

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

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Hearing:
February 7, 2012

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Advanced Armament Corp., LLC

Serial No. 77770899

Glenn D. Bellamy of Wood Herron & Evans LLP for Advanced Armament Corp., LLC.

Giselle M. Agosto-Hincapie, Trademark Examining Attorney,
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Before Holtzman, Taylor, and Wellington,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Advanced Armament Corp., LLC seeks registration of the following mark for "silencers for firearms":



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In the application, the mark is described, in part, as depicting "the upper torso of the Statue of Liberty holding a pistol with a silencer overhead in place of the torch..." The wording ARMAMENT CORP., SILENCERS, and MADE IN THE USA has been disclaimed.¹

This appeal from the final refusal of registration of the mark involves Section 2(a) of the Trademark Act of 1946, 15 U.S.C. § 1052(a), which precludes registration of marks that comprise "immoral, deceptive, or scandalous matter" or that "may disparage...persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." Specifically, the examining attorney argues that the Statue of Liberty is "a universally recognized symbol of peace and welcome" (Brief, p. 4); that "[l]ike guns, silencers are polarizing objects, illegal in many jurisdictions, and surrounded by a cloud of controversy that they are perceived as contributors to violence and crime" (Brief, p. 6); and that the "greeting by the Statue of Liberty waving a pistol with an attached silencer changes the symbolic context of the Statue of Liberty from a welcoming beacon of light to a threatening symbol...result[ing] in the image rising to the level of

¹ The application was filed June 30, 2009, claiming first use, and first use of the mark in commerce, as of March 31, 2008.

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scandalous and offensive matter that is shocking to the sense of decency and propriety" (Brief, p. 20). Put succinctly, the examining attorney argues that the "combination of the Statue of Liberty plus a silencer in place of its torch, plus a banner displaying the word SILENCERS is shocking, offensive and disparaging" to a substantial composite of the population and should thus be refused registration. Brief, p. 20.

After applicant filed its appeal, briefs were filed and an oral hearing was held.

Post-Appeal Events and Recently Submitted Evidence

On October 3, 2012, this appeal was suspended and the application file was remanded at the request of the examining attorney to allow for issuance of an Office action asserting an additional basis for refusing registration.² The examining attorney then issued a refusal under Section 2(d) of the Trademark Act based upon a likelihood of confusion with the following then-registered mark:

² After the hearing, the application was reassigned to a new examining attorney who requested the remand on behalf of the Office and issued the subsequent Office action. However, the application was later reassigned to the original and current examining attorney (identified in the caption of this decision).



for "retail store and on-line retail store services featuring firearms, firearms accessories, firearms parts, telescopic firearms sights and body armor" in International Class 13. Applicant, in turn, successfully petitioned to cancel the cited registration. Thus the Section 2(d) basis for refusal was rendered moot and the appeal was ready for resumption.

Then, on May 15, 2013, the examining attorney filed a second request to remand the application "to allow for the inclusion of new and relevant evidence that was not previously available" and argued that "recent events involving gun violence and the ensuing public expressions of opinion on the issue" would impact public perception of applicant's mark. The Board ultimately granted the second request for remand, thereby allowing certain evidence into the record, and also allowed both applicant and the examining attorney to file supplemental briefs. The examining attorney and applicant both submitted additional evidence with their respective briefs. As our primary

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focus necessarily is on the sufficiency of the examining attorney's evidence, as discussed infra, we note that the following materials proffered by the examining attorney have been considered:

1. "Gunmakers and the NRA Bet Big on Silencers. What Could Go Wrong?" obtained from Mother Jones website (www.motherjones.com) and dated March 19, 2013;
2. "U.S. has long recent history of mass shooting" obtained from the New York Daily News website (www.nydailynews.com) and dated December 14, 2012;
3. "U.S. Shooting Deaths Since Sandy Hook Top 100" obtained from the Huffington Post website (www.huffingtonpost.com) and dated December 21, 2012; and
4. "What the Public Really Thinks About Guns" obtained from the Center for American Progress website (www.americanprogress.org) and dated March 27, 2013;
5. "Two new polls show rise in support for gun control after Newtown, Conn., massacre" New York Daily News (obtained from www.nydailynews.com), December 20, 2012;
6. "After Newtown - Public Opinion on Gun Policy and Mental Illness" The New England Journal of Medicine (obtained from www.nejm.org), March 21, 2013;
7. "About High-Capacity Ammunition Magazines" Progressive Majority Action Fund (obtained from www.progressivemajorityaction.org), no date provided indicating when material was made available;
8. "Silencers: The NRA's latest big lie" Salon News (obtained from www.salon.com), December 30, 2012;
9. "Gun control and the school shooting in Newtown (17 letters)" Denver Post (obtained from www.denverpost.com), December 15, 2012;

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10. "From sonic boom to light whisper: Texas legalizes silencers for hunting" News-Journal Longview, Texas (obtained from www.news-journal.com), May 15, 2012;
11. "...with silencers also added into the mix" Fort Wayne, IN Journal Gazette (obtained from www.journalgazette.net), January 16, 2013;
12. Press Releases from U.S. Attorney's Office for the Eastern District of California, April 23, 2013 and Northern District of Georgia, May 23, 2013;
13. News releases from Federal Bureau of Investigation (FBI) San Diego Division (February 13, 2013), New Haven Division (April 9, 2012), Atlanta Division (August 2, 2012);
14. "Gemtech" listing of state laws "concerning ownership and hunting with use of [silencers or suppressors]" as of January 2013;
15. "Time Warner bans some gun ads" UPI, January 19, 2013;
16. "Ad for rifle draws complaint, store owner respects request" The Daily Gazette, December 19, 2012;
17. Google AdWords policy involving weapons;
18. "Connecticut Newspaper Extremely Sorry for Gun Ad Next to Sandy Hook Story" New York News & Features, January 3, 2013;
19. "Comcast bans gun, ammo ads" USA Today, March 22, 2013;
20. "Little Red Riding Hood and AR-15's? New Ads Contrast School Bans and Gun Regulations" Yahoo! (obtained from www.yahoo.com), April 15, 2013;
21. "Madonna on MDNA tour with AK-47 rifle, pistol; ignores Colorado shooting victims" The Examiner (www.examiner.com), July 22, 2012;

22. Analysis of immigration-theme cartoons (obtained from www.newiesthirteen.wordpress.com)
23. Comments on image of Statue of Liberty holding a handgun (obtained from www.pinterest.com);
24. Comments on "Graphic Advertisement (PSA) - Gun Control" posted on website www.tjmorano.com, February 12, 2013; and
25. "Snellville Duo Stop Man Suspected of Planning Terrorist Attack in Gwinnett" Snellville Patch, February 26, 2013.

Section 2(a) and the Ground for Refusal

Throughout prosecution, the examining attorney has articulated the refusal of registration under Section 2(a) of the Act by describing the mark both as "scandalous" and as "disparaging" of the Statue of Liberty.³

As previously noted, Section 2(a) precludes registration of a mark that, *inter alia*, "[c]onsists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." These two provisions of Section 2(a), separated by a semi-colon, technically may be asserted as separate bases for refusing registration depending on the

³ No refusal was made under Section 2(b) of the Act, which proscribes registration of marks consisting or comprising insignia of the United States. See TMEP § 1204.02(c) (statues, such as the Statue of Liberty, are not government "insignia" within the meaning of Section 2(b)).

mark in issue. Whether a mark comprises "immoral" or "scandalous" matter is viewed from the standpoint of a substantial composite of the general public, whereas the question whether a mark "may disparage" - as applied to "persons" or "beliefs" - is viewed from the perspective of the referenced persons or group, e.g., an ethnic or religious group. See *In re Lebanese Arak Corp.*, 94 USPQ2d 1215 (TTAB 2010) for discussion concerning the distinction between the two subsections.⁴ Where the object of purported disparagement is, as here, a statue that is viewed as a symbol of America and its people, we believe we must view the issue from the perspective of the American public as a whole, and not a particular subset thereof. In addition, the examining attorney, in refusing registration, has essentially provided the same rationale for scandalousness and disparagement. Specifically, the examining attorney argues that applicant's mark fundamentally alters the essence of the symbol in such a way that a substantial composite of the public would consider the mark to present a shocking or offensive juxtaposition. Thus, in this case, a conclusion that the mark is scandalous would mean that

⁴ As the *Lebanese Arak* decision explained, in cases involving asserted offense to the sensibilities of an ethnic or religious group, the proper refusal is disparagement, not that the mark is scandalous, and alternative refusals would not be appropriate.

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the mark is disparaging as well. See, *In re Old Glory Condom Corp.*, 26 USPQ2d 1216, fn. 4 (TTAB 1993) (Board found applicant's mark depicting an American flag in the shape of a condom not to be scandalous and this also "subsumes a finding that the mark is not disparaging" because the scandalous refusal "was based, in large part, on [a] finding that the mark disparages the flag."). And we further point out that, in most cases involving an assertedly offensive adaptation of a national symbol, the preferred refusal to be made is that the mark is scandalous. See *id.*⁵ Accordingly, we make our findings from the perspective of the general public and look to whether a substantial composite thereof would perceive applicant's mark to be a scandalous adaptation of the Statue of Liberty.

The U.S. Patent and Trademark Office bears the burden of proving that a trademark falls within any of the prohibitions of Section 2(a). *In re Mavety Media Group*

⁵ To be clear, and as noted in *Old Glory*, "scandalous" and "disparaging of a national symbol" remain viable, separate grounds for refusing registration of a mark. Indeed, in circumstances different from those in this case, a mark may be found to be disparaging of a national symbol without any scandalous or shocking qualities being argued or attributed to the mark. See, e.g., *In re Anti-Communist World Freedom Congress, Inc.*, 161 USPQ 304 (TTAB 1969) (mark consisting of hammer and sickle with a cross drawn thereon found disparaging of a national symbol).

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Ltd., 33 F.3d 1367, 31 USPQ2d 1923, 1925 (Fed. Cir. 1994).
See also *In re Standard Elektrik Lorenz A.G.*, 371 F.2d 870,
152 USPQ 563, 566 (CCPA 1967).

For purposes of deciding whether applicant's mark comprises "scandalous" matter within the meaning of Section 2(a), we find the Board's decision in *Old Glory* instructive because the circumstances in that case are similar to those in this appeal.⁶ In *Old Glory*, the Board considered whether a mark comprising, in part, an image presenting the American flag in the shape of a condom "can be characterized as '[g]iving offense to the conscience or moral feelings' or 'shocking to the sense of decency or propriety.'" *In re Old Glory*, 26 USPQ2d at 1220, citing *In re Riverbank Canning Co.*, 95 F.2d 327, 37 USPQ 268 (CCPA 1938). Similarly, in this case, we are faced with the question of whether the Statue of Liberty holding a pistol with a silencer will be considered by a substantial composite of the American public - which is "not necessarily a majority," see, e.g., *In re Fox*, 702 F.3d 633, 105 USPQ2d 1247, 1248 (Fed. Cir. 2012) - as "giving

⁶ There are more recent precedents involving Section 2(a) "scandalous" refusals; however, these cases involved marks that contained sexually explicit terms or images requiring assessment of whether the objectionable term or image would be considered "vulgar" by a substantial composite of the public. See, e.g., *Boston Red Sox Baseball Club Limited Partnership v. Sherman*, 88 USPQ2d 1581 (TTAB 2008). The examining attorney does not argue that applicant's mark should be considered "vulgar."

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offense to the conscience or moral feelings" or "shocking to the sense of decency or propriety." *Id.* We assess the mark as a whole in light of contemporary attitudes and in the context of applicant's goods, i.e., silencers. *Id.*

Finally, we note that, in cases under Section 2(a), the Federal Circuit has approved an approach that allows publication of marks where the Board may harbor doubt that the record supports a finding of scandalousness or disparagement. See *In re Mavety Media Group Ltd.*, 33 F.3d 1367, 31 USPQ2d 1923, 1928 (Fed. Cir. 1994) (vacating the Board's affirmance of a refusal and noting its preference for the approach taken by the Board in *In re In Over Our Heads Inc.*, 16 USPQ2d 1653, 1654-55 (TTAB 1990)).

Arguments

In her main appeal brief and in support of the refusal, the examining attorney relies on various materials submitted during the prosecution of the application, including the following: printouts from applicant's website ("technical questions"); a printout from Western Criminology Review titled "Criminal Use of Firearm Silencers"; printouts from several third-party websites, e.g., "Pyramyd Air Gun Mall" containing the article "Airgun silencers: What's the big deal?" (www.pyramydair.com); a printout of an article "Defining 'use' of a firearm"

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(Journal of Criminal Law and Criminology, Spring 1997); printouts from various websites containing photographs and information regarding the Statue of Liberty; and printouts from various websites, blogs, and articles involving the use of guns and/or silencers (also referred to as "suppressors"). The examining attorney specifically points to the following submissions for purposes of "illustrating that the depiction of guns with the Statue of Liberty is offensive to a substantial composite of the general public":

Two excerpts from publications containing negative reactions to a previously-published editorial cartoon that purportedly shows (the actual image is not shown in the excerpt) the Statue of Liberty holding a gun to its head.⁷

An article excerpt involving the unveiling of a "Diallo Mural" artwork (actual image of the mural is not shown). In the article, a person discussing the mural states, "[i]t's pretty good art, but he could have avoided some of the negative stuff...Cops wearing hoods? Not all cops are bad. And we don't need the kids seeing the Statue of Liberty holding a gun."⁸

An article printout concerning a Michigan woman who petitioned Mattel Inc. in opposition to a "Road Wars Liberty Base" toy that is described as featuring "a battle-scarred Statue of Liberty with bomb holes, graffiti, a missile launcher hidden behind her face and gun mounts in her crown. A terrorist's attack

⁷ From The Austin American-Statesman, Editorial (July 11, 2008) and The Tulsa World (July 13, 2008). Excerpts attached to Office action issued on May 26, 2010.

⁸ From Daily News (New York), April 25, 2001. Excerpt attached to Office action issued on May 26, 2010.

helicopter also is included, which can set off fake explosions at the statue's base."⁹

A website printout describing a fictitious world in which "the Statue of Liberty holding a rifle is one of the symbols of [a resistance organization]."¹⁰

Printouts from a blog site containing reactions to graffiti purportedly (actual image cannot be viewed in printouts) showing the Statue of Liberty with a rifle in place of the torch.¹¹

A website review, apparently written in London, England, of a t-shirt depicting the Statue of Liberty holding a pistol into the air, instead of the torch. The reviewer states, "[o]bviously, this isn't your Grandma's Statue of Liberty." One response to the review mentions "Good T-shirt and all the better for not having a slogan or statement on it. Makes it more open to different interpretations. However, maybe not the shirt to wear when visiting the US Embassy."¹²

In her supplemental appeal brief and in conjunction with her submission of the supplemental evidence, the examining attorney argues that there has been a "shift in public opinion after recent high-profile gun violence" and that "new stricter laws against guns reflect negative public perception" of firearms. Supp. Brief, at pp. 3 and

⁹ From The Argus Press (November 17, 1995). Printout attached to Office action issued on May 26, 2010.

¹⁰ From NSWIKI website page "The Secular Resistance" (www.nswiki.net). Printout attached to Office action issued on December 15, 2010.

¹¹ From www.blogger.com, "Iowa City Graffiti (Statue of Liberty)". Printout attached to Office action issued on December 15, 2010.

¹² "Liberty by Akomplice Clothing [review]" (www.robotroyalty.com) attached to May 26, 2010 Office action.

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7, respectively. In support, she points to online articles and other commentary as reflective of recent increased public support for stricter gun ownership laws. She also notes recent reactions to guns being used in advertisements and other media and asserts that "if contemporary attitudes reveal that people are offended by seeing a picture of a gun in an ad, a substantial composite of the public is likely to be shocked and offended upon seeing an image of a gun with a silencer in the arms of the country's symbol of peace and welcome, *i.e.*, the Statue of Liberty." *Id.* at p. 10. Finally, the examining attorney references certain materials with images depicting, in part, the Statue of Liberty holding a gun and relies on a few of the posted reactions to these images as showing that "public opinion again sides with the negative connotation of an image of a national symbol like the Statue of Liberty with a gun." *Id.* at p. 11.

Applicant is a licensed manufacturer and seller of silencers, founded in 1994 by Mr. Kevin Brittingham. According to Mr. Brittingham, silencers are "legally purchased and used in a variety of applications, most commonly for the purpose of hearing protection."

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Brittingham Dec., p. 4.¹³ He further explains that other hearing protection measures, e.g., in-ear plugs or over-the-ear muffs, may be impractical or even unwanted because “[w]hen a military or law enforcement unit enters an enclosed area where gunfire may be necessary, it is dangerous to impair their ability to hear sounds made by a suspect being pursued.” *Id.* Approximately 50% of applicant’s sales of silencers are made to military or civilian law enforcement agencies. *Id.* The manufacture and sale of suppressors or silencers in the United States are regulated by the Federal government; however, approximately 12 states and the District of Columbia prohibit the sale thereof to private individuals.

In response to the refusal of registration of its mark, applicant argues that “the image of the Statue of Liberty in Applicant’s mark respectfully depicts the statue’s serene face, is in no sense vulgar, and does not disparage or ridicule this national symbol of freedom.”

Response to Office action (March 12, 2010), p. 5.

Applicant explains that when it commissioned development of the artwork comprising the applied-for mark in 2008, it “chose the elements of the applied-for design with care,

¹³ Submitted with March 12, 2010 response to Office action.

and with the intention of creating a decidedly patriotic impression," *id.*, p. 8.¹⁴

In addition to the declaration of its president, applicant submitted three signed declarations from third-party licensed sellers of firearms and silencers, including applicant's goods; various other materials concerning the legal use of silencers; copies of trademark applications and registrations for marks comprised, in part, of the Statue of Liberty for various goods and services; and other materials that applicant argues are relevant to the public's perception of its mark.

Applicant argues that the supplemental evidence submitted by the examining attorney on remand does not support the scandalous refusal because "the mark must be considered **in the context of the marketplace and as applied to only the goods or services described in the application for registration.**" Supp. Brief at p. 3. (Emphasis supplied in applicant's brief). Applicant asserts that the evidence showing "deeply divided public sentiment on gun rights or gun control in general says little to nothing about public opinion regarding silencers nor, more specifically, about

¹⁴ In the absence of evidence to the contrary, the Board presumes a proper intent by an applicant. In the end, however, such intent is irrelevant if the evidence supports a refusal of registration. *Cf. J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991).

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how the public views Applicant's mark." *Id.* at 6. As to the three different images of the Statue of Liberty with a gun made of record by the examining attorney, applicant points out that several online posted reactions to one such image were actually positive, e.g.: "Having the freedom to protect our freedom, that is beautiful"; "You only have Liberty as for long as you can defend it. Awesome image."; "we would never have become a country, if we had never fought for it." Applicant suggests that these "interpretations would be at least as likely to apply to Applicant's mark as those ascribed by the Examining Attorney." *Id.* at 11. Applicant argues that the two online publications depicting the Statue of Liberty with a gun are being used in totally different contexts such as immigration policy and advocating gun control and thus are "inherently designed to be provocative and evoke an emotional reaction." *Id.* at p. 13. Finally, applicant attacks several statements made by the examining attorney in her supplemental brief as either unsubstantiated or misconstruing the evidence. For example, applicant takes issue with the examining attorney's assertion that "the association between silencers and criminal activities is supported by the recent revamping of gun legislation" (examining attorney's Supp. Brief, p. 8) and argues that

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"[t]here is absolutely no evidence in the record that any recent legislation - proposed or enacted - relates in any way to further restricting ownership of silencers or makes any association between silencers and criminal activities."

Id. at p. 9.

Holding

Based on our review of the entire record before us, we are not "free of doubt" that applicant's mark will be perceived as scandalous by a substantial composite of Americans. Rather, the record before us is mixed as to whether a "substantial composite" of the American people would view this mark as scandalous or, as applicant argues, as a gesture of patriotism. We readily note that the issues involving the ownership of firearms and their use are frequently the subjects of debate amongst Americans and increasingly so in light of recent, high-profile shootings and Supreme Court decisions concerning the Second Amendment right to bear arms. Nevertheless, we are not convinced by the examining attorney's evidence that any objections by some, or even perhaps many, to firearms in general necessarily equate to objections to silencers in particular; or unquestionably require us to conclude that applicant's mark will rise to the level of "giving offense to the conscience or moral feelings" or be "shocking to the

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sense of decency or propriety" of a substantial composite of Americans.

The record is replete with evidence, and there is no real dispute, that the Statue of Liberty is perceived as a welcoming, national symbol of liberty and conjures many other positive feelings among Americans. The record also establishes that it is not uncommon for persons to adopt and/or register marks incorporating the Statue of Liberty holding an object, e.g., a cup of coffee or football, in place of the torch, thereby suggesting a connection with goods and/or services being offered for sale. Such marks utilize the Statue of Liberty because they are clearly intended to engender a sense of patriotism, Americana, or, perhaps of New York City, where the statue is located, for those who would use or purchase the associated goods or services. We acknowledge that most examples of such marks in the record involve fairly innocuous objects in place of the Statue's torch and that a handgun with a silencer might not be viewed as innocuous by all. Moreover, the record does indeed show there is a negative image associated with silencers when discussed in connection with criminal activity. On the record before us, however, we cannot determine what fraction of those who associate silencers with criminal activity may nevertheless not view the mark

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as scandalous. In this regard, we note that the mark does not depict the Statue of Liberty in a threatening pose or in any manner suggestive of criminal activity. Indeed, it may be viewed by many as suggestive of, and consistent with, the right to bear arms that is enshrined in the Constitution. The disclaimed wording MADE IN THE USA, appearing below the statue, would seem to reinforce such a view.

We disagree with the examining attorney's suggestion that the mark is somehow more offensive than it would be if it only showed the Statue of Liberty holding a gun, because of the inclusion of the silencer and the banner design containing the term SILENCERS. See Brief, p. 9 ("the Statue of Liberty is not just holding a gun, but a gun with an attached silencer.... Furthermore, the statue is displayed enveloped by a banner that prominently reads in large letters SILENCERS."). We do not believe that the record before us supports the examining attorney's suggestion. Indeed, we note that the word SILENCERS and the depiction of the product may well be viewed as a descriptive or generic reference to the actual goods.

Evidence of personal reactions to applicant's mark is limited to the declarations of applicant's president, Mr. Brittingham, and three third-party retailers of firearms

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and silencers. While it is clear that our analysis must not be limited to the views of purchasers of firearms or those affiliated with the sale of silencers, firearms and their accessories are available for purchase in the United States, albeit through regulated purchasing regimes in the various states, and we cannot ignore the declarations of record by retailers of such goods. They do have probative value. By way of these declarations, Mr. Brittingham and the three third-party sellers of applicant's silencers aver that "the logo has been enthusiastically received in the industry and by customers." In addition, these third-party sellers and applicant's president have declared that they are unaware of any negative reaction to applicant's mark being used in connection with silencers or otherwise. We recognize that we cannot construe these conclusory declarations as necessarily reflecting the perceptions of a majority or even a substantial composite of Americans. Nonetheless, the statements of Mr. Brittingham and the retailers have some modicum of probative value. And we remain cognizant of the fact that it is not applicant's burden to show that its mark is viewed positively by a substantial composite of Americans, but it is the Office's burden to show the opposite.

The evidence submitted by the examining attorney involving negative reactions to depictions of the Statue of Liberty with handguns or in connection with violent imagery does not dispel our doubt that applicant's mark should be refused registration on the basis of scandalousness. The website and article excerpts do not deal with the mark at hand and are few in number.¹⁵ Indeed, several evidentiary submissions, as noted in the description of the record, do not even contain a visual depiction of the Statue of Liberty being discussed. It is thus difficult, if not impossible, to fully understand the context of the reported negative reactions or whether such reactions would extend to the image in applicant's mark. Based on certain descriptions provided in the articles, the Statue of Liberty is being portrayed in these other instances in ways that are very different from that in applicant's mark. For example, the Statue of Liberty cartoon is described as showing the statue holding a gun to her own head. This image obviously presents a disturbing message and is likely to evoke a significantly different reaction than that of

¹⁵ The Board acknowledges that it is not always possible, and perhaps may be difficult, for examining attorneys to find evidence involving public reaction to the actual applied-for mark. The Office's evidentiary resources are limited and do not include taking surveys of individuals for purposes of showing how specific marks will be perceived.

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applicant's mark. We are unsure, however, how that image informs the issue at hand. Similarly, the toy described as "a battle-scarred Statue of Liberty with bomb holes, graffiti, a missile launcher hidden behind her face and gun mounts in her crown," being attacked by a "terrorist" helicopter, suggests a violent scene of the statue being attacked; it cannot be compared to applicant's mark for purposes of attempting to gauge the reaction of the general public. The supplemental evidence submitted by the examining attorney on remand is no different. Applicant is correct that these depictions of the Statue of Liberty holding a gun are either significantly different from applicant's mark in context (and contain other inflammatory matter) or that the negative reviews of one such image were mixed with several being positive. We certainly concur that the "immigration and undocumented workers" cartoon cannot be fairly compared to applicant's mark given the additional matter in the cartoon and the context in which it is being shown. Specifically, the description under the cartoon provides: "the Statue of Liberty is shown holding a gun and a flaming torch, about to light a pile of sticks on fire. An illegal immigrant is tied to the top of the stick pile..." A cartoon such as this, being used for political purposes, and which openly depicts violence and

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criminal activity, will clearly draw very different reactions than applicant's mark being used in connection with the legal sale of silencers.

The mixed record in this case leaves us with doubt about whether applicant's mark gives "offense to the conscience or moral feelings" or is "shocking to the sense of decency or propriety" in the minds of a substantial composite of Americans. This leads us to the conclusion that it would be prudent, under the circumstances, to permit the mark to proceed to publication and, if a person, entity, or group "find[s] the mark to be scandalous . . . , an opposition proceeding can be brought and a more complete record can be established." See *Mavety Media*, 33 F.3d 1367, 31 USPQ2d at 1928.

Decision: The refusal to register is reversed.