVER, “the mere fact that [A]pplicant’s slogan appears on the specimens, even separate and apart from any other indicia which appear on them, does not make it a trademark.” *Wal-Mart Stores*, 2019 WL 193990, at *4.

Applicant also argues that none of the examples provided by the Examining Attorney are for online retail store services but are instead ornamental uses on clothing and other goods.³¹ However, “evidence that a phrase is used to convey a

³⁰ 6 TTABVUE 5.

³¹ June 9, 2023 Request for Reconsideration at TSDR 3.

single, common sentiment or meaning across a variety of goods or services can support a finding that consumers will view the phrase as conveying that same sentiment or meaning regardless of the goods or services in connection with which it is used.” *In re Black Card LLC*, 2023 WL 8110301, at *5 (TTAB 2023). The test is not whether the proposed mark is used on goods or in connection with services but whether, upon seeing the proposed mark, the consumer will view it as conveying a message or as a source-indicator. *In re Greenwood*, 2020 WL 7074687, at *3 (TTAB 2020) (“Consumers ordinarily take widely-used, commonplace messages at their ordinary meaning, and not as source indicators, absent evidence to the contrary.”); *Mayweather*, 2020 WL 6689736, at *1 (“Widely used commonplace messages are those that merely convey ordinary, familiar concepts or sentiments and will be understood as conveying the ordinary concept or sentiment normally associated with them, rather than serving any source-indicating function”).

A consumer likely would see Applicant’s display of ASSHOLES LIVE FOREVER, not as the ASSHOLES LIVE FOREVER store, but instead (as explained below) as a section of the Linda Finegold store that sells goods that convey a provocative or vulgar message, particularly as the phrase also appears ornamentally on many of the goods sold on lindafinegold.com. Applicant’s evidence and specimens reveal use of ASSHOLES LIVE FOREVER on various clothing items, in different stylizations, for example:



**ASSHOLES LIVE FOREVER
GREY HOODIE
\$70.00**

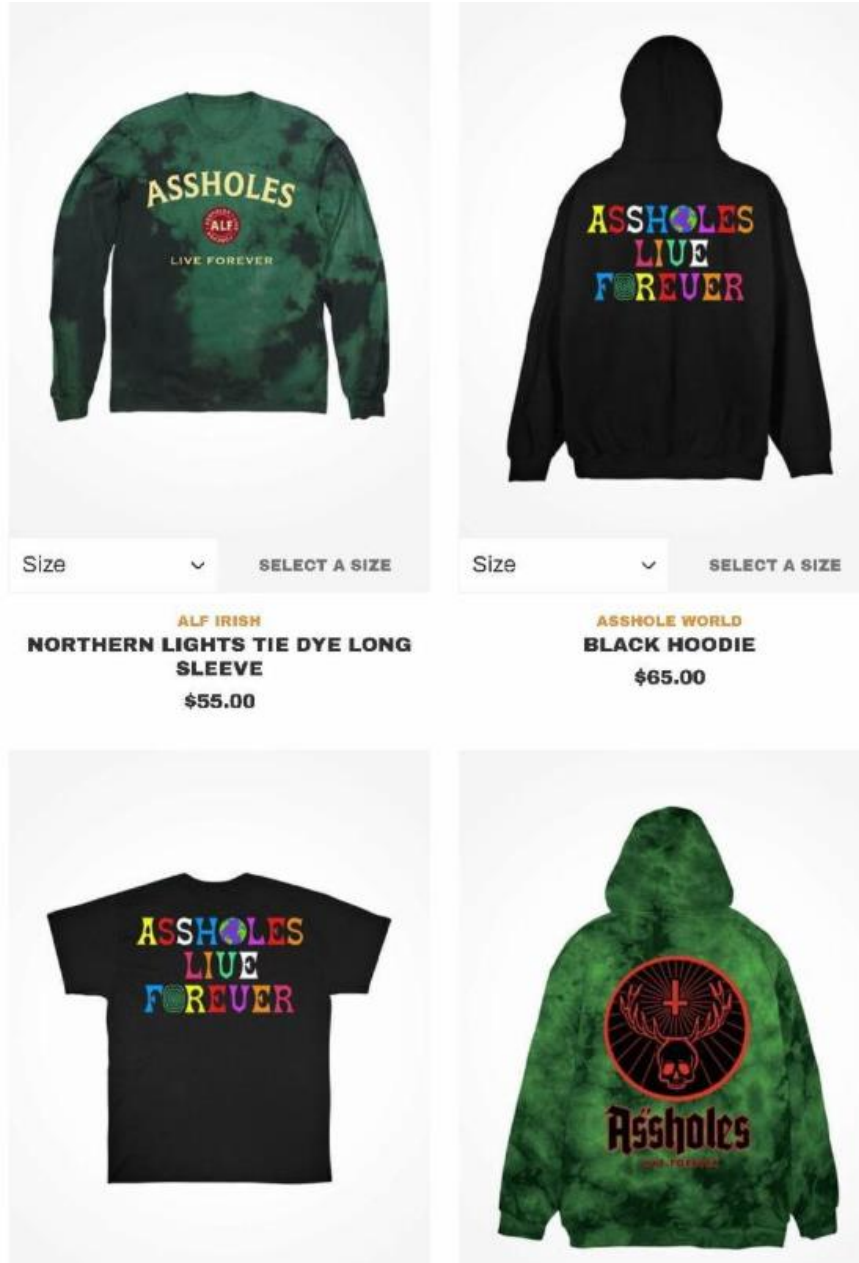


**ANTI SOCIAL BUTTERFLY
BLACK TEE
\$35.00**



;³² and

³² April 12, 2022 Specimen at TSDR 2.



Size SELECT A SIZE
ALF IRISH
NORTHERN LIGHTS TIE DYE LONG SLEEVE
\$55.00

Size SELECT A SIZE
ASSHOLE WORLD
BLACK HOODIE
\$65.00

;33

which supports the assertion that consumers are likely to perceive Applicant's proposed mark as conveying a message. *See Eagle Crest*, 2010 WL 3441109, *4 ("The manner of use on applicant's specimens as well as its other materials would likely

³³ *Id.* at 3.

reinforce the perception of ONCE A MARINE, ALWAYS A MARINE as merely an informational statement.”).

Of additional note, as demonstrated by Applicant’s specimens and evidence, is that Applicant’s online retail store emphasizes Linda Finegold as the source of the retail services, rather than ASSHOLES LIVE FOREVER. As asserted by Applicant, its “photography, event organizing, and merchandise business began promoting services and goods under the ASSHOLES LIVE FOREVER mark in 2017 in connection with its Linda Finegold storefront online and via social media.”³⁴ Applicant’s cease-and-desist letters refer to its “online storefront <https://lindafinegold.com/>” rather than referring to it as the ASSHOLES LIVE FOREVER storefront or website.³⁵ While Applicant displays ASSHOLES LIVE FOREVER at the top of some of its webpages, it is displayed in connection with the Linda Finegold online store which lists other sections of the website such as “LINDA’S BIG BOX” and “TEXT LINDA FOR FREE SHIT.”³⁶ This corroborates the likely impression of Linda Finegold or Linda as the source of the services.

Applicant argues that most of the Examining Attorney’s examples are from print-on-demand websites which carry no stock, and instead allow a consumer “to upload

³⁴ February 16, 2023 Office Action Response at TSDR 4, 81-92.

³⁵ E.g., *id.* at 177, 184.

³⁶ *Id.* at 16.

images of Applicant's logos and designs (or those similar thereto) on websites and create knockoff products"³⁷ or are "products that are knock-offs."³⁸

Regardless of the nature of the third-party businesses, they display ASSHOLES LIVE FOREVER in a manner that consumers would perceive as a message. The fact that with some of these designs, the wording may not be printed on products until an order is placed is immaterial. The products are offered for sale and consumers are exposed to ASSHOLES LIVE FOREVER displayed on those products in the marketplace. Additionally, the frequency of consumers requesting special orders with this same wording suggests that the wording is a popular expression, understood as a message, rather than as a source indicator.

Applicant continues that due to its marketing efforts, the popularity of the phrase has risen;³⁹ that because of its "substantial use and popularization of the [proposed mark] in 2017," the Examining Attorney's examples which post-date 2017 are "merely attempts to trade off Applicant's goodwill";⁴⁰ and that Applicant's evidence of lindafinegold.com website traffic and Applicant's "social media following ..., as well as third-party statements (from consumers, sellers, journalists, podcasters, etc.) demonstrat[e] consumer perception of the [proposed mark] as a source of Applicant's goods and services."⁴¹ To demonstrate its "branding and marketing efforts," Applicant

³⁷ June 9, 2023 Request for Reconsideration at TSDR 3.

³⁸ *Id.*

³⁹ February 16, 2023 Office Action Response at TSDR 5.

⁴⁰ June 9, 2023 Request for Reconsideration at TSDR 6.

⁴¹ *Id.* at 7.

relies on evidence showing the number of visitors to the lindafinegold.com website, a Wikipedia page, social media use such as Instagram, appearances on various videos and podcasts, as well as various third-party statements.⁴² This evidence is unavailing.

The Wikipedia page provided by Applicant is for Kirill Bichutsky,⁴³ not ASSHOLES LIVE FOREVER. Although it mentions, under a tab entitled “Merchandise,” that “Bichutsky has merchandise for sale by *Linda Finegold* under the *Assholes Live Forever* brand”⁴⁴ (emphasis in original), we have stated on numerous occasions that we give guarded consideration to evidence taken from Wikipedia, bearing in mind the limitations inherent in this open-source reference work. Because Wikipedia is an open-content source that may be edited by anyone, including, for example, Applicant, we find it unreliable and unpersuasive to show that ASSHOLES LIVE FOREVER is perceived as a source-indicator by consumers. *See In re IP Carrier Consulting Grp.*, Ser. No. 78542726, 2007 WL 1751192, at *4 (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”). Furthermore, there is no evidence about the exposure to consumers of this Wikipedia page. Without such evidence, we

⁴² February 16, 2023 Office Action Response at TSDR 4-5, 94-110.

⁴³ The Wikipedia page indicates that Kirill Bichutsky “(also known as The Slut Whisperer or Kirill Was Here) is a Russian-born American photographer, event organizer and entrepreneur based in New York City.” *Id.* at 94.

⁴⁴ *Id.* at 94.

cannot determine the extent of exposure, if any, or whether consumers are aware of the page.

Applicant provides visitor information from similarweb.com for the website lindafinegold.com.⁴⁵ This evidence also fails to persuade us that consumers familiar with the phrase ASSHOLES LIVE FOREVER associate it with Applicant as a source-identifier. As discussed above, because Applicant offers products that display the wording in the proposed mark, as well as other similarly cheeky messages, consumers visiting the website would perceive the use of ASSHOLES LIVE FOREVER as such a message, as well as an indication that goods featuring this wording are available. With this type of perception, even substantial web traffic would not convince us that the proposed mark is a source indicator. Regardless, Applicant's website visitor information is also unpersuasive for other reasons. The similarweb.com information indicates that 4.15 pages were viewed on average with the average visit lasting just over 3 minutes,⁴⁶ but it does not indicate which pages were viewed or what was displayed on those pages. Thus, there is no information about whether visitors to the website were exposed to the pages that display ASSHOLES LIVE FOREVER.

Applicant's evidence of third-party statements that allegedly reflect source-indication includes:

- Poshmark listings of merchandise for sale, some of which read: "produced by Linda Finegold's company assholes live forever"; "Kirill

⁴⁵ *Id.* at 4, 106-10.

⁴⁶ *Id.* at 106, 108.

was Here hat. Assholes live forever linda finegold”; and “Brand Assholes Live Forever/Linda Finegold/Kirill!”;⁴⁷

- a podcast interview with the description: “Kirill is an entrepreneur and has a clothing line ‘Assholes Live Forever’ and can find it [sic] at <http://www.lindafinegold.com>”;⁴⁸
- excerpts from posts and articles on websites MIXEDARTICLE.COM entitled “Who is Linda Finegold Owner? Face Reveal” which reads: “Seeing the fact that Linda Finegold sites predominately sell Kirill products ... Kirill’s merchandise name is Assholes Live Forever.”;⁴⁹ THETEALMANGO.COM entitled “Everything About ‘Kirill Bichutsky’ The Internet Personality” which reads: “Kirill Bichutsky has merchandise with his business partner Linda Finegold. And as expected the name of the merchandise is as cool as Kirill. Well, it’s the ‘Assholes Live Forever’ brand”;⁵⁰ TOPINFOGUIDE.COM/WIKI which reads “Bichutsky has merchandise for sale by Linda Finegold under the Assholes Live Forever brand”;⁵¹ and TVGUIDETIME.COM which reads “[Bichutsky] runs the Assholes Live Forever brand with Linda Finegold, where his product is available to be purchased”;⁵² and
- posts made on Reddit or Twitter referring to ASSHOLES LIVE FOREVER as a brand.⁵³

As noted by the Examining Attorney, some of the Reddit and Twitter posts “noting or correcting others [sic] comments to state that ASSHOLES LIVE FOREVER is a brand were made by ‘brand ambassadors’ or the like working on behalf of Applicant”⁵⁴

⁴⁷ *Id.* at 245-49.

⁴⁸ *Id.* at 250.

⁴⁹ *Id.* at 276.

⁵⁰ *Id.* at 278-79.

⁵¹ *Id.* at 280.

⁵² *Id.* at 281.

⁵³ *Id.* at 251-75; 282.

⁵⁴ 8 TTABVUE 17.

calling into question how many, if any, of the posts are from independent consumers who actually perceive ASSHOLES LIVE FOREVER as a source-identifier. Applicant counters that use of brand ambassadors shows that it “utilized this marketing strategy to further promote consumer awareness of the brand.”⁵⁵ However, we find that this strategy cuts the other way in our analysis. Applicant’s need to develop a targeted campaign to correct the commentary by ordinary, independent members of the consuming public reflects consumer perception of the wording as something other than a service mark. Regardless, whether Applicant’s third-party evidence is from brand ambassadors or not, or the evidence is otherwise generated by Applicant in an effort to promote its goods and services, “substantial sales and advertising of its product ... does not prove recognition by the public of the subject slogan as a trademark.” *In re Remington Prods., Inc.*, Ser. No. 73493829, 1987 WL 124304, at *2 (TTAB 1987). Moreover, we reject Applicant’s argument that the Examining Attorney must establish whether the activity in question was sponsored,⁵⁶ as the Court of Appeals for the Federal Circuit and Trademark Trial and Appeal Board have long recognized that “the PTO is an agency of limited resources” for obtaining evidence when examining applications for registration; the practicalities of these limited resources are routinely taken into account when reviewing a trademark examining attorney’s action. *In re Pacer Tech.*, 338 F.3d 1348, 1352 (Fed. Cir. 2003) (citations omitted); *see also In re Loew’s Theatres, Inc.*, 769 F.2d 764, 768 (Fed. Cir. 1985). The

⁵⁵ 9 TTABVUE 10.

⁵⁶ 9 TTABVUE 10 (“it is up to the Examiner to provide evidence supporting the argument that each of the posts are from brand ambassadors or paid influencers”).

Examining Attorney lacked access to such information, and Applicant was free to provide a denial of having sponsored such activity, but did not.⁵⁷

We note that most of Applicant's evidence, including the Reddit and Twitter posts, comments on the message conveyed by ASSHOLES LIVE FOREVER. For example (highlight emphasis in original):



,58

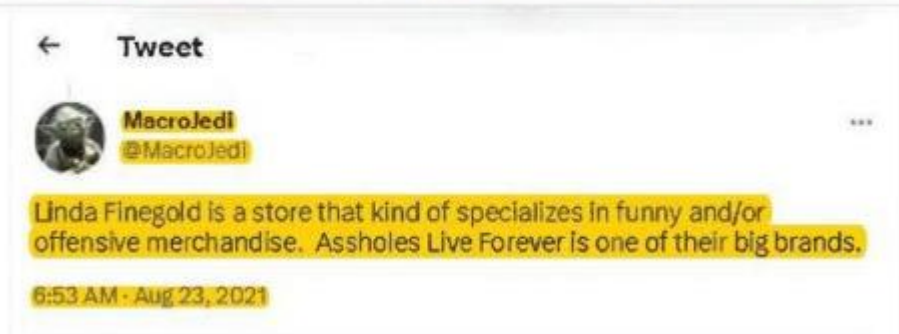
⁵⁷ *Id.*

⁵⁸ June 9, 2023 Request for Reconsideration at TSDR 52.

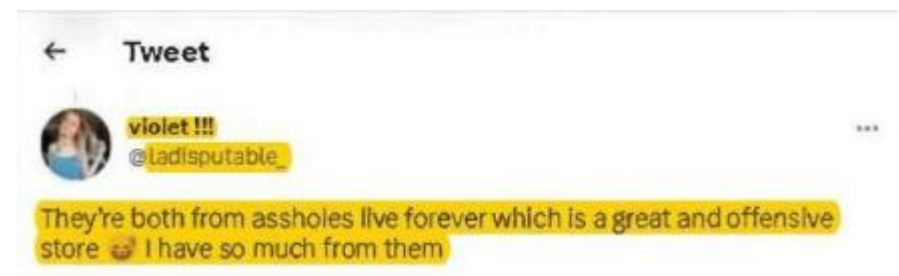


;59

aw Edge PLI PLI PLI PLUS Login PLI IP Treatises Law360 ADP



;60



;61

⁵⁹ *Id.* at 44.

⁶⁰ *Id.* at 57.

⁶¹ *Id.* at 62.



;⁶² and



.⁶³

Thus, even though some of the evidence also refers to ASSHOLES LIVE FOREVER as a brand, this evidence indicates general consumer recognition of the phrase for the message conveyed. Simply calling ASSHOLES LIVE FOREVER a brand cannot transform an otherwise unregistrable designation into a registrable mark. *Univ. of Ky.* 2021 WL 839189, at *16, *Eagle Crest Inc.*, 2010 WL 3441109, at *4.

As is evident from the record, consumers consistently understand this widely used, commonplace phrase as conveying the ordinary sentiment associated with it,

⁶² *Id.* at 64.

⁶³ February 16, 2023 Office Action Response at TSDR 260.

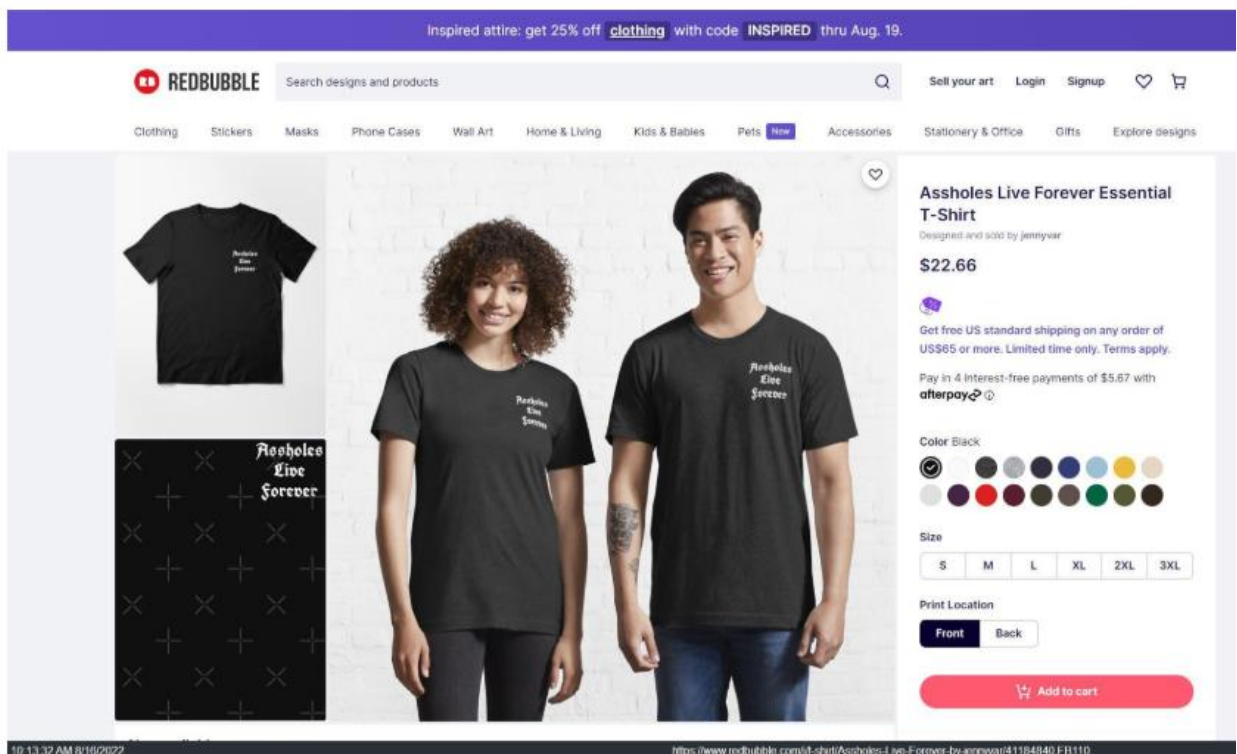
rather than as a source-indicator. The entirety of the evidence of record indicates that there are several third-party uses of the phrase on various goods that do not appear to be associated with Applicant, thereby suggesting that the broader class of consumers would perceive only the common meaning of the phrase. *See Mayweather*, 2020 WL 6689736, at *3. Thus, “even if there were evidence that some consumers associated the phrase with Applicant, that alone would not entitle Applicant to appropriate for itself exclusive use of an otherwise common informational phrase and thereby attempt to prevent competitors or others from using it....” *Wal-Mart Stores*, 2019 WL 193990, at *12

Applicant also seeks to discount the Examining Attorney’s evidence by arguing that some of the evidence post-dates its first use and is representative of infringing products. Applicant cites no authority for the proposition that the Examining Attorney’s evidence must be disregarded because it post-dates Applicant’s first use. 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 use or the filing dates of the subject applications.⁶⁴ As discussed above, the “critical inquiry in

⁶⁴ *See, e.g., Team Jesus*, 2020 WL 7312021, at *1 n.1 (displaying and discussing third-party use evidence downloaded from the Internet on July 8, 2019, after the use-based application filing date of September 5, 2018); *Wal-Mart Stores*, 2019 WL 193990, at *1 n.2, *5-6 nn. 9-14 (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 and alleged first use of February 28, 2014); *Tex. With Love*, 2020 WL 6689657, at *1 & n.1 (displaying third-party use evidence downloaded on September 17, 2018, after the applicant’s filing date of February 12, 2018 and alleged first use of February 8, 2018).

determining whether a proposed mark functions as a trademark is how the relevant public perceives it,” *Univ. of Ky.*, 2021 WL 839189, at *13, and the public’s perception is not frozen as of the first use date.

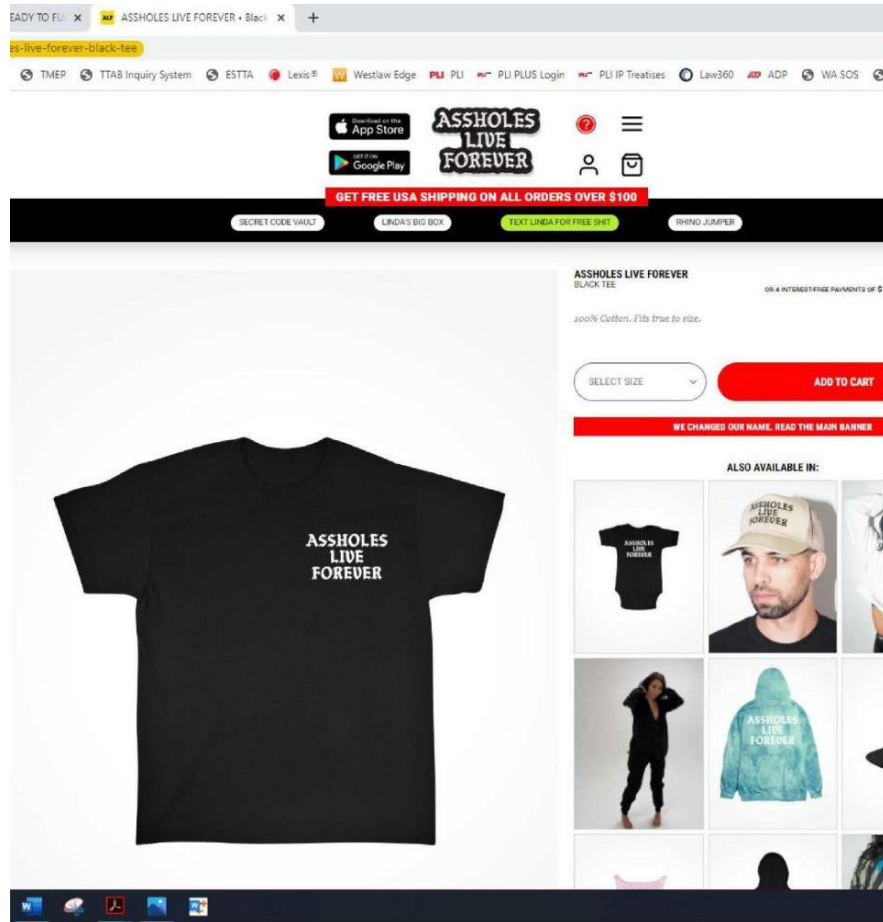
While Applicant asserts that some of the third-parties place the proposed mark on goods in the same or similar fashion as Applicant, e.g., placing ASSHOLES LIVE FOREVER in the center of a banner or on the upper, right corner of a shirt, this type of placement is relatively common.⁶⁵ For example, Applicant suggests the following shirts are “knock-offs”:



(third-party use);⁶⁶ and

⁶⁵ June 9, 2023 Request for Reconsideration at TSDR 3-5.

⁶⁶ August 16, 2022 Office Action at TSDR 8.



(Applicant's use).⁶⁷ However, this example, in addition to many of the other examples noted, display the same commonplace phrase in a font different from Applicant's. We are not convinced it is evidence of copying, rather than evidence of the general popularity of the expression, particularly in connection with clothing sales. Further, unlike in *Lizzo*, 2023 WL 1507238, a case relied upon by Applicant, the Examining Attorney's third-party uses do not reference Applicant. In *Lizzo*, "much of the evidence of third-party use specifically seeks to associate the goods ... with Lizzo. *Id.* at *11. Here, the Examining Attorney's third-party uses make no reference to

⁶⁷ February 16, 2023 Response to Office Action at TSDR 116.

Applicant at all. Rather, the third-party uses prominently display ASSHOLES LIVE FOREVER as a descriptor of the wording on the clothing, highlighting the message conveyed. *See D.C. One Wholesaler*, 2016 WL 7010638, at *7; *In re Hulting*, Ser. No. 77666826, 2013 WL 5407310, at *3 (TTAB 2013). Even to the extent Applicant alleges that, of the Examining Attorney’s evidence of third party use, five are “knockoffs” of Applicant’s products (only one of which appears to be for the same font depicted in the Application),⁶⁸ there is no evidence of record that persuades us that they are meant to copy Applicant’s proposed mark, and there is no proof that the third-party use has been found to be infringing use or that Applicant has objected to such use. Indeed, Applicant submits copies of six cease and desist letters⁶⁹ it sent to purported infringers as well as a complaint filed in U.S. District Court, Southern District of New York,⁷⁰ none of which are the third-parties listed in the Examining Attorney’s evidence.

As to the Southern District proceeding emphasized by Applicant as proof of infringing uses, the court dismissed the complaint with prejudice without addressing any purported rights in ASSHOLES LIVE FOREVER.⁷¹ As to the cease and desist

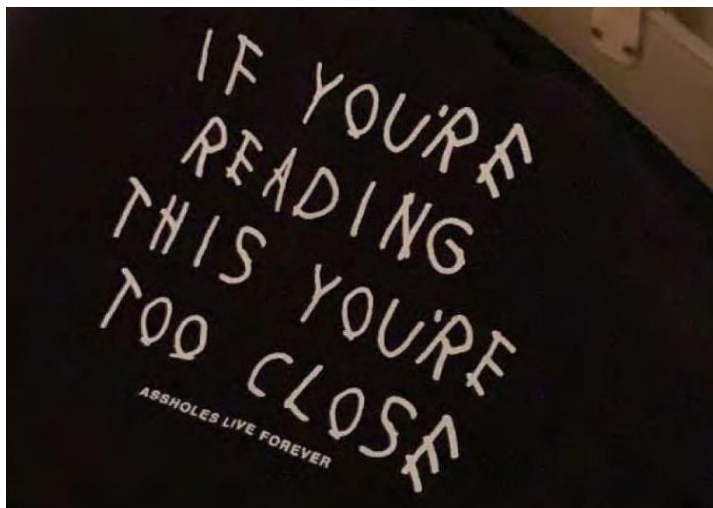
⁶⁸ Applicant asserts that of the Examining Attorney’s third-party evidence of ASSHOLES LIVE FOREVER included in the first Office Action, three are “knockoff” products. February 16, 2023 Office Action Response at TSDR 5. Applicant also discusses four purported “knockoffs” in its Request for Reconsideration and Appeal Brief, two of which appear to be repeats from the Office Action Response. June 9, 2023 Request for Reconsideration at TSDR 2-5; 6 TTABVUE 20-22.

⁶⁹ February 16, 2023 Office Action Response at TSDR 144-243.

⁷⁰ *Id.* at TSDR 122-43.

⁷¹ June 27, 2023 Request for Reconsideration Denied at TSDR 4-7.

letters sent, Applicant provides only one response to those cease and desist letters and no evidence that the recipients acknowledged its purported rights in ASSHOLES LIVE FOREVER or that its enforcement efforts successfully ended third-party use of ASSHOLES LIVE FOREVER. The single response indicates the third-party no longer sells the disputed goods.⁷² Notably, the response does not acknowledge any rights owned by Applicant in ASSHOLES LIVE FOREVER; in fact, it does not mention ASSHOLES LIVE FOREVER.⁷³ Also, the response indicates the purported infringing products are masks, and “bear slogans that are identical”⁷⁴ to those offered by Applicant as displayed below:



⁷⁵

It is unclear what, if any, implication may be drawn from the response and whether the implication is a tacit acknowledgment, as Applicant seems to assert,⁷⁶ in

⁷² February 16, 2023 Office Action Response at TSDR 176.

⁷³ *Id.*

⁷⁴ *Id.* at 146.

⁷⁵ *Id.* at 149.

⁷⁶ 9 TTABVUE 7.

trademark rights in IF YOU'RE READING THIS YOU'RE TOO CLOSE, ASSHOLES LIVE FOREVER, both or none.

This evidence does not establish that the third-parties adopted the phrase to capitalize on whatever alleged recognition Applicant claims to have in that phrase. *Cf. Mayweather*, 2020 WL 6689736, at *4 (record devoid of evidence regarding marketing investment “or that due to such activities, the mark has become highly distinctive and well known in the trade and to the relevant public.”) (internal quotations omitted). Based on the record before us, it is just as likely that the third-parties adopted the recognized, common phrase independently without consideration of Applicant and its use of the phrase.

In further support of its argument that ASSHOLES LIVE FOREVER is a source-identifier, Applicant lists a variety of phrases and slogans registered on the Principal Register⁷⁷ and applications and registrations⁷⁸ that include “sentimental marks using ‘never die’ or ‘live forever’ phrases.⁷⁹ We have no proof that these are common expressions widely used by a number of different entities on a variety of goods and services. Applicant “has not provided any evidence that consumers regularly encounter these [third-party marks] used in the same way as the mark in question,

⁷⁷ February 16, 2023 Office Action Response at TSDR 10-11; 283-367.

⁷⁸ Pending applications have “no probative value other than as evidence that the application was filed.” *Edwards Lifesciences Corp. v. VigiLanz Corp.*, Opp. No. 91154210, 2010 WL 1514315, at *3 n.4 (TTAB 2010) (citing, *In re Phillips Van Heusen Corp.*, Ser. No. 75664835, 2002 WL 523343, at *3 n.4 (TTAB 2002). Some of the registrations are not active, and they have no probative value. *In re Kysela Pere et Fils, Ltd.*, Ser. No. 77686637, 2011 WL 1399224, at *2 (TTAB 2011) (“‘dead’ or cancelled registrations have no probative value at all”).

⁷⁹ *Id.* at 11-12; 283-367.

namely, as an expression that is commonly used as such on a wide variety of goods.” *Brunetti*, 2022 WL 3644733, at *17. Moreover, and importantly, the Office’s registration of the foregoing marks does not bind us here. *Id.* at *3. As recognized by Applicant, each case must be decided on its own merits. Our determination of whether Applicant’s proposed mark is eligible for registration, as already discussed, must be based on the evidence of consumer perception in the present record,⁸⁰ not the Office’s treatment of other proposed marks. *Id.*

⁸⁰ We note Applicant’s argument that:

[the Examining Attorney’s] repeated references to [the words] ‘vulgar’ and ‘offensive’ ... coupled with the Examiner’s insistence that Applicant’s Mark can never function as a service mark for any goods or services despite evidence demonstrating otherwise, suggest an improper viewpoint bias may be underlying, at least in part, the continued refusal of Applicant’s Mark by the Examiner.

9 TTABVUE 11. Applicant’s assertion is misplaced.

First, the Examining Attorney’s characterization of the proposed mark as vulgar or offensive comes in the context of explaining the commonplace message conveyed by the wording in the proposed mark, and is supported by the definition of “asshole” as “usually vulgar: a stupid, annoying, or detestable person.” Merriam-Webster Dictionary, www.Merriam-Webster.com/dictionary/asshole (visited May 16, 2024). We take judicial notice of this definition of “asshole.” *See B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 728 (Fed. Cir. 1988); *In re Cordua Rests. LP*, Serial No. 85214191, 2014 WL 1390504, at *2 n.4 (TTAB 2014) *aff’d* 823 F.3d 594 (Fed. Cir. 2016). Thus, the characterization does not represent improper viewpoint bias, as Applicant contends.

Second, the Examining Attorney’s position that the phrase does not function as a source-identifier 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 services, rather than on any contention that the wording is vulgar or offensive. *See generally Brunetti*, 2022 WL 3644733; *Eagle Crest*, 2010 WL 3441109. Applicant’s proposed mark was refused because it is a commonly understood phrase that consumers will not perceive as a means to distinguish source.

III. Conclusion

After full consideration of the evidence of record, we find that the wording in the proposed mark is used to convey a message of commonplace message. The record of third-party goods adorned with the phrase ASSHOLES LIVE FOREVER, in addition to a blogpost and song title, shows use of the wording by numerous third-party sources to convey a message. *See Black Card LLC*, 2023 WL 8110301, at *11 (“[E]vidence that a phrase is used to convey a single, common sentiment or meaning across a variety of goods or services can support a finding that consumers will view the phrase as conveying that same sentiment or meaning regardless of the goods or services in connection with which it is used”). The evidence that the Examining Attorney submitted supports the assertion that “[b]ecause consumers are accustomed to seeing this ... expression commonly used in everyday speech by many different sources, they would not perceive it as a mark identifying the source of [A]pplicant’s services but rather as only conveying an informational message.”⁸¹ *See, e.g., Brunetti*, 2022 WL 3644733, at *19.

Decision: The refusal to register Applicant’s proposed mark ASSHOLES LIVE FOREVER is affirmed.

⁸¹ August 16, 2022 Office Action at TSDR at 3.