

**THIS OPINION IS NOT A
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re RK Netmedia, Inc.

Serial No. 77060742
Serial No. 77060766

Marc J. Randazza of Weston, Garrou, Walters & Mooney for RK Netmedia, Inc.

Katherine Connolly Weigle, Trademark Examining Attorney,
Law Office 101 (Ronald R. Sussman, Managing Attorney).

Before Drost, Bergsman and Wellington, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

These appeals from the final refusals of the Trademark Examining Attorney involve 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." RK Netmedia, Inc. ("applicant") seeks to register use-based applications for the marks CUMFIESTA and CUMGIRLS, in standard character form, for "entertainment services in the nature of photographic images, pictures, video and audio recordings,

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and information regarding adult oriented subject matter transmitted through a global computer network," in Class 41.¹

The Examining Attorney contends that CUMFIESTA and CUMGIRLS create commercial impressions which a substantial portion of the general public consider immoral or scandalous. Specifically, the Examining Attorney argues that the word "cum" is a vulgar reference to semen or ejaculate and that the combination of this term with the words "fiesta" and "girls," respectively, does not obviate the immoral or scandalous connotation of the marks.²

Applicant argues, on the other hand, that the refusal is wrong for six reasons:

- 1) The Examiner's decision was arbitrary and capricious;
- 2) The Examiner improperly dissected the mark(s);
- 3) The Examiner fails to account for alternative definitions of the term(s);
- 4) The term "cum" does not rise to the level of condemnation required under Section 2(A) (sic);
- 5) The Examiner failed to apply the requirement that the mark must be examined in the context of the relevant marketplace;
- 6) the Examiner's evidence has been rebutted with superior evidence.³

¹ Because the same applicant filed both applications, the same Examining Attorney reviewed both applications, and both applications involve common issues of fact and law, we have consolidated the appeals.

² Examining Attorney's Briefs, p. 2.

³ Applicant's Amended Briefs, p. 2.

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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). To prove that that CUMFIESTA and CUMGIRLS are scandalous or immoral, it is sufficient if the Examining Attorney shows that the terms are vulgar.⁴ *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). 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 Elektrik 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 mark in the

⁴ 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 registration, and therefore we shall use "vulgar" to facilitate our analysis and discussion.

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context of the marketplace as applied to applicant's description of services. *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 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 proper universe for determining whether a mark is scandalous or immoral.

Before we analyze the evidence of record, we address applicant's argument that the determination of whether

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applicant's marks are scandalous must be limited to the relevant marketplace (*i.e.*, Internet patrons of erotica), not the public in general. Specifically, applicant contends that "[t]o determine whether a mark is scandalous or immoral, the Federal Circuit requires that the mark must be considered in the context of the marketplace as applied to only the goods or services in the application for registration."⁵ *Citing In re Mavety Media Group Ltd.*, 31 USPQ2d at 1925; *In re McGinley*, 211 USPQ at 673; *Greyhound Corp. v. Both Worlds Inc.*, 6 USPQ2d 1635, 1639 (TTAB 1988); *In re Hershey*, 6 USPQ2d 1470, 1471 (TTAB 2988). Applicant concludes that the relevant market, patrons of erotic entertainment, do not consider the word "cum" to be scandalous or immoral. In fact, applicant asserts that they would consider it to be rather "tame."⁶

We do not agree with applicant's conclusion that the determination of whether a mark is scandalous or immoral is limited to the "relevant market." Rather, the determination of whether a proposed mark will be perceived as scandalous or immoral is ascertained from "a substantial composite of the general public." *In re Mavety Media Group*

⁵ Applicant's Amended Briefs, pp. 9-10.

⁶ Applicant's Amended Briefs, p. 10.

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Ltd., 31 USPQ2d at 1925; *In re McGinley*, 211 USPQ at 673;

In re Hershey, 6 USPQ2d at 1471.

In *McGinley*, the Court of Customs and Patent Appeals, the predecessor to the Court of Appeals for the Federal Circuit, held the following:

In determining whether appellant's mark may be refused registration as scandalous, the mark must be considered in the context of the marketplace as applied to only the goods or services described in the application for registration. Whether or not the mark, including innuendo, is scandalous is to be ascertained from the standpoint of not necessarily a majority, but a substantial composite of the general public.

In re McGinley, 211 USPQ at 673, citing *In re Riverbank Canning Co.*, 95 F.2d 327, 37 USPQ 268, 270 (CCPA 1938).

Riverbank involved the refusal to register the mark MADONNA for wine on the ground that the mark was scandalous under Section 5(a) of the Trademark Act of 1905. The court held that "[i]n determining whether the mark, used upon wine, is scandalous, we must consider the viewpoint, not of wine drinkers alone, but also of those who do not use wine as a beverage." *In re Riverbank Canning Co.*, 37 USPQ at 270.

In our opinion, to commercialize the name of, or a representation of, the Virgin Mary as a trade mark is of very doubtful propriety, and we feel certain

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that its use upon wine for beverage purposes would be shocking to the sense of propriety of nearly all who do not use wine as a beverage, and also to many who do so use it.

Id.

The Federal Circuit recently decided that 1-800-JACK-OFF and JACK OFF were scandalous when used in connection with "entertainment in the nature of adult-oriented conversations by telephone" by focusing on the perception of the general public. *In re Boulevard Entertainment Inc.*, 67 USPQ2d 1475. In assessing the probative value of dictionaries, the Federal Circuit opined that "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." 67 USPQ2d at 1478. If the determination of whether a mark is scandalous was limited to the relevant market, then the "collective understanding of the community" would be irrelevant. Accordingly, the court considered evidence of how the community at large perceived the mark at issue, not just the relevant consumers.

Furthermore, the court was not persuaded by applicant's evidence that the term JACK OFF was not

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scandalous because the evidence was not representative of the perceptions of the general public.

The fact that Boulevard's declarants regarded the term, as one put it, as "moral, decent, and proper" falls short of establishing that the term would not be regarded as vulgar by a substantial composite of the public. Moreover, Boulevard's assertion that sexually oriented publications are "willing without hesitation, indeed enthusiastic" to accept advertising featuring the term "jack-off" says nothing about whether the term would be vulgar to persons not involved in that industry, either as producers or consumers.

In re Boulevard Entertainment Inc., 67 USPQ2d at 1479.

In view of the foregoing, we hold that the determination of whether a term is scandalous or immoral is determined by the perceptions held by a substantial composite of the general public, not merely applicant's customers or potential customers.⁷

⁷ Applicant included in its amended briefs a survey of GOOGLE searches comparing the number of Internet users who search for the word "cum" versus those who search for the words "ejaculate" and "orgasm" purportedly to show that Internet users do not consider the word "cum" to be vulgar. The Examining Attorney objected to this evidence as untimely. In its reply briefs, applicant requests the Board to take judicial notice of the search survey or, in the alternative, to remand the application so applicant may supplement the record. Because the GOOGLE search survey was submitted after the appeal was filed, it was untimely. Trademark Rule 2.142(d), 37 CFR §2.142(d). Accordingly, the Examining Attorney's objection is well taken. Moreover, a survey of searches conducted through a private search engine is not the type of evidence for which we may take judicial notice because it is not information which is generally known,

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The language in the cases that the mark must be considered in the context of the marketplace as applied to only the goods or services in the application for registration means that the mark is not defined in a vacuum or in the abstract, but in connection with the goods or services at issue. *In re Boulevard Entertainment Inc.*, 67 USPQ2d at 1478 ("it is clear that [1-800-JACK-OFF and JACK OFF] as used by Boulevard in connection with [entertainment in the nature of adult-oriented conversations by telephone] refer to masturbation"); *In re Mavety Media Group Ltd.*, 31 USPQ2d at 1927 (the meaning of the word "tail" is determined in the context of an adult entertainment magazine); *In re McGinley*, 211 USPQ at 674 (J. Rich, dissenting) ("I agree that the goods and services, as recited, must be considered together with the mark").

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

Applicant argues that the Examining Attorney improperly dissected its marks CUMFIESTA and CUMGIRLS as CUM FIESTA and CUM GIRLS (which are not at issue) and then focused only on the word "cum" to support her contention

nor is it information which is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201(b).

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that the marks are scandalous or immoral.⁸ In essence, applicant is contending that CUMFIESTA and CUMGIRLS are coined terms with no recognizable meaning.

The problem with applicant's argument is that the commercial impression engendered by its marks are CUM FIESTA and CUM GIRLS as two words. When the marks CUMFIESTA and CUMGIRLS are used in connection with adult-oriented materials consumers undoubtedly perceive them as the two separate words. With respect to CUMGIRLS as used on applicant's specimen of use, shown below, the word "cum" is beige and the word "girls" is pink thereby emphasizing the separate commercial impression engendered by the combination of those words. See *Specialty Brands, Inc. v. Coffee Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281, 1284 (Fed. Cir. 1984) (it is proper to look to the specimens to determine the connotation or meaning of a mark).



Likewise, with respect to the mark CUMFIESTA, the specimen of record, shown below, emphasizes the separate commercial impression engendered by the combination of the

⁸ Applicant's Briefs, p. 3.

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two words. The tagline "Where Amateur Girls Get Creamed" dispels any notion that CUMFIESTA will be perceived as a unitary term.



Finally, we note that applicant originally filed its applications to register the marks as two words: CUM FIESTA and CUM GIRLS. This indicates that applicant viewed the commercial impression engendered by its marks as two words.

Although we must consider the marks CUMFIESTA and CUMGIRLS in their entirety, in analyzing the marks, our determination of whether they are scandalous or immoral depends upon whether the word "cum" is vulgar as used by applicant.

D. Representative excerpts from evidence regarding the word "cum."

1. First Office Actions

The Examining Attorney submitted the definitions of the word "cum," shown below, in the first Office Action:

a. *RhymeZone* (rhymezone.com)

Definitions of cum:

noun: the thick white fluid containing spermatozoa that is ejaculated by the male genital tract.

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- b. Bartleby.com based on the American Heritage Dictionary of the English Language (4th ed. 2000)

Cum

Noun: *Vulgar Slang* Variant of come.

- 2. October 9, 2007 responses

- a. An article from the *Sexual Intelligence* blog, published by Dr. Marty Klein (sexualintelligence.wordpress.com) (September 21, 2007). The author criticizes the Board's decision affirming the refusal to register the mark YOU CUM LIKE A GIRL for clothing under Section 2(a) because "'cum' is how real people talk."

Some of my patients - the healthier ones - use the word. Professionals like me - the more comfortable ones - use the word while we're working. It's part of how we connect with patients, letting them know we live in a real world they recognize, not in some perfect therapy-land.

* * *

"Cum" is part of English. People know what it means, and they need a word that says what "cum" says.

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- b. An excerpt from the *Ask The Experts* column appearing in the *Teenwire.com* website.

Your Question:

Dear Experts,

How can I tell if I'm
Ejaculating semen or pre-com?

What are the differences?

The Answer:

Related links include

Can I get pregnant from pre-
come?

When a guy cums, does that mean he's
having an orgasm at the same time?

- c. Definition of "cum" from the Compact Oxford English Dictionary (AskOxford.com) as a preposition meaning "combined with; also used as; a *study-cum-bedroom*."
- d. An abstract describing a report entitled "Beliefs about cum, condoms and intimacy among young gay men (YGM) in the context of rising HIV incidence in Vancouver" from a 2002 international conference on AIDS appearing in the GATEWAY website of the National Library of Medicine (gateway.nlm.nih.gov/meetingabstracts).

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- e. The entry for "cum" from the *Webster's Online Dictionary* website (websters-online-dictionary.org). The exhibit provides the following relevant information:

"Cum" is defined as a noun meaning sperm;⁹

"Cum" first appeared in English literature sometime before 1350;

Synonyms include "ejaculate," "seed," "semen," and "seminal fluid"; and,

"Cum" is frequently used as part of Internet keywords,

- f. An excerpt from a question and answer feature from the website *SexualHealth.com* with the following question:

Question:

When i (sic) cum/ejaculate into my girlfriends (sic)...

- g. An excerpt from an online advice column *Go Ask Alice* (goaskalice-cms.org) sponsored by the health services at Columbia University. The title of the question is "I don't care if I cum, but he does." The person with the question refers to orgasm as "cum." The person responding to the question refers to

⁹ The source of the definition was *WordNet* (2001).

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orgasm as orgasm and makes to no reference to the word "cum."

- h. An excerpt from a website advertising SEMANEX, a product that purportedly will increase the volume of ejaculate and increase the intensity and power of male orgasms. The advertisement references the word "cum" as follows (emphasis in the original):

Maybe you desire a bigger,
more impressive load of cum.

- i. An excerpt from an online advice column *Scarleteen: Sex Ed for the Real World* (scarleteen.com). The topic inquired about was whether a woman can become pregnant from "pre-cum," the fluid secreted before ejaculation. "Pre-cum" is used by both the questioner and the person responding to the inquiry. *But see Pregnant from pre-ejaculation?* from the "Trying to conceive" forum in the *ParentsConnect* website (parentsconnect.com) where a "guest" asks whether it is possible for her to become pregnant from "pre cum." One person who

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responded stated that she thought the title "Pregnant from Precum" was "disgusting": "Thats (sic) nasty and I think its called Semen . . . not cum that sounds so pornographic." Another responder seconded that sentiment: "I do agree that the word 'cum' is a bit vulgar, and would appreciate if the OP would use a more proper term in the future." (Attached to response to requests for reconsideration).

- j. A statement by John Salvi, a prisoner on death row in Virginia, appearing in the January 6, 1995 issue of *The Virginia-Pilot*. The statement included the following reference to "cum":

The next morning I was served breakfast which consisted for 2 eggs scrambled one piece of toast and gritts (sic) that turned my stomach and I began to get sick. The grits appeared to have semen in them, or commonly called cum.

- k. An excerpt from an online advice column entitled *Alexis On The Sexes* (vita.mn/story). The question inquired whether "cumming" is the same as having an

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orgasm. In her response, the author reports on the etymology of the word "cum," derived from Sexy Origins and Intimate Things written by Charles Panati.

Writers who addressed the subject of sex search endlessly for euphemisms for bawdy or sexually explicit words, which could not be printed . . . an aroused man "came at" his lover, in a gentler sense, "came unto" her . . . But the erotic word, meaning both coitus and ejaculate, was hard to spot on the written page, since "come" had so many innocent, nonsexual meanings. It could appear in a novel hundreds of times and never have sexual shading. Linguists believe this is why writers began to spell the word "cum" - - to make it jump off the page."

See also the discussion of the word in the Online Etymology Dictionary (2001) submitted by the Examining Attorney in the Final Office Action.

3. Final Office Actions

- a. Definition of "cum" from the dictionary at *Infoplease.com* defining the word as "Slang (vulgar) come." *See also Dictionary.com* (definitions from The Random House

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Unabridged Dictionary (2006), The American Heritage Dictionary of the English Language (4th ed. 2006), *The Collaborative International Dictionary of English v. 0.48*, Webster's New World College Dictionary (2005)¹⁰ and *Merriam-Webster Online* (*merriam-webster.com*), and the dictionary application at *Encarta.msn.com*. But see the definitions derived from *WordNet* 3.0 where the word "cum" is not identified as vulgar.¹¹

- b. An online article entitled *Notes from a Linguistic Mystic* (*linguisticmystic.com*) regarding automatic language translators that censor words without regard to context (e.g., "the Latin "Cum' ('with') was censored because it's spelled like the American slang word for 'Semen.'").
- c. An excerpt from an online advice column *DearCupid.org* discussing whether "cum" and sperm are the same thing. One of the

¹⁰ Appearing in *YourDictionary.com*.

¹¹ The definition of the word "cum" in *Smut: American Sex Slang* (1992) compiled by Jim Norris is not particularly probative because the editor simply compiled a list of American sex slang and other words with a sexual connotation. The editor did not make any attempt to characterize any of the entries.

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readers commenting on the issue provided the following comment: "'Cum' is a derogatory or slang term for 'semen.' It is also a slang term for the act of orgasm/ejaculation."

- d. An unauthorized copy of AOL's terms of service enforcement manual regarding the use of "offensive" speech appearing on the *Electronic Frontier Foundation* website (w2.eff.org).¹² The excerpt provides the following instruction regarding the word "cum":

Come/cum: Vulgar if used in a possibly sexual manner. Spelling doesn't count. "Cum over here" is fine. "I come when I think if (sic) you" isn't.

- e. An excerpt from the *ALX Klive's WorldTV Blog* (worldtv.com) in which the author quotes the following from Wikipedia:

In Latin, *cum* means "with," but it can be a profane word for "ejaculation" in English.

¹² "The document was revealed by a former AOL 'guide' who blew the whistle."

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- f. An excerpt from an English language instruction site *Antimoon.com* where web surfers can ask questions regarding the English language. The relevant excerpt is set forth below:

French "con" is related to Spanish "coño", as in "cunnilingus".

"Con" is a bad word in French, but in Spanish it is OK, as is the Latin word "cum" which is a bad word in English.

- g. The hit list for the first 30 hits from a search for the word "cum" on the GOOGLE search engine. Nineteen of the 30 hits were in the field of adult entertainment.¹³
- h. A personal blog in which the author was pondering the use of the word "cum" and expressed her opinion that "it was a bit raw for me."
- i. A personal blog in which the author rendered an opinion regarding the comic side (intended or unintended) of pornography. The author

¹³ The GOOGLE search results show that the word "cum" has a sexual connotation. However, they are not probative as to whether the word "cum" is vulgar. Just because a word is used in connection with adult entertainment does not mean that it is a vulgar term.

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found the following text on an adult oriented website to be hilarious despite its vulgarity: "You haven't seen a dude pack 14 inches like this, and the cum shot is just straight up insane."

- j. The characterization of the word "cum" as a word that should be used with extreme caution in The Slangman Guide to Dirty English: Dangerous Expressions Americans Use Everyday (2003) by David Burke.

4. Requests for Reconsideration

- a. Copy of Registration No. 2844606 for the mark CUM TOGETHER, in typed drawing form, for "prerecorded DVDs, video CDs and VHS featuring adult content."
- b. A copy of the notice of allowance for the mark CUMBRELLA, in standard character form, for "condoms" (Serial No. 78622783).
- c. A declaration from Marty Klein, Ph.D., a marriage, family and sex therapist.¹⁴ Dr. Klein is also a lecturer in the field of sexuality. Based on his training and

¹⁴ Dr. Klein was previously referenced in connection with the *Sexual Intelligence* blog.

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experience, Dr. Klein opined that "almost nobody in a healthy mental or emotional state would find 'cum' or 'cum girls' or 'cum fiesta' to be shocking, scandalous, or immoral." Dr. Klein also stated that the word "cum" has become a colloquial expression that is "polite, professional, and proper."

5. Response to requests for reconsideration
 - a. An excerpt from the website *Stupid Questions* (stupidquestions.com).
 - Q. Is "cum" the noun and "come" the verb?
 - A. If there's one thing I truly appreciate, it's an attempt to use vulgarity correctly. William Safire would be proud. And this is one of our great vulgarities - a four letter word that has recently been chopped down to three letters and become all the dirtier for it. . . . It is presumed that the "cum" (mis)spelling is intended to look crude, thus emphasizing the sexual or vulgar meaning.
 - b. In an English language forum at *English-Test.net* a person inquired as to the propriety of an advertisement reading "Receptionist cum HR Assistant required at

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IBI." One person who responded advised the writer not use the word "cum" because "it's more often used as an obscene word nowadays than a preposition meaning 'combined.'"

Based on our review of the evidence, we find that the word "cum" when used in connection with adult oriented entertainment means semen, ejaculation, or orgasm. Applicant argues, on the other hand, that there are alternate meanings, such as "with: together with, along with, in combination with or functioning as (informal)."¹⁵ In addition, CUM FIESTA and CUM GIRLS could also mean "with joy and festivity" or "with girls."¹⁶ Applicant's arguments, however, are not supported by the record. The evidence overwhelmingly demonstrates that "cum" means semen, ejaculation, and/or orgasm when used in connection with adult entertainment services and products. See for example the GOOGLE hit list for the word "cum" wherein 19 of the first 30 hits were for adult entertainment services or products and all the use of the word "cum" in all those sites referenced semen, ejaculation or orgasm. It stretches credulity to suggest that a substantial composite of the general public, or patrons of adult entertainment

¹⁵ Applicant's Amended Briefs, p. 4.

¹⁶ Applicant's Amended Briefs, p. 4.

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services in particular, will perceive any alternative connotations of the word "cum" as used in applicant's marks.

Furthermore, we find that a substantial composite of the general public perceives the word "cum" to be vulgar when used in connection with adult entertainment services and products and, therefore, scandalous and prohibited from registration pursuant to Section 2(a) of the Trademark Act. We base this finding on the following evidence:

1. All the dictionary definitions, except for the definition from WordNet and *RhymeZone*, identify "cum" in connection with semen or orgasm as a vulgar term.

"[D]ictionary 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." *In re Boulevard Entertainment Inc.*, 67 USPQ2d at 1478;

2. In many of the online forums and blogs, participants characterized the word "cum" as vulgar (e.g., *ParentsConnect* website (parentsconnect.com), *DearCupid.org*, *ALX Klive's WorldTV Blog* (worldtv.com), *Antimoon.com*, *Stupid Questions* (stupidquestions.com));

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3. The characterization of "cum" as a word that should be used with extreme caution in The Slangman Guide to Dirty English: Dangerous Expressions Americans Use Everyday (2003) by David Burke; and,

4. The websites discussing censorship online and referencing the word "cum" as a word subject to censorship. *Linguistic Mystic* and *Electronic Frontier Foundation*.

Applicant contends, however, that "[t]he record evidence, consisting of popular sources, news media, and the expert opinion of a mental health professional, clearly shows that contemporary society is fully tolerant of the term 'cum,' as a substitute for orgasm."¹⁷ While that may be true, the evidence in the record highlighted above also shows that a substantial composite of contemporary society finds the use of the term "cum" to be vulgar. Thus, the Examining Attorney has met her burden of proof.

We note the testimony of Dr. Marty Klein, marriage, family and sex therapist and lecturer on sexuality. As indicated above, Dr. Klein opined that based on his experience and training, the word "cum" has become a colloquial term meaning orgasm or ejaculation. While it may be true that in his practice, the use of the word "cum"

¹⁷ Applicant's Amended Briefs, p. 6.

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is considered "polite, professional, and proper," as well as facilitating therapy, it does not diminish the fact that in other walks of life and in other contexts, a substantial composite of contemporary society finds the word "cum" to be vulgar. See *In re Tinseltown, Inc.*, 212 USPQ at 866 ("the fact that profane words may be uttered more freely does not render them any the less profane").

Finally, we note that applicant has made of record Registration No. 2844606 for the mark CUM TOGETHER, for "prerecorded DVDs, video CDs and VHS featuring adult content" and Serial No. 78622783 for the mark CUMBRELLA for "condoms" (notice of allowance issued). It is well settled that the Board must decide each application on its own merits, and decisions regarding other registrations do not bind either examining attorneys or this Board. *In re Boulevard Entertainment Inc.*, 67 USPQ2d at 1480; *In re Nett Designs*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). The fact that, whether because of administrative error or otherwise, some marks have been registered even though they may be in violation of the governing statutory standard does not mean that the U.S. Patent and Trademark office must forgo applying that standard in all other cases. *In re Boulevard Entertainment Inc.*, 67 USPQ2d at 1480.

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Upon due consideration of the entire record, we find that the marks CUMFIESTA and CUMGIRLS as applied to "entertainment services in the nature of photographic images, pictures, video and audio recordings, and information regarding adult oriented subject matter transmitted through a global computer network" would be offensive to a substantial composite of the general public and is therefore prohibited by Section 2(a) of the Trademark Act.

Decision: The refusals to register are affirmed.