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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	77595225
Applicant	BIG EFFIN GARAGE, LLC
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Big Effin Garage, LLC

Serial No. 77595225

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APPEAL BRIEF

Big Effin Garage, LLC submits the following brief in support of its appeal of the examining attorney's refusal to register the applied-for mark on the grounds that the mark consists of or comprises immoral or scandalous matter.

ISSUE

Does applicant's mark, BIG EFFIN GARAGE, consist of or comprise immoral or scandalous matter so as to permit refusal of registration of the mark in accordance with Section 2(a) of the Lanham Act, 15 USC §1052(a)?

FACTS

Background. Applicant owns and operates the social networking website Big F'N Garage (www.bigfn.com), which is directed at independent rock musicians, bands (i.e. "garage bands")

and their fans. The website is functional and is operating in so-called “beta” form, using the mark BIG F’N GARAGE. Applicant filed the subject application for federal trademark registration of the phrase BIG EFFIN GARAGE on October 17, 2008. On that same day, applicant filed a substantially identical application to register the phrase BIG F’N GARAGE.

Procedural Matters. On January 26, 2009, the examining attorney issued an Office Action refusing registration of applicant’s mark on the grounds that the mark “consists of or comprises immoral or scandalous matter”.

On May 7, 2009, applicant filed a timely response to the Office Action, arguing that the facts elucidated by the examining attorney had not established that applicant’s applied-for mark consists of or is comprised of immoral or scandalous matter, setting forth arguments and evidence contrary to the examining attorney’s position.

On June 23, 2009, the examining attorney issued a Final Action maintaining the refusal on the grounds that the applied-for mark consists of or comprises immoral or scandalous matter. This appeal ensued.

Substantive Facts. The substantive facts in the record consist entirely of references to EFFIN and various similar formulations, as found on the internet and reproduced as exhibits in the file. These are not in dispute. Since the evidence is not voluminous, we will set forth the factual record in our brief to aid in the Board’s review.

The online Urban Dictionary entry for the term EFFING, is set forth below¹:

Derivative of the word 'fucking', 'effing' means literally 'f-ing'. . . . It is, however, its own, unique word, separate from 'fucking' or 'f-ing' or 'F-ing' in its entirety.

¹ effing. (n.d.). Urban Dictionary. Retrieved April 17, 2010, from [Urbandictionary.com](http://www.urbandictionary.com/define.php?term=effing) website: <http://www.urbandictionary.com/define.php?term=effing>

"A variant of 'fucking' used on Canadian television, primarily 'Royal Canadian Air Farce'. Pre-teens have been known to use it when quoting and the term 'fucking' comes up in the quotation."

"Polite way of saying 'fucking' in the workplace."

"A nicer way to say 'fucking'."

Another online dictionary, www.dictionary.com, defines EFFING as follows:

Effing – adjective, adverb Slang.

Origin:

1940–45; euphemism for fucking, with ef as spelled form of the name of the initial letter².

A *euphemism* is defined as "the substitution of a mild, indirect, or vague expression for one thought to be offensive, harsh, or blunt"³.

The same dictionary offers the following definition of FUCKING:

Fucking – adjective, adverb Slang: Vulgar. damned; confounded (used as an intensifier).

Emphasis added.

ARGUMENT

The determination that a mark comprises scandalous matter is a conclusion of law based upon underlying factual inquiries. *In re Mavety Media Group Ltd.*, 33 F.3d 1367, 1371 (Fed. Cir. 1994), citing *Frederick Gash, Inc. v. Mayo Clinic*, 461 F.2d 1395 (CCPA 1972). The burden of proof justifying a refusal under 15 U.S.C. 1052 is on the Patent and Trademark Office. *In re Standard Elektrik Lorenz Aktiengesellschaft*, 371 F.2d 870 (CCPA 1967). To justify refusal, the PTO must demonstrate that the mark is "shocking to the sense of truth, decency or propriety;

² effing. (n.d.). *Dictionary.com Unabridged*. Retrieved April 16, 2010, from Dictionary.com website: <http://dictionary.reference.com/browse/effing>

³ euphemism. (n.d.). *Dictionary.com Unabridged*. Retrieved April 16, 2010, from Dictionary.com website: <http://dictionary.reference.com/browse/euphemism>

disgraceful; offensive; disreputable; ... giving offense to the conscience or moral feelings; ... [or] calling out [for] condemnation.” *Mavety, supra*, 1371, quoting from *In re Riverbank Canning Co.*, 95 F.2d 327 (CCPA 1938). The determination is to be made from the standpoint of a substantial composite of the general public in the context of contemporary attitudes. *In re Old Glory Condom Corp.*, 26 USPQ 2d 1216, 1219 (TTAB 1993).

The examining attorney has failed to show that BIG EFFIN GARAGE consists of or comprises immoral or scandalous matter. The record does not show that EFFIN would be regarded as “shocking to the sense of truth, decency or propriety; disgraceful; offensive; disreputable; ... giving offense to the conscience or moral feelings; ... [or] calling out [for] condemnation” from the standpoint of a substantial composite of the general public.

The Court of Appeals for the Federal Circuit has held that dictionary evidence alone may be sufficient if multiple dictionaries, including at least one standard dictionary, uniformly indicate that a word is vulgar. *In re The Boulevard Entertainment, Inc.*, 334 F.3d 1336 (Fed. Cir. 2003). In that case, the question was whether the mark 1-800- JACK-OFF for a phone sex service was properly refused registration due to its scandalous character. There was plenty of dictionary evidence that JACK-OFF was vulgar. However, in this case, the examining attorney has failed to introduce a single dictionary definition – standard or not – that indicates the word EFFIN is vulgar. The examining attorney introduced plenty of evidence that FUCKING is vulgar, but such evidence is irrelevant. The word in question is EFFIN, which the record shows is its own separate and distinct word. The record further shows that EFFIN is not vulgar.

The examining attorney confuses origin and the equivalency of use with the equivalency of vulgarity or “scandalous-ness”. The English language is rich, with multiple words which may express the same meaning but carry a different value or tone. In many ways, EFFIN is similar to

other F-based intensifiers, like “freaking” or “flipping” , or even mild invectives like “fiddlesticks” or “fudge”. All of these play on a sonic resemblance to their distant, vulgar origin.

The evidence introduced by applicant (and even by the examining attorney) shows that EFFIN is not the equivalent of FUCKING. It is universally used in place of the vulgar term – to avoid vulgarity and offense. The entries from www.dictionary.com make the distinction clear. FUCKING is *vulgar* slang. EFFING is just slang.

F-based intensifiers might be ranked on a scale from wholesome to vulgar; perhaps with PHOOEY on the far left and FUCK on the far right. EFFING, FREAKING, FLIPPING might be said to fall somewhere between. The question of whether a particular point on that scale is far enough to the right to be considered “shocking” to a substantial composite of the general public should not be prejudged by reference to dictionaries and their editors. We urge the Board to attend to the following language from *Mavety*:

We therefore commend the practice adopted by the Board in another case to resolve the issue whether a mark comprises scandalous matter under § 1052(a) “in favor of [the] applicant and pass the mark for publication with the knowledge that if a group does find the mark to be scandalous ..., an opposition proceeding can be brought and a more complete record can be established.” [*citations omitted*] (noting that where “no easy applicable objective test” exists to determine whether a mark is merely descriptive or merely suggestive, the frequent manner of disposition is resolution in favor of the applicant on the theory that any person believed damaged by the registration would have the opportunity to oppose registration and present evidence usually not present in the *ex parte* application). Moreover, the Board has held that under 15 U.S.C. § 1063(a) (1988), any person who *believes* that he would be damaged by registration of a mark upon the principal register, thus including interested members of the composite of the general public, has standing to challenge registration in an opposition proceeding.

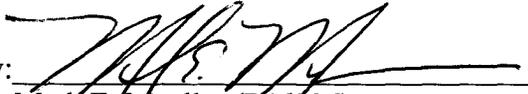
Mavety, p. 1374.

By following the suggestion in *Mavety*, in close cases the Board and the PTO can avoid guessing what is shocking to the general public, and let the general public decide for itself.

SUMMARY

The record evidence shows that EFFIN is not vulgar. Applicant's applied-for mark, BIG EFFIN GARAGE, should not be refused registration because it does not consist of or comprise immoral or scandalous matter. The examining attorney's refusal should be reversed.

Respectfully submitted,

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