

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

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nicholas Jones

Serial No. 85855449

Mark Borghese of Borghese Legal Ltd. for Nicholas Jones.

David C. Reihner, Trademark Examining Attorney, Law Office 111 (Robert Lorenzo, Managing Attorney).

Before Kuhlke, Cataldo and Adlin, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Nicholas Jones (applicant) filed an application to register on the Principal Register the mark **no \$#!+** in standard characters for services identified as “Entertainment services, namely, providing a web site featuring photographic, video and prose presentations featuring news, humor, and memes” in International Class 41.¹

The examining attorney refused registration pursuant to Section 2(a) of the Trademark Act, 15 U.S.C. §1052(a), on the ground that applicant’s proposed mark,

¹ Application Serial No. 85855449, filed February 20, 2013, alleging a *bona fide* intent to use the mark in commerce pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

when used in connection with applicant's services, comprises immoral or scandalous matter.

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

Applicant argues that (1) "[t]he record does not show that no \$#!+ would be regarded as [scandalous]" because although there is "plenty of evidence that SHIT is vulgar" such evidence is irrelevant because the mark is \$#!+ which "at most [is] an indication that the symbols are being used in place of an offensive word, not that the symbols themselves are vulgar" and the one Urban Dictionary excerpt regarding \$#!+ is not sufficient to establish that the mark is immoral or scandalous (App. Br. p. 3); (2) substitutes for vulgar terms are not themselves vulgar; and (3) the USPTO has allowed a "similar arrangement" in a third-party registration.

The examining attorney argues, *inter alia*, that "the commercial impression of the designation [NO \$#!+] is the same as the properly spelled designation NO SHIT ... and [is] understood to be a vulgar and offensive expression... ." Ex. Att. Br. p. 7, 10.

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 held that the burden of proving that a mark is scandalous rests with the USPTO. *In re Boulevard Entertainment, Inc.*, 334 F.3d 1336, 1339, 67 USPQ2d 1475, 1477 (Fed.

Cir. 2003) citing *In re Mavety Group, Ltd.*, 33 F.3d 1367, 31 USPQ2d 1923 (Fed. Cir. 1994). Further, the court stated as follows:

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. [citation omitted] 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, [citation omitted], keeping in mind changes in social mores and sensitivities.

Boulevard, 67 USPQ2d at 1477. See also *In re McGinley*, 660 F.2d 481, 485, 211 USPQ 668, 673 (CCPA 1981).

The examining attorney 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*, 31 USPQ2d at 1925 citing *In re Riverbank Canning Co.*, 95 F.2d 327, 37 USPQ 268 (CCPA 1938). Dictionary evidence alone can be sufficient to satisfy the USPTO’s burden, where the mark has only one pertinent meaning. *Boulevard*, 67 USPQ2d at 1478. The USPTO may prove scandalousness by establishing that a mark is “vulgar.” *In re Fox*, 702 F.3d 633, 105 USPQ2d 1247, 1248 (Fed. Cir. 2012). See also *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”). As explained in *In re Star Belly Stitcher, Inc.*, 107 USPQ2d 2059, 2060 (TTAB 2013):

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, 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); see also *In re Fox*, 105 USPQ2d at 1251 (“the fact that something is funny does not mean that it cannot also be ‘scandalous’”).

Further, “as long as a ‘substantial composite of the general public’ perceives the mark, in context, to have *a* vulgar meaning, the mark as a whole ‘consists of *or* comprises ... scandalous matter.’” *In re Fox*, 105 USPQ2d at 1251 (emphasis in original) *citing* 15 U.S.C. § 1052(a) and *Boulevard*, 67 USPQ2d at 1647. In *Fox* the court distinguished *Mavety* as addressing ambiguous meaning. Notably, the Court defines the issue in terms of whether the “meaning” is vulgar.

In support of his position that the mark NO \$#!+ would be perceived as NO SHIT and that NO SHIT is offensive, the examining attorney submitted dictionary evidence indicating that both the word SHIT and the phrase NO SHIT are considered vulgar.

Shit *usually vulgar* feces, an act of defecation, nonsense, crap, damn ... used as an interjection;²

Shit interjection - *vulgar* excrement, nonsense, something inferior or worthless;³

Shit One of the most popular swear/cuss/curse words/profanities;⁴

² Merriam-Webster (merriam-webster.com 2013).

³ Random House Dictionary retrieved at dictionary.com.

⁴ Urban Dictionary (urbandictionary.com 2013). The limitations on the probative value of the Urban Dictionary discussed by applicant have been recognized by the Board and we have considered such limitations in weighing the evidence in this record. *In re Star Belly*,

No Shit slang a. used to express amazement or incredulity ... b. used to express one's annoyance with an obvious statement;⁵

No Shit used to express contemptuous acknowledgment of the obvious.⁶

The examining attorney provided the following definition for \$#!+ to support that it means SHIT:

\$#!+ 1 This is the word SHIT in Chat-Room-With-Word-Filter language, 2. Just something to say when you hate when ppl talk on the internet.⁷

The examining attorney also submitted an excerpt from a Wikipedia page explaining the use of word filters on the Internet and printouts from various websites, blogs and the search results for the word SHIT which depict this word using a wide variety of symbols and letters to spell SHIT.⁸ The variations that

107 USPQ2d at 2062 n. 3 (Board considers “dictionary definitions from Urban Dictionary so long as the non-offering party has an opportunity to rebut that evidence by submitting other definitions that may call into question the accuracy of the particular Urban Dictionary definitions. Our consideration of the Urban Dictionary definitions is with the recognition of the limitations inherent in this dictionary, given that anyone can submit or edit the definitions.”) Applicant had opportunity to rebut this evidence but did not submit any alternative meanings of \$#!+, in particular when used as part of the phrase NO \$#!+.

⁵ Random House Dictionary retrieved at dictionary.com.

⁶ Urban Dictionary.

⁷ Id.

⁸ Although the search engine results of third-party Internet websites submitted by the examining attorney are of limited probative value inasmuch as typically there is insufficient text to show the context within which a term is used, the results in this case do show use of symbols to spell the expletive SHIT. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007); TBMP § 1208.03 (2013).

employ symbols include, \$HIT, \$hl+, \$hi+, and S#i+. The discussion regarding word filters includes the following passage:

A swear filter, also known as a profanity filter or language filter is a software subsystem which modifies text to remove words deemed offensive by the administrator or community of an online forum. Swear filters are common in custom-programmed chat rooms and online video games ... Expletives are typically partially replaced (f*ck), completely replaced (***), or replaced by nonsense words (frak). ... A user trying to avoid vulgarity filter might use “shi-”⁹

There is no dispute that SHIT and the phrase NO SHIT are vulgar and the record supports such a finding. Moreover, in a recently published decision the Board found the phrase AWSHIT WORKS for use in connection with various clothing items to comprise immoral or scandalous matter under Section 2(a). *Star Belly Stitcher*, 107 USPQ2d at 2059. Further, based on the evidence of record we find that the public would clearly perceive the term NO SHIT, both in meaning and pronunciation, when presented with the proposed mark NO \$#!+, in particular, in connection with applicant’s services, which are specifically identified as being provided online through a website and the evidence shows use of such symbols to spell vulgar words online. This finding is further supported by the fact that the symbols used appear very similar to the letters, i.e., \$ for S, # for H, ! for I and + for T or t. Here, there is no ambiguity in meaning when viewing the mark as a whole. Having found that the proposed mark NO \$#!+ has the meaning and would be pronounced as NO SHIT, the refusal under Section 2(a) is appropriate. *Fox*, 105 USPQ2d 1247.

⁹ www.wikipedia.org/wiki/Wordfilter.

Applicant's arguments that use of these symbols is the inoffensive way to represent the vulgar word are not persuasive in this case. Applicant points to the unpublished, non-precedential decision *In re Big Effin Garage, LLC*, slip op. 77595225 (November 23, 2010) where the Board found that the USPTO had not met its burden to demonstrate that "effin" and "fn" and the overall designations BIG EFFEN GARAGE and BIG F'N GARAGE are scandalous under Section 2(a) where the record included, *inter alia*, dictionary definitions explicitly stating that effing is the edited version of the word fucking. However, in this case there is no such redeeming dictionary definition and the symbols spell out and look like the vulgar word and not an acceptable substitute. Rather, this case is more similar to another unpublished decision where an applicant sought to register "THE COMPLETE A**HOLE'S GUIDE TO ...," arguing that society "has adopted the term 'a**hole' as a non-offensive alternative when attempting to categorize provocative products or people." *In re Daniel Zaharoni*, slip op. 76351811 (January 4, 2005) at 5. In that case, the Board was not convinced that use of other symbols in place of the two "S's" in asshole "cleaned-up" the mark to render it non-vulgar and affirmed the refusal under Section 2(a), noting that "all types of material appears on the Internet, some of it scandalous in nature." *Id.* at 9.¹⁰

Here, the use of the symbols \$#!+ closely resembles the lettering for the word SHIT and combined with the word NO clearly means NO SHIT. There is no doubt

¹⁰ The contrast between these two decisions, neither issued as a precedent of the Board, illustrates the reason citations to non-precedents are typically of little utility. For when a non-precedent is relied on, it is just as likely as not that there will be a countervailing decision available. Parties to Board cases are best served by restricting their citations to decisions issued as precedents of the Board.

that the proposed mark NO \$#!+ would be perceived as the phrase NO SHIT and would be pronounced as NO SHIT. This is distinguished from the scenario applicant describes where “a string of typographical symbols such as @#\$\$%* ... have been used in comic strip speech bubbles and in other writings as a polite replacement for an obscenity, a swearword, or violence.”¹¹ App. Br. p. 3. Applicant’s comic strip example contemplates only an understanding that the symbols convey some manner of swear words but not the specific word and meaning as represented by applicant’s mark NO \$#!+. To the extent the argument is that such examples of this use of symbols on the Internet or in comic strips may serve to indicate that they are not offensive and do not fall within the purview of Section 2(a), we note that the Internet is full of vulgar words that are routinely barred from registration by Section 2(a). Rather, the evidence in this record, which includes dictionary definitions, establishes the general consensus that the term NO SHIT is vulgar and that NO \$#!+ would be perceived precisely as the vulgar term NO SHIT.

As to the third-party registration that issued for the mark \$#!+ MY DAD SAYS,¹² “although consistent treatment under the Trademark Act is an administrative goal, the existence of third-party registrations that may be equally immoral or scandalous, or more immoral or scandalous, is not justification for the registration of another immoral or scandalous mark.” *Star Belly Stitcher*, 107 USPQ2d at 2064 *citing In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009) and *Boulevard*, 67 USPQ2d at 1480.

¹¹ Applicant did not submit examples of such use.

¹² Registration No. 4142745, issued on May 15, 2012.

Finally, while applicant argues that if the Board has doubts as to whether the examining attorney has established that the mark is scandalous or immoral, any such doubt should be resolved in favor of applicant, based on this record, we have no such doubt.

Decision: The refusal to register the mark NO \$#!+ under Section 2(a) is affirmed.