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Mailed: June 22, 2005
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Love Bottling Company

Serial No. 78171270

Rachel Blue of Doerner, Saunders, Daniel & Anderson, LLP
for Love Bottling Company.

Cheryl Clayton, Trademark Examining Attorney, Law Office
102 (Thomas V. Shaw, Managing Attorney).

Before Seeherman, Walters and Kuhlke, Administrative
Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Love Bottling Company has filed an application to
register in typed drawing form W.B. WIFE BEATER for
"clothing, namely, T-Shirts."¹

The examining attorney initially required a disclaimer
for the allegedly "descriptive wording 'WIFE BEATER' apart

¹ Application Serial No. 78171270, filed October 4, 2002,
alleging a date of first use anywhere of January 1988 and date of
first use in commerce of July, 2002.

from the mark as shown," noting that "[t]he wording is merely descriptive because it describes a characteristic of the goods, e.g., slang for t-shirts commonly referred to by this wording." Applicant responded by providing the required disclaimer.

The examining attorney, in a second Office action, withdrew the disclaimer requirement and issued a refusal under Section 2(a) of the Trademark Act, 15 U.S.C. §1052(a), on the ground that applicant's mark comprises immoral or scandalous matter. Registration under Section 2(a) was subsequently finally refused.²

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested.

As a preliminary matter, we must address an evidentiary issue. In its brief, for the first time, applicant makes reference to, but does not file a copy of, a news article about the online Oxford English Dictionary and requests that the Board take judicial notice of it.³ In addition, applicant invites the

² We note that applicant has not withdrawn the disclaimer and the disclaimer of WIFE BEATER remains of record.

³ Applicant characterizes this as "newly discovered" evidence; however, this "newly discovered" evidence is dated January 13, 2003, which is long prior to applicant's response of October 7, 2003 to the examining attorney's first Section 2(a) refusal. Further, the proper means for submitting newly discovered evidence, once an appeal is filed, would be with a timely request

Board to "see for itself" the use of the term "WIFE BEATER" on eBay. The Board will not take judicial notice of the news article or accept the invitation to "see for itself" the use of the term on eBay. See *In re Total Quality Group Inc.*, 51 USPQ2d 1474 (TTAB 1999). Not only is this material untimely, but, applicant would have had to make such material of record by submitting copies thereof in its response to the Office action. Thus, we have given this evidence no consideration.

Examining Attorney's Arguments

The examining attorney contends that the mark is scandalous and immoral in connection with the identified goods and, therefore, unregistrable because, even as used to identify t-shirts, the "primary meaning [of "wife beater"] to a substantial composite of the general public is that of domestic abuse." Brief p. 4. The examining attorney concedes that the evidence of record shows the use of the term as slang for a t-shirt; however, she contends that "the definition of the term 'wife beater' as a slang term for a T-shirt is inevitably tied to the offensive

for remand, as any new evidence must be considered by the examining attorney.

and scandalous meaning related to domestic abuse" such that any "purported 'innocuous' meaning is not innocuous at all because the term is forever linked to its vulgar origin of domestic abuse" (Brief pp. 4, 6); and that "[t]he slang version is not a separate distinct meaning, but rather the slang term embodies the primary meaning because it is inextricably bound to the characteristics of a person who engages in domestic abuse." Brief p. 10. Moreover, she argues that the slang term is not "known to all" and to "those who are not familiar with slang, the term 'wife beater' will only mean domestic violence." Id. She notes that "[u]nlike the situation in *In re Mavety*, which involved adult-oriented magazines that are purchased by a narrow segment of the United States adult population, t-shirts are marketed to, and purchased by, a cross-section of the United States adult population...[I]n addition, t-shirts are displayed in department stores and the like, in plain view of the general consuming public...[t]he market for applicant's goods is not limited to adults or limited in distribution channels." Brief p. 8. The examining attorney concludes that, in connection with t-shirts, the evidence "overwhelmingly demonstrates

that the primary meaning of the term 'wife beater' is vulgar to a substantial composite of the general public." Brief p. 8.

Examining Attorney's Evidence

In support of her position that "WIFE BEATER" when used in connection with t-shirts is scandalous within the meaning of Section 2(a), the examining attorney submitted (1) excerpts of articles retrieved from the Lexis-Nexis® database that use the word "wifebeater" to refer to spousal abuse, t-shirts, or both, (2) a print-out of the home page of the website www.wife-beaters.com and articles from online publications retrieved from a search of a computerized database regarding that website (The Spectator Online, May 11, 2001; Salt of the Earth, May 2001), (3) entries from an online discussion entitled "Wife Beater v. Tank Top" on the list forum "The Wordwizard Clubhouse" (www.wordwizard.com) regarding the origin of the word wifebeater used in connection with t-shirts, (4) excerpts of articles retrieved from computerized databases based on a search of the terms WIFEBEATER and DOMESTIC appearing in the same paragraph, and (5) excerpts of websites retrieved from

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the Internet based on a search of the term WIFE BEATER using the Google® search engine.

The following samples of the examining attorney's evidence in the form of excerpts of articles from the Lexis-Nexis® database and a computerized database, and an excerpt from the website freedictionary.com were submitted to show use of this word to describe spousal abuse, a certain type of t-shirt, and in some instances both:

He said he also would order his prosecutors to push harder to prosecute people accused of domestic abuse...That way, prosecutors could go after a wife beater in more cases, including some incidents where the victim recants.

Charleston Daily Mail, (August 4, 2003).

Only wife beaters have to worry about having their guns confiscated by provisions of state Senate Bill 919. This bill puts some teeth into Statute 50B regarding domestic violence.

The News & Observer, (Raleigh, North Carolina, June 10, 2003).

An end to some of the domestic abuse programs pioneered in Massachusetts courts means more wife-beaters, more wife-killers, more broken homes and less counseling that might turn around some of the batterers.

The Boston Herald, (July 2, 2002).

"Wifebeater(noun) 1. tank-style underwear shirts. Origin: based on the stereotype that physically abusive husbands wear that particular style of undershirt." The definition comes courtesy of wifebeaters.com, a site peddling the shirts that

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for some time have been commonly (if not exactly tastefully) referred to by the above name.

San Diego Union-Tribune, (April 17, 2001).

Wife beater, also wifebeater, and sometimes abbreviated as simply beater, is the politically incorrect slang term used in the United States to refer to a tank top style shirt when worn as a sole outer layer...The origin of the term is from the belief that the shirts are worn alone predominantly by men who beat their wives...

TheFreeDictionary.com, TheFreeDictionary.clmhttp://encyclopedia.thefreedictionary.com/Wifebeater.

Two days later, a group of fans started reminding Kidd about a domestic-abuse incident with his wife. They chanted "wife beater" and wore a style of t-shirt that is crudely referred to as a wife beater.

The Boston Globe, (November 8, 2003).

The following samples of the examining attorney's evidence in the form of excerpts of articles from the Lexis-Nexis® database and an excerpt from the website freedictionary.com, were submitted to show the reaction of the public to the use of the term WIFE BEATER in connection with t-shirts:

Stephen Krensky of Lexington was reading the Jan. 9 review of the Avril Lavigne concert at the Orpheum when he was stopped by the description of what the young audience was wearing: "skinny ties, wifebeaters, loose trousers, and pin-straight hair." Wifebeater? For those who don't know, it's like a tank top or muscle shirt, only more hip.

"What bothered me is it conveys a certain acceptability for the term...It's not OK for the

Globe to be sanctioning this - I don't care how hip the term is."

Ombud note: Krensky's comment prompted in-house discussion about the role of a newspaper in echoing words that - accepted as they may be in pop culture - are rooted in stereotype or born of a misplaced glibness. In general, the Globe steers clear of such phrases, preferring, say, "boom box" to "ghetto blaster." In the case of "wifebeater" the post-publication consensus seems to be that, from now on, the phrase is best reserved for articles on domestic violence.

The Boston Globe, (January 20, 2003).

What's next, creating a moniker for a certain type of shirt a child molester or other socially reprehensible person wears? This fuss isn't 'media made.' Naming a white tank top a "wife beater" shouldn't be OK - if it were called a child molester, everyone would have a fit. Is our society seeing less of a wrong in domestic abuse?

Chicago Tribune p. 27 (December 23, 2002).

Some people find the term extremely offensive, as serving to legitimize spousal abuse; while others consider it harmless or even humorous. The term has been denounced by the National Organization for Women, who say it trivializes domestic violence. "The implication is that wife beating is not viewed as sufficiently serious to lift it above the level of something that's OK to joke about," says Kim Gandy, president of NOW. "Like all slang, its meaning is not known to all; so to those unfamiliar with the slang sense, wife beater will only mean a person who beats a wife."

TheFreeDictionary.com, TheFreeDictionary.clmhttp://encyclopedia.thefreedictionary.com/Wifebeater.

..."She wants to look raunchy so she's wearing a wifebeater." A what? Swiftly, disconcertingly, the new term has entered the fashion lexicon,

used to describe a ribbed white undershirt of the sort Stanley Kowalski might have worn. But its glib adoption, particularly by those under 25, doesn't always sit well with people who associate "wifebeater" with something more vicious than a popular tank-style top.

...a 39-year-old woman was taken aback when, while trying on a green Army-style blouse, the young saleswoman casually offered, "That would look great with jeans and a wifebeater under."

...a student...who likes to wear the shirts, was looking around his family's apartment the other day, saying, "Where's my wifebeater?"...His mother...was appalled. "I got hysterical," she recalled...she forbade him to use the word again. [The student] said, "Don't you have a sense of humor?" [she said] "There's nothing funny about battering women"...

The debate...is typical of the differences between those who easily toss around 'wifebeater' and those who are offended by it...

But those who use the term insist that it is not meant to demean women or condone domestic violence; instead, they say, it playfully refers to a stereotype, conjuring lumpen brutes ranging from Ralph Cramden to Tony Soprano...Defenders of "wifebeater" say women use it ironically, just as some gay men and lesbians have appropriated "queer," undermining the power of a slur to wound them...

Others, however, do not see the humor. They point out that women using "wifebeater" as a term of empowerment are not identifying with victims of domestic violence but with abusers. And now that the term has seeped into the mainstream, it has been picked up by many who are heedless of its layers of meaning... "I think it's crazy to teach a consumer to associate abuse with fashion."

Andrea Dworkin, the feminist writer, argued that changing the meaning of "wifebeater" had

consequences for how the crime of domestic violence is perceived. "To have 'wifebeater' used in such an insidious way means that young women who grow up with the word referring to a piece of apparel will not understand the sense of horror evoked by the language," she said. "They will not understand the real meaning of the word and the value of a woman's life."

Mary Alice Stephenson, the fashion director of Marie Claire magazine, said she likes the style but abhors the slang term for it.

The New York Times, (April 22, 2001).

The examining attorney also submitted a copy of an Internet web page of a third-party company that markets t-shirts under the moniker WIFEBEATER at www.wife-beaters.com. The page displays a woman being spanked by a man, offers a free t-shirt for convicted wifebeaters, and provides the following definition of its product: "wifebeater (noun) 1. tank-style underwear shirts, Origin: based on the stereotype that physically abusive husbands wear that particular style of undershirt." The shirt, as it appears on the web page, and an excerpt reacting to the above-described website from the online publication "Salt of the Earth," appearing at <http://salt.claretianpubs.org.com> are shown below.



Wife-Beater T-Shirts sells white tank top undershirts with the words "Wife Beater" printed across the chest. The 3-month-old company provides a special discount—a second shirt for half price—to customers who can prove they have abused their wives."

It's just a fashion trend for high school, college guys," Doolin says, "The site is a humorous site; it's not meant to condone violence."

But Dads and Daughters, a national organization founded to improve the relationships between fathers and daughters, doesn't see it that way. It has launched a protest of Wife-Beater T-Shirts in hopes of shutting down the company. "The biggest thing is raising awareness that there are people out there willing to make money off the most horrible things - destroying our children's self esteem and mocking rape and domestic violence. We as consumers have to speak up about this."

"Wife-Beater must immediately stop selling these shirts," says Joe Kelly, Dads and Daughters executive director. "They convey a woeful lack of understanding about the horrendous price our families - especially our children - pay for domestic violence."

Both Dads and Daughters and the NCADV [National Coalition Against Domestic Violence] are asking the public to complain to Wife-Beater T-Shirts and demand the halt of it sales.

Salt of the Earth, Social Justice News, (May 2001)
<http://salt.claretianpubs.org.com>.

Finally, the excerpts from an online discussion entitled "Wifebeater v. Tank Top" from the list forum "The Wordwizard Clubhouse" (www.wordwizard.com),

include the following statements from two participants:

It's called wife beater because everytime you see a guy getting arrested for beating his wife, you'll see them with those tank tops.

Whatever the origin, the fact that people are COMFORTABLE saying "wifebeater" so freely is disturbing. I counsel adolescent girls and teach them about abusive relationships. How dare we use this word freely as if it were not a HORRIBLE thing to be: I have asked my students to substitute "wife-lover" which any self-respecting woman or man would do the same. Language is what it is because of all of our contributions. Do we really want to contribute to perpetuating nasty words/thoughts in our daily vocabulary? No thanks.

The Wordwizard Clubhouse, Wife Beater v. Tank Top, www.wordwizard.com.

Applicant's Arguments

Applicant, in urging reversal of the refusal, argues that the examining attorney has not met her burden of establishing that the term WIFE BEATER is scandalous. Applicant contends that the mark W.B. WIFE BEATER when applied to t-shirts "does not consist of 'immoral' or 'scandalous' matter under section 2(a) of the Lanham Act, since the 'WIFE BEATER' component of the mark is descriptive of tank-style underwear shirts, and descriptive terms cannot also be deemed scandalous or immoral." Brief p. 2. Applicant argues that "wife beater" has "inoffensive definitions" when

viewed in the "proper context of the marketplace [which] is that of sales of tank-style t-shirts."

Brief p. 3. Further, applicant claims that the examining attorney's Internet evidence is unreliable because her search strategy was not limited to the use of the term "wife beater" in connection with the relevant clothing terms, but, rather, included the term "domestic," thus "skewing" the results.

Applicant states that "insofar as uncovering evidence of 'contemporary attitudes,' the examining attorney suggests that various women's groups might be offended by the terms' use on such t-shirts, but fails to offer hard proof of the same" and that one website excerpt with a "social justice bent does not, in any fashion, reflect the feelings of a substantial composite of the general public."⁴ Brief p. 10. In addition, applicant points out that the examining attorney initially found

⁴ In its October 7, 2003 response to the Office action, applicant concedes the origin of the term WIFE BEATER in connection with t-shirts: "The origin of this particular context is that of a stereotypical slovenly individual often clad only in an undershirt and pants, consuming alcoholic beverages, engaged in no useful pursuits, ill-tempered, and inclined toward domestic violence. In short, a picture of a Ralph Kramden or Stanley Kowalski type character ... The applicant herein is not promoting domestic violence, but rather making an ironic use of a stereotype that has been promoted by the costuming of stereotypical characters that might or might not be inclined toward physical violence or spousal abuse." Applicant's Response p. 2 (October 7, 2003).

the mark to be merely descriptive and required a disclaimer, thus evidencing that the term 'wife beater' "has already migrated from 'connotation' or 'slang' to 'denotation' or 'definition.'" Brief p. 6. Finally, applicant argues that, at a minimum, an ambiguity exists as to the "propriety of using WIFE BEATER to refer to a white, ribbed, tank-style undershirt" and resolution should be left to the public by way of opposition. Brief p. 13.

Applicant's Evidence

In support of its position, applicant submitted (1) the results of an Internet search using the Dogpile® search engine based on a search of the word "wifebeater," (2) an excerpt from the website "Online Slang Dictionary" at www.ocj.berkeley.edu and (3) an excerpt from the website "Slangssite.com." at www.slangsite.com.

The excerpts from the two online slang dictionaries have the following entries for WIFE BEATER:

Wife-beater n 1. a sleeveless undershirt.
Origin: before wearing a wife-beater as one's only shirt became a popular style, the stereotype existed that they were worn primarily by alcoholics or people who were too poor to buy outer shirts. One stereotypical American image of an alcoholic is someone wearing an undershirt

and beating their wife. ("All the thugs wear wife-beaters.")

Online Slang Dictionary, www.ocj.berkeley.edu

Wife-beater: 1. Newcastle Brown Ale. 2. The sleeveless undervest as favoured by the redneck community. Example: Bottle of wife-beater please. Ah, I see your dad is wearing his wife-beater.

Wifebeater: a wife beater is one of those tank tops for men and are usually white.

Slangsite.com - The Slang Dictionary, www.slangsite.com⁵

The following are examples of the results of the Internet search on the Dogpile® search engine for the word "wifebeater" in connection with t-shirts:

Texas Map "Wifebeater" Tank with Pink Rhinestones from Frisk, Classic "wife-beater" white cotton tank...

MulletMan.com WifeBeater Tshirts, trailer trash tshirts

Severed Threads Wifebeater For Sale: Whether you call them wife beaters, tank tops, or A- tees, I think we can agree these timeless under shirts will never go out of style...

DKNY Jeans Signature Ribbed Wifebeater Dr. Jays, Don't get a farmer's tan this summer - let those shoulders you've been toning at the gym see the light!

Senate Wifebeater Top at Inline Warehouse

⁵ We note that the relevance of this particular reference to public perception in the United States is in doubt inasmuch as the use of the term "undervest" rather than "undershirt" and the spelling of "favoured" indicates that this is, most likely, from

Your large source of rock memorabilia and merchandise, US concert posters, wifebeater, wind resistant lighter...

Wife Beater T-shirts for the Baby, "Wife Beater" Tank Tops Mensstuff® has compiled the following information on tank tops for wife beaters and the wives who have been beaten. The wife in this picture looks like she has a metal bar through her left bicep.

Rockmarch.com - Metallica "Wifebeater" Tank - XL

Need: WifeBeater/Thin Tank Tops

Wifebeater, Godsmack Tank Top, Adult, White Ribbed Stretch Fit...

Analysis

Registration of a mark which consists of or comprises immoral or scandalous matter is prohibited under Section 2(a) of the Trademark Act. Our primary reviewing court, the U.S. Court of Appeals for the Federal Circuit, has noted that the burden of proving that a mark is scandalous rests with the USPTO. *In re Boulevard Entertainment, Inc.*, 334 F.3d 1336, 1339, 67 USPQ2d 1475, 1477 (Fed. Cir. 2003) *citing In re Mavety Group, Ltd.*, 33 F.3d 1367, 31 USPQ2d 1923 (Fed. Cir. 1994). Further, the court stated as follows:

In meeting its burden, the PTO must consider the mark in the context of the marketplace as applied to the goods described in the application for registration. [citation omitted] In addition,

a British source. Neither the applicant or the examining attorney has addressed this issue.

whether the mark consists of or comprises scandalous matter must be determined from the standpoint of a substantial composite of the general public (although not necessarily a majority), and in the context of contemporary attitudes, [citation omitted], keeping in mind changes in social mores and sensitivities.

In re Boulevard Entertainment, Inc., 334 F.3d 1336, 1339, 67 USPQ2d 1475, 1477. See also *In re McGinley*, 660 F.2d 481, 485, 211 USPQ 668, 673 (CCPA 1981).

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*, 33 F.3d 1367, 1371, 31 USPQ2d 1923, 1925 (Fed. Cir. 1994) citing *In re Riverbank Canning Co.*, 95 F.2d 327, 37 USPQ 268 (CCPA 1938).

We first address the meaning of WIFE BEATER in connection with the identified goods, namely t-shirts.

It is clear from the numerous excerpts of articles and websites submitted by the examining attorney that the ordinary meaning of the term WIFE BEATER is a person who engages in spousal abuse and that, in connection with this meaning, the term has a very negative connotation, which applicant does not contest.

The evidence also establishes that WIFE BEATER has become a slang term referring to a style of t-shirt; and that even in connection with t-shirts, the term WIFE BEATER evokes the connotation of spousal abuse. Applicant does not appear to contest this either. Rather, applicant argues that the term means t-shirts in connection with t-shirts.

This leads us to the next question in our analysis: whether the evidence of record is sufficient to show that a substantial composite of the general public finds use of the term WIFE BEATER in connection with t-shirts "scandalous" within the meaning of Section 2(a). As previously noted, we must make this determination not in isolation, but in the context of the goods in the marketplace and in view of contemporary attitudes. Here, there are a substantial number of excerpts from recent articles and Internet websites that reference spousal abuse specifically in connection with the goods in question, and include numerous statements from a wide range of individuals and organizations expressing outrage and moral indignation about the use of the term WIFE BEATER in connection with t-shirts. The individuals quoted

include, to name just a few, fashion editors, journalists, writers, mothers, and interior designers.

Additionally, the president of the National Organization of Women, speaking on behalf of this national organization, denounced use of the term in this manner; The Boston Globe, a noted newspaper, stated that it would not use this term in connection with t-shirts, in response to reader complaints that it was offensive; and Dads and Daughters and The National Coalition Against Domestic Violence have objected to one company's use of this term in connection with t-shirts on the ground that the company takes advantage of the spousal abuse connotation of WIFE BEATER in its marketing campaign.

To be sure, the record also shows that some members of the public (not surprisingly, younger members) find use of this term with t-shirts to be humorous rather than offensive. Case law specifically tells us, however, that a substantial composite need *not* be a majority.

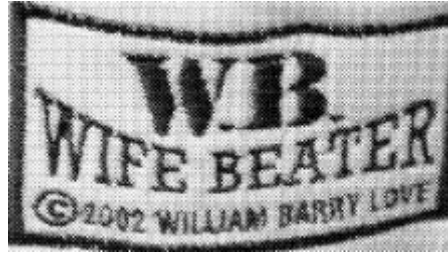
In the final analysis, while the record shows some part of the public may use this term in connection with t-shirts without flinching, clearly, the record also shows that a substantial composite of

the general public are offended by use of this term in connection with applicant's identified goods and that this term has not shed its connotation of spousal abuse when used with t-shirts such that it would only evoke a tank style t-shirt and contain no offensive innuendo as to spousal abuse.

We do not find the arguments and cases cited by applicant to be persuasive of a different result. In particular, the evidentiary record in this case is easily distinguished from the record in *In re Mavety Media Group*, 33 F.3d 1367, 31 USPQ2d 1923 (Fed. Cir. 1994) (BLACK TAIL found not scandalous for adult magazines) and *In re Hershey*, 6 USPQ2d 1470 (TTAB 1988) (BIG PECKER BRAND found not scandalous for t-shirts). In *Mavety* and *Hershey*, the dictionary notations of record conflicted as to whether the respective terms TAIL and PECKER were vulgar, and there was no evidence of public perception of the respective terms. Additionally, the record in *In re Hershey* included specimens of use that showed the mark appearing next to the head of a chicken, thus connecting the word to the clearly non-vulgar meaning of the term, namely a bird's beak. In the case before us, the additional meaning of WIFE BEATER is of a

tank-style t-shirt, but this meaning is derived from, and equally evocative of, the ordinary meaning of WIFE BEATER as one who engages in spousal abuse. It is this connection that a substantial composite of the general public finds offensive as shown by the evidence of public perception contained in this record.

Contrary to applicant's contention, our conclusion is consistent with *In re Old Glory Condom, Corp.*, 26 USPQ2d 1216, 1220 (TTAB 1993), where the Board stressed that "whether applicant's mark would be likely to offend must be judged not in isolation but in the entire context of the mark's use." In that case, the Board reviewed the packaging used for applicant's goods, finding that the packaging showed the "seriousness of purpose" of the use. Here, the specimens show the mark W.B. WIFE BEATER applied on the outside of the bottom of the t-shirt, beneath which appears a small copyright notice including the name William Barry Love.



To the extent the specimen of use may provide us with pertinent information as to how it would be perceived by the public, as noted above, the evidence of record demonstrates that a substantial composite of the public is offended by use of the word WIFEBEATER displayed on a t-shirt. Moreover, considering the mark in its entirety, the initials or acronym, W.B., do not avoid the offensive connotation of WIFE BEATER as it appears on applicant's t-shirt.⁶

With regard to applicant's argument that a descriptive term cannot be scandalous under Section 2(a), we know of no statutory language or case law for the proposition that descriptiveness obviates scandalousness, nor has applicant cited any.

With regard to applicant's argument that the examining attorney's evidence is flawed because she

⁶ In fact, it is more likely that the W.B. will be perceived as an acronym for WIFE BEATER, and, thus, reinforce the term, than it is that W.B. will be perceived as the initial letters of part of the name in the copyright notice shown in the specimens of record.

did not limit her evidence to use of the term WIFE BEATER only in connection with t-shirts, we note that, in addition to evidence pertaining to spousal abuse in general, the examining attorney also submitted a significant amount of evidence indicating the general public's attitude toward use of the term WIFE BEATER in connection with t-shirts. Moreover, the examples pertaining more generally to spousal abuse serve to give the full context and connotation of this term as it is used in society today, which the evidence has shown is clearly relevant to its connotation in connection with t-shirts.⁷

Finally, while applicant argues that if the Board has doubts as to whether the examining attorney has established that the mark is scandalous or immoral, any such doubt should be resolved in favor of

⁷ The cases cited by applicant are distinguished from the instant case by the absence of evidence of public perception and attitudes in those cases. *In re Old Glory Condom Corp.*, 26 USPQ2d 1216 (TTAB 1993) (record did not contain evidence of the marketplace in connection with the identified goods, and in fact contained evidence that the goods were marketed with a "seriousness of purpose.") *Id.* at 1220; *In re Over Our Heads, Inc.*, 16 USPQ2d 1653 (TTAB 1990) (conflicting dictionary notations regarding vulgarity); *In re Hepperle*, 17 USPQ 512 (TTAB 1972) (no mention of evidence or standard to be met); *In re Madsen*, 180 USPQ 334 (TTAB 1973) (no mention of evidence); *In re Leo Quan, Inc.*, 200 USPQ 370 (TTAB 1978) (combination of dictionary definitions of individual terms Bad and Ass insufficient).

applicant, the majority writing this opinion have no such doubt. This case is distinguishable from *In Over Our Heads Inc.*, 16 USPQ2d 1653 (TTAB 1990), wherein the Board resolved its doubt regarding the scandalous nature of a mark in favor of publication of the mark. In that case, the applicant sought to register the mark MOONIES with a buttocks design and the examining attorney issued a refusal on the basis that the mark comprises scandalous matter which disparages The Unification Church founded by the Reverend Sun Myung Moon. It was not the word MOONIES that was considered scandalous or derogatory but rather the use of that word in combination with the design and the Board found that use of this mark with dolls, the identified goods, would be perceived as the doll "mooning" rather than referencing the church. Moreover, there was no evidence of public perception of the mark in connection with the identified goods. Here, there is a significant amount of evidence establishing that a substantial composite of the general population find the term WIFE BEATER to be offensive, and specifically when used in connection with t-shirts. Further, there are no conflicting standard dictionary definitions.

At a minimum, the evidence of record sets out a prima facie case that a substantial composite of the general public finds this term offensive within the meaning of Section 2(a) when used in connection with t-shirts. Applicant's rebuttal to that evidence consisting of an excerpt from an online slang dictionary site that references the origin of the term in connection with people who beat their wives, and a handful of results from a search engine listing websites where a consumer can purchase a "wifebeater," including one site that includes the promotion "tank tops for wife beaters and the wives who have been beaten" is not sufficient to overcome the examining attorney's prima facie case.

Decision: The refusal to register under Section 2(a) of the Trademark Act is affirmed.

Seeherman, Administrative Trademark Judge, dissenting:

I respectfully dissent from the majority's conclusion that applicant's mark is scandalous because of the inclusion of the descriptive words WIFE BEATER in the mark.

The question here is not whether people find the concept of spousal abuse offensive, or whether the term WIFE BEATER, taken alone, has a negative connotation. The question is whether the term WIFE BEATER, as applied to t-

shirts, is scandalous. See *In re Hepperle*, 175 USPQ 512 (TTAB 1972) (ACAPULCO GOLD not scandalous as applied to suntan lotion, despite the fact that it is a synonym for marijuana). It is the Office's burden to prove that, in the context of the marketplace, a substantial composite of the general public would find WIFE BEATER scandalous as applied to t-shirts. *In re Mavety Media Group Ltd.*, 33 F.3d 1367, 31 USPQ2d 1923 (Fed. Cir. 1994), citing *In re McGinley*, 660 F.2d 481, 485, 211 USPQ 668, 673 (CCPA 1981).

The record is clear that WIFE BEATER is a descriptive term for a type of sleeveless t-shirt. The examining attorney found this to be the case when she required a disclaimer of the term, and applicant has acknowledged it by submitting such a disclaimer. Further, the majority has found that WIFE BEATER is a slang term referring to a style of t-shirt (p. 18).⁸

The fact one of the meanings of a word is offensive is not sufficient to find a term scandalous, if that word also

⁸ As the majority notes, the definitions of "wife beater" as a t-shirt all come from non-standard dictionaries. However, there is no question that "wife beater" has the meaning of a sleeveless t-shirt. This meaning has been acknowledged by applicant, the examining attorney and the majority, and it is demonstrated by the record. The fact that applicant and the examining attorney have submitted excerpts from slang and on-line dictionaries appears to be more a function of the relatively new meaning for this term, and the fact that it takes some time for new editions of print dictionaries to be issued, than an indication that "wife beater" does not have a recognized meaning as a type of t-shirt.

has non-offensive meanings. See *In re Mavety, supra*, in which BLACK TAIL was found to be not scandalous for adult magazines because TAIL had a dictionary meaning of "buttocks" or the "hindmost or rear end" as well as the vulgar meaning of a "female sexual partner"; Cf. *In re Boulevard Entertainment Inc.*, 334 F.3d 1336, 67 USPQ2d 1475 (Fed. Cir. 2003) (JACK-OFF found to be scandalous where dictionary definitions uniformly characterize the word as an offensive or vulgar reference).

The majority takes the position that, even used descriptively as a term for a t-shirt, WIFE BEATER is scandalous because it retains its offensive meaning of spousal abuse. Some of the evidence supporting this position comes from the website of a third party that sells wife beater t-shirts, and which contends that the origin of the term for shirts is "based on the stereotype that physically abusive husbands wear that particular style of undershirt." www.wife-beaters.com. Needless to say, there is no particular style of dress that is worn by men who abuse their wives, and the problem of spousal abuse is not limited to a particular ethnic group or socio-economic class. The fact that a third party's marketing efforts may have crossed the line of acceptability, and have drawn fire from Dads and Daughters and other organizations, goes not

to whether WIFE BEATER per se is a scandalous term for t-shirts, but whether a third party is using the term in a scandalous manner. Cf. *In re Old Glory Condom, Corp.*, 26 USPQ2d 1216, 1220 (TTAB 1993), (OLD GLORY CONDOM CORP. and design of condom decorated as flag not scandalous for condoms, the evidence surrounding use of mark showing a seriousness of purpose). There is no evidence of record that applicant is using the term WIFE BEATER, in either its mark or its marketing materials, as anything other than a descriptive term to identify the style of its t-shirts.

After reviewing the record in its entirety, I believe that the evidence is not sufficient to demonstrate that a substantial composite of the general public considers WIFE BEATER, used in connection with t-shirts, to be scandalous within the meaning of Section 2(a) of the Statute.

Some of the evidence submitted by the examining attorney shows merely that WIFE BEATER for t-shirts is "a politically incorrect slang term,"⁹ or is not in the best of taste [the shirts have "for some time been commonly (if not exactly tastefully) referred to by the above name [wife beater]."¹⁰ "The Boston Globe," in explaining its decision

⁹ TheFreeDictionary.com.

¹⁰ "San Diego Union-Tribune," (April 17, 2001).

not to use the term in future articles, refers to it in the same manner as "ghetto blaster."¹¹ However, although a term may be in bad taste or politically incorrect, that does not mean that it 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*, *supra* at 33 F.3d 1371, 31 USPQ2d 1925 (Fed. Cir. 1994) quoting *In re Riverbank Canning Co.*, 95 F.2d 327, 37 USPQ 268 (CCPA 1938).

More importantly, the evidence of record clearly shows that there are many who do not consider the term WIFE BEATER, when applied to t-shirts, to have any sort of negative connotation. Rather they regard it as a neutral term that merely describes a type of shirt, or they consider it to be a jocular reference. Thus, as reported by the majority, The FreeDictionary.com says that, while some find the term extremely offensive, "others consider it harmless or even humorous."

"The New York Times"¹² states that "the new term has entered the fashion lexicon, used to describe a ribbed

¹¹ January 20, 2003.

¹² April 22, 2001.

white undershirt" and "that the term has seeped into the mainstream," reporting that, in helping a customer, a "young saleswoman casually offered, 'That would look great with jeans and a wifebeater under.'" That same article, extensively quoted by the majority, indicates that there is a debate about the acceptability of the word. The online discussion entitled "Wifebeater v. Tank Top," also reported in the majority opinion, quotes one person as recognizing (and being disturbed by) "the fact that people are COMFORTABLE saying 'wifebeater' so freely." (emphasis in the original). Most of the excerpts from the Dogpile search also appear to use wife beater as a merely descriptive term for t-shirts, without any indication that it may be offensive. See, for example, "Texas Map 'Wifebeater' Tank with Pink Rhinestones from Frisk, Class 'wife-beater' white cotton tank"; "Severed Threads Wifebeater For Sale: Whether you call them wife beaters, tank tops, or A- tees, I think we can agree these timeless under shirts will never go out of style"; "Need: WifeBeater/Thin Tank Tops".

Thus, while I accept the majority's view that WIFE BEATER for t-shirts has an offensive connotation for some people, there is also substantial evidence that, to others, it does not.

As a result, I do not think that the Office has met its burden of showing that the term is scandalous to a substantial composite of the general public. At the very least, the evidence of record is sufficient to raise doubt about whether WIFE BEATER is scandalous. Accordingly, I think that we should follow the practice previously enunciated by the Board in *In re Over Our Heads, Inc.*, 16 USPQ2d 1653, 1654-55 (TTAB 1990) and quoted with approval by the Court in *In re Mavety*, i.e., that we should resolve this issue "in favor of [the] applicant and pass the mark for publication with the knowledge that if a group does find the mark to be scandalous..., an opposition proceeding can be brought and a more complete record can be established."

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