Mailed: January 4, 2005
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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 Daniel Zaharoni

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Serial No. 76351811

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David G. Duckworth of Drummond & Duckworth for Daniel Zaharoni.

Margery A. Tierney, Trademark Examining Attorney, Law Office 111 (Craig Taylor, Managing Attorney).

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Before Hairston, Walters and Rogers, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by David Zaharoni to register the mark "THE COMPLETE A**HOLE'S GUIDE TO …" for a "series of books providing information relating to advice, counseling, self-help, and humor."[1]

[1] Serial No. 76351811, filed on December 21, 2001, alleging a bona fide intention to use the mark in commerce. On June 25, 2003 applicant submitted an amendment to allege use and specimen of use. Applicant alleges first use and first use in commerce on May 1, 2003.

Registration has been finally refused under Section 2(a) of the Trademark Act, 15 U.S.C. §1052(a), on the ground that applicant's mark comprises immoral or scandalous matter.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested.

The Examining Attorney, relying upon various dictionary definitions and Internet printouts, contends that because "A**HOLE" in applicant's mark is a term for the word "asshole," the mark is accordingly scandalous.[2] 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. American Dictionary of the English Language.
>
> (2) asshole: 1 usually vulgar: ANUS 2a usually vulgar: a stupid, incompetent, or detestable person b usually vulgar: a despicable place – usually used in the phrase *asshole of the universe.* Merriam-Webster Dictionary.
>
> (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. www.wordsmyth.net/live/home

[2] The current Examining Attorney was not the original Examining Attorney in this case.

> (4) asshole: n. Vulgar Slang 1. The anus. 2. A thoroughly contemptible, detestable person. 3. The most miserable or undesirable place in a particular area.
> Dictionary.com

The Examining Attorney also submitted excerpts of articles downloaded from the Internet:

> (1) An article from Salon.com bears the headline- "Trump revelation. 'I am an a**hole.'" The article continues with: "Setting fire to a series of $100 bills last week for the benefit of a largely indifferent gathering of reporters, real estate mogul Donald Trump suddenly announced that he is a 'big asshole.'"
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> (2) An article from Action Pinball and Amusement at www.awsnet indicates that a reviewed video game consists of a profanity option. The article states that "[t]he profanity consists of the word 'f**ck you a**hole."
>
> (3) An article downloaded from the homepage of The Parent's Television Council, which reviews, inter alia, television shows for the use of foul language, states that the foul language used on the cop show series The Beat included "asshole," "hell," "crap," "balls," …
>
> (4) In an article from Yahoo Sports, the author describes a sports reporter's writing "mf" and "a**hole" on the telestrator as a "profanity."
>
> (5) At the website cannabisnews.com the following comment is posted: "After reading this article, a scene from 'Liar, Liar' comes to mind. A lawyer receives a phone call from a client whom he has defended multiple times for the same offense. The lawyer screams into the phone, 'STOP BREAKING THE LAW A**HOLE!!!'"

> (6) At a website which contains discussion of the movie The Rocky Horror Picture Show, a post reads "… every time you hear Brad Majors, you yell out 'A**hole'…"
>
> (7) At a website, a reference is made to the stupid e-mail received containing profanity. The author recounts that a portion of the e-mail stated: "Your (sic) nothing but an a**hole and I hated your website."

In view of the above evidence, the Examining Attorney maintains that the record confirms that "a**hole" is a term for "asshole" and that the 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. Applicant contends that the Patent and Trademark Office has provided "no factual basis that 'a**hole' is considered scandalous." (Brief, p. 2). Further, applicant states:

> Applicant agrees that most readers would infer that the term "a**hole" refers to the word "asshole." However, the use of the term "a**hole" reflects a concerted effort by Applicant, and by others that use the term, to present a "cleaned up," non-scandalous alternative for the word "asshole." (Brief, pp. 1-2).

Applicant points out that the Merriam-Webster Dictionary relied upon by the Examining Attorney also lists the entry "asshole" as meaning "anus, the posterior opening of the alimentary canal." Relying on In re Mavety Media Group,

Ltd., 33 F.2d 1357 (Fed. Cir. 1994), applicant argues that in light of this alternative, non-vulgar meaning of the term “asshole”, its mark should be passed for publication.

In addition, applicant contends that society or the majority of the public does not consider “a**hole” to be scandalous, but rather society “has adopted the term “a**hole” as a non-offensive alternative when attempting to categorize provocative products or people.” (Brief, p. 5). Applicant argues that the Examining Attorney’s Internet evidence shows that the term “a**hole” frequently appears in publications and hence is not scandalous.

Applicant also points out that the terms "asshole" and “arshole” are used in the names of cocktail drinks, and submitted copies of two cocktail recipes obtained from the Internet. Lastly, applicant submitted a copy of a third-party application for the mark “WHEN $*%# HAPPENS BLAME IT ON 2000 EVERYBODY ELSE DOES BB” for clothing which was approved for publication and a list of third-party

applications and registrations for marks that include the term "ass" or "bitch."[3]

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:

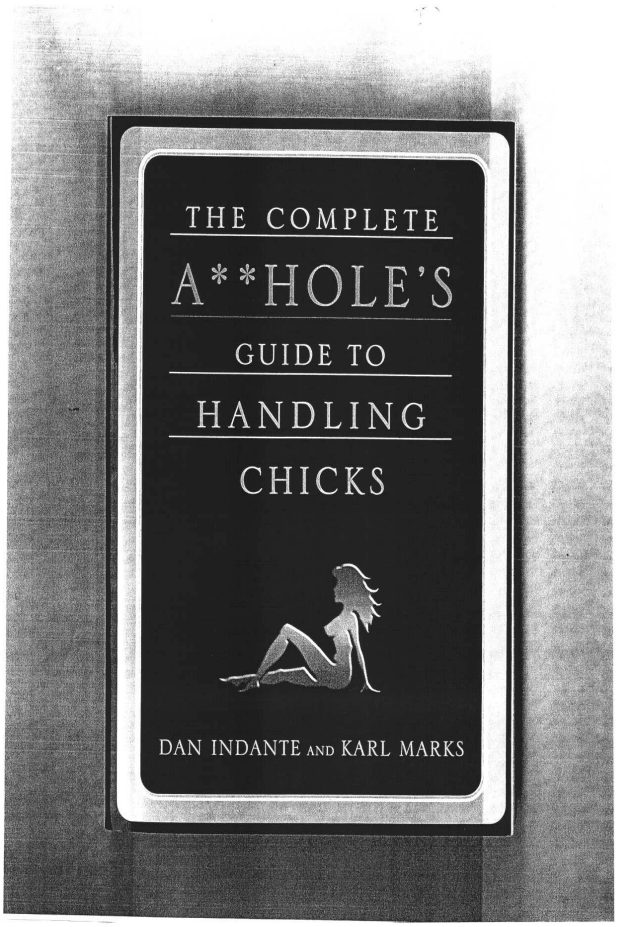
> To justify refusing to register a trademark under the first clause of section 1052(a), the PTO must show that the mark consists of or comprises "immoral, deceptive, or scandalous matter." *In re Mavety Media Group, Ltd.*, 33 F.3d 1367, 1371 (Fed. Cir. 1994). A showing that a mark is vulgar is sufficient 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 (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

[3] We note that a mere listing of third-party applications and registrations generally is insufficient to make such evidence of record. Rather, copies of the applications and registrations ordinarily must be submitted to make them properly of record. In this case, however, the Examining Attorney did not object to the list of third-party applications and registrations, but rather discussed them in an Office action. Thus, we have considered the materials as of record.

> 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).

Considering first the dictionary definitions of record, they overwhelmingly indicate that the term "asshole" is vulgar slang for a contemptible or detestable person. Only the definition cited by applicant attributes a non-vulgar definition to the term. Moreover, it is clear that in applicant's mark THE COMPLETE A**HOLE"S GUIDE TO …", "a**hole" is a slang term meant to refer to a person, not a part of the body. Applicant's goods are identified as a "series of books providing information relating to advice, counseling, self-help, and humor" and applicant's specimen is reproduced below.



When viewed in the context of applicant's books, the term "a**hole" refers to the person to whom the book is intended. The non-vulgar meaning of "asshole" 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 demonstrates overwhelmingly 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."

Applicant has essentially acknowledged that the term "asshole" is vulgar by the statement in its brief that it and others use the term "a**hole" as a cleaned-up, non scandalous alternative for the word "asshole." Obviously, if "asshole" were not vulgar, there would be no need for an alternative.

Further, we are not convinced that the term "a**hole" is "cleaned-up" and non-vulgar. The fact that the term "a**hole" appears in articles at various Internet websites does not persuade us that the public would regard the term as non-scandalous. It is common knowledge that all types of material appears on the Internet, some of it scandalous in nature. Thus, the mere appearance of the term "a**hole" on the Internet says nothing about how the public would regard the term. There is no evidence in this record that

the term “a**hole” has appeared in general interest publications that are widely distributed to the public.

The third-party applications and registrations relied upon by applicant are not persuasive of a different result herein. Third-party applications are evidence of nothing more than that such applications were filed; they are not evidence that the PTO has “accepted” the marks therein for registration. With respect to the third-party registrations, 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”].

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