

This Opinion is Not a  
Precedent of the TTAB

Mailed: May 2, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Tinder LLC*<sup>1</sup>

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Serial Nos. 86608903 and 86680923

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Jonathan D. Reichman of Hunton Andrews Kurth LLP,  
for Tinder LLC.

Kristen Z. Wu, Trademark Examining Attorney, Law Office 114,<sup>2</sup>  
Nicole Nguyen, Managing Attorney.

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Before Casagrande, Myles, and Bradley,  
Administrative Trademark Judges.

Opinion by Myles, Administrative Trademark Judge:

Tinder LLC (“Applicant”) seeks to register the standard character mark SWIPE

LEFT on the Principal Register for the following:

Downloadable software in the nature of a mobile application for internet-based dating and matchmaking; downloadable software in the nature of a mobile application in the field of social media, namely, for sending status updates to

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<sup>1</sup> Applicant recorded a change of name from Match Group, LLC to Tinder LLC on October 30, 2024 (Reel/Frame 8628/0947). The caption has been updated to reflect the change of name.

<sup>2</sup> After Applicant filed its appeal brief, the applications were assigned to a new Examining Attorney. In this opinion, we refer to both examining attorneys as the “Examining Attorney.”

subscribers of web feeds, uploading and downloading electronic files to share with others in International Class 9;<sup>3</sup> and

Dating services; internet-based social networking, introduction and dating services in International Class 45.<sup>4</sup>

The Examining Attorney refused registration of Application Serial No. 86608903 (the “903 Application”) on the ground that the proposed mark is merely descriptive of the identified goods under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), and on the ground that the proposed mark is unregistrable under Sections 1, 2, 3, and 45 of the Trademark Act, 15 U.S.C. §§ 1051-53, 1127, because it fails to function as a mark. The Examining Attorney refused registration of Application Serial No. 86680923 (the “923 Application”) on the ground that the proposed mark is unregistrable under Sections 1, 2, 3, and 45 of the Trademark Act, 15 U.S.C. §§ 1051-53, 1127, because it fails to function as a mark.

When the refusal in each application was made final, Applicant requested reconsideration and appealed. After the Examining Attorney denied the requests, the appeals resumed. We consolidated the appeals and they are now fully briefed.<sup>5</sup>

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<sup>3</sup> Application Serial No. 86608903, filed April 24, 2015, based on an allegation of a bona fide intent to use under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

<sup>4</sup> Application Serial No. 86680923, filed July 1, 2015, based on an allegation of a bona fide intent to use under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

<sup>5</sup> 12 TTABVUE (Applicant’s consolidated appeal brief), 16 TTABVUE (Examining Attorney’s consolidated brief), and 17 TTABVUE (Applicant’s amended consolidated reply brief). Applicant filed a document titled “Applicant’s Amended Consolidated Reply Brief” at 17 TTABVUE and “Applicant’s Consolidated Reply Brief” at 18 TTABVUE. Despite the order of filing, we presume Applicant intended its “Amended Consolidated Reply Brief” at 17 TTABVUE to be the operative filing.

Citations in this opinion to the record and briefs refer to TTABVUE, the Board’s online docketing system, in application Ser. No. 86608903. The number preceding TTABVUE

### **I. '903 Application—Mere Descriptiveness**

“A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.” *In re Chamber of Com. of the U.S.*, 675 F.3d 1297, 1300 (Fed. Cir. 2012) (citations omitted); *accord In re Zuma Array Ltd.*, Ser. No. 79288888, 2022 WL 3282655, at \*3 (TTAB 2022). “A mark need not recite each feature of the relevant goods or services in detail to be descriptive, it need only describe a single feature or attribute.” *Chamber of Com.*, 675 F.3d at 1300 (cleaned up; citation omitted); *accord Zuma Array*, 2022 WL 3282655, at \*3. “A descriptiveness refusal is proper ‘if the mark is descriptive of any of the [services] for which registration is sought.’” *Chamber of Com.*, 675 F.3d at 1300 (citation omitted); *accord Zuma Array*, 2022 WL 3282655, at \*3.

“Descriptiveness of a mark is not considered in the abstract. Rather, it is considered in relation to the particular goods for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use.” *In re Bayer AG*, 488 F.3d 960, 963-64 (Fed. Cir. 2007) (citation omitted); *accord In re Fallon*, Ser. No. 86882668, 2020 WL 6255423, at \*8 (TTAB

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corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear.

This opinion cites to 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 of the United States Patent and Trademark Office (USPTO), this opinion cites to the Westlaw (WL) legal database. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (2024). Practitioners should also adhere to the citation form recommended in TBMP § 101.03.

2020). “The question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods or services are will understand the mark to convey information about them.” *DuoProSS Meditech Corp. v. Inviro Medical Devices, Ltd.*, 695 F.3d 1247, 1254 (Fed. Cir. 2012) (citation omitted); *accord Fallon*, 2020 WL 6255423, at \*8. “In contrast [to a descriptive term], a suggestive mark requires imagination, thought and perception to reach a conclusion about the nature of the goods or services.” *In re N.C. Lottery*, 866 F.3d 1363, 1367 (Fed. Cir. 2017) (cleaned up; citations omitted); *accord Fallon*, 2020 WL 6255423, at \*8.

“The perception of the relevant purchasing public sets the standard for determining descriptiveness.” *In re Nett Designs, Inc.*, 236 F.3d 1339, 1341 (Fed. Cir. 2001) (citation omitted). Evidence that a term is merely descriptive to the relevant purchasing public “may be obtained from any competent source, such as dictionaries,” *In re Bayer AG*, 488 F.3d 960, 964 (Fed. Cir. 2007), as well as “advertising material directed to the goods.” *In re Abcor Dev. Corp.*, 588 F.2d 811, 814 (Fed. Cir. 1978); *see also Nett Designs, Inc.*, 236 F.3d at 1341-42. It may also be obtained from websites and publications. *N.C. Lottery*, 866 F.3d at 1368. Additionally, evidence that a term is merely descriptive may be found in third-party usage in connection with goods or services similar or related to those at issue. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1378 (Fed. Cir. 2012).

The Examining Attorney argues that to “swipe left” or “swipe right” on a touchscreen describes a common manner of navigating software and that “swipe left”

merely describes a key feature and function of Applicant's software, because consumers using Applicant's mobile dating application "swipe left" on pictures of potential romantic partners to indicate rejection or disinterest.<sup>6</sup>

The record reflects that one definition of "swipe" is "Sliding a finger or stylus across a touchscreen to scroll or move items around"<sup>7</sup> and that "swipe left" means "to move a finger from right to left across a touchscreen in order to dismiss an image."<sup>8</sup> When used in connection with a mobile application, "swipe left" therefore clearly means sliding a finger across a touchscreen to the left. The record is replete with evidence establishing that "swipe left" has a clear meaning in the context of mobile applications, touchscreens or computers: it describes an action a user takes to navigate software.

The Apple and Samsung Community support pages feature discussions among users about how to "swipe left" or "swipe right" on mobile devices to interact or perform tasks with software, as shown below:<sup>9</sup>

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<sup>6</sup> 16 TTABVUE 6-8.

<sup>7</sup> August 12, 2015 Office Action at 43 ([encyclopedia2.thefreedictionary.com/swipe](http://encyclopedia2.thefreedictionary.com/swipe)).

All citations to documents contained in the Trademark Status & Document Retrieval (TSDR) database are to the downloadable .pdf versions of the documents. Because the records for both applications are the same, this opinion cites only to the record in the '903 Application.

<sup>8</sup> June 6, 2023 Final Office Action at 62 ([collinsdictionary.com/us/dictionary/English/swipe-left](http://collinsdictionary.com/us/dictionary/English/swipe-left)).

<sup>9</sup> June 28, 2024 Request for Reconsideration Denied at 76-81 ([discussions.apple.com/thread/253165566?sortBy=best](https://discussions.apple.com/thread/253165566?sortBy=best)), ([us.community.samsung.com/15/Galaxy-S23/How-to-disable-swipe-left-right-to-go-back/td-p/2563156](https://us.community.samsung.com/15/Galaxy-S23/How-to-disable-swipe-left-right-to-go-back/td-p/2563156)).



## swipe left to view message

Hi i have downloaded the new IOS 15, And know unable to swipe left on messages or any notifications to view can someone help me on this. I have a Apple Iphone 12 pro

iPhone 12 Pro, IOS 15  
Posted on Sep 21, 2021 11:07 AM



### Similar questions

<b>iPhone 12 Messages main screen suddenly has Swipe Left to close...</b> My iPhone 12 Messages main screen suddenly has Swipe Left to close it. How do I get it back to Swipe Up from the bottom, to close it? 3 years ago @ 746 1	<b>Swipe right in messages driving me nuts</b> In previous versions of IOS, the Messages app would let you swipe right to mark a message as read and swipe left to delete a message. In IOS 1... 2 years ago @ 614 1	<b>I'm using IOS14.7.1 but the messages icon disappeared from...</b> I'm using IOS14.7.1 but the messages icon disappeared from my home screen How do I put it back? 2 years ago @ 223 1
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Samsung Community / Get Help / Phones / Galaxy S23 / How to disable swipe left/right to go back

### Original topic:

## How to disable swipe left/right to go back

(Topic created: 05-12-2023 09:40 PM) @ 10528 Views



mirhmsb Constellation

OPTIONS

05-12-2023 09:40 PM in Galaxy S23

Can anyone tell me how to disable the feature to go back from swiping in from the left or right edge of the screen? I've tried the navigation buttons and nothing seems to work. I keep swiping back by mistake and it's driving me crazy!



An article on ZDNet explains how to “swipe left or right” to switch between tasks on a computer or mobile device:<sup>10</sup>

<sup>10</sup> *Id.* at 84-94 (zdnet.com/article/11-windows-touchpad-tricks-to-help-you-work-faster-and-smarter/).

## 1. Swipe to switch between tasks

Using three fingers, swipe up from the bottom of the touchpad (see image, below). That gesture switches you into Task View, with a large thumbnail for each open window and virtual desktop. You can tap to choose the window you want to open, or swipe down with three fingers to return to your previous position. You can also use three fingers to swipe left or right, which begins

Other examples of websites explaining how software settings enable users to “swipe right” or “swipe left” on computers or mobile devices include:

Threads comment explaining that on Threads, users can “swipe right on a post to like it, or swipe left to show they’re not interested” in a post.<sup>11</sup>

Microsoft support page explaining the functionality of swiping right or left on emails and how to customize swipe options, including “Swipe Right or Swipe Left.”<sup>12</sup>

Bubble Forum “Creating a swipe-left or swipe-right gesture to reveal icons or actions in a mobile app.”<sup>13</sup>

In its brief, Applicant acknowledges that “[s]liding a finger ... [to] move items around’ ... is just how smartphones work,” but argues that “[r]eferencing the mechanics of the interface on which a software program runs does not tell a consumer anything about **the software program** itself or what it offers to consumers (*i.e.*, a product that facilitates dating).”<sup>14</sup> This argument ignores that a proposed mark need

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<sup>11</sup> *Id.* at 62-67 ([threats.net/@mosseri/post/C4vtEOKPs2w?hi=en](https://threats.net/@mosseri/post/C4vtEOKPs2w?hi=en)).

<sup>12</sup> *Id.* at 68-71 ([support.microsoft.com/en-us/office/customize-swipe-left-and-swipe-right-gestures-in-outlook-cB534c2e-1002-450d-a8f3-e53cc8e36b1d](https://support.microsoft.com/en-us/office/customize-swipe-left-and-swipe-right-gestures-in-outlook-cB534c2e-1002-450d-a8f3-e53cc8e36b1d)) and [82-83 \(support.microsoft.com/en-us/office/how-do-i-customize-my-swipe-options-2c66fbb9-09cd-4c97-9f16-1fdad0bb4172\)](https://support.microsoft.com/en-us/office/how-do-i-customize-my-swipe-options-2c66fbb9-09cd-4c97-9f16-1fdad0bb4172).

<sup>13</sup> *Id.* at 72-75 ([forum.bubble.io/t/creating-a-swipe-left-or-swipe-right-gesture-to-reveal-icons-or-actions-in-a-mobile-app/283347](https://forum.bubble.io/t/creating-a-swipe-left-or-swipe-right-gesture-to-reveal-icons-or-actions-in-a-mobile-app/283347)) and [79-80 \(us.community.samsung.com/15/Galaxy-S23/How-to-disable-swipe-left-right-to-go-back/td-p/2563156\)](https://us.community.samsung.com/15/Galaxy-S23/How-to-disable-swipe-left-right-to-go-back/td-p/2563156).

<sup>14</sup> 12 TTABVUE 24 (emphasis in underline in original).

not immediately convey an idea of each and every feature of the goods in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of the goods. *See, e.g., Chamber of Com.*, 675 F.3d at 1300; *Zuma Array*, 2022 WL 3282655, at \*3. Nor is it necessary that the proposed mark “describe the ‘full scope and extent’ of the applicant’s goods or services. *Oppedahl & Larson LLP*, 373 F.3d at 1173 (citing *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1346 (Fed. Cir. 2001)).

Here, as Applicant acknowledges, “swipe left” describes an action users take to interface with Applicant’s mobile application. Applicant explains that it is the owner of the TINDER® mobile dating application and website, and that within the mobile application or on the website, “users are shown photographs and profiles of prospective romantic partners” and can indicate on their mobile phones if they are interested in someone by “swiping a photo off the right edge of the screen,” that they are **really** interested in someone by “swiping it off the top edge,” or that they are not interested at all by “swiping it off the left edge.”<sup>15</sup> “Swipe left” therefore describes one of the key ways that consumers can interact with potential matches in Applicant’s mobile dating application, i.e. literally “swiping left” on the screen to reject a potential

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<sup>15</sup> 12 TTABVUE 3. Applicant claims that it coined the terms SWIPE, SWIPE RIGHT, SWIPE UP, and SWIPE LEFT “as shorthand for discussing how to interact with photos specifically on the TINDER® app.” *Id.* The fact that Applicant may have been “the first and only one to adopt and use the mark sought to be registered does not prove that the mark is not descriptive.” *In re Bailey Meter Co.*, 102 F.2d 843, 844 (CCPA 1939). The Trademark Act does not countenance someone obtaining “a complete monopoly on use of a descriptive term simply by grabbing it first” and thereby “depriv[ing] commercial speakers of the ordinary utility of descriptive words.” *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 122 (2004) (citation omitted).



match. In this regard, this case is reminiscent of the situation the Federal Circuit faced in the *DuoProSS Meditech* case. There, the Court held that two marks with the term SNAP in them were descriptive of the product, which was a syringe-disposal product requiring the user to insert the syringe into the product, which allowed the user to then snap off the needle from the rest of the syringe. 695 F.3d at 1254-55.

The record also supports the Examining Attorney's determination that "swipe left" is used to describe the action taken in a mobile dating application such as Applicant's to reject or express disinterest in a potential match, as seen in the examples below:

### **Swiping left, Swiping Right, What Does It Mean?**

On most dating apps, swiping right means you like a person, and swiping left means you don't want anything to do with them.

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Although Tinder was the service that popularized "swipe right" and "swipe left," most modern dating apps use some variation of the "swipe right" and "swipe left." Other very popular dating apps that use similar mechanics include [Bumble](#) and [Coffee Meets Bagel](#).

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<sup>16</sup> June 6, 2023 Final Office Action at 7-18 (roast.dating/blog/tinder-swipe-left-right). The Blog entry, titled "Tinder, swipe left or right?", explains that on both Tinder and "most dating apps," swiping right means to express interest in someone and swiping left means to reject or express disinterest in someone.

## Swipe Left, Swipe Right

If you've been on the internet lately, there's a good chance you've seen a [meme](#) or a post that uses the term "swipe left" or "swipe right." These two terms come from [Tinder](#), the most popular [online dating app around the world](#).

"Swipe right" means to like or accept someone, while "swipe left" means to reject them. The meaning of these two phrases is taken from one of Tinder's core mechanics. When a person sees a profile on their Tinder feed, they can either swipe right to show their interest or swipe left if they're uninterested. If both people swipe right on each other, they'll be matched up.

It's common for two people not to match even if one of them swipes right. Creating a match requires mutual interest from both parties. If you don't end up matching with someone you swiped right on, you can just assume that they swiped left on you.

RELATED: [How to Meet People When You Travel](#)

## How Dating Apps Work

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Applicant argues that it has registered other marks consisting of or containing the word SWIPE for the same or similar goods and services.<sup>18</sup> This is irrelevant. It is axiomatic that each application must be examined on its own record. *In re Cordua Rests.*, 823 F.3d 594, 600 (Fed. Cir. 2016); *In re Consumer Prot. Firm PLLC*, Ser. No. 87445801, 2021 WL 825503, at \*11 (TTAB 2021). The fact that Applicant obtained registrations for different marks is not persuasive. *The Consumer Prot. Firm PLLC*, 2021 WL 825503, at \*11 ("The question of whether a proposed mark is merely descriptive or generic is determined based on the evidence of record at the time each registration is sought .... Each case must be decided on its own facts, and the Board is not bound by prior decisions involving different records.") (internal citations omitted); *see also Nett Designs*, 236 F.3d at 1342 ("Even if some prior registrations

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<sup>17</sup> September 12, 2022 Office Action at 4-8 ([howtogeek.com/702931/what-do-swipe-left-and-swipe-right-mean/](https://www.howtogeek.com/702931/what-do-swipe-left-and-swipe-right-mean/)).

<sup>18</sup> 12 TTABVUE 3-4.

had some characteristics similar to Nett Designs' application, the PTO's allowance of such prior registrations does not bind the Board or this court.”).

Applicant also argues that the Board should consider how Applicant uses a different mark, SWIPE RIGHT, on its website, where the physical act of “swiping” is not possible.<sup>19</sup> Applicant's argument is unavailing. Applicant's applied-for goods are mobile applications.<sup>20</sup> We must consider the issue of mere descriptiveness of Applicant's proposed mark in relation to the goods set forth in the identification, not Applicant's use of a different mark in connection with different goods or services.

Finally, Applicant relies upon the expert report and survey of Susan Schwartz McDonald, Ph.D. (the “McDonald Survey”) and the expert report and survey of Sarah Butler (the “Butler Survey”).<sup>21</sup> Applicant argues that the Butler and McDonald Surveys show that “SWIPE LEFT **already** functions as a mark, in the sense that the majority of consumers currently associate the phrase and its use with Applicant and/or the TINDER® dating application rather than viewing the phrase as merely descriptive.”<sup>22</sup> Applicant's application was filed based on an allegation of a bona fide intent to use and there is no evidence in the record of any use of the proposed mark in connection with the applied-for goods. Since there is no use of the proposed mark in connection with the applied-for goods, neither survey can be said to show that

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<sup>19</sup> *Id.* at 24-25.

<sup>20</sup> In any event, websites may be viewed on mobile devices or computers with touchscreens where the physical act of swiping a screen is certainly possible.

<sup>21</sup> December 6, 2023 Request for Reconsideration at 82-384 (McDonald Survey) and 385-655 (Butler Survey).

<sup>22</sup> 12 TTABVUE 26 (emphasis in italics in original).

consumers already associate the phrase as source-identifying for the applied-for goods. In fact, in its reply brief, Applicant argues that the McDonald Survey was not designed to test “association” of the phrase SWIPE LEFT with Applicant, but instead “to test the Examining Attorney’s **factual** conclusion” that “swipe left” is commonly used in everyday speech to convey rejection or disagreement.<sup>23</sup> The McDonald Survey is therefore more appropriately considered in connection with the failure to function refusal, discussed below.

Moreover, upon careful review, we find that the probative value of each of the surveys is limited. “Survey evidence is subject to review for its probative value, based on factors including the design of the survey, the questions asked, and the experience of the surveyor.” *In re Hotels.com LP*, 573 F.3d 1300, 1305 (Fed. Cir. 2009).

The universe of survey respondents for the McDonald Survey was consumers between the ages of 18-60 who have used an online dating service in the past five years.<sup>24</sup> Dr. McDonald explains that the universe was defined in this way because it would mean the consumers “are already likely to have some familiarity with the phrase at issue and thus able to offer impressions of the degree to which the phrase may already have distinct associations with Tinder.”<sup>25</sup> Approximately half of the respondents were assigned to a “Swipe Right” group and the remainder to a “Swipe Right/Swipe Left” group.<sup>26</sup> Dr. McDonald explains that “[t]he action of sliding a finger

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<sup>23</sup> 17 TTABVUE 3-4 (emphasis in underline in the original).

<sup>24</sup> December 6, 2023 Request for Reconsideration at 90-91, McDonald Dec. ¶ 19.

<sup>25</sup> *Id.* at 89, McDonald Dec. ¶ 15.

<sup>26</sup> *Id.* at 93.

to the right or left to retain or discard content (or an item) is a functionality that mobile device-using consumers are likely to encounter in more than one context... .”<sup>27</sup>

The first question respondents were asked was if they were familiar with “Swipe Right/Swipe Left,” with a yes or no response, followed by an open-ended question:

Q2. In what context or situations have you encountered or used the phrase [“Swipe Right” / “Swipe Right/Swipe Left”]? Please enter your response in the space below. The space will expand as you type, so please be as specific and complete as you can. If you don’t know or can’t recall, click the box below.

Don’t know/can’t recall

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The survey utilized software to identify respondents who identified online dating or dating applications, but not Applicant’s TINDER® platform specifically, to ask the following follow-up question:

Q3. Even if you have mentioned this before, with what particular online dating app(s) or platform(s) do you associate the phrase, [“Swipe Right” / “Swipe Right/Swipe Left”]? Please enter your response in the space below. If you can’t recall, check the box and continue.

Don’t know/can’t recall

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Respondents who identified online dating, dating applications, or TINDER® in Q2 were asked if they have encountered or used the phrase outside of online dating and,

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<sup>27</sup> *Id.* at 93-94, ¶ 22 (emphasis in italics in original).

<sup>28</sup> *Id.* at 95.

<sup>29</sup> *Id.* at 96.

if yes, were asked to identify those situations.<sup>30</sup> Respondents who did not reference online dating or TINDER® did not receive this question.<sup>31</sup>

All respondents were then asked if they “have ever used this phrase in everyday speech, or heard it used by others, when **not** talking about doing something on a computer, mobile phone, or other digital device?” with yes or no as options. Respondents were then provided a box to describe any examples if they selected yes.<sup>32</sup>

Among all respondents, in response to all questions, 74% associated “Swipe Right/Swipe Left” with a dating app, 55% specifically identified TINDER®, 33% identified another dating app by name (“including apps owned or licensed by Applicant”),<sup>33</sup> 30% identified another “app, website, or digital functionality,” 11% associated it as a conversational expression “re romantic or sexual attraction” and 18% associated it with a conversational expression that was “not re romantic or sexual attraction.”<sup>34</sup>

The McDonald Survey failed to include “any sort of ‘mini-course’ that would include a test of the understanding of the survey participants as to whether

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 97.

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

<sup>33</sup> Applicant does not identify which additional applications are owned or licensed by Applicant or indicate what portion of the 33% identified applications owned or licensed by Applicant.

<sup>34</sup> *Id.* at 104. The chart provided includes responses to Q2, Q3, Q5, and Q6b together and it therefore appears that the percentages reflect the total of respondents providing an affirmative response or association for each category. In other words, a respondent could indicate both that they associated the phrase with a dating application and with another application, website, or digital functionality.

something functions as a mark.” *In re The Ride, LLC*, Ser. No. 86845550, 2020 WL 564792, at \*8 (TTAB 2020).<sup>35</sup> The Board gives “‘little weight’ to a survey where a mini-test was not performed and we do not know whether survey participants actually understood what they were being asked.” *Id.* (internal quotations omitted) (cleaned up). We cannot determine based on the survey and responses if the respondents understood the meaning of or could even identify a trademark or service mark, let alone understand the distinction between an inherently distinctive mark and a merely descriptive phrase. *See id.*

More specifically, the survey does not discern between those who perceive the stimulus in its descriptive sense and those who do not. The survey asked respondents the context or situations where they have “encountered or used” the phrases “Swipe Right/Swipe Left” and what dating application or platform they “associated” with the phrases. The fact that respondents “encountered” the phrases in connection with a dating application or even “associated” the phrases specifically with TINDER® does not necessarily mean that they are understood by consumers or potential consumers as a source identifier, rather than as merely descriptive of a feature of the goods. Rather, it may be that respondents “encounter” or “associate” the phrases “Swipe

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<sup>35</sup> While the McDonald Survey did not purport to be a “failure-to-function” survey, the Board’s observation in *The Ride* seems apt here as well. The Federal Circuit has observed that descriptiveness (and genericness) are examples of specific ways that a proposed mark can fail to function as a source identifier. *See In re Vox Populi Registry Ltd.*, 25 F.4th 1348, 1351 (Fed. Cir. 2022) (“The question whether a proposed mark is a source identifier typically arises before us in the context of whether the proposed mark is descriptive under 15 U.S.C. § 1052(e). ... However, ... the source identifier requirement is broader than just whether a proposed mark is generic or descriptive.”), *quoted in In re GO & Assocs., LLC*, 90 F.4th 1354, 1356 (Fed. Cir. 2024).

Right/Swipe Left” with dating applications, including Applicant’s, because swiping right and left are physical gestures commonly used in mobile applications in general and in dating applications specifically to express interest or disinterest, respectively. *Cf. Rise-N-Shine, LLC v. Duner-Fenter*, No. 14-cv-1305 (RJS), 2015 WL 876470, at \*2 n.1 (S.D.N.Y. Feb. 28, 2015) (noting that “just because a mark is a brand name (and perceived as such) does not mean that it is suggestive rather than descriptive”). If anything, the results of the surveys seem to reflect the fact that consumers are aware of the functionality of “swiping left” in a dating application such as Applicant’s.

In fact, the results of the McDonald Survey appear to support the conclusion that the phrase “swipe left” is merely descriptive of an important feature of Applicant’s applied-for goods. While Applicant acknowledges that it has not yet used the term as a source identifier in connection with the applied-for goods, many respondents nevertheless “associated” the phrases “Swipe Right/Swipe Left” with a dating application such as TINDER®. If anything, this suggests that, while consumers have not been exposed to the phrase “swipe left” as a source indicator for a mobile dating application, they “associated” the phrase with mobile dating applications, because it describes a well-known action taken by consumers while using software such as Applicant’s TINDER® application.

Additionally, the stimulus term was different from the mark at issue in this case. The survey did not solely test consumers’ perception of the proposed SWIPE LEFT mark, but instead considered consumers’ perception of “Swipe Right/Swipe Left.” The use of both phrases together may have skewed respondents’ view of the phrase “swipe



left,” because it would be more likely associated with the actions taken in a dating application like TINDER® when considered in conjunction with, and as the opposite of “swipe right.” In other words, the survey did not fairly test consumers’ perception of the proposed SWIPE LEFT mark alone. Moreover, the use of the two phrases together, separated by a slash, if anything diminishes the likelihood that respondents understood or viewed either phrase as inherently distinctive.

Turning next to the Butler Survey, we note first that the survey was conducted in 2019 in connection with litigation and the survey was designed to measure secondary meaning or acquired distinctiveness of SWIPE, SWIPE RIGHT, or SWIPE LEFT.<sup>36</sup> Whether a proposed mark is merely descriptive is measured from the time registration is sought. *Remington Prods., Inc. v. N. Am. Philips Corp.*, 892 F.2d 1576, 1582 (Fed. Cir. 1990) (“descriptiveness is determined in cases of this type on the basis of the factual situation as of the time when registration is sought, meaning now”) (cleaned up; citation omitted). The probative value of the survey is therefore somewhat diminished by the passage of time. *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 1371 (Fed. Cir. 2018) (“a survey is only probative if it deals with conditions at the appropriate time”) (citation omitted); *In re Morton-Norwich Prod., Inc.*, 671 F.2d 1332, 1344 (CCPA 1982) (“the factual situation may be different in 1982 than it was in May 1978 when appellant had the survey conducted”). Further, because the survey was designed to test acquired distinctiveness, it is of limited probative value

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<sup>36</sup> *Id.* at 394-95.

in determining whether the proposed mark is inherently distinctive as opposed to merely descriptive.

Ms. Butler surveyed individuals who have used or planned to use an online dating service, a dating application, or a social networking application.<sup>37</sup> Respondents were asked the following question:<sup>38</sup>

- Q1. Thinking about apps for dating services, do you identify **SWIPE [PIPE IN “WORD” FROM GROUPINGS]** with ...? **[RANDOMIZE 1 AND 2 BELOW]**
1. One brand or company **[GO TO Q2]**
  2. More than one brand or company **[GO TO Q2]**
  3. No brand or company **[GO TO END]**
  4. Don't know / no opinion **[GO TO END]**

Any respondents who responded “one brand or company” or “more than one brand or company” were asked to identify the brand(s).<sup>39</sup> As shown in the chart below, 47.3% of respondents associated SWIPE LEFT with only one company or brand while 20% associated it with **more** than one company or brand, and 18% with **no** brand or company:<sup>40</sup>

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<sup>37</sup> *Id.* at 400-01.

<sup>38</sup> *Id.* at 433.

<sup>39</sup> *Id.* at 398-99.

<sup>40</sup> *Id.* at 406.

<b>Response Options</b>	<b>SWIPE LEFT</b>		<b>DRAG DOWN</b>		<b>Net</b>
	<b>Count</b>	<b>Percent</b>	<b>Count</b>	<b>Percent</b>	
One company or brand	71	47.3%	10	6.6%	<b>40.7%</b>
More than one company or brand	30	20.0%	5	3.3%	<b>16.7%</b>
No brand or company	27	18.0%	89	58.9%	<b>-40.9%</b>
Don't know / No opinion	22	14.7%	47	31.1%	<b>-16.5%</b>
<b>Total Respondents</b>	<b>150</b>	<b>100.0%</b>	<b>151</b>	<b>100.0%</b>	

*Q1. Thinking about apps for dating services, do you identify [SWIPE LEFT/DRAG DOWN] with...?*

Source: NERA App Survey, May 2019

Of those respondents who did identify the phrase with a single company, 88.7%, or a net of 40.7% of respondents, identified Applicant.<sup>41</sup>

The Butler Survey suffers from some of the same defects as the McDonald Survey when Applicant attempts to repurpose it for the context here of supporting an argument regarding the conceptual strength of its proposed mark (i.e. descriptiveness versus inherent distinctiveness) instead of its stated purpose and design which was to measure whether the tested terms “ha[d] attained secondary meaning.”<sup>42</sup> Respondents were not provided a mini-course and there is therefore no way to draw conclusions regarding whether Applicant’s mark is an inherently distinctive trademark or a merely descriptive phrase from survey questions designed to measure whether the tested terms had acquired secondary meaning (i.e., acquired distinctiveness). Indeed, the key question it asked—a classic acquired distinctiveness question—is even less pertinent than the question in the McDonald Survey, because associating a phrase with a brand does not preclude the possibility that the

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<sup>41</sup> *Id.* at 390-391.

<sup>42</sup> *Id.* at 388-89.

respondents think it primarily conveys information about a quality, characteristic, purpose, or function of the relevant good or service. Additionally, the fact that respondents “identify” the phrase “swipe left” with Applicant does not suggest that respondents view the phrase as inherently distinctive. *See Rise-N-Shine*, 2015 WL 876470, at \*2 n.1 (“just because a mark is a brand name (and perceived as such) does not mean that it is suggestive rather than descriptive”); *cited in* 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:16 (5th ed.) (Mar. 2025 update). Instead, it is at least equally likely that respondents “identify” the phrase “swipe left” with Applicant’s dating service offerings, because it describes a gesture used to interact with Applicant’s application.

In short, neither survey strikes us as pertinent or helpful in this context.

Based on our weighing of the evidence of record, we have no doubt that SWIPE LEFT is merely descriptive of Applicant’s “Downloadable software in the nature of a mobile application for internet-based dating and matchmaking.”

## **II. '903 and '923 Applications—Failure to Function**

As explained above, we find that the phrase “swipe left” is merely descriptive of a key feature of Applicant’s applied-for goods in the '903 Application. That is one type of “failure to function,” *see GO & Assocs.*, 90 F.4th at 1356; *Vox Populi*, 25 F.4th at 1351, though we typically just call it mere descriptiveness. The Examining Attorney also contends that the phrase “swipe left” has become a commonly used expression “to refer to rejection and conveys being disinterested” both in the field of dating and

“colloquially ... in other contexts.”<sup>43</sup> This is another type of failure to function, one which, if proved, would render the phrase incapable of functioning as a trademark for the goods and services in either application, regardless of how it is actually used by Applicant.<sup>44</sup>

“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. 140, 146 (2023). Indeed, the Trademark Act’s very definition of a trademark “describes every trademark’s ‘primary’ function: ‘to identify the origin or ownership of the article to which it is affixed.’” *Id.* at 145-46 (citing 15 U.S.C. § 1127); *see also id.* at 156-57 (“From its definition of ‘trademark’ onward, the Lanham Act views marks as source identifiers—as things that function to ‘indicate the source’ of goods, and so to ‘distinguish’ them from ones “manufactured or sold by others.”). Accordingly, the USPTO “is statutorily constrained to register matter on the

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<sup>43</sup> 16 TTABVUE 14-18.

<sup>44</sup> Each of Applicant’s applications was filed on the basis of an allegation of a bona fide intent to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), and as of the time of the appeal, Applicant had not submitted a specimen of use for either application. However, 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 (TMEP) § 1202 (Nov. 2024). *See, e.g., Vox Populi*, Ser. No. 86700941, 2020 WL 6581862 (TTAB 2020) (affirming failure-to-function refusal against application class with an intent-to-use filing basis on the basis of third-party use evidence), *aff’d*, 25 F.4th 1348 (Fed. Cir. 2022).

Principal Register if and only if it functions as a mark.” *The Ride, LLC*, 2020 WL 564792, at \*6.

The critical inquiry in determining whether matter proposed as a mark can function as a trademark or service mark is how the relevant public perceives the phrase sought to be registered. *Univ. of Ky. v. 40-0, LLC*, Opp. No. 91224310, 2021 WL 839189, 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] ....” *Mayweather Promotions*, Ser. No. 86753084, 2020 WL 6689736, at \*3 (TTAB 2020). Here, there are no limitations on the channels of trade or classes of consumers in either application, so the relevant public comprises all potential purchasers of Applicant’s dating services and mobile dating application. *See Team Jesus LLC*, Ser. No. 88105154, 2020 WL 7312021, at \*3 (TTAB 2020).

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.” *In re Texas With Love, LLC*, Ser. No. 87793802, 2020 WL 6689657, at \*3 (TTAB 2020) (quoting *In re Eagle Crest Inc.*, Ser. No. 77114518, 2010 WL 3441109, at \*2 (TTAB 2010)). “It is well settled that articles obtained from the Internet, websites, and blog posts are admissible as evidence of information available to the consuming public and of the way in which a term is being used or would be understood by the relevant

public.” *In re Wal-Mart Stores, Inc.*, Ser. No. 86261962, 2019 WL 193990, at \*10 (TTAB 2019).

“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 WL 7312021, at \*3 (citations omitted); *accord GO & Assocs.*, 90 F.4th at 1356-57. “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.” *D.C. One Wholesaler, Inc. v. Chien*, Opp. No. 91199035, 2016 WL 7010638, at \*6 (TTAB 2016), *cited in GO & Assocs.*, 90 F.4th at 1356. The more commonly a phrase is used by many, the less likely that it will be recognized by purchasers as “identify[ing] and distinguish[ing] the services of one person ... from the services of others,” as the Act defines a service mark. *See id.*; *see also In re Mayweather Promotions*, 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.”); *In re Eagle Crest, Inc.*, 2010 WL 3441109, at \*2 (“Because consumers would be accustomed to seeing this phrase [ONCE A MARINE, ALWAYS A MARINE] displayed on clothing items from many different sources, they could not view the slogan as a trademark indicating source of the clothing only in applicant.”).

### A. Evidence and Analysis

The Examining Attorney made of record numerous online definitions of “swipe left,” including the following:

The Urban Dictionary defines “swipe left” as a verb meaning “to find unattractive...,” that you “Swipe left to say no,” and explains that while the phrase was first used in connection with Tinder, “[t]he phrase has developed over time and now describes anything remotely ugly or detestable.”<sup>45</sup>

Macmillan Dictionary defines “swipe right/left” as “on an online dating app, to show whether you find someone attractive or unattractive by moving your finger to the right or left across their photo on the screen of a smartphone or tablet,” that you “swipe left to say no,” or that the phrase is “used to say that someone accepts or rejects something.”<sup>46</sup>

The Free Dictionary defines “swipe left” as slang “To decline or reject someone or something in an app. The phrase was popularized by the dating app Tinder...” or “by extension, to reject or decline something.”<sup>47</sup>

Slang.net states that “[t]o swipe left on someone or something means that you reject or disagree with it,” and that the phrase originated with Tinder.<sup>48</sup>

Yourdictionary.com defines “swipe left” as meaning “To reject or discard something.”<sup>49</sup>

One characteristic of terms or phrases that fail to function as indicators of a unique source of goods or services is that they are “widely used to convey ordinary or familiar concepts,” *see, e.g., Team Jesus*, 2020 WL 7312021, at \*3, and evidence that a phrase is defined in dictionaries tends to show wide use and the familiarity of the concept.

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<sup>45</sup> September 12, 2022 Office Action at 16-17 (urbandictionary.com/define/php?term=swipe%20left).

<sup>46</sup> *Id.* at 20 (macmillandictionary.com/us/dictionary/American/swipe-right-left).

<sup>47</sup> *Id.* at 23 (idioms.thefreedictionary.com/swiping+left).

<sup>48</sup> *Id.* at 32 (slang.net.meaning/swipe\_left).

<sup>49</sup> June 6, 2023 Final Office Action at 19 (yourdictionary.com/swipe-left).



Applicant objects to this evidence, arguing that the sources cited by the Examining Attorney are not traditional print dictionaries, but instead crowd-sourced online dictionaries, similar to Wikipedia.<sup>50</sup> For example, the Urban Dictionary is “a slang dictionary with definitions submitted by visitors to the website.” *In re Lizzo LLC*, Ser. No. 88466264, 2023 WL 1507238, at \*5 (TTAB 2023) (citing *In re Star Belly Stitcher, Inc.*, Ser. No. 85247730, 2013 WL 4635976, at \*4 n.3 (TTAB 2013)). While we “recognize the inherent problems regarding the reliability of Urban Dictionary [and other similar sources] because it is a collaborative website that permits anyone to submit or edit a definition,” the Board “will consider dictionary definitions taken from Urban Dictionary so long as the non-offering party has an opportunity to rebut that evidence by submitting other definitions that may call into question the accuracy of the particular Urban Dictionary definitions.” *Id.* We therefore consider each of these sources, while keeping in mind the inherent problems with crowd-sourced websites such as these. Here, the Examining Attorney has provided five separate sources, including the MacMillan Dictionary, all identifying “swipe left” as having a similar meaning, i.e., to find unattractive or to reject. This evidence is probative of consumer perception of the proposed mark.

In addition, other evidence of record corroborates these dictionary definitions. The Examining Attorney made of record numerous examples of third-party websites using “swipe left” to mean to reject someone as a potential romantic partner, including, for example, the following:

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<sup>50</sup> 12 TTABVUE 11-13.

“Tinder, swipe left or right? [2023 edition]” explains that “[o]n most dating apps, swiping right means you like a person, and swiping left means you don’t want anything to do with them.”<sup>51</sup>

“What it means swipe left?” discusses the use of “swiping left” on dating apps including Tinder and Bumble, as well as on social media sites such as Instagram.<sup>52</sup>

“What Do ‘Swipe Left’ and ‘Swipe Right’ Mean?” states that “‘Swipe right’ and ‘swipe left’ are essential phrases in online dating” and that “‘swipe right’ means to like or accept someone, while ‘swipe left’ means to reject them.” The article explains that the phrases originate from Tinder, but have now “become commonplace” and have “become popular memes and slang words” in real life and “have become ways for people to identify whether or not they’re interested in something or someone.”<sup>53</sup>

“Swipe left, swipe right – but why?” describes “Swiping Left and Swiping Right” as “Tinder-inspired ... gestures [that] have become mainstream” and explaining that there is a “cultural association” associating swiping left with “going backward, or dismissal” that “[m]any mobile apps” utilize.<sup>54</sup>

“Swipe Left or Right: Tinder Expert Explains the Art of Swiping” states that “[t]he terms swipe left and swipe right have been popularized by the immensely popular dating app, Tinder, and all its look-a-like competitors.”<sup>55</sup>

“Swipe Left Meaning: How to Use This Trendy Internet Term ‘Swipe Left’ Correctly?” explains that the phrase “swipe left” means to literally swipe left in a dating app, but as an idiomatic phrase it “means to reject or deny someone or something” and lists “No,” “I’ll decline” and “I reject” as synonyms for “swipe left.”<sup>56</sup>

The record makes clear that “swipe left” is “widely used to convey ordinary or familiar concepts.”

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<sup>51</sup> June 6, 2023 Final Office Action at 7-18 ([roast.dating/blog/tinder-swipe-left-right](https://roast.dating/blog/tinder-swipe-left-right)).

<sup>52</sup> *Id.* at 113-121 ([techshift.net/what-it-means-swipe-left/](https://techshift.net/what-it-means-swipe-left/)).

<sup>53</sup> September 12, 2022 Office Action at 4-8 ([howtogeek.com/702931/what-do-swipe-left-and-swipe-right-mean/](https://howtogeek.com/702931/what-do-swipe-left-and-swipe-right-mean/)).

<sup>54</sup> June 6, 2023 Final Office Action at 29-38 ([luxdesign.cc/swipe-left-swipe-right-but-why-tinder-ux-ui-simple-dating-mobile-app-swiping-design-4d2205d80407](https://luxdesign.cc/swipe-left-swipe-right-but-why-tinder-ux-ui-simple-dating-mobile-app-swiping-design-4d2205d80407)).

<sup>55</sup> *Id.* at 45-56 ([testgod.com/swipe-left-or-right](https://testgod.com/swipe-left-or-right)).

<sup>56</sup> *Id.* at 57-61 ([7esl.com/swipe-left](https://7esl.com/swipe-left)).

Applicant insists that much of this evidence actually supports its argument that SWIPE LEFT can function as a mark, because many of the sources cited by the Examining Attorney reference Applicant or Applicant's offerings and therefore "reinforce consumers' association" with Applicant, or otherwise use the phrase as a "hook" to "exploit[] this association" with TINDER®.<sup>57</sup> While Applicant is correct that some of these sources specifically identify TINDER® as the origin of the phrase, as detailed above, many also acknowledge that "swipe left" is used by other dating applications and, more generally, has become an idiomatic phrase meaning to reject someone or something.

In addition, the record reflects that third parties use the term "swipe left" in its more general sense in a variety of contexts, signifying use of the phrase to convey rejection. Some examples include:

The United Nations Alliance of Civilizations' "Swipe Left on Hate" is a campaign to empower young women of faith, to lead the conversations on the stereotypes and microaggressions they too often face."<sup>58</sup>

Charles Beco "Why 'swiping left' on A\$AP Rocky and people we disagree with is Wrong."<sup>59</sup>

National Library of Medicine article titled "Swipe right, swipe left: Initial interactions in social anxiety disorder" explaining experiment where users were asked to "swipe left" on pictures to indicate a "lack of willingness to meet the individual."<sup>60</sup>

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<sup>57</sup> 12 TTABVUE 15-16.

<sup>58</sup> *Id.* at 66-88 ([edin.uncct.unaoc.org/campaign/swipe-left-on-hate/](http://edin.uncct.unaoc.org/campaign/swipe-left-on-hate/)).

<sup>59</sup> *Id.* at 125-135 ([charlesbecco.medium.com/why-swiping-left-on-asap-rocky-and-people-we-disagree-with-is-wrong-176d1236872b](http://charlesbecco.medium.com/why-swiping-left-on-asap-rocky-and-people-we-disagree-with-is-wrong-176d1236872b)).

<sup>60</sup> June 28, 2024 Request for Reconsideration Denied at 27-29 ([pubmed.ncbi.nlm.nih.gov/35653757](http://pubmed.ncbi.nlm.nih.gov/35653757)).

A book titled “Swipe Left for Love: An Enemies to Lovers Romance” available on Amazon.<sup>61</sup>

Applicant argues that these examples again “seek to exploit consumers’ association between SWIPE LEFT and the TINDER® app/website” and do not reflect that consumers are using or understand the phrase SWIPE LEFT as conveying a common message of rejecting or disagreeing with someone.<sup>62</sup> For example, with respect to the book titled “Swipe Left for Love,” Applicant argues that the book “is a romance novel that (of course) centers around a young **dating app user**” and therefore “[t]his suggests that the author’s use of SWIPE LEFT in the book’s title was not the random use of a ‘commonplace’ phrase in the English language, but rather, a deliberate attempt to draw on readers’ familiarity with **Applicant**.”<sup>63</sup> Applicant also argues that we can infer that these references are deliberate references to Applicant, because they occurred **after** Applicant first “coined” the phrase.<sup>64</sup> Much of the evidence above, however, suggests that “swiping left” is a gesture or action common to dating applications and, indeed, mobile applications in general, and not specific to Applicant, even if Applicant were the first to use it specifically in connection with mobile or online dating services.

In the context of terms that do not function as unique source identifiers due to their descriptive or generic meaning, the law is clear that it does not matter that the

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<sup>61</sup> June 6, 2023 Final Office Action at 22.

<sup>62</sup> 12 TTABVUE 16 n.17.

<sup>63</sup> *Id.* at 15 (emphasis in italics in original).

<sup>64</sup> *Id.* (citing *Lizzo*, 2023 WL 1507238, at \*11).

entity seeking exclusive rights in the term claims that it was the first to use the term. *See, e.g., KP Permanent Make-Up*, 543 U.S. at 122 (descriptiveness); *In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 828 F.2d 1567, 1569 (Fed. Cir. 1987) (genericness). That concept applies here as well. The record here supports a finding that, notwithstanding Applicant's claim to have coined the term, "swipe left" now conveys a widely-understood meaning of rejection both inside and outside the context of dating.

The Examining Attorney also made of record examples of ornamental use of the proposed mark by others. Ornamental use by third parties "may be relevant to consumer perception." *Lizzo*, 2023 WL 1507238, at \*10. That is because when many others use a term or device ornamentally (and not to indicate that they are the source), that is evidence that consumers will not perceive the term as indicating a unique source. *See Team Jesus LLC*, 2020 WL 7312021, at \*6 ("Because of the nature and ubiquity of the phrase TEAM JESUS, including on apparel from many sources, 'it does not create the commercial impression of a source indicator, even when displayed on a hangtag or label.'") (citing *D.C. One Wholesaler, Inc.*, 2016 WL 7010638, at \*7). An Etsy search shows numerous goods featuring the phrases "swipe left," "swiped left," or "swiping left," as shown below:<sup>65</sup>

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<sup>65</sup> September 12, 2015 Office Action at 35-52 ([etsy.com/search?q=swipe%20right](https://www.etsy.com/search?q=swipe%20right)) and ([etsy.com/search?q=swipe%20left](https://www.etsy.com/search?q=swipe%20left)).






Henry VIII "Swipe Left" Mug

(17)

\$19.99 **FREE shipping**

Ad by Etsy seller

+ Add to cart More like this →




Swiped Left Postcard

(2)

\$5.00

Ad by Etsy seller

+ Add to cart More like this →



...insulated should have swiped left kmr731

(1)

\$28.95

Ad by Etsy seller

More like this →



Applicant again argues that each of these ornamental uses is a reference to Applicant’s TINDER® offerings and that the evidence is therefore comparable to the third-party ornamental use in *Lizzo*.<sup>66</sup> 2023 WL 1507238, at \*6. In *Lizzo*, the Board found that much of the ornamental use of the proposed mark clearly referenced Lizzo and her lyrics from her single “Truth Hurts” as the origin of the phrase, which “lessen[ed] the weight we otherwise may have accorded the ornamental nature of those uses in showing that the phrase fails to function as a trademark.” *Id.* at \*9. Here, unlike in the *Lizzo* case, it is not clear from the third-party ornamental use that the users are referencing Applicant or its TINDER® app, as opposed to dating applications in general, or the broader sentiment of rejection.

Applicant made of record evidence of its licensing and enforcement action against third parties to police its proposed SWIPE LEFT mark to support its argument that

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<sup>66</sup> 12 TTABVUE 6, 8-10.



the phrase is capable of functioning as a mark and that consumers, in fact, already associate it with Applicant.<sup>67</sup> Evidence of successful enforcement efforts against third parties may be evidence that a proposed mark is acting as a source identifier. *See Lizzo*, 2023 WL 1507238, at \*11 (successful takedown notices were evidence of consumer recognition). Applicant submitted one example of a license agreement with a third party for use of the proposed SWIPE LEFT mark.<sup>68</sup> Applicant also made of record the declaration of Benjamin J. Setnick, Applicant's Director, Sr. Counsel, Litigation & IP, who attests to three examples of Applicant's successful enforcement actions against third parties seeking to register the phrase SWIPE LEFT (along with four examples of successful enforcement actions against third parties seeking to register phrases consisting of or containing SWIPE RIGHT).<sup>69</sup> However, on this record, we cannot infer that the acquiescence of any of these third parties was a result of a recognition of Applicant's purported rights in its mark, as opposed to a desire to avoid litigation. *See, e.g., In re Wella Corp.*, 565 F.2d 143, 144 n.2 (CCPA 1977) ("Appellant argues that various letters (of record) from competitors indicating their discontinuance of use of its mark upon threat of legal action are evidence of its distinctiveness, but we agree with the TTAB that such evidence shows a desire of competitors to avoid litigation rather than distinctiveness of the mark."); *Jenkins Bros. v. Newman Hender & Co.*, 289 F.2d 675, 680 (CCPA 1961) ("Opposer has

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<sup>67</sup> *Id.* at 4.

<sup>68</sup> December 6, 2023 Request for Reconsideration at 36-42.

<sup>69</sup> *Id.* at 26-28, ¶¶ 9-15.

asserted that it has protested many of the attempts by others to register marks similar to some of those shown in the third party registrations and has ‘obtained acquiescence satisfactory to it.’ We do not consider this to be persuasive evidence [of the strength of opposer’s mark] here. We do not know the terms on which such ‘acquiescence’ was obtained. We have no indication that any of the prior registrations were cancelled.”). Nor would these few examples of enforcement efforts outweigh the evidence of record showing third-party use of “swipe left” in a colloquial or idiomatic manner to convey the meaning of rejection.

Finally, Applicant again relies on the McDonald and Butler Surveys to rebut the Examining Attorney’s argument that the phrase “swipe left” is a commonly used phrase conveying a single sentiment or meaning, and instead argues that consumers “associate” the phrase with Applicant.<sup>70</sup> As explained in more detail above, the fact that respondents “associate” the phrase with Applicant is not an indication that consumers view it as potentially source identifying. *See The Ride, LLC*, 2020 WL 564792, at \*11. “Measuring mere association of something with a particular source is insufficient. To show that that ‘something’ serves as a source-indicator, the questions and responses must demonstrate that the ‘primary significance’ of the stimulus is as a brand identifier, not just a type of service or a feature of the services.” *Id.* at \*10 (citations omitted). There were no questions that asked whether respondents perceived the phrases as a mark and “we cannot determine whether participates even perceived the intended nature or purpose of [the phrases “Swipe Right/Swipe Left”].”

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<sup>70</sup> 12 TTABVUE 3-4.

*Id.* at \*11 (finding survey results showing “association” of proposed mark with Applicant unpersuasive, because there was no indication that respondents’ “association” with Applicant meant they understood it as a source identifier).

Applicant argues that the McDonald Survey shows that “there is actually little evidence that consumers use or encounter ‘swipe left’ in real life outside the context of online dating, and ‘no evidence’ that they make use of it ‘in everyday speech’ without ‘at least a nod and a wink’ to the TINDER® app.”<sup>71</sup> Even if most respondents associate the phrase with online dating, that does not mean that it is capable of functioning as a mark. As detailed above, “swipe left” is commonly used in the context of dating, both in real life and online, not as a source identifier, but as an expression to mean to reject or say no to someone or something. The fact that many respondents have seen the phrase used in connection with dating does not detract from the fact that “swipe left” is a common phrase that has the same meaning in other contexts. Moreover, as shown in the chart below, a significant number of respondents also associated the phrase with other mobile applications or websites, or as a conversational expression.<sup>72</sup>

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<sup>71</sup> *Id.* at 4.

<sup>72</sup> December 6, 2023 Request for Reconsideration at 104.

Table III-3 (Q2/3/5/6b): Context and Associations Linked to Phrase, Overall

	TOTAL (n = 424)	TEST A ("Swipe Right") (n = 216)	TEST B ("Swipe Right / Swipe Left") (n = 208)
Any dating app mention (net)	78% (330)	81% (176)	74% (154)
<i>Tinder</i>	58% (244)	60% (129)	55% (115)
<i>Other named dating app (including apps owned or licensed by Applicant)</i>	31% (133)	30% (64)	33% (69)
<i>Dating app, not specified</i>	13% (54)	16% (35)	9% (19)
Other app, website, or digital functionality	27% (113)	23% (50)	30% (63)
Conversational expression re romantic or sexual attraction	15% (65)	20% (43)	11% (22)
Conversational expression not re romantic or sexual attraction	18% (77)	19% (40)	18% (37)
Other	8% (34)	6% (14)	10% (20)
Don't know/Don't recall	17% (73)	16% (34)	19% (39)

We therefore find that neither survey demonstrates that potential consumers understand the phrase “swipe left” as a source of origin for Applicant’s goods or services. *See The Ride, LLC*, 2020 WL 564792, at \*11 (finding that at best, the proffered “surveys suggest a strong to very strong association of Applicant’s trade name The Ride with the questions put to the participants, but are not probative of the association of the applied-for mark with Applicant as the source of origin of Applicant’s services.”).

Finally, Applicant argues that, although the Board has not explicitly so held, a failure to function refusal should be treated in the same manner as a genericness refusal to the extent that any doubt should be resolved in favor of Applicant.<sup>73</sup> On

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<sup>73</sup> *Id.* at 21-23.

this record, any such rule would not apply: we have no doubt that “swipe left” is a commonly used phrase that conveys the sentiment or meaning of rejecting or saying no to someone or something and that it is incapable of functioning as a mark.

**Decision:** The refusal to register on the ground that Applicant’s proposed mark is merely descriptive is affirmed for the ’903 Application and the refusal to register Applicant’s proposed mark on the ground that it fails to function as a trademark is affirmed for the ’903 and ’923 Applications.