

This Opinion is Not a
Precedent of the TTAB

Mailed: August 18, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board

In re Kollins Ezekh

Serial No. 88759272

Clay McGurk of The Law Office of Clay McGurk
for Kollins Ezekh.

Shana McNamara, Trademark Examining Attorney, Law Office 125,
Heather Biddulph, Managing Attorney.

Before Wellington, Adlin and Dunn, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Kollins Ezekh seeks registration of BUILT BY GOD, in standard characters, for “clothing, namely, T-shirts, shirts, sweaters, coats, jeans, socks, shorts, tracksuits, shoes, boots, tank tops, swimsuits, dresses, bras, caps, hats, beanies,” in International Class 25.¹ The Examining Attorney refused registration of the proposed mark under Sections 1, 2 and 45 of the Trademark Act, on the ground that BUILT BY GOD fails to function as a mark, because it does not indicate the source of Applicant’s goods, or identify and distinguish them from those of others.

¹ Application Serial No. 88759272, filed January 15, 2020 under Section 1(b) of the Trademark Act, based on an alleged intent to use the mark in commerce.

After the refusal became final, Applicant appealed and filed a request for reconsideration that was denied. Applicant then filed its Appeal Brief (“Original Appeal Brief”), following which: (1) the Examining Attorney requested and was granted a remand to introduce additional evidence;² (2) Applicant filed his first Supplemental Appeal Brief (“First Supplemental Appeal Brief”) in response to the newly-introduced evidence; (3) the Examining Attorney requested and was granted another remand to introduce new evidence not previously available and to perfect the evidence introduced after the first remand; (4) Applicant filed his Second Supplemental Appeal Brief responding to the new and perfected evidence; and (5) the Examining Attorney filed her Appeal Brief.

I. Evidentiary Objections

In his First Supplemental Appeal Brief, Applicant objected to the vast majority of the Internet evidence the Examining Attorney introduced after the first remand, because the “examining attorney failed to provide the required URL.” 15 TTABVue 9. In response to this objection, following the second remand, the Examining Attorney re-submitted the Internet evidence in question with the URLs included, and also introduced new evidence. December 15, 2021 Office Action TSDR 6-53.

In his Second Supplemental Appeal Brief, Applicant maintained, but changed the basis for, his objection to the Examining Attorney’s Internet evidence submitted after the first remand. Specifically, Applicant now objects to all of the evidence submitted

² Responsibility for this application transferred from the original examining attorney to the current Examining Attorney prior to the first remand.

after the second remand (which includes copies of the evidence originally submitted following the first remand that was updated after the second remand by adding URLs) on the ground that it is “cumulative, duplicative, irrelevant and/or of no or minimal evidentiary value.” 23 TTABVue 3. The objection is overruled.

In fact, Applicant mislabels the new basis for his objection. Applicant’s complaint is not really that the evidence is “cumulative,” or “duplicative,” such as evidence which merely echoes prior evidence without establishing new or different facts. Rather, Applicant’s issue with the new and re-submitted evidence is actually that it is the same **type** of evidence already made of record before Applicant’s appeal:

Evidence previously submitted in the first office action (8-10-2020) by the first Examining Attorney included shirts [bearing the proposed mark] and sermon titles [including the proposed mark]. The new evidence submitted in the third final office action (12-15-2021) by the new Examining Attorney includes shirts, sermon titles

Id. at 4. This evidence is neither “cumulative” nor “duplicative.”

Rather, this evidence shows that there are **additional** third-party shirts bearing and sermon titles containing the same wording as the proposed mark, beyond those made of record prior to the first remand. By contrast, cumulative or duplicative evidence would be new post-remand evidence that does nothing more than again show that particular third-party shirts or sermon titles already made of record prior to remand bear or include the proposed mark.

In failure to function cases such as this, the extent of third-party use of the term in question is often crucial. *See e.g. In re Wal-Mart Stores, Inc.*, 129 USPQ2d 1148, 1153 (TTAB 2019) (widespread third party use of a phrase “makes it less likely that

the public will perceive it as identifying a single commercial source and less likely that it will be recognized by purchasers as a trademark”); *D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d 1710, 1716 (TTAB 2016) (due to “ubiquity” of **I ♥ DC**, “it does not create the commercial impression of a source indicator, even when displayed on a hangtag or label”); *In re Hulting*, 107 USPQ2d 1175, 1177 (TTAB 2013) (“The more commonly a phrase is used, the less likely that the public will use it to identify only one source and the less likely that it will be recognized by purchasers as a trademark.”) (quoting *In re Eagle Crest Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010)). Thus, more examples, showing that additional third parties use BUILT BY GOD, are truly new, and different than the earlier evidence about different third party uses of the proposed mark.

It does not escape notice that if we were to sustain Applicant’s objection on the newly-articulated ground that the evidence is “cumulative” and “duplicative,” we would be hamstringing the Examining Attorney’s effort to support the failure to function refusal and respond to Applicant’s arguments. Indeed, Applicant’s primary argument throughout prosecution and appeal has been that there is little if any third-party use of BUILT BY GOD. Applicant cannot fairly seek to prevent the Examining Attorney from establishing widespread third-party use of the phrase by objecting that evidence about additional third parties that use the phrase is “cumulative” or “duplicative.”

Finally, Applicant’s argument that much of the Examining Attorney’s evidence is “irrelevant and/or of no or minimal evidentiary value,” 23 TTABVUE 5-6, is not well-

taken. Applicant is correct that evidence showing many online reviews, or sales, of products bearing BUILT BY GOD may be more probative of the relevant public's exposure to the term than evidence that does not show reviews or sales or other specific public exposures to the phrase. But that does not make evidence that products bearing BUILT BY GOD are for sale online but have no reviews or accompanying sales data "irrelevant." That evidence still shows, at the very least, third-party use of the phrase.

II. Evidence and Arguments

The Examining Attorney argues, based primarily on third-party use of the phrase, that BUILT BY GOD has religious significance and is "commonly used," such that consumers would perceive it "merely as an informational message" rather than an identification of source. 25 TTABVUE 7.

Applicant counters that he is a "famous physical fitness trainer," that he uses BUILT BY GOD in that "context," and that "the number of people who follow and know [Applicant] out-strips by 18x the number of people who bought religious clothing items with the phrase 'BUILT BY GOD POWERED BY JESUS.'" 15 TTABVUE 5, 13. Furthermore, Applicant contends that few if any third parties use the phrase BUILT BY GOD by itself, the mark BUILTBYGOD was previously registered to a third party for clothing, and the Examining Attorney's explanation of the proposed mark's religious significance is mistaken. *Id.* at 15-23.

A. The Phrase's Origin and Meaning

The Examining Attorney introduced evidence that according to the New International Version of the Bible, Hebrews 3:4 translates to "For every house is built

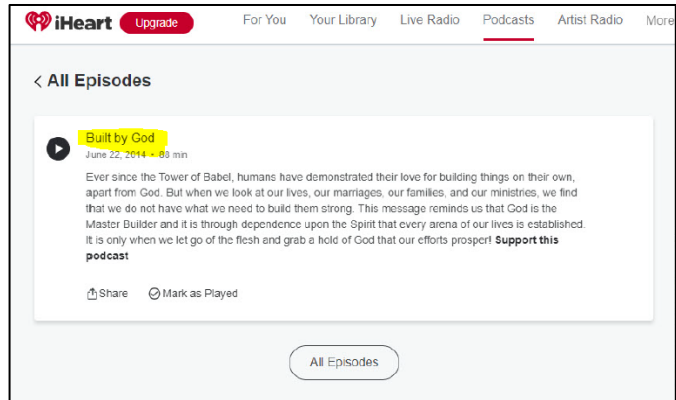
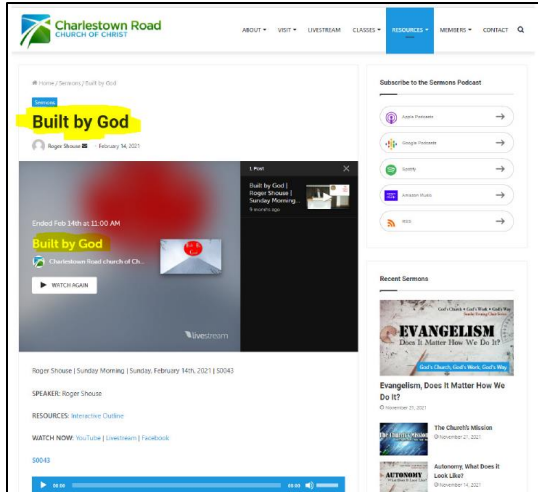
by someone, but God is the builder of everything.” April 3, 2020 Office Action TSDR 4 (printout from “biblegateway.com”). She also relies on the Wild Eyes Signs website, which offers a vinyl wall decal translating the last part of Hebrews 3:4 somewhat differently, to “For Every House is Built By Someone, But All Things are **Built By God.**” December 15, 2021 Office Action TSDR 15-17 (emphasis supplied).

An entry on the “enduringword.com” website uses the phrase similarly, without referencing Hebrews 3:4:

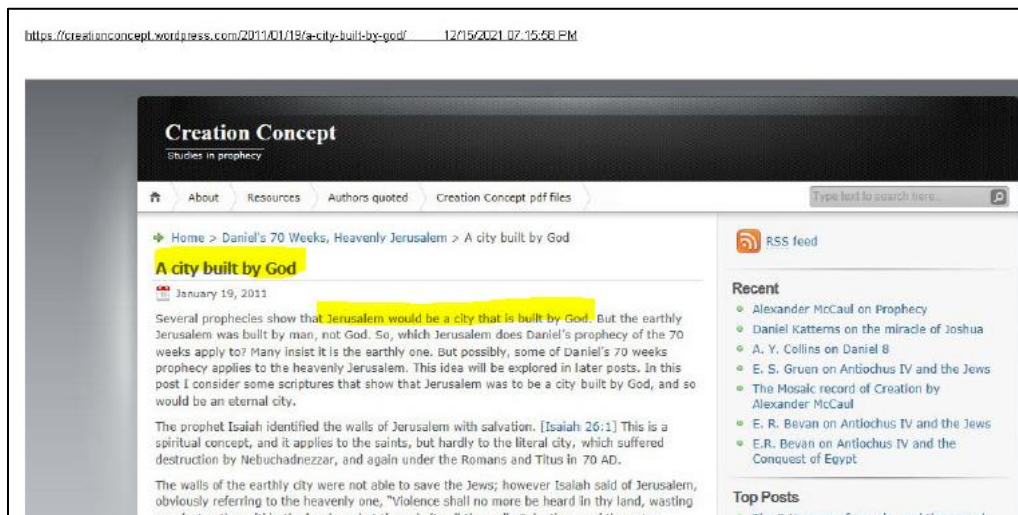
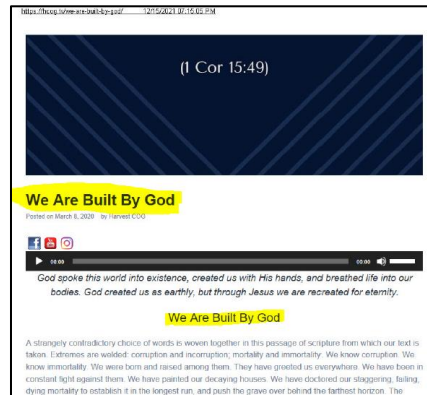
The Bible says that we are like a temple being **built by God**. Ephesians 2:19-21 tells us that God’s people are being built up like a temple, with Jesus Christ as the chief corner stone and God’s apostles and prophets as the rest of the foundation. Then God keeps building with all of God’s people, *in whom the whole building, being joined together, grows into a holy temple in the Lord* (Ephesians 2:21).

Id. at 42 (bold emphasis supplied).

The Examining Attorney also relies on titles of religious sermons and religious commentary which include the phrase “built by God.” December 15, 2021 Office Action TSDR 6, 7, 38. In addition, The Charlestown Road Church of Christ website offers a video of another sermon titled “Built By God”, and iHeartMedia offers a podcast entitled “Built By God”:



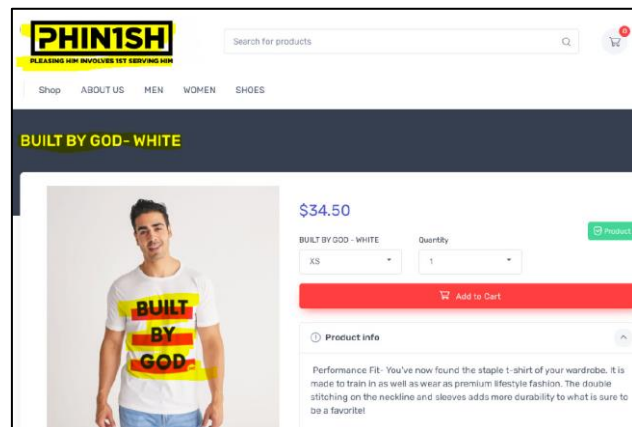
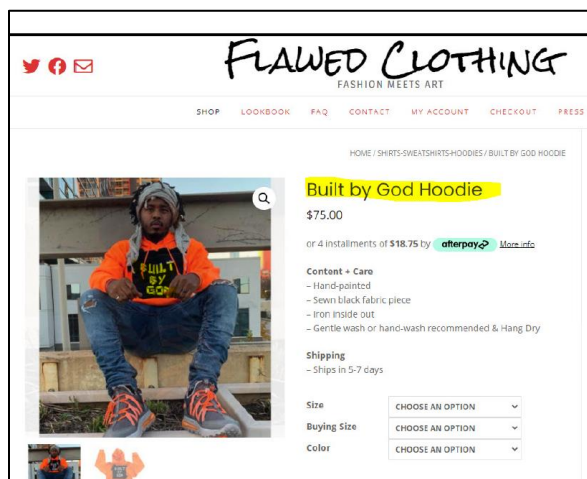
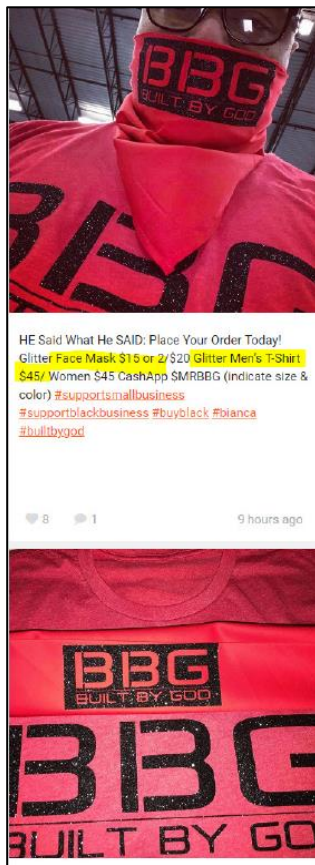
Id. at 10, 11 (highlighting added). Similarly the Harvest Church of God offers a video of the sermon “We are Built By God,” and Creation Concept features what appears to be a sermon entitled “A city built by God,” in reference to Jerusalem:

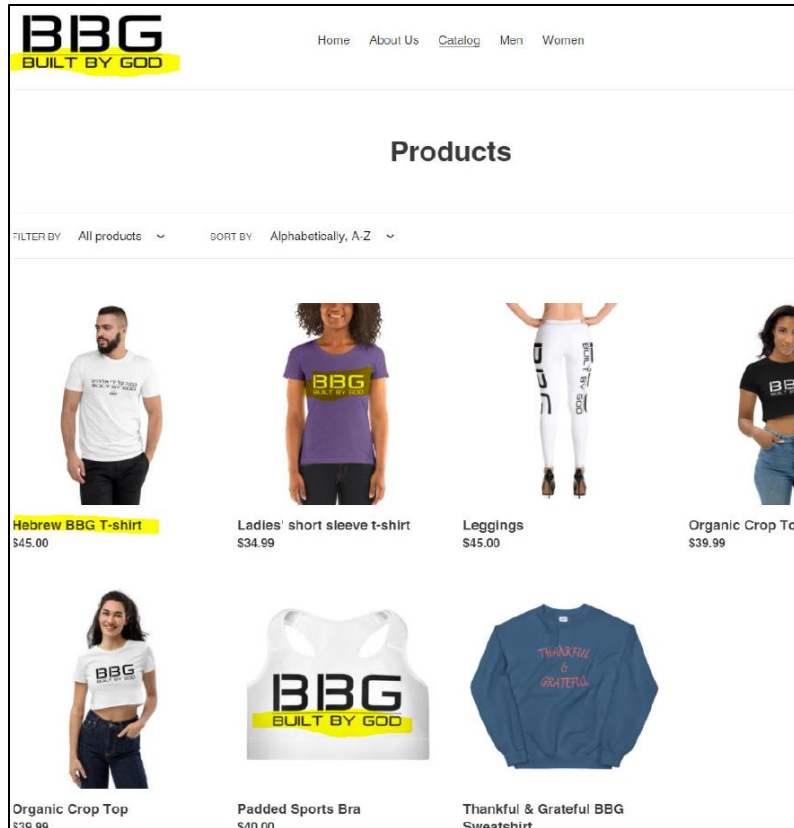


Id. at 46, 49 (highlighting added).

B. Third-Party Use of BUILT BY GOD on Clothing

The Examining Attorney also introduced evidence that the proposed mark is often used on clothing. Uses of the phrase by itself include the following five examples:





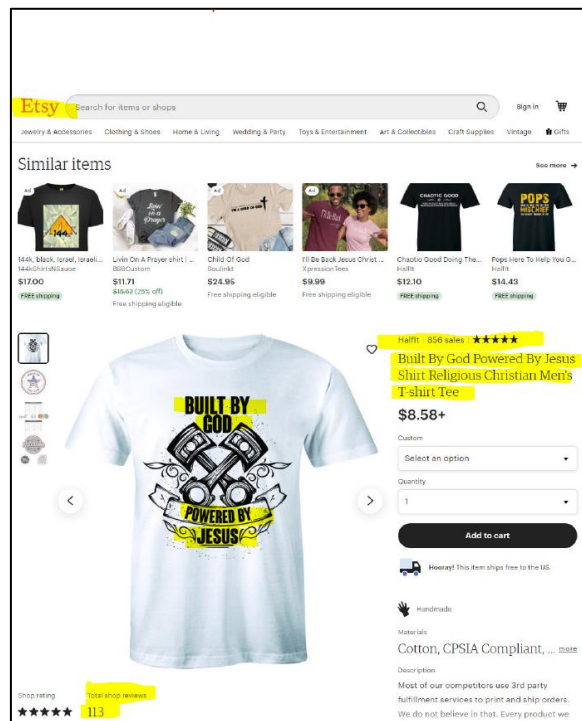
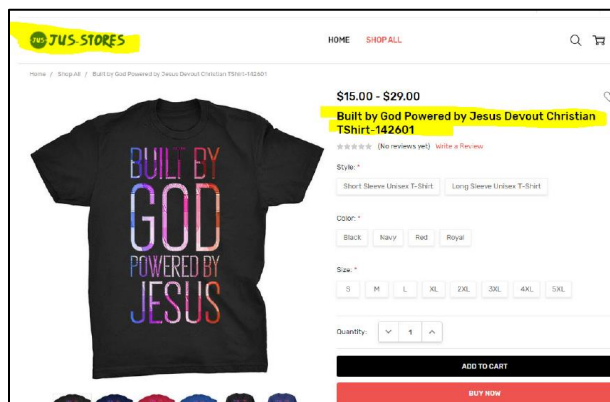
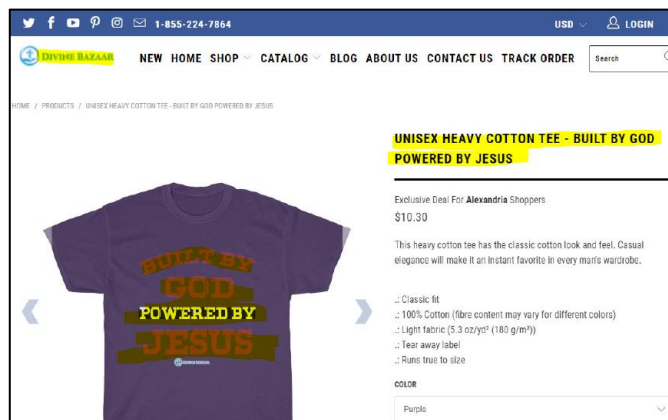
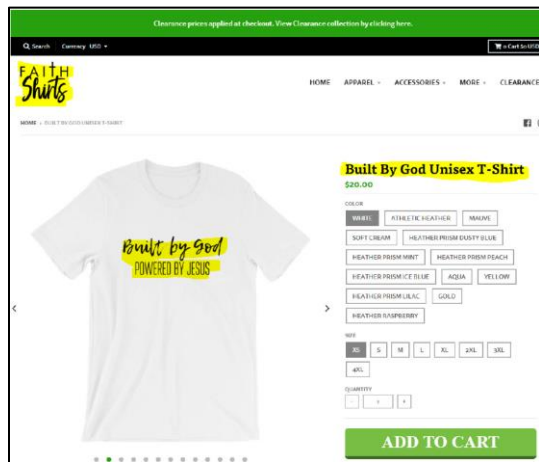
August 10, 2020 Office Action TSDR 8, 9 (highlighting added); December 15, 2021 Office Action TSDR 22, 26-34 (highlighting added). In the example on the right of the top row above, the phrase is not only used by itself, but is also used in connection with fitness and bodybuilding, as the front of the shirt depicts a bodybuilder. The source of this “Men’s BUILT BY GOD bodybuilder shirt” also offers t-shirts and sweatshirts featuring the phrase I’M BUILT BY GOD. August 10, 2020 Office Action TSDR 9. Another third-party offers a “Personalized Built By God zipper hoodie 3D hoodie” bearing the phrase. December 15, 2021 Office Action TSDR 20.

This evidence belies Applicant’s argument that BUILT BY GOD is rarely used on its own, without additional words or phrases. In any event, we find that evidence of use of BUILT BY GOD with other words or phrases is also probative, especially where

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the additional terms highlight, amplify or are subordinate to the phrase BUILT BY GOD. Indeed, these types of uses show not only consumer exposure to the phrase BUILT BY GOD, but also that the phrase is widely used in a variety of contexts for clothing (and other products).

There are a number of examples of the phrase being used with additional wording or other elements including the following 13 uses:

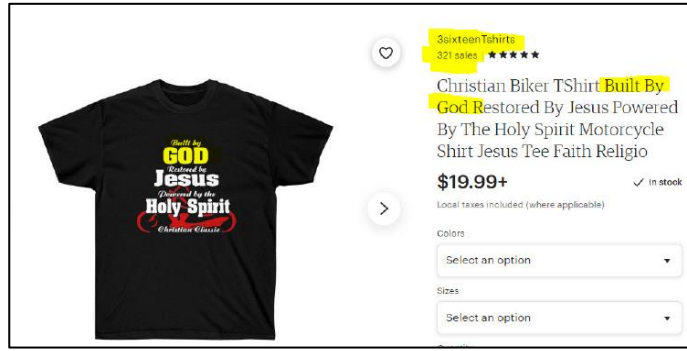


April 3, 2020 Office Action TSDR 5, 6, 8, 9 (highlighting added). These examples are similar in that: (1) BUILT BY GOD POWERED BY JESUS is displayed ornamentally on the front of all four shirts in large lettering; (2) the identity of the source of the shirts (Faith Shirts in the example on the left in the upper row, Divine Bazaar³ in the example on the right in the upper row, Jus-Stores⁴ in the example on the left in the bottom row and Halfit in the example on the right in the bottom row) is clearly displayed separately from the name of the shirts themselves (“Built By God Unisex T-Shirt” in the example on the left in the upper row, “Unisex Heavy Cotton Tee – BUILT BY GOD POWERED BY JESUS” on the right in the upper row, “Built By God Powered by Jesus Devout Christian TShirt” on the left in the bottom row and “Built By God Powered By Jesus Shirt Religious Christian Men’s T-shirt Tee” on the right in the bottom row). The record includes additional uses of BUILT BY GOD POWERED BY JESUS or variations thereof. August 10, 2020 Office Action TSDR 5, 6 (Christian Strong’s “Built by God T-Shirt” and Teemua’s “Built by God Powered by Jesus Devout Christian Long Sleeve T-Shirt”); December 15, 2021 Office Action TSDR 8, 18, 21 (Allezys’s “Built By God Powered By Jesus Spoiled By Husband T-shirt,” chaKalateLineDesigns’s “Built by God and Saved by Christ” t-shirt and Antife Store’s “Built By God Unisex T-Shirt”).

³ Applicant introduced evidence showing that the “divinebazaar.com” website was inaccessible on February 8, 2021. February 8, 2021 Request for Reconsideration TSDR 11.

⁴ Applicant introduced evidence showing that the “jus-stores.com” website was inaccessible on February 8, 2021. February 8, 2021 Request for Reconsideration TSDR 13. In any event, what appears to be the same shirt is also offered on Redbubble. December 15, 2021 Office Action TSDR 23.

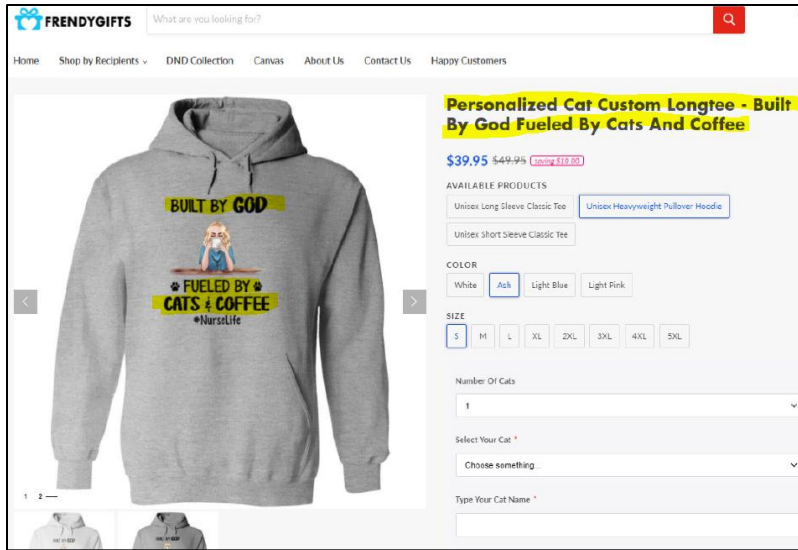
The Examining Attorney introduced many comparable examples in which BUILT BY GOD is used in phrases with similar themes, such as “Built By God Restored by Jesus Powered By the Holy Spirit”:



August 10, 2020 Office Action TSDR 4, (highlighting added).

Third parties also offer clothing which bears the phrase used with non-religious terms or phrases, including: TEAM MUSCLE BUILT BY GOD; BUILT BY GOD INFUSED WITH LOVE; and BUILT BY GOD FUELED BY CATS & COFFEE:

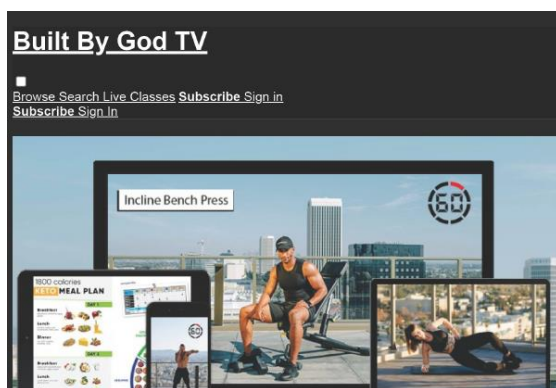




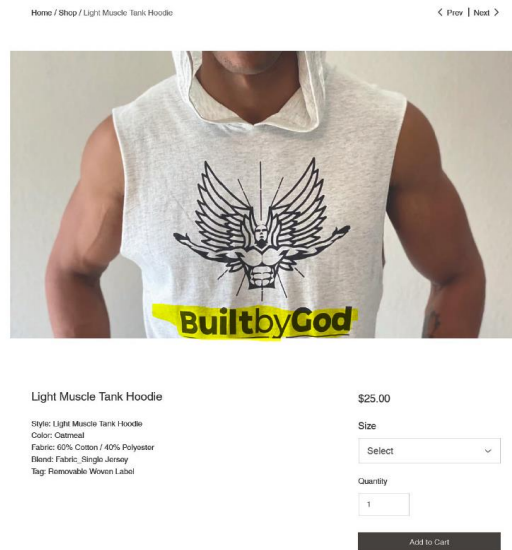
August 10, 2020 Office Action TSDR 9; December 15, 2021 Office Action TSDR 9, 25 (highlighting added).

C. Applicant's Use of the Term

Applicant introduced evidence of his own use of the phrase. Applicant's clothing is "associated with the acclaimed fitness services offered by the Applicant on www.builtbygod.tv," as shown below:



July 17, 2020 Office Action response TSDR 1, 7, 9 (highlighting added). The site also offers clothing bearing the proposed mark:



August 21, 2020 Office Action TSDR 14 (highlighting added). As shown, Applicant's clothing combines the phrase BUILT BY GOD with a design element depicting a male bodybuilder with wings. *Id.*

D. Cancelled Third-Party Registration

Applicant also points out that the phrase BUILTBYGOD in standard characters was registered for athletic clothing in 2013, though the registration was cancelled in 2019. August 21, 2020 Office Action TSDR 18-20.

III. Analysis

"The Trade-Mark Act is not an act to register words but to register trademarks. Before there can be registrability, there must be a trademark (or a service mark) and, unless words have been so used, they cannot qualify for registration." *In re Standard Oil Co.*, 275 F.2d 945, 125 USPQ 227, 229 (CCPA 1960). Thus, we start our analysis with the Act's definition of a trademark, which is "any word, name, symbol, or device, or any combination thereof – (1) used by a person ... to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others

and to indicate the source of the goods, even if that source is unknown.” 15 U.S.C. § 1127. *See also In re Bose Corp.*, 546 F.2d 893, 192 USPQ 213, 215 (CCPA 1976) (“[T]he classic function of a trademark is to point out distinctively the origin of the goods to which it is attached.”).

Whether the phrase BUILT BY GOD falls within this definition and functions as a mark depends on whether the relevant public, i.e., purchasers or potential purchasers of Applicant’s clothing, would perceive the phrase as identifying the source or origin of Applicant’s goods. *See, e.g., In re TracFone Wireless, Inc.*, 2019 USPQ2d 222983 at *1-2 (TTAB 2019); *In re Volvo Cars of N. Am. Inc.*, 46 USPQ2d 1455, 1459 (TTAB 1998) (“A critical element in determining whether a term or phrase is a trademark is the impression the term or phrase makes on the relevant public.”); *In re Safariland Hunting Corp.*, 24 USPQ2d 1380 (TTAB 1992). Here, the involved application was filed based on an intent to use and therefore the involved application’s file does not contain a specimen of use which would help us answer this question.

Nonetheless, Applicant has provided an example of his use of the proposed mark for clothing, August 21, 2020 Office Action TSDR 14 (shown above), which we consider in the same way we would consider a specimen of use. Moreover, given the drawing of the mark in the involved application and the entire record in this case, we do not require a specimen in order to affirm the failure to function refusal. *See e.g. In re Vox Populi Registry Ltd.*, 2020 USPQ2d 11289 (TTAB 2020) and *In re Mayweather Promotions, LLC*, 2020 USPQ2d 11298 (TTAB 2020) (both affirming failure to

function refusals of intent to use applications); TMEP § 1202 (2022) (“The issue of whether a designation functions as a mark usually is tied to the use of the mark, as evidenced by the specimen. Therefore, **unless the drawing and description of the mark are dispositive of the failure to function without the need to consider a specimen**, generally, no refusal on this basis will be issued in an intent-to-use application under § 1(b) of the Act.” (emphasis added).

Applicant’s “[m]ere intent that [BUILT BY GOD] function as a trademark is not enough in and of itself to make it a trademark.” *In re Wal-Mart Stores, Inc.*, 129 USPQ2d 1148, 1152 (TTAB 2019) (“The mere fact that a phrase proposed for registration appears on the specimens of record does not establish its use as a service mark.”); *In re Pro-Line Corp.*, 28 USPQ2d 1141, 1142 (TTAB 1993); *see generally Roux Labs, Inc. v. Clairol Inc.*, 427 F.2d 823, 66 USPQ2d 34, 39 (CCPA 1970) (“The mere fact that a combination of words or a slogan is adopted and used by a manufacturer with the intent Clairol has manifested here – does not necessarily mean that the slogan accomplishes that purpose in reality.”).

Here, notwithstanding Applicant’s intention, the religious origin and third-party uses of BUILT BY GOD, with and without additional elements, reveals that the phrase BUILT BY GOD does not perform the desired trademark function and does not fall within the Act’s definition of a mark. It will be perceived not as a source identifier, but instead as merely conveying religious devotion, or appreciation for God.

This is clear from the phrase’s biblical origins. While the evidence that the phrase is derived from Hebrews 3:4 is not voluminous, and the “enduringword.com” site cites

Ephesians 2:19-21 rather than Hebrews 3:4 in connection with the phrase, there is no question that the phrase is religiously significant, to Christians especially. April 3, 2020 Office Action TSDR 4; December 15, 2021 Office Action TSDR 15-17, 42. This is apparent not just from the association of the phrase with Bible passages, but also from the religious sermons and commentaries which focus on or are named for the phrase. December 15, 2021 Office Action TSDR 6, 7, 10, 11, 38, 46, 49.

Here, because the record shows that the phrase is commonly used to express devotion or appreciation, rather than to identify source, consumers would be unlikely to perceive it as a source identifier. *Cf. In re Team Jesus LLC*, 2020 USPQ2d 11489, at *5-6 (TTAB 2020) (affirming failure to function refusal of TEAM JESUS for clothing in part because the clothing is “presumably offered for consumers who want to convey their Christian affiliation by wearing apparel that prominently proclaims that message”).

Even if we were to ignore the proposed mark’s religious origin, message and significance, its widespread and typically ornamental use by third parties for clothing and other products is by itself a sufficient basis to find that it fails to function as a trademark. Widely used phrases such as BUILT BY GOD often fail to function as trademarks. *In re Wal-Mart*, 129 USPQ2d at 1153 (widespread third party use of a phrase “makes it less likely that the public will perceive it as identifying a single commercial source and less likely that it will be recognized by purchasers as a trademark”); *D.C. One Wholesaler*, 120 USPQ2d at 1716 (due to “ubiquity” of **I ♥ DC**, “it does not create the commercial impression of a source indicator, even

when displayed on a hangtag or label”); *In re Hulting*, 107 USPQ2d at 1177 (“The more commonly a phrase is used, the less likely that the public will use it to identify only one source and the less likely that it will be recognized by purchasers as a trademark.”) (quoting *In re Eagle Crest*, 96 USPQ2d at 1229); *In re Volvo Cars*, 46 USPQ2d at 1459 (DRIVE SAFELY is merely “an everyday, commonplace safety admonition”); *Reed v. Amoco Oil Co.*, 611 F.Supp. 9, 225 USPQ 876, 877 (M.D. Tenn. 1984) (“[C]ourts are reluctant to allow one to obtain monopoly rights to the use of a common word or phrase.... The more common a phrase is, the more it appears in everyday parlance, less is the likelihood that the phrase identifies the source of a certain product, and less is the likelihood that it deserves trademark protection”). Here, as in these “widespread use” cases, the proposed mark is too commonly used by too many third parties in a variety of forms for it to identify the source of Applicant’s goods.

We are not persuaded by Applicant’s vigorous argument that the Examining Attorney has not shown the proposed mark to be widely used because she has not shown how many products bearing BUILT BY GOD have been sold, and because the web listings for BUILT BY GOD products show an insubstantial number of reviews. 6 TTABVUE 18-19; 15 TTABVUE 19-20; 23 TTABVUE 5. Sales data is sometimes provided in *inter partes* cases but neither sales data nor a precise quantification of consumer exposure is required in *ex parte* cases such as this. See e.g. *In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003) (“We are mindful of the reality that the PTO is an agency of limited resources.”) (citing *In re Loew’s Theatres, Inc.*,

769 F.2d 764, 226 USPQ 865, 868 (Fed. Cir. 1985)); *In re Budge Mfg., Inc.*, 857 F.2d 773, 8 USPQ2d 1259, 1260-61 (Fed. Cir. 1988) (“Mindful that the PTO has limited facilities for acquiring evidence – it cannot, for example, be expected to conduct a survey of the marketplace or obtain consumer affidavits – we conclude that the evidence of record here is sufficient to establish a *prima facie* case of deceptiveness.”); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1087 n.4 (TTAB 2016); *In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1565 (TTAB 1996).

Indeed, it is telling that in prior, analogous cases affirming failure to function refusals, there was similarly no evidence specifically quantifying consumer exposure through sales information or reviews. *See e.g.*, *In re Team Jesus*, 2020 USPQ2d at 11489; *In re Texas With Love, LLC*, 2020 USPQ2d 11290 (TTAB 2020); *In re Mayweather Promotions*, 2020 USPQ2d at 11298; *In re D.C. One Wholesaler*, 120 USPQ2d at 1710; *In re Hulting*, 107 USPQ2d at 1175. Furthermore, the number of third-party uses is significant here without more, as we can safely infer that there would not be so many BUILT BY GOD shirts and other products offered for sale unless there was a market for them. And there is more evidence specifically quantifying consumer exposure than Applicant contends. *See e.g.* April 3, 2020 Office Action TSDR 9 (856 sales and 113 reviews); August 10, 2020 Office Action TSDR 4 (321 sales and 38 reviews), and 8 (1,790 “#builtbyGod Instagram Posts”); December 15, 2021 Office Action TSDR 23 (96 reviews). Finally, and more importantly, most of the Examining Attorney’s evidence, like online sales listings generally, does not

reveal how many units have been sold, and obviously all purchasers of a product do not submit online reviews.

In any event, the issue is not just that BUILT BY GOD is widely used. The record also reveals that the phrase is quite often used ornamentally, in large, prominent letters on the front of shirts, to convey a specific message, but not to identify the source of clothing or other products. In fact, the record reveals that the phrase is often used to inform consumers about the message conveyed by the shirt or other product (“Men’s BUILT BY GOD bodybuilder shirt,” “Built by God Hoodie,” “Built By God Powered By Jesus Spoiled by Husband T-shirt”), rather than the source of the shirt or product (“Team Muscle Gear,” “Flawed Clothing” and “Allezys,” respectively). August 10, 2020 Office Action TSDR 9; December 15, 2021 Office Action TSDR 22, 26. This common ornamental use of the phrase influences public perception of the phrase and its purpose, which in this case is to convey a message rather than to identify source. *In re Mayweather Promotions, LLC*, 2020 USPQ2d 11298, at *4 (TTAB 2020) (“in the clothing industry, this common message is used on t-shirts as a feature such that ‘the display itself is an important component of the product and customers purchase the product’ not associating it with a particular source but because of the message”) (citing *D.C. One Wholesaler*, 120 USPQ2d at 1716); *In re Hulting*, 107 USPQ2d at 1178-79 (“Clearly, the placement, size, and dominance of the wording are consistent with informational (or ornamental), not trademark use. Such prominence is more consistent with the conveying of an informational message than

with signifying a brand or an indicator of source.”). Here, the source is a fitness trainer, not an entity named Built By God.⁵

Finally, granting the registration Applicant seeks “would achieve the absurd result of hampering others in their use of the common” phrase BUILT BY GOD for clothing or related products. *In re Schwauss*, 217 USPQ at 362. *See also In re Volvo Cars*, 46 USPQ2d at 1460 (“to grant exclusive rights to applicant in this ordinary and commonly used safety admonition would interfere with the rights of others in the automobile industry to freely use the familiar phrase” to promote safe driving) and *America Online, Inc. v. AT&T Corp.*, 243 F.3d 812, 57 USPQ2d 1902, 1910-11 (4th Cir. 2001) (widespread use of “You Have Mail” in connection with an email service could not be protected as a trademark where consumers would perceive it “in its commonly understood way”).⁶

⁵ Applicant’s own use of the phrase BUILT BY GOD in the context of physical fitness is not meaningful here because Applicant’s identification of goods does not limit his BUILT BY GOD clothing to fitness-related clothing, nor does the proposed standard character mark on the involved application’s drawing page convey anything about fitness. *Cf. In re i.am.symbolic, LLC*, 116 USPQ2d 1406, 1409-10 (TTAB 2015), *aff’d* 886 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017).

⁶ The cancelled registration for BUILTBYGOD is irrelevant because it is evidence of nothing other than the fact that it once issued. *Sunnen Prods. Co. v. Sunex Int’l Inc.*, 1 USPQ2d 1744, 1747 (TTAB 1987). In any event, neither the existence of third-party registrations nor any of the evidence in their prosecution records (when it is of record) compels a specific result in later, allegedly analogous cases. *See, e.g., Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1377 (Fed. Cir. 2018) (“these prior registrations do not compel registration of [Applicant’s] proposed mar[k]”) (citing *In re Cordua Rests., Inc.*, 823 F.3d 594, 600 (Fed. Cir. 2016)); *In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009) (“Even if all of the third-party registrations should have been refused registration under section 1052(a), such errors do not bind the USPTO to improperly register Applicant’s marks.”).

IV. Conclusion

In short, the evidence shows that the phrase BUILT BY GOD is religiously significant and too commonly used, ornamentally, in connection with clothing for it to be perceived as a trademark, and Applicant should not be able to deny competitors (who according to the record also use the phrase) the right to use it freely. The phrase fails to function as a trademark under Sections 1, 2 and 45 of the Trademark Act.

Decision: The refusal to register the proposed mark BUILT BY GOD on the ground that it does not function as a mark is affirmed.