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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 Fox

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Serial No. 76315793

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Marsha Fox *pro se*.

Karanendra S. Chhina, Trademark Examining Attorney, Law Office 114 (K. Margret Le, Managing Attorney).

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Before Zervas, Bergsman and Shaw,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

This appeal from the final refusal of the Trademark Examining Attorney involves Section 2(a) of the Trademark Act of 1946, 15 U.S.C. §1052(a), which precludes registration of marks that consist of or comprise "immoral, deceptive, or scandalous matter." Marsha Fox ("applicant") seeks to register a use-based application for the mark COCK SUCKER and a rooster design, shown below, for "chocolate suckers molded in the shape of a rooster," in Class 30.

The Examining Attorney contends that "COCK is defined, in relevant part, as '*penis*,' and SUCKER as, '*one that sucks…*,' with the combined meaning being 'one who sucks a penis.'"[1] (Emphasis in the original). Applicant argues, on the other hand, that the refusal is wrong because "when the consumer studies the product as a whole, the rooster shaped sucker packaged in a clear bag with a tag affixed to it that bears the image of a rooster, a very different and far more logical conclusion is reached."[2]

A. Legal standard for determining whether a mark is scandalous or immoral.

The determination of whether the marks are scandalous is a conclusion of law based on the underlying facts. *In re Mavety Media Group Ltd.*, 33 F.3d 1367, 31 USPQ2d 1923, 1925 (Fed. Cir. 1994). The U.S. Patent and Trademark Office has the burden of proving that a trademark falls within the prohibition of Section 2(a). *In re Mavety Media Group Ltd.*, 31 USPQ2d at 1925. *See also In re Standard*

[1] Examining Attorney's unnumbered brief page 7.
[2] Applicant's Brief, p. 3.

Electrik Lorenz A.G., 371 F.2d 870, 152 USPQ 563, 566 (CCPA 1967). To prove that that the mark COCK SUCKER and a rooster design is scandalous or immoral, it is sufficient if the Examining Attorney shows that the term is vulgar.[3] *In re Boulevard Entertainment Inc.*, 334 F.3d 1336, 67 USPQ2d 1475, 1477 (Fed. Cir. 2003) (showing that the mark is vulgar is sufficient to establish that it is scandalous or immoral); *In re McGinley*, 660 F.2d 481, 211 USPQ 668, 673 (CCPA 1981), *quoting In re Runsdorf*, 171 USPQ 443, 443-444 (TTAB 1971) (vulgar terms are encompassed by the term scandalous); *In re Luxuria s.r.o.*, 100 USPQ2d 1146, 1148 (TTAB 2011). "[T]he threshold for objectionable matter is lower for what can be described as 'scandalous' than for 'obscene.'" *In re McGinley*, 211 USPQ at 673 n.9.

In determining whether a particular designation is scandalous or immoral, we must consider the mark in the context of the marketplace as applied to applicant's description of goods. *In re Boulevard Entertainment Inc.*, 67 USPQ2d at 1477; *In re Mavety Media Group Ltd.*, 31 USPQ2d at 1925 (there are multiple non-vulgar definitions of the term "tail" applicable in connection with an adult

[3] While the cases define scandalous and immoral in additional and more comprehensive terms, the word "vulgar" captures the essence of the prohibition against registration and, therefore, we shall use "vulgar" to facilitate our analysis and discussion.

Entertainment magazine); *In re McGinley,* 211 USPQ at 673. Furthermore, the issue must be ascertained (1) from the standpoint of a substantial composite of the general public, and (2) in terms of contemporary attitudes. *Id.* Thus, even though "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" [*In re Mavety Media Group Ltd.,* 31 USPQ2d at 1926], there are still terms that are sufficiently vulgar that fall under the prohibition of Section 2(a). *In re Tinseltown, Inc.,* 212 USPQ 863, 866 (TTAB 1981) ("the fact that profane words may be uttered more freely does not render them any the less profane": refusing to register BULLSHIT for personal accessories and clothing).

B. The evidence.

1. Dictionary definitions defining the word "cocksucker" as "one who performs fellatio."[4] The term is classified as obscene in the *Merriam-Webster OnLine* dictionary, highly offensive in the *MSN.Encarta* online dictionary, a pejorative term in the *Wictionary,* wiki-based open content dictionary (online), vulgar in the *Wordsmyth*

[4] July 8, 2008 Office action.

online dictionary, The American Heritage Dictionary of the English Language (4th ed. 2006) and the Random House Unabridged Dictionary (2006). "Cocksucker" is also defined as an insulting term of address for people who are stupid, irritating or ridiculous.[5]

2. Dictionary definitions defining the word "cock," *inter alia,* as a male chicken or as a penis.[6] When the word "cock" is used to refer to a penis, it is considered vulgar according to the *Merriam-Webster OnLine* dictionary, Webster's New World College Dictionary (2009), the *Wictionary,* and The American Heritage Dictionary of the English Language (4t ed. 2000) and "taboo" and "highly offensive" by the *MSN.Encarta* online dictionary.

3. Dictionary definitions of the word "sucker" defined, *inter alia,* as "a person or thing that sucks" or a "lollipop."[7]

4. A photographs of applicant's products on display in clear plastic packaging and "in small replicas of egg farm collecting baskets."[8]

[5] *Id.*
[6] August 17, 2009 Office action.
[7] *Id.*
[8] Applicant's June 27, 2002 response.

5. Letters from "members of the general public" to the effect that applicant's mark COCK SUCKER is not immoral or scandalous.[9]

C. The commercial impression engendered by applicant's mark.

The word portion of applicant's mark, COCK SUCKER, when used in connection with applicant's products, creates a double entendre: one meaning is one who performs fellatio; and the other meaning is a rooster lollipop.[10] Applicant concedes that her "application is for a mark that has words that imply a double entendre."[11] In this regard, "[i]n developing the Cock Suckers, [applicant] recognized the need to sway the mind's eye with the use of artwork."[12] Thus, the mark was created with the intent to make an association with the sex act. In this regard, we paraphrase one of applicant's comments regarding the BIG PECKER case: "Obviously anyone pubescent age and older who speaks English, and is familiar with American slang would

[9] Applicant's April 27, 2009 response.
[10] A "double entendre" is a term that has "1. a double meaning. 2. a word or expression used in a given context so that it can be understood in who ways, esp. when one meaning is risqué." The Random House Dictionary of the English Language (Unabridged), p. 587 (2nd ed. 1987).
[11] Applicant's Brief, p. 5. At the same time, applicant noted that the mark includes the design of a rooster "which serves the purpose of guiding the potential purchaser to the less risqué of the two definitions." *Id.*
[12] Applicant's Brief, p. 9.

immediately think of [oral sex] when confronted with the term [COCK SUCKER]."

The term "Cocksucker" is uniformly identified as a vulgar term in dictionaries and the term "Cock Sucker," with a space between the two words, has, for our purposes, the same meaning. We give very little weight to applicant's argument COCK SUCKER has a different meaning than COCKSUCKER. Any consumer that recognizes the double entendre is unlikely to make a distinction, if any, between the meanings of COCK SUCKER and COCKSUCKER. *Cf. In re International Business Machines Corp.*, 81 USPQ2d 1677, 1679 (TTAB 2006) ("we see no difference in the meaning or connotation of 'e-server' and 'eserver,' and consider them to be an abbreviated form of 'electronic server.'"); *Henry I. Siegel Co., Inc. v. Highlander, Ltd.*, 183 USPQ 496 (TTAB 1974) ("Turning to the terms 'h.i.s.' and 'He.', they are alike in that 'h.i.s.' would suggest to purchasers the possessive form of the pronoun 'he', in essence, applicant's mark.").

The goods identified in the application are lollipops in the shape of a rooster and applicant describes them as innocuous and whimsical. Applicant explained that she found that the products were popular at the University of South Carolina football games because the mascot is the

Gamecock. Likewise, at Jacksonville State University in Florida, whose mascot is the Gamecock. Thus, the consumer statements submitted by applicant tend corroborate her argument that some consumers find her mark to be inoffensive. Nevertheless, the lollipops are available to all consumers, including parents shopping with children. Moreover, even if some consumers find the product whimsical and innocuous, they may still find that the mark is vulgar.

Finally, applicant argues that the facts in her application so closely parallels the facts in *In re Hershey,* 6 USPQ2d 1470 (TTAB 1988) that her mark should be approved for publication. In *Hershey,* the applicant applied to register the mark BIG PECKER for t-shirts. Unlike in the case before us, the Board in *Hershey* found that the evidence was "at best marginal to demonstrate that the mark is a vulgar, slang reference to male genitalia and would be recognized as such a reference by a substantial composite of the general public." 6 USPQ2d at 1471. To be clear, we find that the evidence supports the fact that the term COCK SUCKER is vulgar and, therefore, is precluded from registration under Section 2(a) of the Trademark Act.

Decision: The refusal to register is affirmed.