

This Opinion is Not a
Precedent of the TTAB

Mailed: January 6, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Kirill's Big Brain, LLC
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Serial No. 90033810
—

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

Jacob Vigil, Trademark Examining Attorney, Law Office 103,
Stacy Wahlberg, Managing Attorney.
—

Before Zervas, Bergsman and English, Administrative Trademark Judges.

Opinion by English, Administrative Trademark Judge:

Kirill's Big Brain, LLC ("Applicant") seeks registration on the Principal Register of the standard character mark ASSHOLES LIVE FOREVER for the following goods:¹

- "Air fragrancng preparations" in International Class 3;

¹ Application Serial No. 90033810; filed July 2, 2020 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a) claiming a date of first use of the mark anywhere and in commerce of: (1) January 2, 2018 for the goods in Class 21; (2) July 2, 2018 for the goods in Classes 16, 18, 24, 25, and 27; (3) January 2, 2019 for the goods in Classes 3, 14, and 34; and (4) January 2, 2020 for the goods in Classes 9, 10, 20, 26, 28.

- “Decorative switch plate covers; cell phone covers” in International Class 9;
- “Vacuum pumps for medical purposes” in International Class 10;
- “Metal key chains; plastic key chains; earrings; rings; necklaces; ornamental lapel pins” in International Class 14;
- “Stickers” in International Class 16;
- “Duffle bags; backpacks; tote bags; all-purpose carrying bags; fanny packs; makeup bags sold empty; pet clothing; pet accessories, namely, leashes” in International Class 18;
- “Plastic caps for pill bottles” in International Class 20;
- “Coffee cups and mugs; plastic cups; hand operated herb and spice grinders; non-electric bottle openers; plastic coasters; drinking flasks; water bottles sold empty; chopsticks and chopstick cases; tooth brushes; insulating sleeve holders made of foam for cans; Serving trays not of precious metal” in International Class 21;
- “Pillow cases; cloth flags; shower curtains of textile or plastic” in International Class 24;
- “T-shirts; tank tops; tube tops; crop tops; sweatshirts; hooded sweatshirts; bodysuits; union suits; underwear; tops being clothing for men and women; jackets; pants; leggings; shorts; footwear; caps being headwear; hats; beanies; knit facemasks being headwear; swimwear” in International Class 25;

- “Ornamental cloth patches” in International Class 26;
- “Bath mats” in International Class 27;
- “Sporting goods, namely, balls and accessories therefor; playing cards” in International Class 28; and
- “Ashtrays for smokers” in International Class 34.

The Trademark Examining Attorney refused registration under Sections 1, 2, and 45 of the Trademark Act U.S.C. §§ 1051-52 and 1127, on the ground that the applied-for-mark fails to function as a trademark for Applicant’s goods because it “is a commonplace term, message, or expression widely used by a variety of sources that merely conveys an ordinary, familiar, well-recognized concept or sentiment.”² Specifically, the Examining Attorney asserted that the applied-for mark “is commonly used to refer to the sentiment that those who are considered annoying or detestable appear to outlive those who are considered positive or desirable and conveys a common expression of resignation.”³ When the refusal was made final, Applicant appealed and requested reconsideration. The Examining Attorney denied Applicant’s request for reconsideration, and the appeal proceeded.

Both Applicant and the Examining Attorney have filed briefs. We affirm the refusal to register the proposed mark for all classes of goods identified in the application under Sections 1, 2, and 45 of the Trademark Act.

² October 13, 2020 Office Action, TSDR 4; *see also* May 10, 2021 Final Office Action, TSDR 4; Examining Attorney’s Brief, 10 TTABVUE 1.

³ October 13, 2020 Office Action, TSDR 4.

I. Evidentiary Issue⁴

Applicant attached to its appeal brief printouts from the USPTO's Trademark Status and Document Retrieval (TSDR) and Trademark Electronic Search System (TESS) databases for six registered marks that Applicant contends are analogous to the applied-for mark.⁵ The Examining Attorney has objected to this evidence as untimely on the ground that it was not submitted before appeal.

Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), provides that “the record should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal.” Applicant timely introduced two of the registrations attached to its brief (Reg. Nos. 5414637 and 4723285) with its November 10, 2021 Request for Reconsideration.⁶ The Examining Attorney's objection therefore is overruled as to these two registrations and we have considered them. The objection, however, is

⁴ Some of the Internet printouts Applicant introduced during prosecution do not bear URL addresses and dates, as required. *In re Mueller Sports Med., Inc.*, 126 USPQ2d 1584, 1587 (TTAB 2018) (requiring both examining attorneys and applicants in ex parte proceedings to provide URL addresses and download dates for Internet evidence). The Examining Attorney objected to Exhibits C through H of Applicant's April 13, 2021 Office action response on this basis so we have not considered this evidence. *See* May 10, 2021 Final Office Action TSDR 4. Applicant, however, remedied the deficiency by resubmitting with its request for reconsideration much of the same evidence bearing the required URL addresses and dates.

⁵ 8 TTABVUE 9-20.

Applicant also attached to its brief copies of the May 10, 2021 Final Office Action as well as Applicant's April 13, 2021 Office Action Response and November 10, 2021 Request for Reconsideration. This was unnecessary as the file of the involved application is automatically of record in this appeal.

⁶ November 10, 2021 Request for Reconsideration, TSDR 189-96.

sustained as to the four registrations that were untimely introduced for the first time during this appeal (Reg. Nos. 4441054, 6635370, 4020572 and 6335634).⁷ *In re Brunetti*, 2022 USPQ2d 764, at *6 (TTAB 2022) (sustaining examining attorney’s objection to third-party registrations not made of record during prosecution); *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1744 (TTAB 2018) (“The evidence submitted with Applicant’s appeal brief that Applicant did not previously submit during prosecution ... is untimely and will not be considered.”), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019).

II. Failure to Function Refusal

A. Applicable Law

The Trademark 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). Section 45 of the Trademark Act defines a “trademark” as “any word, name, symbol, or device, or any combination thereof – (1) used by a person ... to identify and distinguish his or her goods ... 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

⁷ If Applicant wished to introduce additional evidence, its recourse was to file a written request with the Board to suspend the appeal and remand the application for further examination pursuant to Trademark Rule 2.142(d). TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1207.02 (2022).

213, 216 (CCPA 1976) (“[T]he classic function of a trademark is to point out distinctively the origin of the goods to which it is attached”). “When a proposed mark fails to meet the statutory definition of a trademark, it is ineligible for registration. Section 1 of the Trademark Act permits only a ‘trademark’ to be registered. 15 U.S.C. § 1051.” *Brunetti*, 2022 USPQ2d 764, at *3.

“One way a proposed mark fails to function [as a source identifier] is if consumers will view it as a merely informational slogan or phrase instead of something that ‘point[s] out distinctively the origin of the goods to which it is attached.’” *Id.* at *11 (quoting *Bose Corp.*, 192 USPQ2d at 215). “Matter may be merely informational and fail to function as a trademark if it is a common term or phrase that consumers of the goods or services identified in the application are accustomed to seeing used by various sources to convey ordinary, familiar, or generally understood concepts or sentiments. Such widely used messages will be understood as merely conveying the ordinary concept or sentiment normally associated with them, rather than serving any source-indicating function.” *Id.* at *12; *see also In re Greenwood*, 2020 USPQ2d 11439, at *6 (TTAB 2020) (“Consumers ordinarily take widely-used, commonplace messages at their ordinary meaning, and not as source indicators, absent evidence to the contrary.”); *In re Mayweather Promotions, LLC*, 2020 USPQ2d 11298, at *1 (TTAB 2020) (“Widely used commonplace messages are those that merely convey ordinary, familiar concepts or sentiments and will be understood as conveying the ordinary concept or

sentiment normally associated with them, rather than serving any source-indicating function”); *Texas With Love, LLC*, 2020 USPQ2d 11290, at *2 (TTAB 2020) (holding that TEXAS LOVE would be perceived not as a source identifier, but instead as a widely-used phrase that merely conveys a well-recognized and commonly expressed concept or sentiment); *D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d 1710, 1716 (TTAB 2016) (finding I ♥ DC failed to function as a mark for clothing because it would be perceived merely as an expression of enthusiasm for the city).

“In analyzing whether a proposed mark functions as a source identifier, the Board focuses on consumer perception.” *In re Vox Populi Registry Ltd.*, 25 F.4th 1348, 2022 USPQ2d 115, at *5 (Fed. Cir. 2022) (citations omitted); *see also, e.g., Texas With Love*, 2020 USPQ2d 11290, at *2 (“Whether the term ... functions as a mark depends on whether the relevant public, i.e., purchasers or potential purchasers of Applicant’s goods, would perceive the term as identifying the source or origin of Applicant’s goods.”); *In re TracFone Wireless, Inc.*, 2019 USPQ2d 222983, at *1-2 (TTAB 2019) (“The key question is whether the asserted mark would be perceived as a source indicator for Applicant’s [goods or] services.”); *In re Aerospace Optics, Inc.*, 78 USPQ2d 1861, 1862 (TTAB 2006) (“[T]he critical inquiry is whether the asserted mark would be perceived as a source indicator.”). Where, as here, there are no limitations on the channels of trade or classes of consumers for the identified goods, the relevant consuming

public comprises all potential purchasers of the goods.⁸ *Univ. of Ky. v. 40-0, LLC*, 2021 USPQ2d 253, at *24 (TTAB 2021); *In re Team Jesus LLC*, 2020 USPQ2d 11489, at *3 (TTAB 2020).

We consider all the evidence of record, including Applicant’s specimens, as well as other evidence of “how the designation is actually used in the marketplace.” *Vox Populi Registry*, 2022 USPQ2d 115, at *5 (citing *In re Eagle Crest, Inc.*, 96 USPQ2d 1227, 1230 (TTAB 2010)); *see also Texas With Love*, 2020 USPQ2d 11290, at *2; *D.C. One Wholesaler*, 120 USPQ2d at 1716 (considering third-party use evidence as well as the applicant’s specimens and other examples of use). “Where the evidence suggests that the ordinary

⁸ We consider the perception of the general consuming public for the following goods that are consumer products marketed to the general population: air fragrancing preparations in Cl. 3; decorative switch plate covers; cell phone cases in Cl. 9; key chains, jewelry and lapel pins in Cl.14; stickers in Cl.16; carrying bags; pet clothing and accessories in Cl.18; drinkware, bottle openers and serving trays and toothbrushes in Cl. 21; pillow cases, shower curtains and flags in Cl. 24; clothing in Cl. 25; cloth patches in Cl. 26; bath mats in Cl. 27; sporting goods in Cl. 28; and ashtrays in Cl. 34. *Embiid*, 2021 USPQ2d 577, at *31 (TTAB 2021) (“By their nature, shoes, shirts, and sweatshirts are general consumer goods that are marketed to the general population, and that are purchased or used in some form by virtually everyone.”) (internal quotation marks and citation omitted); *Anheuser-Busch, LLC v. Innopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1825-26 (TTAB 2015) (“[A]bsent any explicit restriction in the application or registration, we must presume the parties’ identified goods to travel through all normal channels of trade for goods of the type identified, and we must consider them to be offered and sold to all of the usual customers for such goods.”). The general consuming public is also part of the relevant consumers for Applicant’s goods in Classes 10 and 20. While Applicant’s “vacuum pumps for medical purposes” in Cl. 10 would appear to be goods marketed to medical professionals, Applicant’s specimen shows that the description is broad enough to encompass “penis pumps” marketed to the general consuming public. July 2, 2020 Specimen, TSDR 4. Similarly, while plastic caps for pill bottles in Class 20 may be sold to medicine manufacturers and pharmacies, Applicant’s specimen shows that the description of goods broadly encompasses plastic caps for pill bottles sold to general consumers. *Id.* at TSDR 13.

consumer would take the words at their ordinary meaning rather than read into them some special meaning distinguishing the goods and services from similar goods and services of others, then the words fail to function as a mark.” *In re Ocean Tech., Inc.*, 2019 USPQ2d 450686, at *3 (TTAB 2019) (internal punctuation omitted).

B. Evidence

1. Third Party Use

The Examining Attorney introduced more than two and one-half dozen examples of various third-parties using the applied-for-mark prominently as an ornamental feature on goods such as clothing, home décor, stickers, cell phone cases, drinking glasses, bottles and mugs.

- **Five Entities selling products on Amazon.com:**⁹

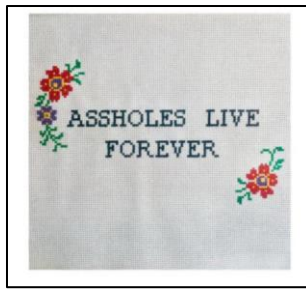
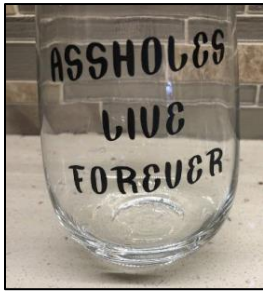


⁹ October 13, 2020 Office Action, TSDR 16, 21; May 10, 2021 Final Office Action, TSDR 64; April 5, 2022, Denial of Request for Reconsideration, TSDR 7, 19.

¹⁰ This product is a sticker.

¹¹ This product is a flag.

- **Three Entities Selling Products on Etsy.com:**¹²



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- **Jennyvar selling numerous items on Redbubble.com:**¹⁴



¹² May 10, 2021 Final Office Action, TSDR 38, 76; April 5, 2022, Denial of Request for Reconsideration, TSDR 4.

¹³ This product is a needlepoint pattern.

¹⁴ October 13, 2020 Office Action, TSDR 26; May 10, 2021 Final Office Action, TSDR 44, 50, 56, 63.

- TeeVision selling numerous items on Spreadshirt.com¹⁵ and Cafepress.com:¹⁶



- Timlsit selling stickers and phone cases on TeePublic.com:¹⁷

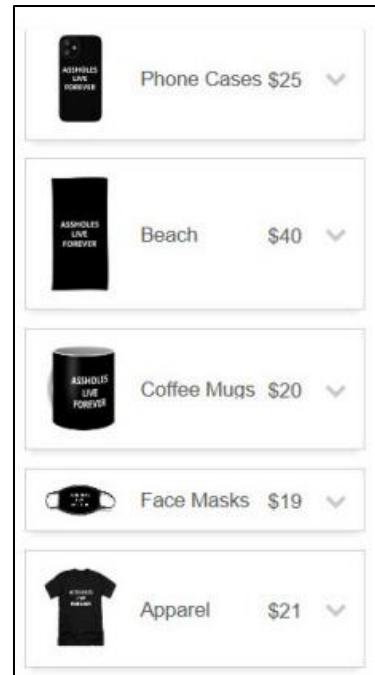
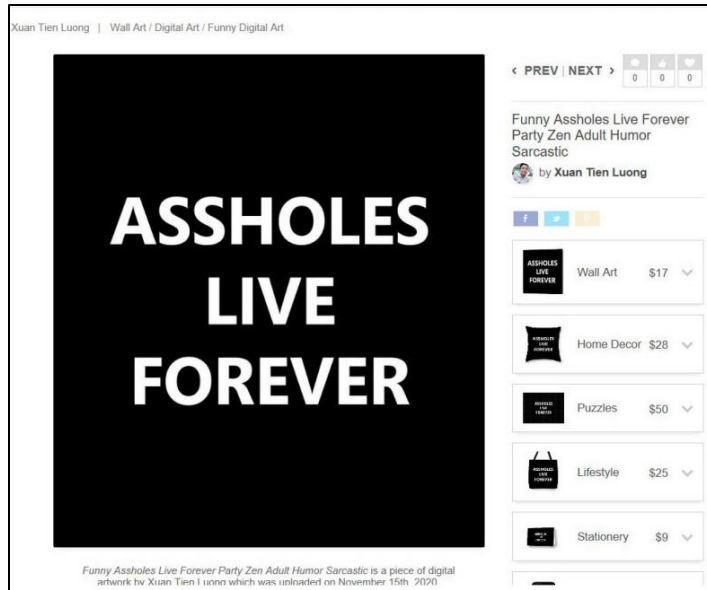


¹⁵ October 13, 2020 Office Action, TSDR 36; May 10, 2021 Final Office Action, TSDR 69-70.

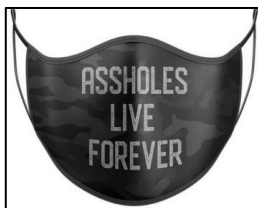
¹⁶ October 13, 2020 Office Action, TSDR 52-53; May 10, 2021 Final Office Action, TSDR 73. This same entity appears to sell an art print on Society6. October 13, 2020 Office Action, TSDR 31.

¹⁷ May 10, 2021 Final Office Action, TSDR 36-37.

- Numerous items sold by Xuan Tien Luong on fineartamerica.com:¹⁸



- 16 additional entities selling clothing, face masks, glassware, jewelry, a journal, a screen print transfer and a lamp, as shown in a few examples below:¹⁹



The record also includes examples of use of the proposed mark generally, not in connection with the goods covered by the application:

¹⁸ May 10, 2021 Final Office Action, TSDR 80-81.

¹⁹ October 13, 2020 Office Action, TSDR 34, 46, 48, 51 58; May 10, 2021 Final Office Action, TSDR 6, 9 (red arrow in screenshot of image attached to Office action); *id.* at 11, 18, 22, 26, 33, 71; April 5, 2022 Denial of Request for Reconsideration, TSDR 5, 15, 17.

- December 31, 2019 tweet from ChuChito: “Got an ‘**Assholes Live Forever**’ Tattoo” (October 13, 2020 Office Action, TSDR 60);
- Screenshot from soundcloud.com “1 Year Ago”: Sound recording and illustration of a cartoon character wearing a shirt bearing **ASSHOLES LIVE FOREVER** (April 5, 2022 Denial of Request for Reconsideration, TSDR 6);
- 2021 book titled BLOOD HEIR with the following dialogue: “Good people don’t last, but **assholes live forever**,” Desandra murmured.” (April 5, 2022 Denial of Request for Reconsideration, TSDR 34-35);
- Reader of a June 19, 2016 article in VARIETY titled “‘Like Crazy’ Director Drake Doremus Remembers Anton Yelchin” commented on June 21, 2016: “Why is it that the beautiful people of this world die way too young but the **assholes live forever**[?]” (October 13, 2020 Office Action, TSDR 65-69);
- February 25, 2014 Reddit Post by raisedbynarcissists: “**Assholes live forever** (rant) ... There has got to be some scientific research out there on why this is. All the good people die young, and **asshole narcissists live forever**.” (November 10, 2021 Request for Reconsideration, TSDR 31);
- April 28, 2009 post on absolutewrite.com: “What’s the expression mean: “Only the good die young” ... It means good people die young and **assholes live forever**.” (November 10, 2021 Request for Reconsideration, TSDR 31);
- Undated novel titled “Find Me” by Laura Van Den Berg with the following passage: “Don’t you wonder who’ll be next?” ‘I wouldn’t bet on you,’ I say. ‘You’re going to live a very long time.’ ‘How would you know?’ I smile, no teeth. ‘**Assholes live forever**.’” (April 5, 2022 Denial of Request for Reconsideration, TSDR 31);
- Search of Tumblr uncovered 3 results: (1) undated post “**ASSHOLES LIVE FOREVER**” by bigoletrippydicks; (2) “**assholes-live-forever** Personal Blog” with a post dated December 3, 2019; and (3) undated post “**FUCK. AssholesLiveForever**” by purplelipstic (October 13, 2020 Office Action, TSDR 59);
- January 28, 1992 book titled HERITICS HANDBOOK OF QUOTATIONS: CUTTING COMMENTS ON BURNING ISSUES, attributing the following quote to The Match!, No. 74: “...while life is fleeting, **assholes live forever**;

or, as Latin might have it ‘Arse longa, vita brevis’ (April 5, 2022 Denial of Request for Reconsideration, TSDR 32; *see also* October 13, 2020 Office Action, TSDR 64);

- 2020 Album titled “**Assholes Live Forever: The Abyss Tapes, Vol. 1**” “Powered by Distrokid” on Spotify and Distrokid.com, October 13, 2020 Office Action, TSDR 55; *see also* April 24, 2020 song titled **Assholes Live Forever** provided to YouTube by Distrokid (October 13, 2020 Office Action, TSDR 33);
- September 12, 2019 to October 19, 2019: **Assholes Live Forever** art show in Los Angeles featuring the works of Max Göran (October 13, 2020 Office Action, TSDR 50);
- June 9, 2020: **Assholes Live Forever**, title of the 50th episode of the podcast Bunker Fly on iHeartRadio (October 13, 2020 Office Action, TSDR 56-57);
- June 13, 2021: Video on YouTube titled “**Assholes Live Forever – RA ft. (Chambers v. Carelessajjj)**” (April 5, 2022 Denial of Request for Reconsideration, TSDR 14);
- December 10, 2019: Song released on Apple Music titled “The Good Die Young, **Assholes Live Forever**” by Davepi23 (April 5, 2022 Denial of Request for Reconsideration, TSDR 30; *see also* October 13, 2020 Office Action, TSDR 61-63 (davepi23.bandcamp.com));
- Undated Instagram Account titled **Assholes.Live.Forever** by Vedant Chauhan (October 13, 2020 Office Action, TSDR 49);
- June 9, 2006 to February 14, 2007: Entries in an online journal titled “The Good Die Young, but **Assholes live Forever**” by Theodore C. Nott (October 13, 2020 Office Action, TSDR 41); and
- December 10, 2006 blogpost on WFMU’s Beware of the Blog titled “The Good Die Young, **Assholes Live Forever (MP3s)**” (April 5, 2022 Denial of Request for Reconsideration, TSDR 25).

2. Applicant’s Use

Below are representative examples of Applicant’s specimens:²⁰

²⁰ July 2, 2020 Specimens of Use.



In addition, the record shows that Applicant sells a number of clothing items bearing the applied-for mark in more than fifteen different stylizations. A few examples are below:²¹

²¹ November 10, 2021 Request for Reconsideration, TSDR 71-111.



C. Analysis

As an initial matter, we address criticism Applicant raised during prosecution regarding the nature of a failure to function refusal. Applicant contends that by this refusal it “is paying the price for an unintended but arguably unfair overzealous application of flawed analysis” and cites to purported comments from the general counsel of IBM that a “separate subject matter refusal” for merely informational matter, including widely-used commonplace terms and expressions, is not necessary because:²²

²² April 13, 2021 Office Action Response, TSDR 8. These comments were purportedly made during prosecution of an unrelated application. Applicant introduced a TSDR printout for the application (*id.* at 25-26) but did not introduce the Office action response with the comments Applicant attributes to IBM’s general counsel.

1. The existing analytical structure [of the Trademark Act] is sufficient.
2. The context of a phrase is crucial.
3. The potential for too much discretion is very real.
4. [It] places an undue burden on applicants to provide additional evidence that the proposed mark is not informational.

As we recently explained in *Brunetti*, 2022 USPQ2d 764:

[T]he Trademark Act does not specifically articulate “failure to function” *in haec verba* as a ground for refusal of a proposed mark. However, as explained above, the starting point for registration is the statutory definition of a trademark. A word that fails to distinguish goods or services does not meet the statutory definition of a trademark, and thus cannot be registered. 15 U.S.C. §§ 1051, 1127. ... Like genericness, “failure to function” finds its statutory basis in Section 45’s definition of a trademark. And, an entire body of law — starting over 60 years ago with the Court of Customs and Patent Appeals decision in *Standard Oil* — has developed that provides guidance on how Trademark Act Section 45’s definition of “trademark” applies to merely informational matter, including widely-used commonplace terms and expressions. That body of law recognizes that such terms and expressions are usually taken by consumers at their ordinary meaning and are not perceived as identifying and distinguishing one party’s goods from those of others or indicating their source.

Id. at *28-29.

Accordingly, refusing registration on the ground that a designation fails to function as a mark is not an arbitrary or “unfair” construct of the Office but rather arises from the definition of a trademark. Moreover, the Office must establish a *prima facie* case to support the refusal of registration. *Id.* at *40 (“The Examining Attorney is required to establish a reasonable predicate for his position—i.e., a *prima facie* case—that [the proposed mark] is not registrable.”). The burden on an applicant to overcome such a refusal is no

different from (or greater than) the burden on an applicant faced with a generic or descriptiveness refusal or a refusal under Section 2(d) of the Trademark Act.

Turning to the merits of the refusal, the Examining Attorney introduced evidence of more than two and one-half dozen third parties offering clothing, and other goods covered by the involved application, emblazoned with the phrase ASSHOLES LIVE FOREVER. In turn, Applicant introduced evidence suggesting that two of the third-parties may no longer be offering the goods.²³ Another three uses display the phrase in a font identical to that used by Applicant suggesting that these third parties may be attempting to associate themselves with Applicant (as discussed below).²⁴ If we discount these five uses, the record still includes two dozen third-parties prominently using ASSHOLES LIVE FOREVER in an ornamental manner on various goods covered by the involved application, including clothing, stickers, home décor, art prints, glassware, water bottles, cell phone cases, jewelry and bags. This evidence supports that the message ASSHOLES LIVE FOREVER “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 it conveys, e.g. celebrating assholes or as resignation that assholes are ever present. *See*

²³ November 10, 2021 Request for Reconsideration, TSDR 56, 62 (Google search result for “catu stop” studio: “It looks like there aren’t many great matches for your search” and screenshot of the webpage for newcloth.com with the text: “Account disabled by server administrator”).

²⁴ May 10, 2021 Final Office Action, TSDR 12, 71; April 5, 2022, Denial of Request for Reconsideration, TSDR 4, 7.

D.C. One Wholesaler, 102 USPQ2d at 1716; *see also Eagle Crest*, 96 USPQ2d at 1230.

Indeed, several third parties tout the nature of the message:

- Duel Drinkware Pint Glass: “We all know it’s true. Show the world how long they’ll have to put up with your shit or give this to someone that needs to be reminded they’re in it for the long haul.”²⁵
- Sarcastic Funny Quotes Apparel tank top: “Mean People Funny Sarcastic Tank Top”; “Assholes Live forever apparently. So act accordingly and you can enjoy a very long life.”²⁶
- Zen Adult Humor tank top: “Perfect for any asshole!”; “Great gift idea!”²⁷
- NonNon Store t-shirt: “Funny Sarcastic Gift Sarcasm Quote Assholes Live Forever T Shirts.”²⁸

Applicant also prominently displays the applied-for-mark as an adornment on many of the goods in the involved application. The placement, size, and dominance of the expression ASSHOLES LIVE FOREVER on Applicant’s goods is consistent with conveying a common sentiment rather than signifying a brand or indicating a source. *In re Hulting*, 107 USPQ2d 1175, 1179 (TTAB 2013); *see also* TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1202.04(b) (July 2022) (“The size, location, dominance, and significance of the wording as it is used in connection with the goods or services should also be considered to determine if any of these elements further support the perception of the

²⁵ May 10, 2021 Final Office Action, TSDR 9.

²⁶ October 13, 2020 Office Action, TSDR 21.

²⁷ *Id.* at 16.

²⁸ *Id.* at 26.

wording merely as an informational message rather than as indicating the source of goods or services.”). The fact that Applicant sells clothing bearing ASSHOLES LIVE FOREVER with the wording in a number of different stylizations further supports that consumers are likely to perceive the proposed mark as conveying a message rather than serving as a source identifier. We acknowledge that Applicant’s specimens show some use of the applied-for mark in a manner typical of trademark use, but that does not negate Applicant’s primarily ornamental use of the expression on numerous goods identified in the involved application. *D.C. One Wholesaler*, 120 USPQ2d at 1716 (“The fact that Respondent has sometimes displayed I ♥ DC on hangtags and labels, in a non-ornamental manner that is conventional for the display of trademarks, does not require” reversal of the failure to function refusal).

Based on the evidence of third-party use of the proposed mark generally, and as a decorative element on many of the same goods covered by the involved application, coupled with Applicant’s own primarily ornamental use of the applied-for designation, we find the Examining Attorney has established a reasonable predicate, i.e. prima facie case, that ASSHOLES LIVE FOREVER is a widely used message that consumers are accustomed to seeing displayed in a non-source identifying manner on a number of different goods such that the proposed mark fails to serve a source-identifying function for Applicant’s goods. *Brunetti*, 2022 USPQ2d 764, at *41 (“It is enough that the third-party

use evidence here ‘is competent to suggest that upon encountering Applicant’s ‘mark’, prospective purchasers familiar with such widespread nontrademark use are unlikely to consider it to indicate the source of Applicant’s goods [or services].’”) (quoting *Team Jesus*, 2020 USPQ2d 11489, at *6 (quoting *In re DePorter*, 129 USPQ2d 1298, 1302 (TTAB 2019))); *Mayweather*, 2020 USPQ2d 11298, at *4; *Eagle Crest*, 96 USPQ2d at 1230 (“Because consumers would be accustomed to seeing this phrase 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.”).

We now consider whether Applicant has rebutted the Examining Attorney’s showing. *Brunetti*, 2022 USPQ2d 764, at *41 (“Applicant was required to come forward with competent evidence that consumers would perceive the proposed mark as a source identifier to rebut the showing made by the Examining Attorney.”).

Applicant argues that the failure to function refusal is improper because the applied-for mark does not convey an informational message:²⁹

The mark ASSHOLES LIVE FOREVER does not convey any informational message as seen with previous[ly] rejected marks. [Applicant] is not actually conveying to the public that anyone, let alone assholes, live forever. The Examiner does not point to any cases where a phrase that cannot be correct or accurate is also deemed “informational.” This makes logical sense as the heart of an “informational” rejection is that the proposed mark actually conveys meaningful information to the public other than ownership. There can be no other reasonable conclusion, because if a mark could be rejected for relaying *any* ‘information’ than [sic]

²⁹ Appeal Brief, 8 TTABVUE 5-6.

no mark could exist as the root of all words, symbols, and language is to convey information from one party to another.

Familiar every day expressions and slogans used to convey social, political, patriotic, religious, and laudatory concepts are more likely to be perceived as imparting information than signifying source. *In re Hulting*, 107 USPQ2d at 1179 (“[A]s the record reflects, consumers would not view the proposed mark as an indicator of the source of applicant’s goods due to the nature of the political message conveyed.”); *Eagle Crest*, 96 USPQ2d at 1229 (“no dispute that the phrase ONCE A MARINE, ALWAYS A MARINE is an old and familiar Marine expression that should remain free for all to use”); *In re Volvo Cars*, 46 USPQ2d 1455, 1460 (TTAB 1998) (finding that the commonly used safety admonition DRIVE SAFELY “should remain in the public domain.”); *In re Manco Inc.*, 24 USPQ2d 1938, 1942 (TTAB 1992) (finding THINK GREEN “broadly conveys the ecological concerns of the expanding environmental movement” and this message “would be impressed upon purchasers and prospective customers for applicant’s goods”); *In re Remington Prods. Inc.*, 3 USPQ2d 1714, 1715 (TTAB 1987) (PROUDLY MADE IN USA not registrable for electric shavers because it would be perceived as expressing a preference for American-made products rather than as a source identifier); *In re Tilcon Warren, Inc.*, 221 USPQ 87, 88 (TTAB 1984) (finding WATCH THAT CHLID for construction materials merely informational because it merely expresses a general concern for child safety).

The evidence here does not demonstrate that the proposed mark conveys a common social, political, patriotic, religious or laudatory message. As we have explained, however, “[a]n expression need not convey a specific type of message to be inherently incapable of functioning as a mark. *Brunetti*, 2022 USPQ2d 764, at *43. “[W]idespread use of a term or phrase may be enough to render it incapable of functioning as a trademark, regardless of the type of message.” *Texas With Love*, 2020 USPQ2d 11290, at *7. That is because “[t]he more commonly a phrase is used, the less likely that the public will use it to identify only one source and the less likely that it will be recognized by purchasers as a trademark.” *Greenwood*, 2020 USPQ2d 11439, at *6 (citing *Eagle Crest*, 96 USPQ2d at 1229). Accordingly, “merely informational matter” includes “widely-used common place terms and expressions” regardless of the specific nature of the message conveyed. *Brunetti*, 2022 USPQ2d 764, at *29.

Here, Applicant acknowledges that the record includes “multiple third party uses of the phrase ‘Assholes Live Forever’ ... but respectfully argues that the timeline is highly important and renders those uses irrelevant to the inquiry at hand. Every third-party use cited by the Examiner post-dates [Applicant’s] use. Thus, each of those uses is an infringing copy of a mark [Applicant] first created and used.”³⁰ Applicant contends that it introduced

³⁰ Appeal Brief, 8 TTABVue 5 (emphasis omitted).

“substantial evidence to show its own significant uses and investment in the mark that would lead to infringement.”³¹ Applicant’s evidence falls short.

Applicant seeks to prove that the third-party uses are infringing uses based on the claimed dates of first use in its application to establish when it commenced use of its mark and hearsay evidence, including Internet screenshots purporting to show the number of Applicant’s social media followers, YouTube viewers, and website traffic, and portions of Google search results for ASSHOLES LIVE FOREVER purporting to cover January 1, 2000 to December 31, 2016 and January 1, 2017 to November 10, 2021.³² Upon consideration of the evidence submitted by Applicant, we find that Applicant has not proven that it made prominent use of its mark before the third-party uses arose such that we can conclude the third-parties are infringers and did not independently adopt the use of “assholes live forever” or adopted the phrase to tread on any trademark rights of Applicant. *Cf. Mayweather*, 2020 USPQ2d 11298, at *3 (record devoid of evidence regarding marketing investment “or that due to such activities, the mark has become highly distinctive and well-known in the trade and to the relevant public.”) (internal quotations omitted). For example, the screenshots from similarweb.com purport to show Internet traffic to Applicant’s website from May to October 2021³³ while the screenshots

³¹ *Id.*

³² November 10, 2021 Request for Reconsideration, TSDR 31-36, 39-54.

³³ *Id.* at 43-45.

from Applicant's social media pages listing the number of Applicant's followers are dated November 10, 2021,³⁴ all of which is after issuance of the Office actions introducing the third-party uses. To the extent there is evidence purporting to reflect a time before the Examining Attorney adduced evidence of third-party use, it is not sufficient to establish that the proposed mark became well-known in the trade and to the relevant public prior to third-party use.³⁵

Just as important, Applicant has not shown that it has successfully policed any purported rights in the proposed mark. Indeed, the record is devoid of evidence that Applicant has made any attempts to eliminate the noted third-party uses. Without such evidence, we must presume that the third party uses are still in the marketplace and are part of the environment in which relevant consumers will encounter Applicant's mark. Accordingly, while evidence that an applicant has popularized an expression and successfully enforced rights against third parties may be relevant to a failure to function refusal, we have no such evidence here.

³⁴ *Id.* at 39-41.

³⁵ For example, Applicant introduced a screenshot from YouTube. The content of the YouTube video is not entirely clear from the face of the screenshot but it appears to concern episode 31 of the Nervous Krill podcast titled "Krill 'The Slut Whisperer': Assholes Live Forever" identifying 6,826 views as of October 9, 2019. *Id.* at 267. Even if we accept as true that more than 6,000 persons viewed the video, took notice of the title of episode, and associated it with Applicant, that is not such a large number to support that Applicant made widespread use prior to the commencement of third-party use.

We recognize that three third-parties use the proposed mark in the same font style as Applicant,³⁶ suggesting that these third parties may be intending to associate themselves with Applicant, but we cannot reach such a conclusion given Applicant has failed to prove that its mark became well-known prior to such uses. Moreover, there is no indication that the two dozen remaining third parties have tried to associate themselves with Applicant.

In addition to arguing that the third-party uses constitute infringement, during prosecution Applicant argued and introduced evidence to support that a number of the identified third-party products are offered through print-on-demand websites.³⁷ The record, however, also shows that these websites feature specific designs of third-parties consisting of “assholes live forever” applied to different products covered by the involved application, such as clothing, glassware and stickers. The fact that these designs may not be printed on products until an order is placed is immaterial; the products bearing the specific designs of third-parties are offered for sale and consumers are exposed to those designs in the marketplace.



³⁶ The referenced font style is shown in this image:




³⁷ November 10, 2021 Request for Reconsideration, TSDR 15.

Applicant also argues that it “incidentally” uses its proposed mark in an ornamental manner and such use “comports with standard practice in the apparel and related industries for displaying trademarks.”³⁸ Applicant elaborates: “Promotional apparel is an important part of many marketing programs, and consumers are accustomed to seeing trademarks prominently placed on promotional merchandise, and as a result, immediately connect the mark to the source rather than interpreting the mark as merely ornamental.”³⁹ In support of this argument, Applicant introduced: (1) a 2019 Ad Impressions Study by the Advertising Specialty Institute concluding that it is common for consumers to own and seek out merchandise that bear company marks and logos; and (2) examples of third-party registered marks and logos prominently displayed on clothing, for example:⁴⁰

³⁸ *Id.* at 20.

³⁹ *Id.* 19, 121-24.

⁴⁰ *Id.* at 24 (chart excerpt).

 Reg. No. 1253013	Class 25: Sportswear, namely, shirts, jerseys, jackets, sweaters, pullovers	 Sep. 20, 2013 Specimen
 Reg. No. 2180866	Class 25: clothing, namely, hats, jackets, shirts and warm-up suits	 Aug. 11, 2004 Specimen
Mark CONVERSE Reg. No. 1868363	Relevant Goods/Services Class 25: Clothing, namely, knit t-shirts, collar placket shirts, woven shirts	Specimen Image  Apr. 23, 2004 Specimen

Applicant’s argument is unpersuasive. Our assessment of the failure to function refusal does not rest solely on Applicant’s ornamental use of its mark. That is only one factor “probative in determining whether a term or phrase would be perceived in the marketplace as a trademark or as a widely used message.” *Mayweather*, 2020 USPQ2d 11298, at *4. Further, there is no evidence that the third-party registered marks Applicant introduced are common expressions widely used by a number of different entities on a variety of goods and services. *Brunetti*, 2022 USPQ2d 764, at *36. In contrast, the

record here shows widespread third-party use of Applicant's proposed mark as a common expression.

Lastly, Applicant argues that its mark should be allowed to register because it is analogous to the following registered third-party marks:⁴¹

- LOVE LIVES FOREVER for “jewelry, namely, rings” (Reg. No. 4184420);
- WHAT BEGAN IN THE HEART LIVES FOREVER for “jewelry” (Reg. No. 3692948);
- WE LIVE FOREVER for “digital media, namely, CDs and downloadable audio files featuring music” (Reg. No. 5414637);
- HEROES LIVE FOREVER for “computer game software for personal computers and home video game consoles; downloadable electronic game software for use on mobile or cellular phones, tablets, and personal computers” (Reg. No. 4723285);
- CHANGING LIVES, FOREVER for “insurance brokerage in the field of life insurance, financial planning and financial investment in the field of securities” (Reg. No. 4376087);
- MONSTERS LIVE FOREVER for “extended warranty services” and “electrical and electromagnetic signal transmitting, amplifying, receiving, and converting devices, namely, cables, wires, connectors, and

⁴¹ Appeal Brief, 8 TTABVUE 6; *see also* November 10, 2021 Request for Reconsideration, TSDR 189-223, 233-40. As addressed in Section I above, we do not consider four third-party registrations attached to Applicant's appeal brief that were not properly introduced during prosecution. We also have not considered the third-party pending and abandoned applications that Applicant introduced (November 10, 2021 Request for Reconsideration, TSDR 178-188, 224-32, 241-63) because they have no probative value. *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *26 (TTAB 2022).

The Examining Attorney also introduced evidence of third-parties using expressions incorporating “live forever” (e.g. dumbasses live forever, characters live forever, legends live forever, warriors live forever, and **heroes live forever**). We find this evidence unpersuasive as to whether the specifically different expression ASSHOLES LIVE FOREVER fails to function as a mark, particularly in view of Applicant's evidence of registered LIVE FOREVER-formative marks, including the mark HEROES LIVE FOREVER.

control devices for use with electrical, electronic, and computer devices; computer components and accessories; speaker mounts; electronic game equipment and accessories; electrical power control components and accessories” (Reg. Nos. 3457221 and 3452907, respectively);

- ART NEVER DIES for “clothing, namely, tops, bottoms, vests, hoodies, bras, sports bras, shorts, biker shorts, shirts, t-shirts, crop top shirts, hats, pants, sweatpants, cargo pants, jackets, jean jackets, varsity jackets, and socks” (Reg. No. 6388492); and
- RIVALRIES NEVER DIE for “arranging and conducting youth sports programs in the field of basketball; entertainment in the nature of basketball games; entertainment in the nature of basketball tournaments; entertainment services, namely, arranging and conducting of competitions in the field of basketball; organization of sports competitions; organizing, conducting and operating basketball tournaments” (Reg. No. 6378547).

The third-party registrations suggest that in general there is nothing inherently unregistrable about LIVE FOREVER-formative marks and marks incorporating similar sentiments (e.g. NEVER DIES). Applicant, however, “has not provided any evidence that consumers regularly encounter these [third-party marks] used in the same way as the mark in question, namely, as an expression that is commonly used as such on a wide variety of goods.” *Brunetti*, 2022 USPQ2d 764, at *36. Rather, the evidence generally shows use of the third-party marks in a manner typical of trademark use.⁴² Moreover, and importantly, the Office’s registration of the foregoing marks does not bind us here. *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to Nett Designs’ application, the PTO’s allowance of such prior registrations

⁴² November 10, 2021 Request for Reconsideration, TSDR 189-223, 233-40.

does not bind the Board or this court.”); *Brunetti*, 2022 USPQ2d 764, at *6 (“[I]t is well settled that the USPTO must examine every application on the facts presented for compliance with statutory eligibility requirements, and every case is necessarily different.”); *In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1793 n.10 (TTAB 2017) (prior decisions and actions of other trademark examining attorneys in registering other marks have little evidentiary value and the Trademark Trial and Appeal Board is not bound by prior decisions involving different records). Each case must be decided on its own merits.

III. Conclusion

The Examining Attorney introduced evidence of wide-spread third-party use of the proposed mark generally as an expression and in an ornamental manner on goods the same as and similar to those identified in the involved application. This evidence, coupled with Applicant’s own display of the proposed mark emblazoned on many of its goods, establishes a prima facie case that ASSHOLES LIVE FOREVER fails to function as a source identifier for Applicant’s goods. For the reasons explained, Applicant has failed to rebut this prima facie case with adequate evidence or argument. Accordingly, we affirm the refusal to register the proposed mark for all classes of goods covered by the application.

Decision: We affirm the refusal to register Applicant's mark ASSHOLES LIVE FOREVER for all classes of goods in the application on the ground that it is not a trademark.