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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Boulevard Entertainment, Inc.

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Serial Nos. 75/414,435 and 421,016

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James L. Bikoff of Silverberg, Goldman & Bikoff for  
Boulevard Entertainment, Inc.

Cynthia Sloan, Trademark Examining Attorney, Law Office 111  
(Craig Taylor, Managing Attorney).

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Before Hairston, Walters and Chapman, Administrative  
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Two applications have been filed by Boulevard  
Entertainment, Inc. to register on the Principal Register

**Ser Nos. 75/414,435 and 75/421,016**

the marks, respectively, 1-800-JACK-OFF<sup>1</sup> and JACK-OFF<sup>2</sup> for "entertainment in the nature of adult-oriented conversations by telephone."

The Trademark Examining Attorney has issued a final refusal to register under Section 2(a) of the Trademark Act on the ground that each of the marks consists of or comprises immoral or scandalous matter. The Examining Attorney maintains that the term "JACK-OFF" is a vulgar term meaning "to masturbate" and, as such, it is offensive to a substantial composite of the general public.

Applicant, in each instance, has appealed. Briefs have been filed, and an oral argument pertaining to both applications was held. Because the issue in each case is essentially the same, the appeals have been treated in a single opinion. We affirm the refusals to register.

*Examining Attorney's Evidence*

In support of her position that the term "JACK-OFF" is a vulgar colloquial term meaning "to masturbate," the Examining Attorney submitted the following dictionary definitions:

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<sup>1</sup> Serial No. 75/414,435, filed January 6, 1998, alleging use of the mark in commerce since July 1996.

<sup>2</sup> Serial No. 75/421,016, filed January 21, 1998, alleging a bona fide intention to use the mark in commerce.

**jack off** vb [prob. alter. of *jerk off*] (1959)<sup>3</sup> :  
MASTURBATE - usu. considered vulgar. *Merriam  
Webster's Collegiate Dictionary*, 1996.

**jack off** See beat off.

**jackoff** See jagoff.

**jagoff AND jackoff, jerkoff** 1. a male who  
masturbates habitually. ... 2. a worthless jerk  
(Usually refers to a male. From sense 1.  
Primarily male talk.)

**beat off AND ball off, jack off, jag off, jerk  
off, pull oneself off, toss off, wack off, wank  
off, whip off.** 1. to masturbate. (Said of the  
male, but is occasionally applied to a female. ...)  
*Forbidden American English*, Richard A. Spears,  
1995.<sup>4</sup>

< **jack off** > v To masturbate; = JERK OFF • Said  
chiefly of males [ultimately from jack "penis"].  
*American Slang*, 1987 (abridgement of *The New  
Dictionary of American Slang*).<sup>5</sup>

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<sup>3</sup> According to the dictionary's explanatory notes, "this is the date of the earliest recorded use in English, as far as it could be determined, of the sense which the date precedes."

<sup>4</sup> The user notes to this dictionary include the following statement about its point of view:

American Society has always been pluralistic. For that reason, it is not now, nor has it ever been, possible to make general and accurate statements about American tastes, values, and behavior. *Forbidden American English*, as the title indicates, presents a specialized vocabulary from the point of view of persons whose tastes and values cause them to avoid or renounce the use of these expressions. There are, of course, other points of view. One view might be that none of the expressions in this dictionary ought to be forbidden. Another view might consider the sexual expressions to be harmless and the racial epithets to be unspeakably vile. This dictionary does not seek to vindicate or eradicate any particular point of view. It is formulated in such a way as to provide guidance to persons, especially nonnative speakers, who are not familiar with the meanings of these expressions, and who wish to avoid the social consequences of offending people with this kind of vocabulary.

<sup>5</sup> The user guide to this dictionary indicates that the "carrot" symbols bracketing a term are impact symbols. The text states

**jack-off** n 1.a. a masturbator - used contemptuously - usu. considered vulgar. b. an act of masturbation - usu. considered vulgar. 2. a dolt; idiot - usu. considered vulgar.  
**jack off** v 1.a. to masturbate - usu. considered vulgar. b. to rub or handle nervously - usu. considered vulgar. 2. to fool around, idle, loaf, etc - usu. considered vulgar. 3. to take advantage of, deceive, stall, or impose upon (someone) - usu. considered vulgar. 4. to tease or taunt - usu. considered vulgar. *Historical Dictionary of American Slang*, 1997.

As additional support for her position that the term "jack-off" is offensive, the Examining Attorney made of record evidence from the NEXIS database of stories published in newspapers and magazines. Specifically, the Examining Attorney has relied upon excerpts from what she characterized as a small number of stories<sup>6</sup> in which the term "jack-off" appears. She argues that the limited appearance of the term and the nature of the publications in which it appears are evidence that the term is offensive

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that "[t]he symbols are assigned on a two-level principle, corresponding to what have usually been called 'taboo' and 'vulgar' levels. ... Terms of strongest impact are marked with the symbols [darkened] and those of lesser impact with the symbols [not darkened]. The assignment of these is a matter of editorial judgment, and not everyone will agree with us." Thus, the dictionary editors assigned the vulgar impact level to "jack off."

<sup>6</sup> It appears, from the LEXIS/NEXIS notations on each page submitted, that the Examining Attorney found 85 stories containing the term. She submitted a total of 19 stories (15 stories as excerpts and four stories printed in full). There is no indication as to whether or not this is a representative sample of the 85 stories.

to a substantial composite of the general public.<sup>7</sup> The following excerpts are a representative sample of those submitted:

You secretly adore Michael Jackson ... But writing that you "would like to gossip about how fascinating that recently surfaced picture of Jacko's pallid son was ... this adorable little Jack-off looks precious little like Daddy, ... [letter to editor, *The Village Voice*, September 7, 1999.]

We first meet Ray as he struts into a bar to do his jack-off act. Buck-naked, he sits down and goes at it. But his back is to us. [theater review, *Houston Press*, August 26, 1999.]

And the Rainbow was an apropos setting for a party celebrating the first issue of a jack-off mag celebrating all-American outlaw girls. [*New Times Los Angeles*, June 3, 1999.]

Headline: Sexual Roulette; Despite the risk, HIV-positive gay men are engaging in unsafe sex in the wake of improved AIDS medications. Don't believe us? Check out South Florida's "backroom bars."...

The basic message - all sex is dangerous - gave rise to "jack-off parties" and slick campaigns designed to eroticize condom use and spread the news that the "best sex is safe sex." [*New Times Broward-Palm Beach*, May 27, 1999.]

Headline: Playboy Interview: Drew Carey...

Carey: Yeah. Could you please title this "Playboy Interviews Jack-Off King Drew Carey"? Man, oh man. ...

Yeah, I could when I was a teenager. But that's my own record: three times in one hour. I haven't had any cause to jack off three times in one hour since then. [*Playboy*, March 1999.]

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<sup>7</sup> The Examining Attorney contends that, within the vast NEXIS database, there should be more uses of the term, and more uses in mainstream publications, if it is an acceptable term.

Headline: The Sex Sin He Won't Confess;  
admission of masturbating.

...  
"Occasionally, I'll jack off in the bathroom  
stall at work, just to relieve tension," says  
Albert. ...

"When I was a teenager, I shared a room with my  
older brother. One day, he caught me  
masturbating on his bed. For years later, I was  
forced to endure nicknames like Jack-Off and  
Jerk-O. Especially in front of new girlfriends."  
Philip, 25. [*Cosmopolitan*, January 1999.]

"They jack off to us on Saturday and don't know  
our names on Monday." - Porn actor Nina Hartley,  
on celebrities. [*Playboy*, January 1999.]

Former Nine Inch Nails drummer Chris Vrena is  
producing a new album for Jack Off Jill, the band  
that comes from Marilyn Manson's hometown of Fort  
Lauderdale and joined Manson's tour earlier this  
year after Hole dropped out. [*Los Angeles Times*,  
July 25, 1999.]

#### *Applicant's Evidence*

Applicant submitted a substantial amount of evidence  
in this case, including the user guides and prefaces to the  
dictionaries submitted by the Examining Attorney.

Applicant argues that the indication of vulgarity by these  
dictionaries is subjective and not necessarily  
representative.

Applicant submitted two declarations by its president,  
Scott Jacobson, both with exhibits, to the effect that  
"jack-off" is not vulgar, immoral or scandalous; that  
sexual terms in general, and "jack-off" in particular, are

becoming more generally acceptable; that masturbation is an acceptable subject for discussion; that a popular music group is named "Jack Off Jill," which is acceptable; that the term "jack-off" is regularly used in all types of media available to the public, including print, movies and radio; that Internet web sites discuss "the concept of hosting all-male social occasions within the United States for the purpose of group masturbation" - referred to as "Jack Off Clubs"; that applicant's business is successful and lawful; that applicant successfully registered domain names containing the term "jack-off"; and that singer/songwriter Elton John recorded a song entitled "Jamaica Jerk-Off."

Applicant submitted declarations by several individuals attesting to their experiences hearing the term "jack-off" and their opinions that it is not a vulgar term; and declarations by individuals employed by applicant and by businesses that do business with applicant attesting to their opinions that the term is not vulgar. Applicant also submitted the declarations of Edward J. Condren, professor of English and Medieval Studies at UCLA; Diane Kelley, a clinical psychologist; and Richard F. Hixson, professor of journalism and mass media at Rutgers University, each of whom renders his or her professional opinion that the term "jack-off" is not vulgar, immoral or scandalous.

Applicant submitted copies of numerous third-party registrations for marks identifying adult entertainment products and services that applicant characterizes as "similar" to applicant's mark. After filing its notice of appeal, applicant filed several requests for remand to consider additional evidence consisting of additional third party applications and registrations, with dictionary and Internet reference. This evidence is part of this record and has been considered by the Board.

*Examining Attorney's and Applicant's Arguments*

The Examining Attorney contends that the four dictionary definitions that she submitted support her conclusion that the term "jack-off" is "slang or vulgar"; that while "jack-off" may have multiple meanings, *i.e.*, "to masturbate," "a masturbator," or "a stupid, incompetent person," each meaning is equally vulgar and/or derogatory in usage; and that, in the context of applicant's services, as shown in the advertisements submitted as specimens in the use-based application, the clear connotation of the term "jack-off" in applicant's marks pertains to masturbation.<sup>8</sup> The Examining Attorney contends that the

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<sup>8</sup> The Examining Attorney states that applicant's specimens consist of advertisements for applicant's services shown on pages of pornographic magazines; and that, in addition to the dictionary definitions and other evidence, the context of applicant's own use of its mark demonstrates that it consists of



NEXIS evidence of use of the term demonstrates that it is not a commonly used or accepted term.

Applicant contends that the Examining Attorney has failed to establish that its marks are immoral or scandalous; that, in fact, the term "jack-off" is an acceptable, commonly used term pertaining to masturbation; and that "jack-off" is also an acceptable, commonly used term referring to someone who is stupid or incompetent. Applicant contends that contemporary American society still has taboos on certain words, but that "jack-off" is not one of those words.<sup>9</sup> Applicant argues that the many third-party registrations issued by the United States Patent and Trademark Office (PTO) for trademarks with sexual meanings are evidence of the liberal nature of a broad spectrum of

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immoral or scandalous matter. Applicant correctly points out that the specimens and nature of the services evidenced thereby cannot serve as a basis for determining whether a mark is scandalous. We consider the nature of the services and the specimens only to the extent that this evidence assists us to determine the likely connotation of the term in question. We consider the mark in the context of the marketplace as applied to only the services identified in the application. *In re McGinley*, 660 F.2d 481, 211 U.S.P.Q. 668, 673 (CCPA 1981).

<sup>9</sup> Applicant devotes a substantial part of its evidence and argument to establishing the acceptability of other terms that it claims are similar to "jack-off" and to establishing the acceptability of references to, and discussions about, masturbation. However, the acceptability of other marks or the topic of masturbation is not before us. We are determining only whether the specific term "jack-off" as it appears in applicant's mark and in the marketplace is immoral or scandalous under the Trademark Act.

contemporary society towards sexual language and discussion.<sup>10</sup>

*Analysis*

Registration of a mark which consists of or comprises immoral or scandalous matter is prohibited under Section 2(a) of the Trademark Act. The Court of Appeals for the Federal Circuit, in *In re Mavety Group, Ltd.*, 33 F.3d 1367, 31 USPQ2d 1923 (Fed. Cir. 1994), reviewed the law regarding scandalous or immoral matter. The court noted that the burden of proving that a mark is scandalous rests with the PTO. The Examining Attorney 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 Mavety*, 31 USPQ2d at 1925, citing *In re Riverbank Canning Co.*, 95 F.2d 327, 37 USPQ 268 (CCPA 1938). The Examining Attorney must consider applicant's mark(s) in the context of the marketplace as applied to only the identified goods and/or services in the

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<sup>10</sup> Applicant also argues that the refusal to register its marks is a violation of its First Amendment constitutional right and denies it equal protection under the law. However, the precedent on this issue is clear and forecloses this challenge. The argument has not been considered further. *In re Mavety Media Group, Ltd.*, 33 F.3d 1367, 31 U.S.P.Q.2d 1923 (Fed. Cir. 1994).

application for registration. Whether the marks consist of or comprise scandalous matter is to be determined from the standpoint of not necessarily a majority, but a substantial composite of the general public, and in the context of contemporary attitudes.

Neither applicant nor the Examining Attorney disagree that the term "jack-off" pertains to masturbation as a noun (referring to the masturbator) or as a verb (referring to the act of masturbating); and that, in certain contexts, the term "jack-off" also refers to a person who is stupid or incompetent. Considering the marks, JACK-OFF and 1-800-JACK-OFF, in the context of the marketplace as applied only to applicant's services, "entertainment in the nature of adult-oriented conversations by telephone," the connotation of JACK-OFF clearly pertains to masturbation, regardless of whether it is considered a noun or a verb.<sup>11</sup> The connotation remains the same for the mark in the form of a telephone number, 1-800-JACK-OFF, since the 1-800 portion merely describes that applicant's services are offered over the telephone.

Even though applicant's services and advertising are directed to adults and the magazines and other media in

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<sup>11</sup> Based on the dictionary references, the hyphenated term may be the noun form. Regardless, our analysis remains the same.

which it advertises may have limited distribution even among adults, we must consider whether applicant's marks are scandalous, in the context of contemporary attitudes, from the standpoint of a substantial composite of the *general public*. Thus, we turn to the evidence of record.

The dictionary definitions made of record by the Examining Attorney, along with the explanatory notes and user guides made of record by applicant, indicate that "jack-off" is a vulgar term pertaining to masturbation.<sup>12</sup> Although applicant points out that there is a certain amount of subjectivity involved in an editor applying this label to a word, which the editors of these dictionaries acknowledge, these notations reflect the editors' professional opinions, not merely personal opinions, that a significant number of people would so view the term. Further, the record includes four dictionaries that have independently reached the conclusion that "jack-off" is vulgar.

Applicant submitted a substantial amount of evidence to establish that societal attitudes towards sex and sexual talk in general have changed significantly over the last several decades. This may be true, however, our inquiry is

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<sup>12</sup> This is clearly not a finding that other terms for, or discussion of, masturbation is vulgar.

narrow and pertains only to the term "jack-off." Three of the four dictionaries excerpted in this record were published in the late 1990's and it is unlikely that societal attitudes towards the term "jack-off" have changed significantly since that time. Thus, these dictionaries may be considered contemporary and probative. The fourth dictionary, although published in the late 1980's, is also probative as it is consistent with the more recent dictionary excerpts in the record.

The NEXIS excerpts made of record by the Examining Attorney lend further support to the dictionary evidence because they suggest that, in the United States, the term "jack-off" is used as a vulgar reference to masturbation and, as a name applied to someone, as a derogatory insult.<sup>13</sup> Applicant argues, however, that the involved marks are not scandalous to a substantial composite of the general public. Applicant maintains that the fact that the term "jack-off" appears in the magazine and newspaper excerpts submitted by the Examining Attorney and applicant is evidence that the term is not scandalous. A close

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<sup>13</sup> We do not, however, draw the conclusion suggested by the Examining Attorney, *i.e.*, that the alleged limited number of references indicates that the term is unacceptable. No such conclusion can be drawn without substantially more evidence regarding, for example, the size of the database, the parameters of the search, and whether the excerpts in the record are representative of the Examining Attorney's entire search results.

examination of the story excerpts reveals that most, if not all, of the stories are in the nature of social commentary, personal interview quotes, or art or film reviews. In other words, these stories do not evidence use of the term "jack-off" in ordinary discourse. Also, several of the publications in which the stories appear are somewhat specialized in nature. In short, we are not convinced that these stories are of a nature that they have been exposed to a large segment of the American public or that a large segment of the American public would not be offended by the use of the term "jack-off" in those articles if exposed to them. Thus, the fact that the term "jack-off" appears therein does not persuade us that the term is not scandalous to a substantial composite of the American public.

The same is true with respect to the evidence of a 1973 song by Elton John entitled "Jamaica Jerk Off" and of a music group named Jack Off Jill. Even assuming that the connotation of "jerk off" is interchangeable in all respects with "jack off," the use of these terms in connection with rock music is not evidence of use of the term "jack-off" in ordinary discourse, nor does it persuade us that the term is not scandalous to a substantial composite of the American public.

We note applicant's reliance on several cases wherein the Board or our reviewing Court has found marks to be not scandalous. Those cases may be distinguished from this case on their facts.

*In re Mavety Media Group, Ltd.*, 33 F.3d 1367, 31 U.S.P.Q.2d 1923 (Fed. Cir. 1994), involved the mark BLACK TAIL for an adult entertainment magazine. The Court found that the PTO had not met its burden of proving the term "tail" scandalous based only on dictionary definitions that included both a vulgar and a non-vulgar definition of the term, both of which were equally applicable in the context of the goods. In the case before us, not only are all of the possible definitions of jack-off labeled "vulgar" by the dictionaries of record, but there is additional evidence that we have found supportive of the conclusion that the term is vulgar and, thus, scandalous to a substantial composite of the general population.

*In re Hershey*, 6 U.S.P.Q.2d 1470 (TTAB 1988), involved the mark BIG PECKER BRAND for T-shirts. In holding that the mark BIG PECKER BRAND does not offend morality or raise scandal, unlike the case before us, the Board found that the primary meanings of the word "pecker" to the general public are innocuous, rather than vulgar.

Similarly, in *In Over Our Heads, Inc.*, 16 U.S.P.Q.2d 1653 (TTAB 1990), the Examining Attorney contended that the mark was lacking in taste and was an affront to an organized religious group, namely, the Unification Church, whose members were sometimes referred to as "Moonies." The case differs from the case now before us because the evidence showed numerous innocuous definitions for the term. The Board reversed the refusal of registration, finding that purchasers were more likely to view the mark as an allusion to "mooning" than as a reference to members of the Unification Church.

In the case of *In re Old Glory Condom Corp.*, 26 U.S.P.Q.2d 1216 (TTAB 1993), the Examining Attorney contended that the flag design in connection with condoms disparaged the American flag and that it was scandalous. In reversing the refusal, the Board pointed to the seriousness of purpose surrounding the use of applicant's mark as a campaign to prevent AIDS. Such a situation does not exist herein.

Finally, applicant argues that its involved marks are no more scandalous or immoral than other third-party marks which the PTO has allowed to register. However, as has often been stated, each case must be decided on its own set



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of facts. We are not privy to the file records of those third-party registrations.

In sum, the evidence of record is sufficient to establish prima facie that the term "jack-off" is offensive to the conscience of a substantial composite of the general public, notwithstanding the fact that contemporary attitudes toward sex and sexual talk are more liberal than they were just a generation ago. Therefore, we find that applicant's marks consist of or comprise scandalous matter.

**Decision:** The refusals to register under Section 2(a) of the Trademark Act are affirmed.