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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	77980028
Applicant	Mixed Message Media, Inc.
Applied for Mark	LAMPOONTANG
Correspondence Address	MARC J RANDAZZA RANDAZZA LEGAL GROUP PO Box 5516 GLOUCESTER, MA 01930 UNITED STATES mjrpatrademarks@me.com
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Filer's Name	Marc J. Randazza
Filer's e-mail	mjrpatrademarks@me.com
Signature	/Marc J. Randazza/
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Application of:	:	
MIXED MESSAGE MEDIA, INC.	:	International Classes 41, 42
Serial Numbers 77860990, 77980028	:	
Filed: April 30, 2011	:	Examiner: Kevon Chisolm
For: LAMPOONTANG	:	Law Office 103

APPELLANT'S REPLY BRIEF

TABLE OF CONTENTS

	PAGE NO.
Table of Authorities.....	ii
Introduction.....	1
Argument.....	1
A. The Weight of the Appellant’s Evidence Clearly Outweighs That Supplied by the Examiner.....	2
B. The Examiner Failed to Meet his Evidentiary Burden in Establishing the Government’s Rationale for Refusing to Register LAMPOONTANG Under Section 2(a).....	3
C. There is no Reason for Women to be Protected from Disparagement under Section 2(a), and Women as a Class – Not the Examiner – Should Have the Final Say on LAMPOONTANG’s Registration.....	5
Conclusion.....	7

TABLE OF AUTHORITIES

STATUTES	PAGE NOS.
15 U.S.C. § 1052(a).....	1-2, 5-7
15 U.S.C. §1127.....	5
CASES	PAGE NOS.
<i>Boswell v. Mavety Media Group Ltd.</i>	5
52 USPQ2d 1600 (TTAB 1999)	
<i>City of Los Angeles v. Alameda Books</i>	3-4
535 U.S. 425 (2002)	
<i>In re Hearst Corp.</i>	2
982 F.2d 493, 494, 25 USPQ2d 1238, 1239 (Fed. Cir. 1992)	
<i>In re Hines</i>	3, 5-6
32 USPQ2d 1376 (TTAB 1994)	
<i>In re Mavety Media Group Ltd.</i>	3
33 F.3d 1367, 31 USPQ2d 1923, 1925 (Fed. Cir. 1994)	
<i>In re Trans Continental Records Inc.</i>	3
62 USPQ2d 1541, 1544 (TTAB 2002)	
<i>McDermott v. San Francisco Women's Motorcycle Contingent</i>	6
81 USPQ2d 1212 (TTAB 2006)	
<i>Morehouse Mfg. Corp. v. J. Strickland & Co.</i>	5
407 F.2d 881, 888, 160 USPQ 715, 720 (C.C.P.A. 1969)	
<i>Opryland USA Inc. v. Great Am. Music Show, Inc.</i>	2
970 F.2d 847, 851 23 USPQ2d 1471, 1473 (Fed. Cir. 1992)	
<i>Order Sons of Italy in America v. Memphis Mafia, Inc.</i>	2
52 USPQ2d 1364 (TTAB 1999)	
OTHER AUTHORITIES	PAGE NOS.
Trademark Manual of Examination Procedures (TMEP) §1203.03(a).....	5
Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 1208.01.....	3

1 Counsel for Applicant/Appellant, Mixed Message Media, Inc., hereby replies to
2 Examiner Kevon Chisolm's (hereinafter, the "Examiner[s]") Appeal Brief (hereinafter, the
3 "Examiner's Brief") opposing the registration of LAMPOONTANG on the principal register.

4 **INTRODUCTION**

5 The Examiner contends that Appellant's applied-for trademark, LAMPOONTANG,
6 consists of disparaging material under 15 U.S.C. § 1052(a) (hereinafter, "Section 2(a)"), yet
7 has utterly failed to produce sufficient evidence to show that it is, in fact, disparaging, nor that
8 the government has any justification in refusing its registration. In addition to impermissibly
9 dissecting the Appellant's applied-for trademark, the Examiner then made the logical long-
10 jump of deciding that there is such a thing as a term that would disturb all women. The
11 Examiner then makes a sociological leap, which all men have been waiting for, and purports to
12 know what women think. After making this breakthrough, the Examiner places himself in a
13 position of omniscience who knows not only what women think, but knows what women will
14 find to be disparaging. He follows by wielding his magical patriarchic powers and substituting
15 his judgment for those of all women, as a class, as to whether LAMPOONTANG is actually
16 disparaging to them. The Examiner's counter-arguments are sloppy, insulting, and are a feeble
17 attempt to find justification for the TTAB to refuse LAMPOONTANG's registration under
18 Section 2(a).

19 **ARGUMENT**

20 LAMPOONTANG – the mark applied for, and not a variant such as LAM +
21 POONTANG, or LAMPOON POONTANG – is not disparaging to anyone. The Examiner's
22 evidence fails to establish "poontang's" disparaging nature, or a rationale for the government's
23 refusal to register the Appellant's applied-for trademark. Even if the Examiner properly read
24

1 “POONTANG” into LAMPOONTANG, the class he seeks to protect from disparagement,
2 women as a whole, is more broad and diffuse than those groups intended to be protected under
3 Section 2(a). One might safely assume that all Jews find the term “kike” to be offensive. One
4 might similarly presume that Italian Americans find “MAFIA” to be offensive¹ (and many
5 TTAB decisions have refused to substitute one activist’s position on that word for those of all
6 Italians). However, it is the height of patronization of women to pat them on the head and say
7 “don’t worry, Mr. Chisholm knows what bothers you, sweetie.” Nevertheless, that is precisely
8 the position taken by the Patent and Trademark Office at this point.

9 ***A. The Weight of the Appellant’s Evidence Clearly Outweighs That Supplied by the***
10 ***Examiner.***

11 Central to the Examiner’s position is the underlying – and fallacious – argument that
12 “poontang” is contained within and inherent to the Appellant’s LAMPOONTANG mark. Not
13 only is this false, but this is inconsistent with precedent indicating that an applied-for mark is to
14 be read and perceived in its entirety.² Consumers will not see or perceive “poontang” preceded
15 by “lam” when they encounter LAMPOONTANG, but will consider only the Appellant’s
16 applied-for trademark in its entirety.

17 Even if “poontang” was properly read into LAMPOONTANG, the evidence submitted
18 by the Examiner is insufficient to establish that poontang is a derogatory term precluding its
19 registration under Section 2(a). Indeed, the Examiner’s own Appeal Brief acknowledges that
20

21 ¹ See, e.g., *Order Sons of Italy in America v. Memphis Mafia, Inc.*, 52 USPQ2d 1364 (TTAB
1999).

22 ² *In re Hearst Corp.*, 982 F.2d 493, 494, 25 USPQ2d 1238, 1239 (Fed. Cir. 1992) (holding that
23 “marks tend to be perceived in their entireties” and should be evaluated as such); *Opryland USA*
24 *Inc. v. Great Am. Music Show, Inc.*, 970 F.2d 847, 851 23 USPQ2d 1471, 1473 (Fed. Cir. 1992)
(finding that when the public will evaluate the entire mark, then the marks must be considered in
their entirety under a likelihood of confusion analysis).

1 the primary definition of poontang is intercourse (which for the record, is an act, which takes
2 place between two or more people of either gender) – and not a disparaging term for women.
3 (Examiner’s Appeal Brief at 4). While the Examiner’s Brief spends a considerable amount of
4 time addressing two websites – websites having *zero* relationship to the petitioner’s website –
5 depicting sex in conjunction with the word “poontang,” Examiner pays virtually no attention to
6 the dozens of sources cited by the Appellant in its September 1 Reply to Office Action.³ All of
7 these sources indicate that poontang’s primary, if not only, definition is sexual intercourse, an
8 action that bears no more inherent degradation to women than the word “screw” or “ass.” To
9 the extent the TTAB has any doubt about the meaning of this word, it must be resolved in the
10 Appellant’s favor.⁴ At that point, if a group can prove that it speaks for all (or most) women,
11 and it wishes to oppose the mark, that would be its privilege.⁵

12 ***B. The Examiner Failed to Meet his Evidentiary Burden in Establishing the Government’s***
13 ***Rationale for Refusing to Register LAMPOONTANG Under Section 2(a).***

14 Considering that trademarks clearly are commercial speech, Appellant recognizes that
15 the government may be able to burden such commercial speech in a way that it could not
16 encumber noncommercial speech (particularly, for example, political speech). When
17 attempting to regulate commercial speech, though, the government must meet certain minimum
18 evidentiary burdens. The Examiner has failed to do so.

19 _____
20 ³ This is particularly troublesome under TBMP § 1208.01, which requires the Examiner to
21 present a full, unbiased and representative sample of available evidence. *See In re Trans*
22 *Continental Records Inc.*, 62 USPQ2d 1541, 1544 (TTAB 2002) (admonishing the
underreporting of probative evidence, where Examiner presented only 10 of 441 articles
available in the NEXIS database).

23 ⁴ *In re Mavety Media Group Ltd.*, 33 F.3d 1367, 31 USPQ2d 1923, 1925 (Fed. Cir. 1994).

24 ⁵ *See In re Hines*, 32 USPQ2d 1376 (TTAB 1994) (holding that if a group proves it speaks for
most of a class that would be offended by a proposed trademark’s registration, it may oppose an
applied-for trademark when it is published for opposition).

1 In *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002), the U.S. Supreme Court
2 held that if the government seeks to restrict First Amendment protected activity in order to
3 combat compelling harms, it may only do so if it reasonably relies upon competent evidence to
4 do so. The government may rely on evidence “reasonably believed to be relevant” for
5 demonstrating the connection between a regulation and the stated governmental interest.⁶ A
6 challenger may then, however, cast doubt upon the government’s rationale or evidence. *Id.*
7 The burden then shifts to the government to rebut the challenger’s evidence.⁷

8 In this case, the Examiner does not identify any rationale for refusing to register the
9 Appellant’s trademark. While the Examiner circularly argues that the trademark is precluded
10 from registration because it is disparaging to women, the Patent and Trademark Office’s and
11 even the United States’ rationale for such a position is never articulated. Though much is said
12 about the offensiveness of poontang – with little evidence offered – there is no argument
13 presented regarding why the government should pursue this case. The Examiner has neither
14 put forth evidence supporting the government’s supposed rationale, nor has the Examiner put
15 forth evidence to adequately support the Patent and Trademark Office’s position. Under
16 *Alameda Books*, the government may put forth unpersuasive evidence, which if challenged, re-
17 shifts the burden to the government. In this case, the government failed in the first step, and it
18 utterly failed in the second step. Consequently, registration of the Appellant’s trademark is
19 proper.

20 //
21 //

23 ⁶ *Alameda Books*, 535 U.S. at 425, (citing *Renton v. Playtime Theatres Inc.*, 475 U.S. 41, 51-52
24 (1986))
⁷ *Id.*

1 ***C. There is no Reason for Women to be Protected from Disparagement under Section 2(a),***
2 ***and Women as a Class – Not the Examiner – Should Have the Final Say on***
3 ***LAMPOONTANG’s Registration.***

4 In this case, the Examiner has taken an overly broad view of the persons or entities
5 whose disparagement may preclude trademark registration under Section 2(a), and one that
6 ultimately is not even supported by Section 2(a). Section 2(a) prohibits a registered mark from
7 disparaging a person,⁸ institution, belief or national symbol. This drawing of Section 2(a)
8 indicates that the individuals or groups intended to be protected from disparagement are small
9 enough to be identifiable and uniformly identify themselves as disparaged. In contrast, a group
10 as large and diffuse as “women” falls far beyond the scope of protection from disparagement
11 afforded under Section 2(a).

12 This Board has declined to afford a class as large and ill-defined as “women” protection
13 from speculative disparagement under Section 2(a) in the past.⁹ Revisiting this position is
14 compelled in this case, where members of the potentially affected class can come forward to
15 object to the trademark’s registration once it has been published for opposition.¹⁰ For this
16 Board to refuse LAMPOONTANG’s registration before that point would impermissibly
17

18 ⁸ A “person” may be living or dead, natural (living or dead individual) or juristic (i.e. a
19 corporation, person or other entity recognized as an individual under law). 15 U.S.C. §1127;
20 TMEP §1203.03(a); *see Morehouse Mfg. Corp. v. J. Strickland & Co.*, 407 F.2d 881, 888, 160
21 USPQ 715, 720 (C.C.P.A. 1969).

22 ⁹ *Boswell v. Mavety Media Group Ltd.*, 52 USPQ2d 1600 (TTAB 1999) (finding that “BLACK
23 TAIL” is not offensive to the classes of women and African-American women, as alleged by
24 opponents of registration).

¹⁰ *In re Hines*, 32 USPQ2d 1376 (TTAB 1994) (allowing the mark “BUDDHA BEACHWEAR”
to be published for opposition, so that Buddhists could oppose its registration in lieu of
substituting the Examiner’s objection to registration for the will of actual Buddhists; it was
“imperative that the board be careful to avoid interposing its own judgment for that of
Buddhists.”).

1 substitute the Examiner's perspective for the allegedly affected class'.¹¹ Consider the absurdity
2 – since the dawn of time, Men have tried to understand what women think. Now, in some
3 cubicle in Alexandria, Virginia, the Examiner has cooked up an alchemic potion, which has
4 given him the magical power to know not only what an individual woman thinks, but what all
5 three billion women planet-wide (or at least all 150 million nationwide) think about one certain
6 word that is not even the trademark at hand. If anyone at the TTAB has such power, then the
7 TTAB should be in a very different line of work and the Examiner's skills are grossly under-
8 utilized.

9 It is not the subjective finding of the individual who objects to a term as disparaging
10 under Section 2(a) that controls this board's analysis, but the meaning assigned to it by the
11 class likely to be offended by it.¹² The Examiner has neither the ability, nor the right, to dissect
12 the mark until he gets to a component of it, which irks some personal feeling he has toward
13 women or toward pornography. Once there, he has no right to substitute his personal demons
14 for those he seems to believe reside within all women.

15 As in the "DYKES ON BIKES" and "BUDDHA BEACHWEAR" cases,¹³ the person
16 to object to the mark has no connection to the allegedly protected class, and if he were outside
17 the Patent and Trademark Office, he would lack standing to bring a Section 2(a) challenge on
18 that basis.¹⁴ Nevertheless, leaving the propriety of the Section 2(a) challenge aside, there is
19 little question that women as a class, while too broad to be protected by the Examiner under the
20

21 ¹¹ *Id.*

22 ¹² *McDermott v. San Francisco Women's Motorcycle Contingent*, 81 USPQ2d 1212 (TTAB
23 2006) (finding that a man, who was not a member of the class at issue nor represented by the
24 contested applied-for trademark of "DYKES ON BIKES," could not claim he was damaged
under Section 2(a)).

¹³ *Id.*; *In re Hines*, 32 USPQ2d at 1376.

¹⁴ *McDermott v. San Francisco Women's Motorcycle Contingent*, 81 USPQ2d at 1212.

1 auspices of Section 2(a), are the proper source of any opposition to LAMPOONTANG’s
2 registration. To that end, the trademark should be published for opposition, at which time
3 voices from the class of women concerned with this trademark may be heard.

4 **CONCLUSION**

5 LAMPOONTANG, as a fictional, arbitrary word with no meaning outside of that
6 assigned to it by Appellant, has no disparaging meaning. Though it is improper for the
7 Examiner to read the word “poontang” from LAMPOONTANG, the weight of the evidence on
8 the record supports “poontang” meaning intercourse – something that involves women, but
9 does not disparage them. Any doubt as to the definition of poontang must be resolved in the
10 Appellant’s favor. In addition to the Appellant’s superior information on this front, the
11 Examiner has failed to present any evidence supporting the government’s use of Section 2(a) to
12 refuse registration of the Appellant’s LAMPOONTANG trademark. The Examiner’s
13 insistence that such refusal is proper because Section 2(a) allows it is not only facile, but lazy,
14 circular reasoning; no evidence has been presented as to the government’s purpose in enacting
15 or using Section 2(a) to preclude the registration of LAMPOONTANG.

16 Finally, women, as a class, are not an identifiable group protected from disparagement
17 under Section 2(a). Unlike individuals, membership organizations and other institutions that
18 are shaped by conscious decisions, one becomes a woman by virtue of anatomy and anatomy
19 only. This arbitrary designation of a large and diffuse class is contrary to the intent of Section
20 2(a), as well as contrary to the Board’s application of the Section. Because of the diffuse range
21 of opinion among women as to the propriety of LAMPOONTANG’s registration, it would be
22 improper to substitute the Examiner’s judgment for that of women, collectively. Thus, the
23
24

1 Examiner's refusal to register LAMPOONTANG should be reversed, allowing women to
2 object – if they object – to the trademark's ultimate registration.

3
4 Submitted April 30, 2011

5 **RANDAZZA** LEGAL GROUP

6 /s/ Marc J. Randazza
7 **Marc J. Randazza**
8 (Admitted in Cal., Fla., Ariz., Mass.)
9 **J. Malcolm DeVoy IV**
10 (Admitted in Nev., Wis.)
11 Phone: 888-667-1113
12 Fax: 305-437-7662
13 www.Randazza.com
14 Attorneys for Applicant,
15 Mixed Message Media, Inc.
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