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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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D&E Media, LLC

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Serial No. 76669945
Serial No. 76669946
Filed: December 5, 2006

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Joseph D. Obenberger, J.D. Obenberger and Associates for D&E Media, LLC.

Jennifer Vasquez,[1] Trademark Examining Attorney, Law Office 113, Odette Bonnet, Managing Attorney.

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Before Zervas, Mermelstein, and Bergsman, Administrative Trademark Judges.

Opinion by Mermelstein, Administrative Trademark Judge:

These appeals from the final refusals of the Trademark Examining Attorney involve Section 2(a) of the Trademark Act, 15 U.S.C. § 1052(a), which precludes registration of marks that consist of or comprise "immoral, ... or scandalous matter." Applicant seeks registration based on use in commerce of the marks

[1] Ms. Vasquez is the latest of several examining attorneys to work on these applications.

Application Serial No. 76669945, and **FACIAL ABUSE** (in standard characters), Application No. 76669946, both for "adult entertainment services, namely, providing an adult entertainment website featuring photographic, audio and video presentations," in International Class 41.

Because these cases present common issues of law and fact, we have consolidated these appeals for decision.[2]

We affirm the refusal in both applications.

I. Applicable Law

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). To prove that that the applied-for marks are scandalous or immoral, it is sufficient if the

[2] Given the common issues and records in these appeals, they could have been consolidated prior to briefing, which would have saved time for applicant, the examining attorney, and the Board. Either applicant or the examining could have requested consolidation. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 1214 (2d ed. rev. 2004). Because the evidence and briefs are substantially identical in both applications, references herein are to the record and argument in Serial No. 76669945.

Examining Attorney shows that the terms are vulgar.[3] *In re Boulevard Entm't 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). The U.S. Patent and Trademark Office has the burden of proving that a trademark falls within the prohibition of Trademark Act § 2(a). *In re Mavety Media Group Ltd.*, 31 USPQ2d at 1925; *see also In re Standard Electrik Lorenz A.G.*, 371 F.2d 870, 152 USPQ 563, 566 (CCPA 1967).

In determining whether a particular designation is scandalous or immoral, we must consider the meaning of the mark in the context of the marketplace as applied to applicant's description of services. *In re Boulevard Entm't 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 entertainment magazine); *In re McGinley*, 211

[3] We note that the cases define scandalous and immoral in additional and more comprehensive terms. However, the word "vulgar" captures the essence of the prohibition against

USPQ at 673. After ascertaining the meaning of the mark, we must determine whether it is scandalous or immoral (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 as to 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).

II. Record

Because our decision must be based on the facts developed in the record, we summarize the most relevant evidence submitted by applicant and the Examining Attorney:

A. Examining Attorney's Evidence

- **facial** –n
  When a man ejaculates on a [sic] someone's face. Used in the phrase "give a facial."

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registration, and therefore we shall use "vulgar" to facilitate our analysis and discussion.

SEX DICTIONARY (no URL or date supplied).[4]

- **abuse**
  ...
  2. To hurt or injure by maltreatment; ill-use. **3.** To force sexual activity on; rape or molest; **4.** To assail with contemptuous, course, or insulting words; revile.

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000)(online edition, Bartleby.com).

- **1. facial abuse**
  The act of sexually humiliating your partner by abusing and degrading her face during rough oral sex by holding her head deep on your genitalia, slapping her face, and talking to her in a degrading manner during the process.

URBAN DICTIONARY (online) www.urbandictionary.com (Jan. 25, 2008).

- A question about "facial abuse" on an online message board and responses thereto.

- A number of web pages from various sites (including those run by applicant), discussing "Facial Abuse."

- Google search result summaries (partial) from a search for "facial abuse." Applicant objected to this evidence, and (without waiving its objection), submitted its own search result summary. We sustain applicant's objection. This evidence (and applicant's opposing Google search results) are of little probative value because it does not show how the search term is used in context on the referenced page. *In re Bayer Aktiengesellschaft*, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007).

[4] The URL and date should appear on all submitted Internet materials to permit inspection and verification by applicant or the Office. Nonetheless, there were no objections to this or similarly deficient submissions (by both applicant and the Examining Attorney) on the ground that it could not be found on the Internet.

B. Applicant's Evidence

- Lyrics to *Sweet Dreams (Are Made of This)* by Annie Lennox and David Stewart (1983).[5]

- Dictionary definitions and historical usage of the words "facial" and "abuse." OXFORD ENGLISH DICTIONARY (2d ed. [no year provided]).

- *Gonzales v. Carhart*, 550 U.S. 124 (2007) (discussing a "facial attack" on the constitutionality of a statute).

- Urban Dictionary form for the submission of the word "testicularity" to be included in the online dictionary. Applicant's counsel submitted this word for inclusion in the online Urban Dictionary to demonstrate that its definitions are unreliable, because it is possible to submit a made-up word.[6]

- Online dictionary results pages (indicating no definition) for the term "facial abuse." MERRIAM-WEBSTER ONLINE DICTIONARY www.merriam-webster.com (Jul. 25, 2008); BARTLEBY.COM www.bartleby.com (Jul. 25, 2008).

- Declaration of applicant's CEO, Donald Vollenweider (Jul. 28, 2008).

- Applicant's Google search results summary (partial). Like the similar evidence submitted by the Examining

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[5] Applicant attempted unsuccessfully to electronically attach an audio file of this song and its music video to its response to the first Office action. (The TEAS electronic filing system does not permit such attachments.) Applicant requests that the music video (on a third-party web site) be considered to be of record. We find that the lyrics have very little probative value in that they do not mention FACIAL ABUSE or describe in any detail the "abuse" which applicant claims is now culturally acceptable. We decline to consider either the audio or video performance, neither of which were submitted during examination.

[6] Ironically, counsel's stunt does not appear to prove his point. Whatever counsel's intention, it seems that "testicularity" is a real (albeit rare) word. Its inclusion in the Urban Dictionary thus does not reflect the failure of the dictionary's editors to prevent the submission of sham words.

Attorney, we find that this evidence has little probative value.

- Twenty-one third-party registrations,[7] which applicant alleges to be as or more vulgar than the marks in the applications on appeal.

III. Discussion

Applicant makes three main arguments in support of its case:

1. "By denying registration to [the marks at issue], the Office violates its own rule, TMEP § 1203(1), [sic] that requires a consistent application of Section 2(a) denials and the Office otherwise arbitrarily denied registration."

2. "The Office has failed in its burden to establish that [the marks at issue] consist[] of or comprise[] scandalous or immoral matter."

3. "Section 2(a) violates the First and Fifth Amendment."

App. Br., Table of Contents.

We first consider applicant's first and third arguments, before turning to the substance of the refusal at issue.

A. The Office Has Not Violated Any Rule Requiring Consistency

[7] Not included in this number are several applications and abandoned registrations, which we have not considered. Applications and abandoned registrations are not entitled to the presumption of validity, *see* Trademark Act § 7(b), and are thus of no probative value on the issue of registrability. *See In re Spirits of New Merced LLC*, 85 USPQ2d 1614, 1619 (TTAB 2007).

Regarding its first point, applicant quotes the TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP"), § 1203.01 (5th ed. 2007):[8] "To ensure consistency in examination with respect to immoral or scandalous matter, when an examining attorney believes, for whatever reason, that a mark may be considered to comprise such matter, the examining attorney must consult with his or her supervisor." Although applicant argues that the examining attorney has violated this "rule,"[9] it does not allege that the examining attorney failed to consult with her supervisor regarding the refusals in question. Indeed, we note that – as is customarily done – the Managing Attorney of the Examining Attorney's Law Office is with her on the Office's brief. It is thus quite apparent that the Examining Attorney's supervisor has been consulted and approves of the refusal issued by the Examining Attorney.

Notwithstanding the Examining Attorney's compliance with the TMEP's guidance, it is clear that applicant claims

[8] The Sixth Edition of the TMEP (rev. 1) was published in October 2009, although no change was made to the quoted language.

[9] Applicant's repeated characterization of the TMEP as a "rule" is mistaken. Rather, the TMEP "sets forth the guidelines and procedures followed by the examining attorneys at the USPTO." TMEP, Introduction (6th ed. rev. 1 2009). *In re Int'l Flavors & Fragrances Inc.*, 51 USPQ2d 1513, 1516 (Fed. Cir. 1999) ("Although the Manual does not have the force of law, it 'sets forth the guidelines and procedures followed by the examining attorneys at the PTO.'" *quoting West Fla. Seafood, Inc. v. Jet Rests., Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1664 n. 8 (Fed. Cir. 1994)).

it is entitled to a good bit more than that which is allegedly required by the TMEP: Applicant claims a right to substantive consistency in the Office's § 2(a) determinations. App. Br. at 2-6. Applicant submits and discusses a number of marks which have been registered, and which applicant alleges to be *more* scandalous or immoral than applicant's marks at issue here. Applicant concludes that its "mark[s] must be passed to publication in light of a clearly articulated policy holding the Office to consistency in the application of Section 2(a) and additionally because its action here is arbitrary and capricious in light of its prior registrations and allowances." App. Br. at 6.

Contrary to applicant's assumption, TMEP § 1203.01 does not guarantee substantive consistency in § 2(a) cases. If it guarantees anything at all,[10] it is that the Office will take procedural steps to strive for consistency. It has often been said that consistency is a worthy goal in the examination of trademarks. But both the Board and the

[10] To be clear, we do not view the quoted TMEP sentence as establishing any actionable duty owed to the applicant to be consistent or even for the examining attorney to consult her supervisor in 2(a) cases. Rather, it merely constitutes guidance to the Examining Attorney in the procedure to follow in such cases. The TMEP does not restrict our precedent and that of the Court of Appeals quoted above. We accordingly reject applicant's argument, *e.g.* Reply at 4-5, that "the particular [*i.e.*, the

Court of Appeals for the Federal Circuit have repeatedly rejected arguments such as applicant's:

> Needless to say, this court encourages the PTO to achieve a uniform standard for assessing registrability of marks. Nonetheless, the Board (and this court in its limited review) must assess each mark on the record of public perception submitted with the application. Accordingly, this court finds little persuasive value in the registrations that Nett Designs submitted to the examiner or in the list of registered marks Nett Designs attempted to submit to the Board.

In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). *See also In re Rodale Inc.*, 80 USPQ2d 1696, 1700 (TTAB 2006) ("Although consistency in examination is a goal of the Office, the decisions of previous Trademark Examining Attorneys are not binding on us, and we must decide each case based on the evidence presented in the record before us"); and *In re Finisair Corp.*, 78 USPQ2d 1618, 1621 (TTAB 2006) ("While uniform treatment is a goal, our task is to determine based on the record before us, whether applicant's mark is merely descriptive"). *See also In re Wilson*, 57 USPQ2d 1863 (TTAB 2001) (administrative law doctrine of "reasoned decisionmaking" does not require consistent treatment of applications to register marks; each application for registration must be considered on its own record and merits).

In re Litehouse Inc., 82 USPQ2d 1471, 1475 (TTAB 2007).

We have considered the third-party registrations submitted by applicant. But as in previous cases, we find that they have little bearing on whether applicant's mark

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quoted TMEP sentence,] always governs the general." *Id.* (emphasis omitted).

should be registered based on the record developed in this application. The question before us is whether *applicant's* mark is scandalous, not whether the very different marks in the cited registrations are just as bad or worse. Even if we assume for the sake of argument that some of the cited marks have crossed the line, such errors do not entitle applicant to registration if its mark does not meet the requirements of the Trademark Act. *In re Shinnecock Smoke Shop*, 571 F.2d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009) ("Even if all of the third-party registrations should have been refused registration under section 1052(a), such errors do not bind the USPTO to improperly register Applicant's marks."), *citing In re Boulevard Entm't*, 67 USPQ2d at 1480.

Finally, applicant posits that

> the inescapable conclusion is that the Office's denial in the matter at bar is only pretextually related to the allegedly offensive nature of the mark itself but that it is closely and immediately connected to the Office's distaste for the subject matter of the Applicant's website, a distaste that provides the Office with no basis for denial of registration for this *mark* in law.

App. Br. at 6 (footnotes omitted).

Applicant is mistaken. A refusal under Trademark Act § 2(a) is clearly directed to the applied-for mark, and not the goods or services to which it pertains. Any alleged

dislike of such goods or services is not a ground for refusal. *In re Madsen*, 180 USPQ 334, 335 (TTAB 1973) ("In making this determination, the question of whether or not the contents of the magazine may be pornographic in nature, is not an issue to be decided by this Board."). Applicants are routinely allowed registrations for inoffensive marks notwithstanding that they are used in connection with adult-themed goods or services, which may be considered offensive by many. *Id.* For example, several of the third-party registrations submitted by applicant involve such services.[11] Indeed, the USPTO's Acceptable Identification of Goods and Services Manual unflinchingly includes suggestions for the proper identification of some sexually-oriented such goods and services which may be offensive to many.

As applicant points out, App. Br. at 6, n.7, the Examining Attorney does discuss the contents of applicant's website in maintaining the refusal to register. However, we understand her comments in that regard to reflect an

[11] *See, e.g.*, Reg. No. 2844606 ("Prerecorded DVDs, Video CDs and VHS featuring adult content"); Reg. No. 3144844 ("Adult entertainment services, namely providing a web site featuring performances, related film and video clips, photographs, and other visual and editorial content; entertainment services, namely, personal appearances by performers who appear in motion pictures, videos and/or other visual media in the field of adult entertainment); Reg. No. 2920403 ("pre-recorded video tapes and digital video discs (DVDs) in the field of adult entertainment").

analysis of the meaning and public perception of the mark, *see* discussion *infra*, rather than a rejection of the application based on such content. In short, applicant's contention that the refusal at hand was a pretext for the Examining Attorney's or the USPTO's bias is simply not borne out by the record.[12]

B. Constitutionality of Trademark Act § 2(a)

Applicant apparently believes that Trademark Act § 2(a) is unconstitutional, although it does not explain in any detail how this is so.

We agree with applicant's assessment in its main brief, App. Br. at 20, that we lack the authority to decide this question. *Harjo v. Pro-Football, Inc.*, 50 USPQ2d 1705, 1710 (TTAB 1999) (no authority to declare provisions of the Act unconstitutional or to determine whether Section 2(a) is overbroad or vague), *rev'd on other grounds*, 284 F. Supp. 2d 96, 68 USPQ2d 1225 (D.D.C. 2003); *Zirco Corp. v. Am. Tel. and Tel. Co.*, 21 USPQ2d 1542, 1544 (TTAB 1991) (no jurisdiction to determine whether Trademark Act § 7(c)

[12] Applicant also alleges that the Examining Attorney's submission of "massive portions of the Applicant's website" exhibits her "clear intent to improperly influence and prejudice the Board." App. Br. at 9, n. 10; *see also* App. Br. at 12, n. 14. On the contrary, we again perceive no improper motive in the Examining Attorney's actions. Applicant clearly disagrees with the Examining Attorney's legal and factual conclusions, and is welcome to do so. But whether she is correct or not, mere

violates the commerce clause of the Constitution). But even if we had such authority, applicant's argument is foreclosed by binding precedent, none of which is addressed by applicant. *In re McGinley*, 211 USPQ at 672 (First Amendment – "No conduct is proscribed, and no tangible form of expression is suppressed. Consequently, appellant's First Amendment rights would not be abridged by the refusal to register his mark."); *In re Shinnecock Smoke Shop*, 91 USPQ2d at 1220-21 (Equal Protection – "Even if his allegations were accurate, the most Applicant could establish is that the USPTO should have rejected the other marks. It does not follow that the proper remedy for such mischief is to grant Applicant's marks in contravention of section 1052(a)."); *In re Boulevard Entm't Inc.*, 67 USPQ2d at 1480.

C. Are Applicant's Marks Scandalous or Immoral?

As noted at the outset, applicant seeks registration of two trademarks, both for the same services: The '946 Application consists of the words **FACIAL ABUSE**, in standard characters. The '945 Application is a mark comprised of the stylized words **FACIAL ABUSE**, above the letters "f" and "a" in an interlocking ring design, all of which appears in

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disagreement is not a sufficient basis for a claim of inappropriate conduct.

lighter letters on a dark background. The words **FACIAL ABUSE** appear first, and dominate the mark in the '945 Application. Because the stylization and the addition of the letters and ring design do not significantly change or detract from the impression of the dominant words **FACIAL ABUSE**, we find the issues in these applications to be identical.[13] In other words, if the '946 Application is unregistrable under Trademark Act § 2(a), then the mark in the '945 Application is likewise unregistrable. We thus focus our analysis on the mark in the '946 Application, *i.e.*, the words **FACIAL ABUSE**.

The first step in a determination of whether the mark is scandalous is to consider what – if any – meaning it has. This determination is made with reference to the goods or services set out in the application and their relevant marketplace. *In re Boulevard Entm't Inc.*, 67 USPQ2d at 1477. We then consider whether that mark is vulgar to a substantial composite of the general public in light of contemporary attitudes. *In re McGinley*, 211 USPQ at 673.

[13] A mark which "comprises," *i.e.*, includes, scandalous matter is subject to refusal, notwithstanding the presence of other non-scandalous matter in the mark, at least so long as the other matter does not render the otherwise scandalous portion inoffensive. *See* Trademark Act § 2(a).

As noted above, applicant complains that the Examining Attorney improperly considered its specimens and evidence from its website. As a result, applicant concludes that the Examining Attorney has improperly refused registration based on her distaste for or disapproval of the subject matter of applicant's services, as opposed to the mark itself.

In order to determine the impression conveyed by the term **FACIAL ABUSE**, we must consider the meaning, if any, of that term to the public. Similar to the analysis in a case of descriptiveness under Trademark Act § 2(e)(1), we consider all the evidence of record bearing on this question, including how the term is used in the relevant market.

Most of the previous cases discussing scandalous marks relied primarily (or only) on dictionary definitions to establish the meaning of the mark and whether it was scandalous. *E.g.*, *In re Boulevard Entm't Inc.*, 67 USPQ at 1478 (dictionary definitions alone may be sufficient to establish vulgarity of term). This is likely due to the fact that, before the Internet, the USPTO had few resources to conduct such research, especially regarding subject matter that was out of the mainstream. But when available, we see no reason not to consider evidence from the

marketplace for such goods, including applicant's own use of the term, to the extent such use gives meaning to it.

This is not to say that any resulting refusal under § 2(a) is based on the goods, rather than the mark. Such a refusal must not be based on the goods or services at issue, but rather on the mark itself. *McDermott v. San Francisco Women's Motorcycle Contingent*, 81 USPQ2d 1212, 1214 (TTAB 2006)("A claim under Section 2(a) ... pertains only to *marks* that are scandalous or immoral. The authority of the Act does not extend to goods or services that may be viewed as scandalous or immoral in nature."), *citing In re Madsen*, 180 USPQ at 335; *In re McGinley*, 211 USPQ2 at 673. If a mark is scandalous, its use on innocuous goods does not make it registrable. *See e.g.*, *Boston Red Sox Baseball Club LP v. Sherman*, 88 USPQ2d 1581 (TTAB 2008)(SEX ROD for clothing items); *In re Red Bull GmbH*, 78 USPQ2d 1375 (TTAB 2006)(BULLSHIT for various beverages and hotel and restaurant services); *In re Wilcher Corp.*, 40 USPQ 1929 (TTAB 1996)(DICK HEAD'S and design for restaurant and bar services). Similarly, a mark which is not scandalous cannot be refused, even if the associated goods or services may be shocking to some or many. *See e.g., In re Madsen*, 180 USPQ 334 (TTAB 1973)(WEEK-END SEX for a magazine, which specimens showed to be sexually-

oriented). It is entirely appropriate to consider how a term is actually used in commerce (including by applicant) in determining its meaning and the public's perception of it, provided that the ultimate decision on whether applicant's mark is registrable does not depend on whether applicant is using its mark on or in connection with goods or services which might be seen by some as objectionable.

Turning to the evidence of record in this case, the Urban Dictionary entry submitted by the Examining Attorney defines **FACIAL ABUSE** as

> The act of sexually humiliating your partner by abusing and degrading her face during rough oral sex by holding her head deep on your genitalia, slapping her face, and talking to her in a degrading manner during the process.

We have considered this evidence over applicant's objection. The fact that some or all of the entries in the Urban Dictionary are user-submitted does not render this evidence inadmissible. *See In re IP Carrier Consulting Group*, 84 USPQ2d 1028, 1032 (TTAB 2007)(Wikipedia evidence admissible so long as the non-offering party has the opportunity to submit evidence and argument in response). Nonetheless, we have kept in mind in weighing its probative value that this dictionary may be less reliable than a

standard reference work written and edited by experts. [14] In this case, the Examining Attorney's definition is supported by other evidence of record, and we therefore find it reliable. For instance, the examining attorney has submitted an excerpt from the Sex Dictionary defining "facial," as "[w]hen a man ejaculates on ... someone's face." "Abuse" is defined as "[t]o hurt or injure by maltreatment; ill use"; [t]o force sexual activity on ... or molest"; and [t]o assail with contemptuous, course, or insulting words...." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000)(online edition, Bartleby.com).

Applicant has submitted its own definition of "facial" from the Oxford English Dictionary, which includes no sexually-related meaning for the term, and evidence that the term **FACIAL ABUSE** is not found in the Merriam-Webster online dictionary. We do not view this evidence as dispositive, however. Slang terms may take some time to gain entry into mainstream dictionaries and, as noted above, it is not clear when applicant's cited edition of the OED was published.

[14] The record suggests that terms submitted for inclusion in the Urban Dictionary are edited, at least to some degree. *See* www.urbandictionary.com./add.php (Req. for Recon. Jul. 28, 2008).

But more importantly, the Examining Attorney's definition of "facial" and **FACIAL ABUSE** are amply supported by her evidence of the use of those terms in the marketplace including, but not limited to, applicant's own website.[15]

> Kyra Steele starts off looking cute and perky in this series of pictures, but the site ain't called Facial Abuse for nothing. What starts out as a sweet little blowjob soon turns into a rough face-fucking, gag-inducing deep throat, ass licking, and masses of cum dripping down the poor slut's ruined face.

www.thefacialshrine.com/blog/category/facial-abuse (Sep. 10, 2008).

> Oh Kennedy. I don't know what to tell you. Soooo sorry you are leaving mad. I guess next time when you read an ad for something called facial abuse you realize that it is going to include a lot of face fucking and wet sloppy deep throating.

www.slobberparty.com/facial-abuse-kennedy (Sep. 10, 2008).

> Title
> Facial Abuse: Face Fucking, Rough Blowjobs And Facial Cumshots
>
> Description
> Excerpted from the website description:
> > *Sluts that love their face getting stuffed with our huge cocks. We hunt horny sluts and show them what real facial abuse and face fucking is.*

www.aboutus.org/Abuse-Facial.com (Sep. 10, 2008).

[15] In all cases, grammar and spelling are as written in web materials quoted in this opinion.

> If do you love facial abuse, you are on the right place. Let me introduce you adult site Brutal Blowjobs. This megasite is based on facial abuse. Guys from Brutal Blowjobs finding the sluts with the biggest mouths and the deepest throats. Just so they can cut off their air supply and make them gag. One of those abused whores is hot youngster Leah Luv. Still with her braces she really knows how a cock can be shoved right down into her mouth. Watch her little teenie slut gaged until her eyes start to run like a river. Watch as guys plug her face with cock. Watch some rigorous facial abuse. What could be better experience, than smash strong spout of semen to woman's face.

www.facialabuse.org.uk (Sep. 10, 2008).

> Welcome to Facial Abuse.com! This is not your average oral site, this is extreme hardcore facials, ... face slapping, gagging, choking, ... and a whole host of other hardcore stuff, and you have Facial Abuse. And believe me, this site really lives up to its name! .... Think you can handle some extreme facials? Then check out the free previews and follow me inside!
>
> ....
>
> The minimum time of the videos is 20 minutes, some were up to an hour long – that is a lot of facial abuse!!! Some of these scenes are extreme! Face slapping, choking, facial cum shots, gagging ... it seriously lives up to it's name Facial Abuse!

http://reviews.freeones.com/Facial_Abuse.shtml (Sep. 6, 2008).

> Facial Abuse is one of the best extreme hardcore paysites I have ever visited. .... And since we're talking about genuine "facial abuse" (the babes are really choking on cock and their own spit, and barfing lunch in several cases)....

www.pamsreviews.com/site_reviews/facial_abuse.html (Aug. 29, 2008).

The examining attorney has also submitted a web page in which the wording "facial abuse Videos" appears above a series of thumbnails, most of which display either women performing oral sex or men ejaculating on women's faces. www.youjizz.com/search/facial-abuse-1.html (Sep. 10, 2008); *see also Hardcore Facial Abuse Whores* www.hardcorepros.com-/hardcore-girls/hardcore-facial-abuse-whores (Sep. 4, 2008).

On the other hand, applicant submitted the declaration of Mr. Vollenweider, applicant's CEO. Mr. Vollenweider avers that

> "Facial Abuse" is not a word of the English language in ordinary usage. ... Facial Abuse is simply the name of a website owned and operated by this company.... "Facial Abuse" is not a word that denotes any particular sexual act. It is simply the name I coined and chose to market this website.

Vollenweider Dec. ¶ 7 (Jul. 28, 2008).

Based on all of the evidence of record, we find that the clear meaning of term "facial" with respect to the identified goods is the act of a man ejaculating on his partner's face, often in conjunction with oral sex. We likewise find that the term **FACIAL ABUSE** describes rough oral sex, variously including gagging, spitting, slapping,

and verbal abuse. We have considered Mr. Vollenweider's declaration asserting that **FACIAL ABUSE** has no meaning other than that of a trademark, and applicant's dictionary and other evidence that the terms "facial" and "abuse" both have non-offensive meanings. But the meaning of "facial" and "abuse" in other contexts is not relevant, and Mr. Vollenweider's statement is outweighed by the evidence showing how the term is used in the relevant marketplace, by both applicant and others.[16]

We next consider whether the terms "facial" or FACIAL ABUSE are vulgar. It is clear that a mark is not unregistrable merely because it describes a sex act. *In re Madsen*, 180 USPQ at 335 ("In making this conclusion [that the mark is not unregistrable,] we do not deny that 'WEEK-END SEX" would no doubt bring to mind a magazine dealing with sexual relationships or affairs on week-ends."). We must consider the mark from the standpoint of a substantial composite (not necessarily a majority) of the general public, and in the context of the goods and contemporary

[16] Given the evidence of record and the Examining Attorney's argument regarding the meaning of the term "FACIAL ABUSE" in connection with applicant's services, it is curious that there was no refusal under Trademark Act § 2(e)(1) or requirement for a disclaimer under Trademark Act § 6 in either of these applications.

attitudes. *In re Boulevard Entm't Inc.*, 67 USPQ2d at 1477; *In re Mavety Media Group, Ltd.*, 31 USPQ2d at 1925-26.

Unlike many of our prior cases and those of the Court of Appeal, the record in this case does not include definitions from mainstream dictionaries defining the terms at issue as "vulgar." As noted, such dictionary evidence may be sufficient in appropriate cases to satisfy the USPTO's burden in a § 2(a) case. *In re Boulevard Entm't Inc.*, 67 USPQ at 1478. But similar to the law in descriptiveness and genericness cases, *see, e.g.*, *In re Mine Safety Appliances Co.*, 66 USPQ 1694, 1697 (TTAB 2002), we hold that the fact that a term is not found in a dictionary – or is not labeled therein as "vulgar"[17] – may be considered, but is not controlling on the issue of registrability.

The record abounds with evidence that "facial abuse" is viewed as shocking, and even "bizarre." *E.g.*, www.thefacialshrine.com/blog/category/facial-abuse (*Facial Abuse* is a site that is completely over the top – and not just in the bizarre sex acts they depict."). The websites

[17] It is not clear whether the Sex Dictionary and the Urban Dictionary relied on by the Examining Attorney make a practice of flagging terms as "vulgar." (The Sex Dictionary page reproduced in the record includes several other terms, none of which is identified as "vulgar.")

quoted above (and others in the record) characterize "facial abuse" as extreme. While the proper focus is on the opinions of the general public, *see infra*, this evidence is taken from the very segment of the population we would expect (as applicant argues) to be most accepting of such material. Instead, it is clear from the evidence that "facial abuse" is viewed as shocking even within this group, and is in fact so intended.

The Examining Attorney also submitted a question posted to an online message board, and a number of responses to it:

> **Facial abuse???**
> I was being nosey and was snooping through my friends laptop and I saw some porn that disturbed me. A guy was spitting, slapping and shoving his ... u know what in her mouth. She looked like she was about to cry. I felt sorry. But she kept askin for more.
>
> What the hell was that??
> Who actually likes doin that?
> Question for both males and females.
> Have any of u seen this type of porn?

Yahoo! Answers, http://answers.yahoo.com (Jan. 25, 2008). Some responders indicated that such materials were highly disturbing to them, while others (ostensibly both male and female) indicated that they found it pleasurable to watch or participate in such activities. While some of the responses are difficult to categorize, it appears that

approximately four of the ten expressed strongly negative views of facial abuse and the materials described in the question.

In response, applicant contends that it runs a "fantasy-based website," Vollenweider Dec. ¶ 3, and that descriptions of it are "hyperbole," "puffery," and "exaggeration," and that no one would believe that the website is a depiction of reality. *Id.* at ¶ 4-5. Applicant points out that all of the performances in its videos are voluntary, and that it does not advocate or promote actual violence. *Id.* at ¶¶ 5-6.

We think applicant's argument misses the point. While we accept that the performers in applicant's videos are voluntary, that is not the standard for registrability. On the contrary, a mark is scandalous if it 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 Group Ltd.*, 31 USPQ2d at 1925, *citing In re Riverbank Canning Co.*, 95 F.2d 327, 328, 37 USPQ 268, 269 (CCPA 1938). Even if the participants in applicant's videos are voluntary, it does not change the meaning of the term **FACIAL ABUSE** as including rough, even

violent oral sex in which one participant (willing or not) is humiliated and degraded.

Applicant contends that in determining whether the mark is scandalous, the relevant segment of the public "is the erotic entertainment-consuming public – a section of the population which Applicant believes to be comfortable with and possessing an interest in consuming legal and non-obscene sexually explicit pornographic materials depicting a wide array of sexual practices." App. Br. at 19. Applicant is incorrect; the issue here is whether applicant's mark is scandalous to a substantial composite of the general public, not merely to those who consume erotic entertainment. *See e.g., In re Boulevard Entm't*, 67 USPQ2d 1477; *In re Riverbank Canning Co.*, 95 F.2d 327, 37 USPQ 268, 270 (CCPA 1938) ("In determining whether the mark, used upon wine, is scandalous, we must consider the viewpoint, not only of wine drinkers alone, but also of those who do not use wine as a beverage.").

Here, both applicant and others have consistently referred to facial abuse as extreme, and there is direct evidence that at least some find it highly disturbing.[18]

[18] The Examining Attorney submitted materials from several web sites discussing pornography in general, the authors' belief in its dangers, and how it may be restricted. We have not

Although applicant now claims that its own descriptions of the facial abuse offered on its web site are mere hyperbole, we accord Mr. Vollenweider's opinion relatively little weight in light of all of the evidence of record. *See In re Boulevard Entm't Inc.*, 67 USPQ2d at 1479; *In re Wilcher Corp.*, 40 USPQ2d at 1934.

IV. Conclusion

We have carefully considered all the evidence of record and the arguments made by applicant and the Examining Attorney, including that which has not been specifically discussed. We conclude that the evidence of record is sufficient to establish *prima facie* that the term **FACIAL ABUSE** is vulgar and "shocking to the sense of ... decency, or propriety" and is offensive to a substantial composite of the general public, and that applicant has not rebutted this showing.

Decision: The refusals to register under Trademark Act § 2(a) are accordingly affirmed.

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considered this material because it is not relevant to an analysis under Trademark Act § 2(a). *In re Madsen*, 180 USPQ 335.