

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: September 21, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Therapy by Amanda LLC
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Serial No. 87771775
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Gene Bolmarchich of The Law Offices of Gene Bolmarchich,
for Therapy by Amanda LLC.

Andrea P. Butler, Trademark Examining Attorney, Law Office 124,
Lydia Belzer, Managing Attorney.

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Before Bergsman, Ritchie and Pologeorgis,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Therapy by Amanda LLC (“Applicant”) seeks registration on the Principal Register of the mark S&M (in standard characters) for “sex therapy services,” in Class 44.¹

The Examining Attorney refused registration of Applicant’s mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 2(e)(1), on the ground that S&M is merely

¹ Application Serial No. 87771775 was filed on January 26, 2018, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as January 20, 2018.

descriptive because it describes a feature of the identified services “which include counseling regarding alternative sexual behaviors and practices such as S&M.”²

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. The appeal is fully briefed. We affirm the refusal to register.

I. Mere Descriptiveness – Applicable Law

Section 2(e)(1) of the Trademark Act prohibits registration on the Principal Register of “a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . . of them.” 15 U.S.C. § 1052(e)(1). A term is “merely descriptive” within the meaning of Section 2(e)(1) if it “immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.” *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). “On the other hand, if one must exercise mature thought or follow a multi-stage reasoning process in order to determine what product or service characteristics the term indicates, the term is suggestive rather than merely descriptive.” *In re Tennis in the Round, Inc.*, 199 USPQ 496, 498 (TTAB 1978); *see also In re Shutts*, 217 USPQ 363, 364-65 (TTAB 1983); *In re Universal Water Sys., Inc.*, 209 USPQ 165, 166 (TTAB 1980).

Whether a mark is merely descriptive is determined in relation to the goods or services for which registration is sought, not in the abstract or on the basis of guesswork, and we must consider “the context in which [the mark] is being used, and

² Examining Attorney’s Brief (6 TTABVUE 4).

the possible significance that the term would have to the average purchaser of the goods [or services] because of the manner of its use or intended use.” *In re Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219 (quoting *In re Bayer AG*, 82 USPQ2d at 1831). In other words, we evaluate whether someone who knows what the goods or services are will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012); *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002)).

We start our analysis by defining Applicant’s “sex therapy services.” “Sex therapy” is defined as the “treatment of sexual disorders that have psychological causes, employing psychiatric counseling, behavior modification and education.”³ It is a “form of behavior modification or psychotherapy directed specifically at difficulties in sexual interaction.”⁴ Sex therapy has many forms.

Comarital therapy refers to the Masters and Johnson model, in which both members of the couple are treated by a team consisting of one male and one female therapist. The couple approach recognizes that sexual dysfunctions take place in the context of the interaction between two people and are not the exclusive problem of one member of the pair. Individual therapy is employed for those without

³ Dictionary.com based on the RANDOM HOUSE UNABRIDGED DICTIONARY (2018). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010). *See also* the website Colorado Sex Therapy (coloradosextherapy.com) attached to the April 20, 2018 Office Action (TSDR, p. 34). References to the TSDR database are to the downloadable .pdf format.

⁴ Sex Therapy, ENCYLOPAEDIA BRITANNICA (britannica.com). The Board may take judicial notice of information from encyclopedias. *B.V.D. Licensing Corp. v. Body Action Design Inc.*, 846 F.2d 727, 6 USPQ2d 1719, 1721 (Fed. Cir. 1988) (“dictionaries and encyclopedias may be consulted”); *In re Weiss Watch Co.*, 123 USPQ2d 1200, 1205 n.10, 12 (TTAB 2017); *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1355 n.10 (TTAB 2015).

cooperating partners and may involve the use of a surrogate partner or may focus on exercises that can be practiced by an individual to improve his or her sexual interactions. Group therapy, in which individuals discuss feelings about sex, is also employed for both single-sex and male–female groups.⁵

According to Colorado Sex Therapy (coloradosextherapy.com),

If you have a sex or intimacy problem, sex therapy could be a great solution for you. Sexual dysfunctions for both men and women can often be treated effectively with sex therapy. Sex therapy is ideal for treating libido on one end of the spectrum and sex addiction on the other end of the spectrum. People who have been abused are also excellent candidates for sex therapy as are people with fetishes and alternative sexualities like S&M. Sex therapy can be effective for adolescent’s [sic] and adults or any age.⁶

Dr. Tiger Devore’s website (tigerdevore.com) defines sex therapy as “psychotherapy that is focused on various aspects of sex and sexuality.”⁷

Fetish and alternative sexualities are all of those kinds of sex that go beyond mainstream ideas of sex, from swinging lifestyles, to S&M, to all of those sexual interests that don’t necessarily include a partner, but focus instead of on an object or ritual.⁸

Applicant’s website (sexandmagic.com) describes its sex therapy services as follows:

Sex Therapy

Let’s address any concerns you might have about pleasure, sexual functioning, intimacy, or bedroom activities. We

⁵ Sex Therapy, ENCYLOPAEDIA BRITANNICA (britannica.com).

⁶ April 20, 2018 Office Action (TSDR 34).

⁷ *Id.* (TSDR 9).

⁸ *Id.* (TSDR 10).

embody a sex-positive philosophy and are fully welcoming to all lifestyles, genders, kinks, and more.⁹

S&M is an abbreviation for “sadism and masochism” or “sadoomasochism.”¹⁰

“Sadoomasochism” is defined as

1. Interaction, especially sexual activity, in which one person enjoys inflicting physical or mental suffering on another person, who derives pleasure from experiencing pain.
2. Gratification, especially sexual, gained through inflicting or receiving pain; sadism and masochism combined.¹¹

There is ample evidence that consumers are familiar with the abbreviation of S&M. The Strut website (strutsf.org) posted an “S&M and Kinky Sex Resources” page.¹² The Strut webpage provides the following information:

Want to spice things up, safely? Get info on BDSM, S&M and kinky sex including how to talk about it, how to do it (without getting hurt or harming your partner) and how to negotiate it with partners.¹³

⁹ *Id.* (TSDR 7).

¹⁰ Dictionary.com based on the RANDOM HOUSE DICTIONARY (2018) attached to the March 20, 2018 Office Action (TSDR 8). *See also* YourDictionary.com attached to the March 20, 2018 Office Action (TSDR 4); URBAN DICTIONARY (urbandictionary.com) attached to the April 20, 2018 Office Action (TSDR 13).

¹¹ Dictionary.com based on the Random House Dictionary (2018) attached to the March 20, 2018 Office Action (TSDR 8). *See also* YourDictionary.com attached to the March 20, 2018 Office Action (TSDR 4); URBAN DICTIONARY (urbandictionary.com) attached to the April 20, 2018 Office Action (TSDR 13).

¹² April 20, 2018 Office Action (TSDR 11).

¹³ *Id.*

Cosmopolitan magazine (cosmopolitan.com) posted an article/podcast dated November 29, 2016, entitled “12 Important Things You Should Know About S&M.”¹⁴

The article/podcast provides the following information:

For tons of people, their idea of S&M is mostly limited to what they’ve seen in Fifty Shades franchise. But the truth is, there’s a whole world of S&M out there, and it has something enjoyable for everyone – from the shy newbie to the experienced masochist.

* * *

1. S&M is a type of sexual play that falls under the umbrella of BDSM.

“S&M technically stand for sadism and masochism,” explains Dr. Drucker. “It’s part of BSDM, which is bondage, dominance, sadism and masochism, or submission and dominance – It’s basically just the act of causing abuse or giving abuse during sex in a way that’s consensual and enjoyable.”¹⁵

Psychology Today magazine (psychologytoday.com) also posted an article about S&M on June 19, 2016 (originally published November 1, 1995).

An Inside Look at S&M

Kinky sex: inside S&M

It’s the ultimate break from thoroughly modern stresses on the self.

* * *

Across the country, from sophisticated cities to subdued suburbs, men and women are acting out fantasies of sexual dominance and submission. With their own partners or specially hired ones, they’re turning to rituals of

¹⁴ *Id.* (TSDR 19).

¹⁵ *Id.* (TSDR 20).

sadomasochism. To borrow their own favorite term, they've happily become "sex slaves" to their submissive desires.¹⁶

S&M is synonymous with sadism and masochism or sadomasochism which is an approach to sexual interaction that may be treated through, or otherwise discussed in, sex therapy and, therefore, S&M is merely descriptive of a subject treated by Applicant's services. *See In re Thomas Nelson, Inc.*, 97 USPQ2d 1712, 1715 (TTAB 2011) (citing *Modern Optics, Inc. v. Univis Lens Co.*, 234 F.2d 504, 506, 110 USPQ 293, 295 (C.C.P.A. 1956)) (holding NKJV substantially synonymous with merely descriptive term "New King James Version" and thus merely descriptive of bibles); *In re BetaBatt Inc.*, 89 USPQ2d 1152, 1155 (TTAB 2008) (holding DEC substantially synonymous with merely descriptive term "direct energy conversion" and thus merely descriptive of a type of batteries and battery related services); TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") §1209.03(h) (Oct. 2017).

Applicant argues that "there is no evidence that the services at issue are ever associated in any way with 'sadism and masochism.'"¹⁷ In making that argument, Applicant simply ignored the Colorado Sex Therapy website (coloradosextherapy.com) (people with fetishes and alternative sexualities like S&M are candidates for sex therapy), Dr. Tiger Devore's website (tigerdevore.com) (S&M is a fetish that may be treated through sex therapy), and its own website wherein Applicant states that it address any concerns potential patients have about "pleasure,

¹⁶ *Id.* (TSDR 29).

¹⁷ Applicant's Brief (4 TTABVUE 3).

sexual functioning, intimacy, or bedroom activities,” including all lifestyles and kinks.¹⁸

Applicant argues that “there is no evidence that Applicant ever has performed, or ever will perform, any services for a patient with a ‘problem’ or ‘condition’ that in any way implicates sadism and masochism.”¹⁹ Again, Applicant simply ignored the evidence in its own website wherein Applicant states that any concerns potential patients have about “pleasure, sexual functioning, intimacy, or bedroom activities,” including all lifestyles and kinks, which could include S&M. Assuming arguendo that Applicant does not counsel patients with a possible S&M issue, nevertheless, we must determine whether Applicant’s mark is merely descriptive based on the description of services. *See In re Allen Elec. and Equip. Co.*, 458 F.2d 1404, 173 USPQ 689, 690 (CCPA 1972) (“trademark cases must be decided on the basis of the identification of the goods as set forth in the application.”); *In re Vehicle Information Network Inc.*, 32 USPQ2d 1542, 1544 (TTAB 1994); *In re Dataline Corp.*, 203 USPQ 878, 879 (TTAB 1979) (whether a mark is primarily geographically descriptive pursuant to Section 2(e)(2) is determined by the description of goods, not what the evidence discloses such goods to be). Because the services at issue are sex therapy services and sex therapy services may include counseling about S&M, the mark S&M used in connection with those services merely describes an approach to sexual interaction that Applicant might treat or otherwise discuss.

¹⁸ A “kink” is defined, inter alia, as a “bizarre or unconventional sexual preference or behavior.” Dictionary.com based on the RANDOM HOUSE UNABRIDGED DICTIONARY (2018).

¹⁹ Applicant’s Brief (4 TTABVUE 3).

II. Conclusion

We have carefully considered all arguments and evidence of record, including any not specifically discussed. We find that S&M is merely descriptive of a feature of the Applicant's sex therapy services under Section 2(e)(1) of the Trademark Act.

Decision: The refusal to register Applicant's mark S&M is affirmed.