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United States Patent and Trademark Office (USPTO)

U.S. Application Serial No. 88629939

Mark: FUCK ME

Correspondence Address:

JONATHAN W BROWN

LIPSITZ GREEN SCIME CAMBRIA LLP

42 DELAWARE AVE STE 120

BUFFALO, NY 14202

Applicant: California Exotic Novelties, LLC

Reference/Docket No. 30783.0081

Correspondence Email Address:

ip@lglaw.com

EXAMINING ATTORNEY'S APPEAL BRIEF

I. SUMMARY OF FACTS

The applicant has applied for registration on the Principal Register for the mark **FUCK ME** in standard characters for "Adult sexual stimulation aids, namely, vibrators" in International Class 10. On December 21, 2019, registration was refused under Trademark Act Sections 1, 2, 3, and 45 on the grounds that the mark is a common phrase that cannot function as a trademark. Applicant responded to the refusal on

June 29, 2020, and received a final refusal on July 20, 2020. This appeal follows the examining attorney's denial of applicant's request for reconsideration on February 9, 2021.

II. ISSUES ON APPEAL

There is one issue on appeal: whether applicant's standard character mark **FUCK ME** for "Adult sexual stimulation aids, namely, vibrators" in International Class 10 is a common phrase that cannot function as a trademark to indicate the source of applicant's goods and to identify and distinguish them from others under Trademark Act Sections 1, 2, 3, and 45, 15 U.S.C. §§1051-1053, 1127.

III. ARGUMENTS

Applicant's mark, **FUCK ME**, is a common phrase that cannot function as a trademark to indicate the source of applicant's goods and to identify and distinguish them from others and should therefore be refused registration on the Principal Register pursuant to Trademark Act Sections 1, 2, 3, and 45, 15 U.S.C. §§1051-1053, 1127.

A. **FUCK ME is a Commonly Used Social Message or Expression**

Applicant seeks to register the standard character mark **FUCK ME** for "Adult sexual stimulation aids, namely, vibrators" in International Class 10. The evidence shows that the phrase **FUCK ME** cannot function as a trademark because it is a commonplace expression used by a wide variety of sources and merely conveys an ordinary, familiar, well-recognized concept or sentiment. See Trademark Act Sections 1, 2, 3, and 45, 15 U.S.C. §§1051-1053, 1127; See *In re Volvo Cars of N. Am., Inc.*, 46 USPQ2d 1455, 1460-61 (TTAB 1998); TMEP §1202.04(b).

As an initial matter, applicant has not denied that the wording **FUCK ME** is a common social phrase or expression. In determining whether a designation functions as a mark, the critical inquiry is how the relevant public would perceive the designation. Here, the evidence establishes that the general public uses social expression **FUCK ME** as a command or request for sexual intercourse to a sexual partner, and

also as “an expression of surprise, contempt, outrage, disgust, boredom, frustration, or of dismay at undesired events happening to oneself.” Further, users on English language learning website forums commonly ask about the meaning of the phrase **FUCK ME**, demonstrating its ubiquitous use in the United States.

See the following evidence:

1. Definitions, (December 21, 2019 Office Action, TSDR pp.8-14) (explaining the meaning of the phrase “FUCK ME” and providing an example of “FUCK ME” used in a sentence).
2. Phrases.com, (December 21, 2019 Office Action, TSDR pp. 37) (explaining the meaning of the phrase “FUCK ME”).
3. Reddit.com, (December 21, 2019 Office Action, TSDR pp. 40-50) (showing a list of social media posts and comments containing the phrase “FUCK ME” on the news and social media website, Reddit).
4. The Free Dictionary, (December 21, 2019 Office Action, TSDR pp. 51) (Defining “FUCK ME” as rude slang or an exclamation of frustration or exasperation).
5. Wikipedia, (December 21, 2019 Office Action, TSDR pp. 52) (Showing various uses of the phrase “FUCK ME,” including as slang for requesting sexual intercourse, slang for extreme pressure and stress, “fuck me shoes” which express a desire to have sex, and as the title of a variety of songs).
6. BedroomJoys, (July 20, 2020 Office Action, TSDR pp. 8) (Article titled “Fuck Me Silly Sex Toys).
7. BuzzFeed, (July 20, 2020 Office Action, TSDR pp.18-19) (Providing a list of sex toys, including the “FUCK ME” anal plug, an anal plug with the wording “FUCK ME” inscribed onto the plug).

8. *The use of fuck: A sociolinguistic approach to the usage of fuck in the BNC and blog authorship Corpus* by Ryan Howe, (July 20, 2020 Office Action, TSDR pp. 35, 71) (Showing the use of various phrases containing the word “FUCK,” including the phrase “FUCK ME”).
9. German Language Stack Exchange, (July 20, 2020 Office Action, TSDR pp. 80) (User stating that they use the phrase “FUCK ME” “a lot,” and request the German equivalent).
10. Love Honey, (July 20, 2020 Office Action, TSDR pp.83) (Selling an adult toy labeled “Pipe Dream Extreme **Fuck me Silly 2**”).
11. Love Toy, (July 20, 2020 Office Action, TSDR pp. 84) (Selling adult toys from the line “**Fuck me bare**”).
12. Quora, (July 20, 2020 Office Action, TSDR pp. 89) (With user answer stating that Americans from the United States both commonly use the phrase “fuck you” and “**FUCK ME**”).
13. Real Life Global, (July 20, 2020 Office Action, TSDR pp. 91, 97) (Article providing 26 different ways to use the word “FUCK,” with “FUCK ME” being the ninth example).
14. Vibe Shop, (July 20, 2020 Office Action, TSDR pp. 112) (Selling a “FUCK ME SILLY” adult toy).
15. The Free Dictionary, (July 20, 2020 Office Action, TSDR pp. 115) (Defining the meaning of the “FUCK ME” idiom or phrase).
16. Google Search Results, (February 9, 2021 Office Action, TSDR pp. 4-19) (Google search results of the phrase “**FUCK ME**”).
17. Hi Native, (February 9, 2021 Office Action, TSDR pp. 20-22) (Questions and answers regarding the meaning of the phrase “FUCK ME”).

18. Urban Dictionary, (February 9, 2021 Office Action, TSDR pp.30-33) (Defining the meaning of the phrase “**FUCK ME**” as a “sarcastic reply towards a frustrating situation,” or a “sexual demand” and providing example sentences using the phrase).
19. Wiktionary, (February 9, 2021 Office Action, TSDR pp. 34) (Defining the phrase “**FUCK ME**” as vulgar slang meaning “an expression of surprise of exasperation).

The evidence also shows the widespread use of **FUCK ME** by popular media and on general consumer items, including adult toys. For example, the music industry frequently uses the phrase **FUCK ME** as a song title or as a part of song lyrics. The consuming public also uses **FUCK ME** when describing clothing intended to convey a sexual invitation, with “**FUCK-ME pumps**” or shoes being a common media trope. Further, film and television actors state **FUCK ME** on set with such frequency that the phrase is considered the signature slang of some individuals.

1. Lexico Dictionary, (July 20, 2020 Office Action, TSDR pp. 82) (Defining the phrase “**FUCK ME**” as inviting or perceived as inviting sexual interest, especially with respect to shoes).
2. Genius Lyrics, (December 21, 2019 Office Action, TSDR pp. 25) (showing use of the phrase **FUCK ME** as a song title by The Notorious B.I.G.)
3. Lyrics.com, (December 21, 2019 Office Action, TSDR pp. 29-35) (showing a variety of song lyrics containing the common phrase “**FUCK ME**”).
4. AV Club, (July 20, 2020 Office Action, TSDR pp. 85) (Discussing the controversy around Britney Spears’ song titled “**F.U.C.K. ME**”).
5. Online Slang Dictionary, (July 20, 2020 Office Action, TSDR pp. 87) (Explaining the meanings of the slang phrase “**FUCK ME**”).
6. The Week, (July 20, 2020 Office Action, TSDR pp. 106, 107) (Article Titled “Our Favorite *Heathers* Slang,” with “**FUCK ME**” being among her commonly used slang phrases).

7. Andrew J Rivers, (July 20, 2020 Office Action, TSDR pp. 6-7) (Discussing the use and origin of the FUCK ME pumps concept).
8. FYE, (July 20, 2020 Office Action, TSDR pp. 78) (Showing the music album FUCK ME I'm Famous!)

Given the extensive use of the wording **FUCK ME**, consumers would not perceive it as a trademark identifying the source of applicant's goods but rather as a popular expression commonly used in everyday speech, particularly in the context of applicant's adult toy goods. As shown by the evidence, the consumers commonly use the phrase **FUCK ME** in the context of discussing, purchasing, or using an adult toy, and would therefore understand the phrase as a popular expression referring to this use; not as a source of the adult toys themselves. For these and all the reasons above, the mark **FUCK ME** is a common phrase that cannot function as a trademark to indicate the source of applicant's goods and to identify and distinguish them from others under Trademark Act Sections 1, 2, 3, and 45, 15 U.S.C. §§1051-1053, 1127.

B. APPLICANT'S ARGUMENTS

Applicant argues that the provided evidence fails to show that the phrase **FUCK ME** merely conveys an informational message and further, that this evidence fails to show that the applied-for mark will fail to function as a source-identifier. (Appeal Brief at 5-6). However, the evidence must show that the applied-for mark is a commonplace term, message, or expression widely used by a variety of sources that merely conveys an ordinary, familiar, well-recognized concept or sentiment. *See In re Volvo Cars of N. Am., Inc.*, 46 USPQ2d 1455, 1460-61(TTAB 1998). The mark need not be merely informational to fail to function as a common phrase, as is the case in this instance. (Appeal Brief at 5-6).

Applicant additionally relies on third-party registrations that allegedly comprise commonplace phrases, arguing that these registrations support registration of applicant's own mark. However, prior

decisions and actions of other trademark examining attorneys in registering other marks have little evidentiary value and the Trademark Trial and Appeal Board is not bound by prior decisions involving different records. *See In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1793 n.10 (TTAB 2017); *See also In re Datapipe, Inc.*, 111 USPQ2d 1330, 1336 (TTAB 2014); TMEP §1209.03(a); TMEP §1207.01(d)(vi). Additionally, the existence of these marks on the register do not indicate that the relevant public would recognize applicant's own mark as source-identifying. (Appeal Brief at 5-6).

1. Current Case Law Provides Support for the Common Phrase Refusal

Applicant argues that the Lanham Act provides no support for the common phrase refusal. This assertion ignores the legal standards set forth in Trademark Act Sections 1, 2, 3, and 45 and by the Trademark Trial and Appeal Board. *See D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d 1710, 1716 (TTAB 2016); *In re Hulting*, 107 USPQ2d 1175, 1179 (TTAB 2013); *In re Eagle Crest Inc.*, 96 USPQ2d 1227, 1230 (TTAB 2010); *In re Manco Inc.*, 24 USPQ2d 1938, 1941 (TTAB 1992); *In re Wal-Mart Stores, Inc.*, 129 USPQ2d 1148, 1160 (TTAB 2019); *In re Volvo Cars of N. Am., Inc.*, 46 USPQ2d 1455, 1460-61 (TTAB 1998); Trademark Act Sections 1, 2, 3, and 45; 15 U.S.C. §§1051-1053, 1127. Each of the foregoing cases relied on Trademark Act Sections 1, 2, 3, and 45 when refusing registration of the applied-for marks for failing to function as a common or informational phrase. The relevant law supports the common phrase refusal.

Applicant then argues that if a common term may function as a trademark, then so should a common phrase. Applicant additionally argues that United States Patent and Trademark Office has failed to provide a clear definition of the failure to function refusal doctrine. (Appeal Brief at 8-11). However, as explained by the Office Actions, “[d]etermining whether the term or expression functions as a trademark or service mark depends on how it would be perceived by the relevant public. *In re Wal-Mart Stores, Inc.*, 129 USPQ2d at 1150; TMEP §1202.04.” “The more commonly a [term or expression] is

used, the less likely that the public will use it to identify only one source and the less likely that it will be recognized by purchasers as a trademark [or service mark].” *In re Hulting*, 107 USPQ2d 1175, 1177 (TTAB 2013). The refusal is evidence-based, and as shown by the evidence in this case, the relevant public would perceive the applied-for mark as a common phrase or expression rather than as identifying the source of applicant’s goods.

In sum, fundamental to registration of a trademark is the question of whether the applied-for matter is even capable of performing the essential purpose of a trademark. That is, can the applied-for matter function to indicate the source of the applicant’s goods. The evidence in this case demonstrates that it cannot.

CONCLUSION

The evidence of record leaves no doubt that applicant’s mark is a common phrase that cannot function as a trademark to indicate the source of applicant’s goods and to identify and distinguish them from others. Therefore, for the foregoing reasons, it is submitted that the refusal to register the applied-for mark under Trademark Act Sections 1, 2, 3, and 45 should be affirmed.

Respectfully submitted,

Erdman, Rachel

/Rachel Erdman/

Examining Attorney

Law Office 104

(571) 272-4717

rachel.erdman@uspto.gov

Zachary Cromer

Managing Attorney

Law Office 104

571-272-6089

Zachary.cromer@uspto.gov