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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re William R. Gray

Serial No. 78622783

Brian B. Shaw of Harter Secrest & Emery LLP for William R. Gray.

John Dwyer, Trademark Examining Attorney, Law Office 116
(Michael W. Baird, Managing Attorney).

Before Quinn, Cataldo and Bergsman, Administrative
Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

This appeal from the final refusal of the Trademark Examining Attorney involves Section 2(a) of the Trademark Act of 1946, 15 U.S.C. §1052(a), which precludes registration of marks that consist of or comprise "immoral, deceptive, or scandalous matter." William R. Gray seeks to register the designation CUMBRELLA, in standard character form, for "condoms" (Serial No. 78622783, filed July 31, 2005, based on applicant's *bona fide* intent to use the mark in commerce under Section 1(b) of the Trademark Act of 1946, 15 U.S.C. §1052(b)).

The Examining Attorney contends that the designation CUMBRELLA "creates an impression which a substantial portion of the general public would consider to be immoral or scandalous."¹ Specifically, the Examining Attorney argues that the designation CUMBRELLA is formed, in part, by the term "cum" and "a substantial portion of the general public would consider the term CUM to be vulgar and tasteless" when used in connection with condoms.² In support of the refusal, the Examining Attorney submitted the following evidence:

1. The definition of the term "cum" from The American Heritage Dictionary of the English Language (4th ed. 2000). "Cum" is defined as a "Vulgar slang variant of come" which is "semen ejaculated during orgasm."

2. The definition of word "umbrella" from the same source. The relevant definition of "umbrella" is "something that covers or protects."

3. The definition of the term "cum" from Wikipedia: The Free Encyclopedia (<http://en.wikipedia.org/wiki/Cum>). "Cum" is defined as "slang usage meaning orgasm, semen or vaginal secretion."

¹ Examining Attorney's Brief, p. 2.

² Examining Attorney's Brief, pp. 3-5.

4. Excerpts from the following "representative" articles from a search of the Lexis® computerized database for the term CUM in relation to ejaculation, semen, sperm or orgasm.

- A. *Village Voice* (May 11, 2004), Porn Faces Realty.

Compare that to a scene of vaginal penetration with a condom and an external cum shot, and you can see that some things are clearly riskier than others.

- B. *Village Voice* (April 29, 2003), Savage Love column.

PR, his mouth filled with his own cum, passes it back into PG's mouth, who passes it back into PR's mouth, who passes it back into PG's mouth . . .

- C. *The Virginia-Pilot* (January 6, 1995), Statement by John Salvi.

The grits appeared to have semen in them, or commonly called cum.

- D. *OC Weekly* (January 8, 1999), Don't Believe The Hype.

[H]e knows 12 ways to pick up extra change (among them, "help clean up graves," "sell your cum to a sperm bank," and steal purses "with or without a razor blade for the straps").

- E. *LA Weekly* (November 9, 2001), Load Warriors.

"Load warriors! Another cum-soaked holiday weekend, brought to you by GM Video."

5. The Google hit list for the first 10 references from a search for "(`cum')(`ejaculate')" with the following text set forth below:

- A. Reproduction@Scarleteen.com - Pregnancy Risks

When having manual sex, did your hands or fingers come into contact with pre-ejaculate (pre-cum) or semen (ejaculate) AS WELL AS touching a woman's vulva or . . .

- B. Ejaculation - Wikipedia, the free encyclopedia

Anejaculation is the condition of being unable to ejaculate . . .

Pre-ejaculate - Wikipedia, the free encyclopedia

Pre-ejaculate (also known as pre-ejaculatory fluid or Cowper's fluid . . . Slang terms for pre-ejaculate include pre-come, pre-cum, dog water, speed drop . . .

- C. Definition of ejaculate - WordReference.com Dictionary

1. semen, seed, seminal fluid, ejaculate, cum. the thick white fluid containing spermatozoa that is ejaculated by the male genital tract.

- D. Semenax™ Volume Enhancing Pills - increase semen production . . .

Maybe you desire a bigger more impressive load of cum . . . the root problem to increase power, potency, volume of ejaculate and intensity of climax . . .

- E. [PDF] 1-800-235-2331 TTY: 617-437-1672
HIV/AIDS Bureau Massachusetts

After you cum (ejaculate), hold onto the condom and pull out while . . .

- F. Semen, seed, seminal fluid, ejaculate, cum: Information From . . .

Semen, seed, seminal fluid, ejaculate, cum the thick white fluid containing spermatozoa that is ejaculated by the male genital.

Pre-ejaculate: Information From
Answers.com

Slang terms for pre-ejaculate include pre-come, pre-cum, dog water, speed drop, widower's tears, and clear stuff. The fluid is usually secreted by Cowper's . . .

- G. Sexual Health Network: Sexuality
Information and Education

When i (sic) cum into my girlfriend's vagina there is a problem when i take my penis out.

- H. Increase ejaculate increase sperm
increase cum make more cum come . . .

produce sperm produce more sperm
produce more cum increase ejaculate by
to 500% make more cum ejaculation
bigger cum shot . . .

6. A prefix to the Encarta dictionary

(<http://encarta.msn.com>) for the word "come" providing a

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"Language Advisory" to the affect that "The dictionary entry you requested contains language that may be considered offensive.

7. The record includes seventeen (17) pages of sexually graphic material in which the term "cum" "is directly associated with degrading sexual acts involving people being ejaculated on and/or ejaculate matter being ingested."³

Applicant argues that the designation CUMBRELLA is not scandalous or immoral and, therefore, should be approved for publication for the following reasons:

1. CUMBRELLA is an coined term with no recognizable meaning;

2. The Examining Attorney has improperly parsed the designation CUMBRELLA as being composed of the term "cum" and "umbrella." Such an interpretation would mean that the mark at issue is CUMUMBRELLA, not CUMBRELLA. Accordingly, the Examining Attorney has created a new mark in order to support the refusal under Section 2(a);

3. There are alternative definitions of "cum" that are equally applicable. For example, "cum" is defined as a

³ July 19, 2006 Trademark Office Action.

"preposition combined with: also used as: a *study-cum-bedroom*"⁴ Thus, "CUM and UMBRELLA (as asserted by the examining attorney) would mean 'with umbrella,'" and because "umbrella" means "protection," "cumbrella" means "with protection," an equally applicable alternative meaning;⁵

4. In contrast to the dictionary definition cited by the Examining Attorney, www.websters-online-dictionary.org does not define the term "cum" as vulgar. "Cum" is simply defined as "[t]he thick white fluid containing spermatozoa that is ejaculated by the male genital tract"; and,

5. The evidence relied upon by the Examining Attorney to show that the mark CUMBRELLA is scandalous (*i.e.*, sexually graphic photographs featuring semen) is not properly associated with applicant's goods (*i.e.*, condoms) because the photographs of the sexually graphic activity is not possible with applicant's products: that is, applicant's products prevent the activity displayed in the

⁴ AskOxford.com derived from The Oxford English Dictionary of Current English. See also the Encarta dictionary (<http://encarta.msn.com>), the Cambridge Dictionaries Online (<http://dictionary.cambridge.org>) based on the Cambridge Dictionary of American English, and Merriam-Webster's Online Dictionary (www.m-w.com). (Applicant's Brief, pp. 5-7). The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed Cir. 1983).

⁵ Applicant's Brief, p. 7.

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photographs. In other words, the refusal to register applicant's mark is based on the association of the term "cum" with sexually graphic photographs, not an association between the designation CUMBRELLA and condoms.

To prove that that the designation CUMBRELLA is scandalous or immoral, the U.S. Patent and Trademark Office must demonstrate that the term is vulgar. *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.*, 33 F.3d 1367, 31 UPSQ2d 1923, 1925 (Fed. Cir. 1994). See also *In re Standard Elektrik Lorenz A.G.*, 371 F.2d 870, 152 UPSQ 563, 566 (CCPA 1967).

In determining whether a particular designation is scandalous or immoral, we must consider the mark in context with applicant's description of goods. *In re Boulevard Entertainment Inc.*, *supra*; *In re Mavety Media Group Ltd.*, *supra* (there are multiple non-vulgar definitions of the

term "tail" applicable in connection with an adult entertainment magazine); *In re McGinley, supra*.

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.*

In analyzing whether CUMBRELLA is a scandalous or immoral term, we agree with applicant that one must divide the unitary term CUMBRELLA into two separate terms (CUM and UMBRELLA), and then give the resulting terms an offensive connotation. Under this approach, the determination of whether the designation is scandalous depends upon whether the term "cum" is vulgar.

In finding the term "cum" to be vulgar, the examining consulted The American Heritage Dictionary of the English Language indicating that the word "cum" was vulgar when used in connection with semen.⁶ On the other hand, neither

⁶ The Examining Attorney also submitted the preface to the Encarta dictionary definition for the word "come" featuring a "Language Advisory" stating that "[t]he dictionary entry you requested contains language that may be considered offensive" purportedly to show that the word "come" may be vulgar. Other than having been made of record, this document is not referenced in either the July 19, 2006 Office Action or the Examining Attorney's Brief. The entry explains that the editors have rated the dictionary content according to the guidelines of the Internet Content Rating Association (ICRA). The ICRA is part of the Family Online Safety Institute, a non-profit organization of Internet leaders working to develop a safer Internet. The organization identifies websites regarding the presence or absence of nudity, sexual content, violence, gambling, drugs, alcohol, etc. to allow parents to use filtering software to limit access based on the information provided. This entry shows only

Wikipedia: The Free Encyclopedia,⁷ nor Websters Online Dictionary, identified "cum" as a vulgar term. In addition, the articles the Examining Attorney retrieved from the Lexis® computerized database display the use of the term "cum" in general circulation newspapers. The use of the term "cum" in general circulation newspapers tends to suggest that it is a generally accepted term, rather than a vulgar term.

Similarly, the Google hit list fails to demonstrate that the term "cum" is vulgar. Applicant correctly points out that "eight of the first ten hits are of an educational nature, including Wikipedia, Word Reference, Answers.com, and reference to the HIV/AIDS Bureau of Massachusetts. The remaining two of the first ten hits from the examining attorney's search are related to increasing sperm production."⁸

This leaves us with the sexually graphic photographs wherein the term "cum" is "directly associated with

that the definition of the word "come" may discuss sexual context, not that the word is vulgar.

⁷ Our consideration of Wikipedia evidence is with the recognition of the limitations inherent with Wikipedia (e.g., that anyone can edit it and submit intentionally false or erroneous information). *In re IP Carrier Consulting Group*, ___USPQ2d ___ (Serial No. 78542726 TTAB June 18, 2007). In this regard, we note that no one edited the entry to explain that "cum" was a vulgar or offensive term.

⁸ Applicant's Brief, p. 9.

degrading sexual acts involving people being ejaculated on and/or ejaculate matter being ingested.”⁹ This fact alone is not sufficient to prove that the word “cum” is vulgar. To find otherwise would be to hold that any term or thing used in association with pornography is vulgar (e.g., the words “sperm” or “ejaculate”). While the Examining Attorney has shown that the term “cum” has been used in connection with sexually graphic activities, he has not established that the term itself is vulgar or offensive. As we noted previously, it is the Examining Attorney’s burden to prove that the term CUMBRELLA falls within the prohibition of Section 2(a), and he has not that burden.

Finally, the evidentiary record regarding whether the term “cum” is vulgar is far from compelling, and ambiguous at best. Under similar circumstances, the Federal Circuit has advised the Board to adopt the practice of resolving doubt in Section 2(a) cases in favor of the applicant and passing the mark to publication. *In re Mavety Media Group Ltd.*, 31 UPSQ2d at 1928.

In view of the foregoing, we find that the designation CUMBRELLA is not scandalous or immoral under Section 2(a).

Decision: The refusal to register is reversed.

⁹ July 19, 2006 Trademark Office Action, p. 2.