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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Murchison

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Serial No. 85748810

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H. Joyce Murchison, *pro se*.

Benji Paradewelai, Trademark Examining Attorney, Law Office 101 (Ronald R. Sussman, Managing Attorney).

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Before Quinn, Ritchie and Wolfson,
Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

H. Joyce Murchison ("applicant") filed, on October 9, 2012, an application to register the proposed mark FOK'N HURTS (in standard characters) for "stun guns" (in International Class 13). Applicant claims first use anywhere and first use in commerce on February 1, 2008.

The trademark examining attorney refused registration under Section 2(a) of the Trademark Act, 15 U.S.C. § 1052(a), on the ground that applicant's proposed mark consists of or includes immoral or scandalous matter.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs.

The examining attorney maintains that applicant's proposed mark FOK'N HURTS is the phonetic equivalent of the profane wording "fucking hurts" which, according to the examining attorney, is "presumably the commercial impression applicant intended to convey about the stun guns." (Brief, p. 7). In support of the refusal, the examining attorney submitted dictionary definitions, excerpts from pronunciation guides, file history copies of two third-party applications, and portions of third-party websites.

Section 2 of the Trademark Act, as amended, provides that "[n]o trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it[] (a) [c]onsists of or comprises immoral, deceptive, or scandalous matter." What constitutes "immoral" or "scandalous matter" has evolved over time, and our primary reviewing court has observed that "we must be mindful of ever-changing social attitudes and sensitivities." *In re Mavety Media Grp. Ltd.*, 33 F.3d 1367, 31 USPQ2d 1923, 1926 (Fed. Cir. 1994). As the Federal Circuit stated: "Today's scandal can be tomorrow's vogue. Proof abounds in nearly every quarter, with the news and entertainment media today vividly portraying

degrees of violence and sexual activity that, while popular today, would have left the average audience of a generation ago aghast." *Id.* During this societal evolution, however, the basic legal framework for analyzing Section 2(a) refusals has remained consistent.

In order to refuse a mark under this portion of Section 2(a), the Office "must demonstrate that the mark is '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.'" *In re Mavety Media Grp. Ltd.*, 31 USPQ2d at 1926. More concisely, and especially useful in the context of this case, the Office may prove scandalousness by establishing that a mark is "vulgar." *In re Fox*, 702 F.3d 633, 105 USPQ2d 1247, 1248 (Fed. Cir. 2012), *citing In re Boulevard Entm't, Inc.*, 334 F.3d 1336, 67 USPQ2d 1475 (Fed. Cir. 2003). *See In re Runsdorf*, 171 USPQ 443, 444 (TTAB 1971) (the statutory language "scandalous" has been considered to encompass matter that is "vulgar," defined as "lacking in taste, indelicate, morally crude"). This demonstration must be made "in the context of contemporary attitudes," "in the context of the marketplace as applied to only the goods described in [the] application," and "from the standpoint of not necessarily a majority, but a substantial

composite of the general public." *In re Mavety Media Grp. Ltd.*, 31 USPQ2d at 1925-26.

Where the meaning of a proposed mark is ambiguous, mere dictionary evidence of a possible vulgar meaning may be insufficient to establish the vulgarity of the mark. *In re Fox*, 105 USPQ2d at 1248 (citations omitted). But where it is clear from dictionary evidence "that the mark[] as used by [the applicant] in connection with the [products] described in [the] application" invokes a vulgar meaning to a substantial composite of the general public, the mark is unregistrable. *Id.* Whether applicant intended the mark to be humorous, as applicant asserts in the present case, or even whether some people would actually find it to be humorous, is immaterial. *In re Luxuria, s.r.o.*, 100 USPQ2d 1146, 1149 (TTAB 2011); *Boston Red Sox Baseball Club LP v. Sherman*, 88 USPQ2d 1581, 1588 (TTAB 2008).

The determination that a mark comprises scandalous matter is a conclusion of law based upon underlying factual inquiries, and the burden of proving that a proposed mark is unregistrable under Section 2(a) rests with the Office. *In re Mavety Media Grp. Ltd.*, 31 USPQ2d at 1925.

A "stun gun" is defined as "a weapon designed to stun or immobilize (as by electric shock) rather than kill or injure the

one affected." (m-w.com).[1] A copy of applicant's specimen showing the mark used on applicant's "stun gun" is reproduced below.

There is no need to belabor the obvious point that the terms "fuck" and "fucking" are "immoral" and/or "scandalous" as contemplated under Section 2(a). Dictionaries routinely characterize the terms as "usually obscene" or "usually vulgar." (*see, e.g.*, m-w.com). The term "fuck" means, in relevant part, "(offensive) an expression of strong disgust or anger (often in exclamatory phrases such as fuck you! fuck it! etc.)." (collinsdictionary.com); "Vulgar Slang To have sexual intercourse with; used to express extreme displeasure." (bartleby.com). The term "fucking" is defined as "an extremely offensive expression used for emphasizing what you are saying,

[1] The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006). *See In re Thomas White Int'l Ltd.*, 106 USPQ2d 1158, 1160 n.1 (TTAB 2013).

especially to show anger." (macmillandictionary.com); "damned; confounded (used as an intensifier)." (Random House Unabridged Dictionary (1997)). We also take judicial notice of the following dictionary definition of "fuck" which states under "Usage": "Despite the wideness and proliferation of its use in many sections of society, the word fuck remains (and has been for centuries) one of the most taboo words in English. Until relatively recently, it rarely appeared in print; even today, there are a number of euphemistic ways of referring to it in speech and writing, e.g., the F-word, f***, or f--k." (The New Oxford American Dictionary (2d ed. 2005).

The term "fok" has been "defined" as follows: "See also fuck. Can be used in any for [sic] of anger or rudeness"; "an act of sexual intercourse; fok around; fok off; fok up; Slang, (used to express anger, disgust, annoyance, impatience, peremptory rejection, etc., often fol. by ... a pronoun, as you or it.); Idiom, give a fok, Slang, to care; be concerned." (urbandictionary.com).[2]

[2] We recognize the potential for uncertainty in an online dictionary definition and therefore, in considering its probative value, look to whether an opportunity to rebut the evidence was afforded. Applicant had the opportunity in this case to rebut the dictionary definitions from Urban Dictionary by submitting other definitions that may call into question the accuracy of these particular definitions. Inasmuch as applicant did not rebut this evidence with any alternative meanings of "fok" or "fok'n," we have considered this evidence. *See In re Star Belly Stitcher, Inc.*, 107 USPQ2d 2059, 2062 n.3 (TTAB 2013).

The examining attorney made of record the following third-party uses of "fok'n":

> He was on fok'n fire.
> (democraticunderground.com)
>
> Holy fok'n shite batman
> (apriliaforum.com)
>
> Fok'n censorship. Lol @ confused people.
> (bust-video.info)
>
> So, for all of you bumbling fok'n fools who cheerlead about a BULL market, think and read between the lines.
> (elitetrader.com)
>
> Blitty, we have a fok'n problem.
> (gamelive.com)
>
> I honestly love this fok'n story so much!
> (fanfiction.net)
>
> They don't even know how to tie their own fok n shoes
> (streetbonersandtvcarnage.com)
>
> In fact they should make a Pride Oreo that look like this!!! I bet they'd taste fok'n amazing.
> (twicsy.com)

It is plain, as shown by the above evidence, that the term "fok'n" is regarded and used as a vulgar slang alternative for the term "fucking" (or "fuck'n") as in the phrase "fucking hurts." There is no evidence that the proposed mark FOK'N HURTS would invoke a different, non-vulgar meaning when used in connection with applicant's stun guns or in the marketplace for such goods. Rather, if anything, the use of the proposed mark

in connection with applicant's stun guns reinforces the vulgar meaning, namely to emphasize in a vulgar manner the high degree of hurt or pain caused by the goods. While we recognize, as noted earlier, that social attitudes and sensitivities are ever-changing, the evidence is sufficiently contemporaneous with the examination of the present application to reflect contemporary viewpoints. *See In re Luxuria, s.r.o.*, 100 USPQ2d 1150.[3]

The record also includes pronunciation guides showing that in English the weak form of any vowel, including the letter "o," is the "schwa" or "uh" sound (represented by "ə" in pronunciation guides). (oed.com (Oxford English Dictionary); pronuncian.com). According to the examining attorney, who also relies on dictionary entries to show the pronunciation of certain words, the "o" in applicant's proposed mark, when spoken, would make the "uh" sound, such as the "o" in the words "love" (shown as "ləv"), "another," "dozen," "seldom," "above," and "gallop," among others.[4]

[3] The examining attorney also introduced the file histories of two third-party applications, to register the terms FOKYEAHDUDE and FOKNO, which were abandoned after being refused registration under Section 2(a) on the ground that the applied-for marks were immoral or scandalous under Section 2(a). The examining attorney highlights these applications to make the point that the examination of the present application is consistent with the examination in these other abandoned applications. These applications are entitled to no weight. *See In re Luxuria, s.r.o.*, 100 USPQ2d at 1151.

[4] The Urban Dictionary listings for "fok" do not show any pronunciation.

Although we have considered this evidence bearing on the likely pronunciation of the terms "fok" and "fok'n," we recognize, as so often stated, that there is no correct pronunciation of a mark because it is impossible to predict how the public will pronounce a particular mark. *See, e.g., In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012). Consumers may pronounce the proposed mark differently than intended by applicant, or differently than what the examining attorney contends. Suffice it to say, however, any minor differences in the sound between the terms "fok'n" and "fucking" may go undetected by consumers. No matter which way the term "fok'n" is pronounced, it will sound similar to "fucking" (or "fuckin/fuck'n") to some degree. As we have noted regarding the commercial impression, when viewed in relation to applicant's "stun guns," we find that applicant's proposed mark would likely be pronounced "Fuck'in Hurts."

Applicant contends that "fok'n is not even a word," and further argues as follows:

> The pronunciation of the word Fok'n is pronounced with a long "O" such as in the word home. This is how I pronounce the word and as members of the public have pronounced the word back to me – unprompted.
>
> [T]he letter "O" does not have the pronunciation of "uh" or "ah" as the original examiner attempts to make it. The original examiner is wrong to conclude and the examiner-attorney wishfully interpreted

> the word FOK'N as a phonetic equivalent of the word fucking (the attorney's term not mine) would be laughable if it weren't presented so ignorantly.
>
> The idea that my application is somehow contrary to current societal norms is wrong.
>
> By using some reference to a court case from 1927, I wonder if anyone reads a newspaper, peruses the internet or just looks out the window. Our country is not the same as in 1927. To use this mind set to deny my application in 2013 is absurd.
> I would hope the [Board] would use more commonsense to determine the name I seek to trademark is not offensive; but, FUNNY and makes customers remember and even promote my small business.
>
> I must also repeat that if my search for a registered trademark is denied, then all of the other trademarks registered as submitted in my supporting Exhibits, must be revoked for the same reasoning. It seems the First Amendment was alive and well for those mentioned in exhibits, it should be alive for me as well.
>
> If the various Exhibits have been approved without the personal subjective belief system of the original examining attorney concerning my application, then my application must be approved. Otherwise, there appears to be conflicting rules and non[-]objective reasoning for approving trademark applications. If this is the case then I question whether my application was treated with discrimination in some form. (Brief, pp. 1-2)(emphasis in original).

In connection with its "state of the register" argument and what applicant perceives to be unequal treatment based on the registrations of marks similar to the one applicant seeks to

register, applicant points to the following third-party registered marks: PUCK-IT; FRIGGIN and design; AIRSCREW; FRIG U; FUCHS and design; FREAKIN; FRICKIN'; SCREW*D; WTF; PROSCREW; and THE F WORD. In each instance, applicant also submitted dictionary-type evidence to show that each of the registered terms, in whole or in part, is an alternative form of the term "fuck" or "fucking." Applicant ultimately asks that the Board "will look at [her] request for what it is ... humor tied to making a business grow." (Reply Brief, p. 2).

The examining attorney offered a detailed response in addressing each of these registrations, an assessment with which we agree. We note that none of the registered marks comprises, in whole or in part, the term at issue herein, namely "fok'n" (or "fok"). The fact that different terms are included in registrations casts no light on the public perception of the term "fok'n" as used by applicant in its proposed mark. Moreover, none of the cited marks is as close to the terms "fuck" and "fucking" as the term "fok'n" in overall commercial impression. Words such as "friggin," "freakin" and "frickin" may be euphemistic expressions for the term "fucking"; when these terms are spoken, however, no one is likely to hear anything close to "fucking" (or "fuckin/fuck'n"). The term "fok'n" bears a similarity in sound (no matter how it is pronounced) to the term "fucking" (or "fuckin/fuck'n") that,

quite simply, the other terms do not. Further, as often stated, each case is decided on its own facts. *See In re McGinley*, 660 F.2d 481, 211 USPQ 668, 672 (CCPA 1981). "Even if all of the third-party registrations should have been refused registration ... such errors do not bind the USPTO to improperly register Applicant's marks." *In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009), citing *In re Boulevard Entm't Inc.*, 67 USPQ2d at 1480. *See 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 [applicant's] application, the PTO's allowance of such prior registrations does not bind the board or this court.").

We would be remiss if we did not comment on one troubling aspect of applicant's prosecution of her application, specifically, applicant's personal attack on the examining attorney. However, so as to be clear, applicant's comments have had no bearing on our determination of the substantive issue on appeal.

During the prosecution of the application, applicant stated (Response, March 28, 2013)[5] that the refusal is "nonsense," and

[5] The communication (not accompanied by any fee) was addressed to Ms. Deborah Cohn, Commissioner for Trademarks, rather than to the examining attorney. This communication properly was considered as a timely response to the Office action dated February 8, 2013, and not as a petition to the Commissioner. Substantive issues that arise in ex parte examination are not proper subject matter for petition, and

that she took "great umbrage in the fact [that] the denial was made by an obvious non English as a first language attorney." In concluding this one and only response filed during examination, applicant also stated:

> In the case of fairness, though, please refund my original fee due to the incompetence of the original examiner. As a lawyer he or she may make a fair custodial engineer (I apologize to all of the custodial engineers I just insulted).
>
> I am a small businesswoman trying to grow my business, protect my creative ideas and use these ideas to enhance my product and increase sales which translates to more income and more taxes. With a seventeen (17) trillion dollar plus national debt, I should think the USPTO would like to help and encourage people to succeed not give them the Chicago salute.

Suffice to say that applicant's comments did nothing to advance the substantive prosecution of her application. The USPTO and the Board requires all parties, whether represented by counsel or proceeding *pro se*, "to conduct their business with decorum and courtesy." Trademark Rule 2.192. In any future contact with the USPTO, applicant should refrain from *ad hominem* attacks on USPTO personnel.

We find that the examining attorney's evidence is fully sufficient to support the refusal that applicant's proposed mark FOK'N HURTS is a vulgar slang form of "fucking hurts," and that

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may be reviewed only by the Board on appeal. *See* TMEP 1704 (8th ed. Oct. 2013).

a substantial composite of the general public would view it as such. Accordingly, we conclude on the record evidence presented that the applied-for mark consists of or comprises immoral or scandalous matter under Section 2(a).

Decision: The refusal to register is affirmed.