

**THIS OPINION IS NOT A  
PRECEDENT OF  
THE T.T.A.B.**

Mailed: February 4, 2009

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Jibjab Media, Inc.

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Serial No. 78951377

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Eric W. Hagen of McDermott Will & Emery LLP for Jibjab Media, Inc.

Gina Hayes, Trademark Examining Attorney, Law Office 103 (Michael Hamilton, Managing Attorney).

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Before Kuhlke, Cataldo and Ritchie,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

An application was filed by Jibjab Media, Inc. to register on the Principal Register the mark A-HOLE PATROL in standard characters for the following services, as amended: "Online social club that screens jokes submitted by users to control offensive and inappropriate content" in International Class 41.<sup>1</sup>

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<sup>1</sup> Application Serial No 78951377 was filed on August 14, 2006, based upon applicant's assertion of a bona fide intent to use the mark in commerce in connection with the services. On July 19, 2007, applicant filed an amendment to allege use reciting April

The examining attorney refused registration under Section 2(a) of the Trademark Act on the ground that the mark sought to be registered consists of or comprises immoral or scandalous matter. When the refusal was made final, applicant appealed. Applicant and the examining attorney filed main briefs on the issue under appeal and applicant filed a reply brief.<sup>2</sup>

The examining attorney, relying upon several dictionary definitions and printouts of articles retrieved from the Internet, contends that because A-HOLE in applicant's mark is a term for the word "asshole," the mark is accordingly scandalous. Specifically, in support of her position, the examining attorney submitted the following definitions:

(1) asshole: Vulgar Slang. 1. The anus. 2. A thoroughly contemptible, detestable person. 3. The most miserable or undesirable place in a particular area.<sup>3</sup>

(2) asshole: 1 usually vulgar: ANUS; 2a usually vulgar: a stupid, incompetent, or detestable person; b usually

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17, 2006 as a date of first use of the mark anywhere and in commerce in connection with the services and a specimen of use.

<sup>2</sup> Inasmuch as the refusal to register is based solely upon the examining attorney's contention that the mark comprises immoral or scandalous matter, applicant's arguments directed toward disparagement will be given no consideration.

<sup>3</sup> American Heritage Dictionary of the English Language, 4<sup>th</sup> Ed. (2006).

vulgar: the worst place – used in phrases like *asshole of the world*.<sup>4</sup>

(3) asshole: Definition 1. (vulgar) the anus. Definition 2. (slang) a contemptible or stupid person. Definition 3. (slang) the worst part of a thing or place.<sup>5</sup>

(4) asshole: Noun Vulgar 1. anus. 2. *Slang*. A. a stupid, mean or contemptible person. B. the worst part of a place or thing. Adjective 3. *Slang*. Stupid, mean, or contemptible.<sup>6</sup>

In addition, the following are illustrative excerpts from Internet articles made of record by the examining attorney:

Much as I concur with the assessment that Sparky is an asshole – hereinafter referenced, in accordance with community standards, as an "a-hole" – it is my considered opinion, as well as a team of experts assembled to study the situation, that our public life will be much the poorer without Sparky on the scene.<sup>7</sup>

In a fourth matter, the respondent raised her voice while being addressed by the judge after receiving an unfavorable ruling in court. The judge admonished respondent to lower her voice or be held in contempt. Shortly after respondent left the courtroom, a loud thumping noise was heard along the wall bordering the jury box. The noise startled the entire court, including the jury. In response to ODC, the respondent acknowledged calling the judge an "**ass hole**"

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<sup>4</sup> Merriam-Webster Dictionary.

<sup>5</sup> www.wordsmyth.net/live/home

<sup>6</sup> Random House Unabridged Dictionary, (2006).

<sup>7</sup> Salt Lake City Weekly (Utah) September 6, 2007.

under her breath. The respondent further explained her heel came loose so she stamped the heel of her shoe back against the wall twice.<sup>8</sup>

It was Friday evening, and like most folks, I'd spent the twilight hours sitting impatiently in my car, squinting into the setting sun and listening to some DJ explain why we were all just sitting there on the highway burning up gas instead of coasting along at a decent clip. I usually just blame all the accidents and delays on some **ass-hole** distracted by his cell phone conversation and dismiss the rest.<sup>9</sup>

The Subtext seemed to be that difficulty in fiction is the tool of socially privileged readers and writers who turn up their noses at the natural pleasure of a "good read" in favor of the invidious, artificial pleasure of feeling superior to other people. To Mrs. M--, I was a "pompous snob, and a real **ass-hole**."<sup>10</sup>

The examining attorney also submitted definitions of A-HOLE:

(1) A hole: Polite, unoffensive [sic] manner to refer to someone as an asshole. *He is such an \*A hole\*.*<sup>11</sup>

(2) A-hole: an *asshole*, a very stupid or annoying person. (Usually refers to a male. Used informally by both sexes in avoidance of *asshole*. Also a term of address.) *Tom can be an A-hole before he's had his coffee. This A-hole comes*

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<sup>8</sup> South Carolina Lawyers Weekly, November 28, 2005.

<sup>9</sup> Birmingham Weekly (Alabama), January 27, 2005 - February 3, 2005.

<sup>10</sup> The New Yorker, September 30, 2002.

<sup>11</sup> Urban Dictionary, [urbandictionary.com](http://urbandictionary.com).

*up to me and asks for a free oil change.*<sup>12</sup>

In view of the above evidence, the examining attorney argues that the record confirms that A-HOLE is a term for "asshole" and that such term is accordingly scandalous.

Applicant, in urging reversal of the refusal, argues that the examining attorney has not met her burden of establishing that the term A-HOLE is scandalous. Specifically, while agreeing that the term "asshole" is not "appropriate as a trademark,"<sup>13</sup> applicant contends that the examining attorney's evidence demonstrates that A-HOLE is a more polite and "sanitized" substitute therefor.<sup>14</sup>

Applicant further contends that A-HOLE has an alternate meaning as a shorthand reference to "analog hole."<sup>15</sup>

Applicant argues in addition that the United States Patent and Trademark Office (USPTO) previously has issued a registration to a third party for the following mark<sup>16</sup>:



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<sup>12</sup> Forbidden American English, Richard A. Spears (1994).

<sup>13</sup> Brief, p. 6.

<sup>14</sup> Id.

<sup>15</sup> Id., referring to Internet article at [beingboing.net](http://beingboing.net) attached to April 18, 2008 request for reconsideration.

<sup>16</sup> Registration No. 1408493 issued on September 9, 1986, for "calendars and decalomanias" in Class 16 and "caps and T-shirts" in Class 25. Cancelled under Section 8, March 15, 1993.

as well as numerous third-party registrations for marks containing the term "ass" variably used "in a pejorative, risqué, off-color, or belligerent manner."<sup>17</sup> Applicant has introduced copies of such third-party registrations in support of its contention.<sup>18</sup> Finally, applicant submitted the April 18, 2008 declaration of Tim Gillons, its Director of Operations, attesting that since launching its A-HOLE PATROL service on April 17, 2006, he has "never encountered any user complaints that the mark is viewed as offensive, vulgar, profane, indecent, or otherwise inappropriate."<sup>19</sup>

Registration of a mark which consists of or comprises immoral or scandalous matter is prohibited under Section 2(a) of the Trademark Act. Our primary reviewing court, the U.S. Court of Appeals for the Federal Circuit, has stated as follows:

To justify refusing to register a trademark under the first clause of section 1052(a), the PTO must show that the mark consists of or comprises "immoral, deceptive, or scandalous matter." In *re Mavety Media Group, Ltd.*, 33 F.3d 1367, 1371 (Fed. Cir. 1994). A showing that a mark is vulgar is sufficient to establish that it "consists of or comprises immoral ... or scandalous matter" within the meaning of section 1052(a). See *id.* at 1373-74 (analyzing a mark in terms of "vulgarity"); In *re McGinley*, 660 F. 2d 481, 485

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<sup>17</sup> *Id.*

<sup>18</sup> April 18, 2008 request for reconsideration.

<sup>19</sup> *Id.*

(CCPA 1981) (quoting with approval *In re Runsdorf*, 171 USPQ 443, 443-44 (TTAB 1971), which refused registration of a mark on grounds of vulgarity). In meeting its burden, the PTO must consider the mark in the context of the marketplace as applied to the goods described in the application for registration. *McGinley*, 660 F.2d at 485. In addition, whether the mark consists of or comprises scandalous matter must be determined from the standpoint of a substantial composite of the general public (although not necessarily a majority), and in the context of contemporary attitudes, *Id.*, keeping in mind changes in social mores and sensitivities. *Mavety*, 33 F.3d at 1371.

*In re Boulevard Entertainment, Inc.*, 334 F.3d at 1336, 67 USPQ2d 1475, 1477 (Fed. Cir. 2003). In cases in which the evidence demonstrates that the term in question has only one pertinent meaning, dictionary definitions alone can be sufficient to satisfy the USPTO's burden of establishing that such term is scandalous. *Id.*, 334 F.3d at 1341-2, 67 USPQ2d at 1478.

Considering first the dictionary definitions of record, they uniformly indicate that the term "asshole" is a vulgar term for either a stupid, contemptible or detestable person, or a part of the body. Further, the dictionary definitions, as well as Internet evidence, consistently indicate that an A-HOLE is an "asshole."

Applicant's mark, A-HOLE PATROL, is used to identify an "Online social club that screens jokes submitted by users to control offensive and inappropriate content."

Further, applicant's specimen, submitted with its amendment to allege use, indicates as follows:

The A-Hole Patrol is JibJab's volunteer community police force that is entrusted with helping keep the JibJab community safe from pornographers, hate mongers and extremists. The A-Hole Patrol (1) reviews new submissions to JibJab (2) investigates reports of abuse in the community and (3) re-reviews jokes that have been reported as offensive by JibJabbers.

If the A-Hole Patrol determines that the joke meets any of the following criteria, it will be pulled from the site.

Is not a Joke  
Contains Explicit Pornography  
Contains Graphic Violence  
Contains Hateful Material  
Joke is not visible or appears to be broken<sup>20</sup>

Based upon the foregoing, it is clear that as used in the context of applicant's A-HOLE PATROL mark, A-HOLE is a slang term meant to refer to a detestable person, and not an anatomical feature. Nor are we persuaded that a single use in an Internet article of A-HOLE as a shorthand term for "analog hole" as applied to conversion of analog music and video to digital files suggests that the term has a common, non-vulgar meaning. Indeed, it is unclear from the article whether the author intends to convey a vulgar connotation by referring to "controversial Analog Hole"

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<sup>20</sup> Printout from [jibjab.com/help/5](http://jibjab.com/help/5), submitted with applicant's July 19, 2007 amendment to allege use.

legislation as an "'A-Hole' bill."<sup>21</sup> In any event, the potentially non-vulgar meaning has no applicability in this context.

Thus, this case is distinguishable from the situation in *Mavety* wherein the Court found that the term "tail," in the context of the use of BLACK TAIL as applicant's mark for magazines, had both a vulgar and equally applicable non-vulgar meaning. Here, the dictionary evidence overwhelmingly demonstrates that the meaning of "asshole" is vulgar and that the term would be scandalous to a substantial composite of the general population. As noted by the Federal Circuit in *In re Boulevard Entertainment*, *supra* at 1478, "dictionary definitions represent an effort to distill the collective understanding of the community with respect to language and thus clearly constitute more than a reflection of the individual views of either the examining attorney or the dictionary editors." We note in addition that applicant acknowledges that the term "asshole" is unsuitable for trademark registration.

Further, we are not convinced that the term A-HOLE is "sanitized" or otherwise non-vulgar. The mere fact that the term A-HOLE is utilized in two slang dictionaries and

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<sup>21</sup> April 18, 2008 request for reconsideration.

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an Internet article as a substitute to avoid use of the word "asshole" - while clearly conveying the same meaning - does not persuade us that the public would regard the term as non-scandalous. In other words, the evidence of record, while sufficient to support a finding that A-HOLE is less vulgar than "asshole," is insufficient to support a finding that A-HOLE is itself a non-vulgar, non-scandalous term.

The third-party registrations relied upon by applicant are not persuasive of a different result herein. The cancelled third-party Registration No. 1408493 for the mark



is not evidence of anything except that it issued. See TBMP §704.03(b) (2d ed. rev. 2004) and cases cited therein. See also Time Warner Entertainment Co. v. Jones, 65 USPQ2d 1650 (TTAB 2002). Further, the highly stylized manner in which the mark is presented suggests that the term A HOLE as it appears therein may allow for a broader range of interpretation than the term A-HOLE as it appears in applicant's A-HOLE PATROL mark. With regard to the remaining third-party marks, we note that while many of them consist in part of the term ASS, none contain either

the term "asshole" or A-HOLE. In addition, and as often noted by the Board, each case must be decided on its own merits. We are not privy to the records in the files of such registrations and, moreover, the determination of registrability of particular marks by the Trademark Law Offices cannot control the result in another case involving a different mark. See *In re Nett Designs, Inc.*, 57 USPQ2d 1564 (Fed. Cir. 2001). ["Even if some prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such prior registrations does not bind the Board"].

Finally, we note applicant's contention that its Internet website receives an average of 1 million page views per day, and that it is unaware of any complaints that its A-HOLE PATROL mark is viewed as vulgar by its users. We further appreciate the irony that the services offered under applicant's A-HOLE PATROL mark are intended to control and excise from applicant's Internet humor site materials that are offensive to its users as a result of being graphically violent, pornographic, hateful, or simply devoid of humor. Nonetheless, the record in this case, as analyzed within the parameters of the statute and case law, supports a finding that applicant's mark consists in part of a term that is considered vulgar by a substantial

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portion of the general public, not simply users of applicant's website, and therefore would be viewed as scandalous thereby.

Decision: The refusal to register under Section 2(a) is affirmed.