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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Shearer

Serial No. 78690531

Michelle A. Hon of Duane Morris LLP for Jonathan Shearer.

William T. Verhosek, Trademark Examining Attorney, Law
Office 114 (K. Margaret Le, Managing Attorney).

Before Kuhlke, Walsh and Taylor, Administrative Trademark
Judges.

Opinion by Walsh, Administrative Trademark Judge:

Jonathan Shearer (Applicant), a citizen of the United
Kingdom, has applied to register the mark shown below on
the Principal Register for goods now identified as:

non-alcoholic beverages, namely, carbonated
beverages; non-alcoholic aperitifs and cocktail
drinks; mineral and aerated waters; fruit drinks
and fruit juices; non-alcoholic fruit extracts
used in the preparation of beverages; fruit
nectars; syrups for making beverages, and other
preparations for making carbonated beverages,
non-alcoholic aperitifs, nonalcoholic cocktail
drinks, fruit drinks, fruit juices, energy drinks
and isotonic beverage drinks; energy drinks;
isotonic beverage drinks; powders and pastille

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preparations used in the preparation of effervescent carbonated beverages; and beer, in International Class 32.



The application includes the following statements:

The color(s) pink, black and silver is/are claimed as a feature of the mark.

and

The mark consists of the color pink appearing in the wording "NATURAL ENERGY" and in the top portion of the wording "PUSSY"; the color black appearing in the lower portion of the wording "PUSSY"; and the color silver appearing in the outline of the wording "PUSSY".

Furthermore, Applicant has disclaimed "NATURAL ENERGY."¹

The Examining Attorney has issued a final refusal under Trademark Act Section 2(a), 15 U.S.C. § 1052(a), on the grounds that the mark "consists of or comprises immoral or scandalous matter." Final Office Action, dated May 5, 2008 at 5. The Examining Attorney explains further, "The applied-for mark PUSSY is slang for 'female genitalia' or reference to women sexually and is thus scandalous because

¹ Application Serial No. 78690531, filed August 11, 2005, based on European Community Registration No. 004580106 under Trademark Act Section 44(e), 15 U.S.C. § 1126(e), and claiming priority based on the filing of corresponding Application Serial No. 004580106, filed on August 2, 2005, under Trademark Act Section 44(d), 15 U.S.C. § 1126(d).

such term is described as vulgar, offensive, taboo, obscene and coarse." *Id.* Applicant has appealed. Applicant and the Examining Attorney have filed briefs.

In this case, it is the term PUSSY which is the focus of the refusal and our analysis. The term PUSSY is the most significant element in the mark. Accordingly, when we discuss the term PUSSY alone, we are mindful that the entire mark is the mark shown above.

We affirm.

Background

Before addressing the arguments and evidence presented by Applicant and the Examining Attorney, we will first review the standards which govern in determining whether a mark is scandalous under Section 2(a). The Court of Appeals for the Federal Circuit set forth the standards in *In re Mavety Media Group Ltd.*, 33 F.3d 1367, 31 USPQ2d 1923 (Fed. Cir. 1994). In that case the Federal Circuit states:

In order to prove that Mavety's mark BLACK TAIL is scandalous, the PTO must demonstrate that the mark 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 Riverbank Canning Co.*, 95 F.2d 327, 328, 37 USPQ 268, 269 (CCPA 1938) (citations omitted). The PTO must consider the mark in the context of the marketplace as applied to only the goods described in Mavety's application for registration. *In re McGinley*, 660 F.2d 481, 485, 211 USPQ 668, 673 (CCPA 1981).

Furthermore, whether the mark BLACK TAIL, including innuendo, comprises scandalous matter is to be ascertained (1) from "the standpoint of not necessarily a majority, but a substantial composite of the general public," *id.*, 211 USPQ at 673, and (2) "in the context of contemporary attitudes," *In re Old Glory Condom Corp.*, 26 USPQ2d 1216, 1219 (TTAB 1993).

Id. at 1925-26.

The Federal Circuit elaborated further on "contemporary attitudes" and in the process reviewed relevant earlier cases:

In addition, we must be mindful of ever-changing social attitudes and sensitivities. Today's scandal can be tomorrow's vogue. Proof abounds in nearly every quarter, with 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. To appreciate the extreme changes in social mores over time, one need only glance at a historical survey of Board decisions regarding refusals to register marks containing particular words deemed scandalous. Compare *In re Old Glory Condom Corp.*, 26 USPQ2d 1216 (TTAB 1993) (OLD GLORY CONDOM CORP, with stars and stripes design on condoms suggesting the American flag, not scandalous); *In re In Over Our Heads Inc.*, 16 USPQ2d 1653 (TTAB 1990) (MOONIES on dolls, whose pants can be dropped to expose their buttocks, not scandalous); *In re Hershey*, 6 USPQ2d 1470 (TTAB 1988) (BIG PECKER BRAND on T-shirts not scandalous); *In re Leo Quan Inc.*, 200 USPQ 370 (TTAB 1978) (BADASS for bridges of stringed musical instruments not scandalous); *In re Madsen*, 180 USPQ 334 (TTAB 1973) (WEEK-END SEX on magazines not scandalous); *In re Hepperle*, 175 USPQ 512 (TTAB 1972) (ACAPULCO GOLD on suntan lotion not scandalous); *Ex parte Parfum L'Orle, Inc.*, 93 USPQ 481 (Pat. Off. Exam'r-Chief 1952) (LIBIDO on perfumes not scandalous) with *In re*

Tinseltown, Inc., 212 USPQ 863 (TTAB 1981) (BULLSHIT on personal accessories scandalous); *In re Runsdorf*, 171 USPQ 443 (TTAB 1971) (BUBBY TRAP for brassieres scandalous); *In re Sociedade Agricola E. Comerical Dos Vinhos Messias, S.A.R.L.*, 159 USPQ 275 (TTAB 1968) (MESSIAS on wine and brandy scandalous); *In re Reemtsma Cigarettenfabriken G.m.b.H.*, 122 USPQ 339 (TTAB 1959) (SENUSSI on cigarettes scandalous); *In re P.J. Valckenberg, GmbH*, 122 USPQ 334 (TTAB 1959) (MADONNA on wine scandalous); *Ex parte Summit Brass & Bronze Works, Inc.*, 59 USPQ 22 (TTAB 1943) (AGNUS DEI on metallic tabernacle safes scandalous); *In re Riverbank Canning Co.*, 95 F.2d 327, 37 USPQ 268 (CCPA 1938) (MADONNA on wine scandalous); *Ex parte Martha Maid Mfg. Co.*, 37 USPQ 156 (Comm'r Pats. 1938) (QUEEN MARY on women's underwear scandalous).

Id. at 1926.

In *Mavety* the Federal Circuit ultimately concluded that the Board erred in concluding that the BLACK TAIL mark for "adult entertainment magazines" was scandalous. In that case BLACK was disclaimed and the USPTO finding that the mark was scandalous was based on a single dictionary definition of "tail" as "SEXUAL INTERCOURSE - usu. considered vulgar."² *Id.* at 1924. The Federal Circuit found the USPTO's evidence insufficient to sustain the Section 2(a) refusal in view of alternative definitions of "tail" as "buttocks or the hindmost or rear end" in the

² The Court also noted that the Board took judicial notice of six additional sources, including four slang dictionaries, which referenced the vulgar meaning, but that the Board stated that it would affirm based on the single definition the Examining Attorney had provided. *Mavety*, 31 USPQ2d at 1924.

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context of adult entertainment magazines. *Id.* at 1927. The Court viewed the alternative meaning as not vulgar or scandalous.

For completeness we also note here the principal, precedential "scandalous" cases under Section 2(a) following *Mavety*: *In re Boulevard Entertainment Inc.*, 334 F.3d 1336, 67 USPQ2d 1475 (Fed. Cir. 2003) (1-800-JACK-OFF and JACK-OFF for entertainment in the nature of adult-oriented conversations by telephone held scandalous); *Boston Red Sox Baseball Club LP v. Sherman*, 88 USPQ2d 1581 (TTAB 2008) (SEX ROD for clothing held scandalous); *In re Red Bull GmbH*, 78 USPQ2d 1375 (TTAB 2006) (BULLSHIT for various alcoholic and nonalcoholic beverages, including energy drinks, and related services held scandalous); *In re Wilcher Corp.*, 40 USPQ2d 1929 (TTAB 1996) (DICK HEADS' and design for bar and restaurant services held scandalous).

The Arguments

The Examining Attorney argues as follows:

... the continually evolving meaning of the term "pussy" has come to mean something more, (sic) than merely a cat, or a catkin, a pus wound, or even that of a weak and cowardly male. In today's attitudes and mind set, the term "pussy" is used in a most offensive and vulgar manner. Specifically, the term "pussy" refers to female genitalia, desire for sexual intercourse with women and ultimately women as sexual objects."

Examining Attorney's Brief at 3.

On the other hand, Applicant argues, "Applicant respectfully submits that its mark is not scandalous on the grounds that (1) the mark is not obscene under its ordinary meaning; (2) the general public does not perceive the mark to be scandalous; and (3) any ambiguity as to the meaning of the mark must be construed in favor of the Applicant." Applicant's Brief at 5. In this regard, Applicant argues that the Examining Attorney has failed to meet the burden of showing that the entire mark is scandalous and that the Examining Attorney has disregarded "... the numerous common meanings [of PUSSY] that are not scandalous or vulgar." *Id.* at 7.

Applicant continues, "While it may be a slang term for female genitalia, this meaning clearly does not apply to Applicant's all natural energy drinks, whether explicitly or implicitly. At best, the term is a double entendre that has been used for more over (sic) 100 years." *Id.*

In his reply brief Applicant argues further that we must look at his mark in its entirety, stating, "Nothing about this design is suggestive of female genitalia." Applicant's Reply Brief at 3. Applicant argues further that the packaging for the product likewise supports his position, stating, "The overall look of the packaging is

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elegant and tasteful..." *Id.* Applicant argues again that the Examining Attorney has failed to give proper consideration to other, non-vulgar meanings of PUSSY. Applicant argues, "... the Examining Attorney suggests that this term [PUSSY] has recently evolved such that any use of the term necessarily references female genitalia or desire for sexual intercourse with women. This position is not supported by fact or law." *Id.* at 4. In addition, Applicant asserts that the Examining Attorney has failed to "... demonstrate how Applicant's mark is scandalous as perceived in the relevant marketplace as applied to Applicant's all natural energy drink." *Id.*

The Evidence

Under Section 2(a), the Examining Attorney bears the initial burden of establishing that the mark in question is scandalous to a substantial composite of the general public. *In re Boulevard Entertainment Inc.*, 67 USPQ2d at 1480; *Mavety*, 31 USPQ2d at 1925. *See also In re Squaw Valley Development Co.*, 80 USPQ2d 1264, 1271 (TTAB 2006) (SQUAW and SQUAW ONE for clothing and accessories and related retail store services held disparaging of Native Americans under Section 2(a); applicant failed to rebut USPTO's prima facie case).

Dictionaries

Both the Examining Attorney and Applicant have presented dictionary evidence to support their respective positions.

In *Mavety*, the Court of Appeals for the Federal Circuit did not reach the ultimate question of whether a dictionary definition, by itself, may suffice to establish that a term is scandalous. However, in *Boulevard Entertainment*, the Court did reach this issue and concluded that, under limited circumstances, "... the PTO can sustain its burden of showing that the mark comprises or consists of scandalous matter by reference to dictionary definitions alone." *Boulevard Entertainment*, 31 USPQ2d at 1927. The Court concluded that dictionary definitions would suffice in the *Boulevard Entertainment* case, "... in which multiple dictionaries, including at least one standard dictionary, uniformly indicate that a word is vulgar, and the applicant's use of the word is clearly limited to the vulgar meaning of the word." *Id.*

In this case, the Examining Attorney provided evidence from four online dictionaries, including at least one standard dictionary. In relevant part, the definitions follow:

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From m-w.com (Merriam-Webster Online Dictionary):

²**pussy** ... **1** usually vulgar: vulva **2 a** usually vulgar: sexual intercourse **b** usually vulgar: the female partner in sexual intercourse;

From dictionary.cambridge.org:

pussy (SEX) noun OFFENSIVE 1[C] a woman's vagina [2] sex with a woman

pussy (VAGINA) noun [CU] TABOO SLANG a woman's vagina or sex with a woman;

From rhymezone.com:

Definitions of pussy: ·**noun** obscene term for female genitals ·**noun** informal term referring to a cat ·**adjective** having undergone infection;

From allwords.com:

pussy 1. colloq. A cat Form: pussycat (also) 2a. **coarse slang** The female genitals; the vulva 2b. **coarse slang** Women collectively, especially when considered sexually.

Examining Attorney's Final Action of May 5, 2008.

In the appeal brief, which followed the final action, Applicant takes issue with the Examining Attorney's use of these definitions arguing that the "... refusal focuses on merely one of the many definitions of 'pussy'."

Applicant's Brief at 5. To support his position Applicant provided copies of the other definitions which appear in the Merriam-Webster Online Dictionary:

¹**pussy** noun 1 : CAT 2 : a catkin of the pussy willow

³**pussy** adjective : full of or resembling pus <a pussy wound>

⁴**pussy** noun : a weak or cowardly man or boy : WIMP, SISSY.

Thus, Applicant has provided a more complete picture of the meanings of PUSSY from the Merriam-Webster Online Dictionary.³ It appears that the Examining Attorney was somewhat selective in presenting the evidence from that source. Taken as a whole, the dictionary evidence does show that PUSSY possesses a vulgar, potentially scandalous, meaning, as well as other meanings.⁴ Therefore, this is not a case where we can rely on dictionary evidence alone to conclude whether or not PUSSY is scandalous.

Other Evidence

The Examining Attorney has provided other types of evidence to show that PUSSY is vulgar and scandalous in this case. All of the Examining Attorney's evidence

³ Neither Applicant nor the Examining Attorney provided any evidence which explains the significance of the numerals in superscript which precede each of the definitions. The explanatory notes in *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003) states: "HOMOGRAPHS - When one main entry has exactly the same written form as another, the two are distinguished by superscript numerals preceding the word. ... The order of the homographs is usually historical: the one first used in English is entered first." Accordingly, we cannot rely on the order or numerals to determine which meaning, if any, is now dominant or primary.

⁴ In this case, we find no reason to conclude that the vulgar meanings in the definitions are outdated. Nor has Applicant argued that they are.

discussed here is attached to the Examining Attorney's Final Action of May 5, 2008. Applicant also provided evidence to counter the Examining Attorney's evidence.

The Examining Attorney's "Other" Evidence

First, the Examining Attorney presented evidence from three searches in the NEXIS News data base for articles where the term PUSSY appeared with either the term offensive, obscene, coarse, taboo, vulgar, vulgarity or crass. Many of the results have limited, if any, probative value because the excerpts are too brief or too truncated, and consequently lack sufficient context to understand the significance of the uses. However, we note the following examples which are probative:

Journal of Law and Education, October 2003: "... the use of words such as 'pussy' and 'cunt' are simply uncalled for and very offensive to many, including me."

Salt Lake Tribune (Utah) February 21, 2003: "Georgia-based Nashville Pussy has one of the most potentially offensive names to ever make it..."

Phoenix New Times (Arizona) December 26, 2002: "Nashville Pussy named itself after obscene stage banter..."

Essence February 1999: "... my stepmother said to me, crass as this may be, 'How much pussy did he take from you?'"

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Attachment to Examining Attorney's Final Action of May 5, 2008. These excerpts show a public perception of the term PUSSY as offensive.

The Examining Attorney also made of record copies of excerpts from Internet sites obtained through a search using the Google search engine for the term PUSSY and terms such as "vulgar." Some of the sites in question appear to be related to "adult," that is, sex-related interests or businesses. The domain names for these sites provide further confirmation of the nature of the sites, for example, 4sexylinks.com and literotica.com. *Id.* We find no need to recount the uses of PUSSY on these sites. Suffice it to say, these sites demonstrate the common use of the term PUSSY in its sexual sense in the world of adult entertainment and adult businesses. Applicant does not seriously dispute the existence of this usage.

The site foulmouthshirts.com features "offensive shirts," for example, t-shirts featuring messages, such as, "Pussy, the breakfast of champions" and "PUSSY Tastes Great. Less Filling." These are arguably the two least offensive of nearly twenty shirts where the term PUSSY is used in this manner on an "offensive shirt." *Id.* Again, these capture the essence of the larger group, and we decline to list more. This evidence also shows a

perception of the use of the term PUSSY in "messaging" in its vulgar sense and a characterization of that meaning as foul or offensive. It is also worth noting that one of these examples incorporates a reference to a slogan, Tastes Great - Less Filling, which is associated with a beer, one of the beverages identified in the application before us.

Another excerpt from lectlaw.com discusses "vulgar" words which AOL might sanction on its service. The excerpt states, "'Pussy' is warnable as vulgar when used as sexual slang. The only time you wouldn't warn for pussy is when it is a cat reference." *Id.* This too confirms the general perception of the term PUSSY as vulgar.

An article from guardian.co.uk, a United Kingdom site, entitled "Don't be so beastly?" discusses the uses of the term "pussy" over time up to recent times.⁵ It traces the evolving meaning of the term from a term of endearment for cats or women from earlier times into the 19th century, and as a term in "tavern slang" for "sexual intercourse, female genitalia and women." As to the current meaning, the

⁵ The site appears to be from the United Kingdom. However, because such sites are generally accessible to U.S. Internet viewers, we conclude that it possesses some probative value. *Cf. In re Cell Therapeutics Inc.*, 67 USPQ2d 1795, 1798 (TTAB 2003). It is also relevant here to weigh possibly differing perceptions of the term in the United Kingdom versus the United States.

article states, "The word has lost its power to shock, but no one now is unworldly enough to call a cat a pussy without a wry grin." *Id.* This evidence may show a somewhat more tolerant contemporary attitude toward the vulgar use of PUSSY in the United Kingdom than in the United States.

In similar fashion an excerpt from typepad.com discusses the current use and meaning of the term PUSSY in relation to the movie *Austin Powers International Man of Mystery*. It states, "After all, it [the Austin Powers film] does contain one of the more vulgar words in the English language, pussy, which is slang for vagina." Some reader comments follow this article, some benign, but most comments from women express extreme disapproval, for example:

Wow that word is stupid and immature!
This word is sick really sick I mean if a guy called me that I would go up to him and slap him across the face...

I personally don't like the word myself. My sister gags when she hears it.

Ughhh I can't stand this word. Can we please just stick with saying vagina. Pussy sounds so nasty...

It is so DISGUSTING!!!! That word makes me mad when anybody uses it in front of me. It's so nasty.

I hate this word more than anything...

Id. This evidence shows a visceral repulsion to the term PUSSY and a clear sense that it is highly offensive to these women, in particular.⁶

The Examining Attorney also provides a listing of search results for the term "PUSSY" alone from the Google search engine. The Examining Attorney argues, "... the first 90 hits are adult entertainment sites using the word offensively to refer to women's genitalia, sexual intercourse and to denigrate women as sexual objects." Examining Attorney's Appeal Brief at 8. We note that mere listings of search results, such as this, generally have limited probative value. *In re International Business Machines Corp.*, 81 USPQ2d 1677, 1679 n.3 (TTAB 2006). However, in this instance the text provided is sufficient for the limited purpose of supporting the Examining Attorney's position that the term PUSSY is frequently used in the context of adult entertainment sites. Furthermore, we have other evidentiary support in the record for this proposition, as we noted above.

⁶ Another Board case applying the scandalous standard to the DICK HEADS' mark refers to evidence showing sensitivity to the use of the term PUSSY or "the P word." *In re Wilcher Corp.*, 40 USPQ2d at 1931 ("... I have never been taken to task for calling someone a dickhead, but now I won't even call someone the feline P word when chiding them for lack of bravery.").

We find the Examining Attorney's evidence, both the dictionary evidence and other evidence, more than sufficient to meet the burden of showing that PUSSY is offensive in the context of the goods identified in the application before us from the standpoint of a substantial composite of the general public and in view of contemporary attitudes. *Mavety*, 31 USPQ2d at 1925-1926. Below, we address the relevance of the vulgar meaning in the context of Applicant's goods more specifically.

We will proceed to consider whether Applicant's evidence is sufficient to overcome that showing.

Applicant's "Other" Evidence

At the outset we note again that Applicant has provided sufficient dictionary evidence to establish that the term PUSSY has non-vulgar meanings.

In addition, Applicant has provided evidence that he has registered the PUSSY NATURAL ENERGY mark in the United Kingdom, Australia and the European Community, and that his application for registration has been approved in Canada. Of course, the fact that Applicant has succeeded in registering his mark in other trademark offices has no bearing on our determination as to whether Applicant's PUSSY NATURAL ENERGY mark is scandalous under Section 2(a). *In re Rath*, 402 F.3d 1207, 74 USPQ2d 1174, 1179 (Fed. Cir.

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2005) ("Thus, we conclude that while section 44(e), like section 44(d), affects United States priority or prior use rules, it is impossible to read section 44(e) to require the registration of foreign marks that fail to meet United States requirements for eligibility. Section 44 applications are subject to the section 2 bars to registration....").

We must determine whether Applicant's mark meets the standards for registration in the United States. Accordingly, the evidence of registrations outside the United States is not relevant here. Furthermore, it is entirely possible that the term PUSSY may be perceived differently in other English-speaking countries than in the United States. Indeed, the limited evidence from guardian.co.uk noted above suggests that conclusion. However, it is the public perception of the term PUSSY in the United States that is relevant to our analysis.

Applicant also argues, "'Pussy' was also the nickname of Mr. Shearer's [Applicant's] grandmother, whose family crest appears on the front of the can." Applicant's Brief at 5-6. This fact is not probative of the public perception of the term PUSSY in relation to the goods identified in the application in the United States. Accordingly, we find this argument unpersuasive. *See In re*

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Red Bull GmbH, 78 USPQ2d at 1380 (Applicant's claim that its BULLSHIT mark would be perceived as a "... play on the expression BULLS HIT, where a 'Hit' is a drink or, in some parlance, an inhale or ingestion of some substance..." rejected as unsupported).

Applicant also relies on an entry from the online encyclopedia Wikipedia regarding the term PUSSY. The entry addresses all of the potential meanings identified in the dictionaries cited above; with regard to the potentially vulgar meaning, in particular, the entry states:

Pussy is an English word meaning cat. It may also refer to female genitalia, among other definitions.

...

The word "pussy" often refers to the female genitalia. Used in conjunction with "some", the phrase *some pussy* refers to sexual intercourse itself. Most dictionaries mark the anatomical meaning as "vulgar" or "offensive" and its use is frowned upon in polite company.

Attachment to Applicant's Response of February 11, 2008.

Wikipedia also discusses the use of the term PUSSY in a double entendre which involves both the "cat" meaning and the vulgar meaning by reference to several such uses in literature and other forms of entertainment, including film and television. In his argument, Applicant asserts that

these uses show that PUSSY is not scandalous. Applicant states:

At best the term is a double entendre that has been used for more (sic) over 100 years. See, for example, the page on Wikipedia that describes the use of "pussy" for double meanings, which includes a late 19th century vaudeville act the Barrison Sisters who performed the notorious routine "Do You Want to See My Pussy?"; the Funkadelic song "Pussy"; the character Pussy Galore in the James Bond series; the 1983 film (sic) James Bond Film, *Octopussy*; and the British comedy *Are You Being Served?*, where the character Mrs. Slocombe is often heard to be concerned with the welfare of her pussy, presumably unaware of the secondary meaning.

Applicant's Brief at 7.

Applicant also uses the Wikipedia evidence to argue that PUSSY is not scandalous based on more contemporary uses in the arts and media:

Tellingly, the Wikipedia page discusses several instances in which televised references to the word "pussy" were not censored, including in episodes of *Arrested Development*, *Drawn Together* and *South Park*. *Id.* In all of these the term was used as a double entendre which was not considered obscene. *Id.* Indeed, "pussy" is not among the seven words that George Carlin famously pointed out are impermissible on TV.

Id. at 8. To clarify matters, we note that, in the case of the *Arrested Development* example, the Wikipedia entry states specifically, "... the word [pussy] was censored if used as an insult, but not censored if used to mean sweet

or gentle (as in pussycat)." Attachment to Applicant's Response of February 11, 2008.

We find neither the evidence Applicant offers here, nor the arguments based on that evidence, persuasive. We reject the proposition that any word which has not been censored or otherwise sanctioned when used in artistic expression or entertainment must be regarded as not scandalous. While the boundaries of what is scandalous under Section 2(a) may be difficult to define, we reject the notion that those boundaries are coextensive with the boundaries of permissible, that is, uncensored, artistic expression. Neither vaudeville nor South Park provide a useful guide for applying Section 2(a). See *In re Red Bull GmbH*, 78 USPQ2d at 1379-1380 (Board rejects argument based on use of BULLSHIT in conjunction with Penn & Teller performance).

Also, we reject Applicant's assertion that his use of the term PUSSY, like other uses of PUSSY in double entendres, should be viewed as not scandalous. As we noted, under Section 2(a) we must view Applicant's mark as it would be perceived as applied to the goods identified in the application, alcoholic and nonalcoholic beverages, including energy drinks.

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We reject out of hand the argument that, in the context of beverages, including natural energy drinks, the public would view the term PUSSY as conveying a double meaning. This case is distinguishable from the *Hershey* case where the Board found a credible double entendre in the BIG PECKER mark based on the display of a chicken with a beak along with the BIG PECKER word mark in the specimen of record. *In re Hershey*, 6 USPQ2d at 1470, 1472 (TTAB 1988).

In this case Applicant posits that his PUSSY NATURAL ENERGY mark, when used on an energy drink, on the one hand would suggest either a cat, a weak or cowardly man or boy, a catkin of the pussy willow, or a pussy wound, and simultaneously on the other hand, might suggest PUSSY in the vulgar sense.

We do not find this proposition credible, nor has Applicant provided any support for the proposition. We see no double entendre in this context. We conclude so whether we view the term PUSSY alone or as part of Applicant's full mark. Furthermore, there is nothing in the display of the mark or the additional wording, "natural energy" which affects the perception of the term PUSSY. Accordingly, we reject Applicant's double-entendre argument.

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With his evidence Applicant has also submitted copies of excerpts from trade journals which discuss the product Applicant offers under the PUSSY NATURAL ENERGY mark in the United Kingdom. Those excerpts include the following statements regarding the product:

Pussy launched in the UK earlier in the summer, and offers the drink market a unique product whose name guarantees a certain playful element drinkers will have fun with while also grabbing the attention wherever it is sold. (HRM Drinks News);

PUSSY POWER - ... Jonnie Shearer, CEO and Founder of Pussy Drinks said, "I knew I had a good product. The challenge is to make people aware of it. That is where our unique name comes in." (Class);

PUSSY DRINKS - As energy drinks go, Pussy is definitely a cut above the rest. Aside from the provocative name, which serves as a clever marketing tool, two years of intense research and 100% natural ingredients have gone into making this drink an exclusively posh energy drink. (source not identified).

Attachments to Applicant's Response of February 11, 2008.

This evidence reflects Applicant's introduction of his product and mark in the United Kingdom. Although these excerpts often refer the reader to Applicant's site at pussydrinks.com, Applicant has not provided material directly from that site.

Thus Applicant's own evidence points to a single meaning for PUSSY in this context, rather than any double

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entendre. That single meaning is the one which is attention grabbing, unique and provocative, the meaning related to female genitalia and sexual intercourse, the meaning which is both vulgar and scandalous in the United States.

The Examining Attorney has provided additional evidence which not only confirms that the term PUSSY is vulgar, but evidence that the attention-grabbing meaning is the only reasonable meaning to conclude the relevant public would perceive in this context. An excerpt from factexpert.com discusses the highly competitive marketing of energy drinks, stating:

Energy drink packaging is more often flashy and bright than subtle and understated. The primary consumer group of energy drinks includes extreme sports enthusiasts, young adults and teenagers, and the hip-hop crowd. ... Because this group is a group excited by speed, energy, flash and instant thrill, most energy drink packaging appeals to these tastes.

Attachment to Final Office Action of May 5, 2008. In this context, it is not reasonable to conclude that the relevant public will perceive PUSSY as referring to a cat, a weak or cowardly man or boy, a catkin of the pussy willow or a pussy wound. The offensive, vulgar meaning is the only one which makes sense in this context. *Cf. In re Red Bull GmbH*, 78 USPQ2d 1375 (TTAB 2006) (BULLSHIT for various

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alcoholic and nonalcoholic beverages, including energy drinks, and related services held scandalous).

Applicant has also argued that he now offers his products in high-end establishments without complaint. Those establishments are all located in the United Kingdom. Even if we assume that Applicant's mark is not offensive in that setting, this fact would have no bearing on our determination here. We must consider the perception of Applicant's mark in the United States. Therefore, we reject Applicant's arguments based on the alleged perception of his mark in other countries.

Applicant has also submitted four third-party U.S. trademark registrations, two active and two canceled, for marks consisting of the term PUSSY alone or with another term. Applicant argues that these registrations indicate that the term PUSSY is not scandalous. First, canceled registrations have no probative value as evidence. *Cf. Temporary Services Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989). More importantly, we must decide each case on the merits and on the record before us. In *Boulevard Entertainment*, in disposing of similar arguments based on prior registrations, the Court stated, "In any event, the PTO must decide each application on its own merits, and decisions regarding other

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registrations do not bind either the agency or this court. *In re Nett Designs*, 236 F.3d 1339, 1342 [57 USPQ2d 1564] (Fed. Cir. 2001)." *Boulevard Entertainment*, 67 USPQ2d at 1480. Accordingly, we reject Applicant's arguments based on the third-party registrations.

In sum, we have considered all of the evidence offered by Applicant and find it insufficient to overcome the Examining Attorney's evidence that the PUSSY NATURAL ENERGY mark is scandalous. Contrary to Applicant's argument, we harbor no doubt in reaching this conclusion.

Conclusion

Finally, after considering all of the arguments and evidence, including arguments and evidence we have not specifically discussed here, we conclude that Applicant's PUSSY NATURAL ENERGY mark is offensive when viewed in the context of the goods identified in the application from the standpoint of a substantial composite of the general public according to contemporary attitudes. *Mavety*, 31 USPQ2d at 1925-1926. The record, taken as a whole, shows that, in the view of a substantial composite of the public, in particular women, the term PUSSY currently has a vulgar, offensive sexual meaning and that the offensive meaning is the meaning which the relevant public will perceive as

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applied to the beverage products identified in the application, including energy drinks.

Decision: We affirm the refusal under Trademark Act Section 2(a).