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## 10 **RESPONSE TO OFFICE ACTION**

11 This Response to Office Action is offered in reply to the Office Action taken on February  
12 17, 2011, regarding Serial Number 85165352, in which the examining attorney rejected the  
13 application under Section 2(a) of the Lanham Act.

### 14 **I. INTRODUCTION**

15 The particular publication the Applicant seeks to protect is the proposed Corbin Fisher  
16 University ("CFU") mark because of its use of a line-art logo in the shape of a phallic tower. See  
17 Exhibit A.

18 The blanket theme of the rejection is the Examiner's statement:

19  
20 *"The depiction of male genitals in connection with adult entertainment*  
21 *services is shocking to the sense of decency or propriety. While the applicant*  
22 *has indicated in the drawing description that the design is of a "tower," the*  
23 *mark clearly identifies male genitalia because of the circular design at the*  
*base of the design and the shape of the design at the top. None of these*  
*elements are present in a traditional design of a tower or obelisk."*  
24 (Office Action at 2).

25 The Applicant respectfully challenges this characterization of the symbol of a "traditional  
26 design of a tower or obelisk" and the determination that "the mark is "shocking to the sense of  
27 decency or propriety." (Office Action at 2)

1           **II.     PHALLIC IMAGERY HAS BEEN A CONSTANT FORM OF**  
2           **EXPRESSION SINCE THE DAWN OF MAN AND THUS NOT**  
3           **SHOCKING TO THE SENSE OF DECENCY AND PROPRIETY.**

4           Admittedly, the CFU Tower is phallic in nature. Phallic symbols are now, and have  
5 always been, common in the society of man as an identifier of fertility. Furthermore,  
6 *conventional* towers and obelisks are intentional derivatives of a phallus – meant to portray  
7 strength, fertility and power.<sup>1</sup> The Applicant should not be denied the right to protect these  
8 Alpha-male characteristics just because the USPTO feels threatened by them. After all, America  
9 is an Alpha nation, and such a Beta position cuts against the very fabric of the symbolism that  
10 tells the tale of the American experience.

11           **1.     The Symbolism of the Shaft.**

12           It is common knowledge within the psychological field that the phallus represents male  
13 qualities. While this may be “*shocking to the sense of decency and propriety*” to some, this is  
14 not the mentality of a substantial composite of society at large. Naturally, there will always be a  
15 small majority of people who will reach for their clutching-pearls and dramatically cast  
16 themselves upon their fainting divan at the mere suggestion of anything to do with sexuality.  
17 However, Section 2(a), as misguided as it might be, was not enacted to protect the eggshell-frail  
18 sensibilities of a few erotophile outliers.

19           No intro to philosophy course would be complete without exposure to the writings of  
20 Sigmund Freud and his phallic symbolism in dreams, later echoed by Jacques Lacan’s *Ecrits: A*  
21 *Selection*. The basic premise of both Freud and Lacan, is that there is a difference between  
22 “being” and “having” a phallus. Men are seen as “having” the phallus while women are seen to  
23 “being” the phallus. Furthermore, both highly regarded forefathers of psychology state the  
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<sup>1</sup> Hargrave Jennings, *Phallicism, Celestial and Terrestrial, etc.*, pp. 23, London, George Redway, 1884.

1 symbolic nature of the phallus as the concept of being the “ultimate man.”<sup>2</sup> The proposed Mark  
2 is a tower and all towers are in fact phallic symbols. The rejection, if left to stand, would operate  
3 to ban any tower-imagery for the Principal Register.

4 In Judith Butler’s seminal work, *Gender Troubles*, she states “[t]he law requires  
5 conformity to its own notion of ‘nature’. It gains its legitimacy through the binary and  
6 asymmetrical naturalization of bodies in which the phallus, though clearly not identical to the  
7 penis, deploys the penis as its naturalized instrument and sign.”<sup>3</sup> In Butler’s later work, *Bodies*  
8 *that Matter*, she expands on this notion. Butler notes that if, as Freud enumerates, a set of  
9 analogies and substitutions that rhetorically affirm the fundamental transferability of the phallus  
10 from the penis elsewhere, then any number of other things [such as towers] might come to stand  
11 in for the phallus.”<sup>4</sup> Clearly, the logic of the present rejection sweeps too broadly, and its  
12 premise would cause the literal and figurative emasculation of everything.

## 15 **2. Our Phallic History.**

16 Mankind erected phallic symbols in its earliest days. The Hohle Phallus is 28,000 years  
17 old.<sup>5</sup> The phallus lost no popularity as the earliest civilizations developed, and it was ubiquitous  
18 in Ancient Egypt. In Egyptian mythology, the god Seth vivisected Osiris and scattered 14 pieces  
19 of his body throughout Egypt. Osiris’ wife, Isis, collected all of the pieces except his penis,  
20 which was supposedly swallowed by a fish. According to the myth, Isis erected a wooden  
21 replacement. Ever after, the phallus served as a symbol of male virility and agricultural fertility  
22 (Exhibit B). These representations eventually led to the proliferation of obelisks, symbolizing  
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25 <sup>2</sup> Felluga, Dino. "Modules on Lacan: On Psychosexual Development." *Introductory Guide to Critical Theory*. Jan.  
26 31, 2011. Purdue U. Aug. 16, 2011. <<http://www.purdue.edu/guidetotheory/psychoanalysis/lacandevlop.html>>.

27 <sup>3</sup> Butler, Judith (1999), *Gender Trouble: Feminism and the Subversion of Identity*. New York: Routledge. xxviii–  
xxix.

28 <sup>4</sup> Butler, Judith (1993). *Bodies That Matter: On the Discursive Limits of "Sex"*. New York: Routledge. pp. 95.

<sup>5</sup> Amos, Jonathan (2005-07-25). “Ancient phallus unearthed in cave”

(<http://news.bbc.co.uk/2/hi/science/nature/4713323.stm>). BBC News.

(<http://news.bbc.co.uk/2/hi/science/nature/4713323.stm>) Retrieved 16-08-2011.

1 fertility and prosperity as well as power and dominance.<sup>6</sup> To be Alpha means to invoke the  
2 power of the phallus.

3 Exaggerated and elongated phalluses were commonplace in Ancient Greek depictions of  
4 gods associated with fertility - Hermes, his son Pan, and Priapus among them. (Exhibit C). In  
5 modern times the city of Tyrnavos, Greece holds an annual Phallic festival accompanied by  
6 phallic events on the first day of Lent.<sup>7</sup> The undersigned has found no examples of any ill-  
7 effects upon the residents of Tyrnavos.  
8

9 Of course, phallocentrism is not entirely European. In Japan, the Mara Kannon National  
10 Shrine in Nagato, Yamaguchi is among the many fertility shrines still erect in Japan today, where  
11 phallic adoration is common and phallic keep-sakes and souvenirs can be purchased as fertility  
12 idols.<sup>8</sup> (Exhibit D).  
13

### 14 **3. Erecting the Phallus.**

15 The basis for rejection is flawed. Many high-profile structures would fit within the  
16 strangely contrived rule against invoking the imagery of phallus shaped buildings. One element  
17 of the mark that apparently offended the PTO was “the circular design at the base of the design  
18 and the shape of the design at the top. None of these elements are present in a traditional design  
19 of a tower or obelisk.” (Office Action at 2). One can only infer from the rejection that it is  
20 meant to imply that the “circular design at the base” represents testicles and the “shape of the  
21 design at the top” to represent the “dome” of the penis. It is important for the Examiner to keep  
22 in mind the aforementioned teachings of famed psychoanalysts – simply because a structure is  
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27 <sup>6</sup> Hargrave Jennings, *Phallicism, Celestial and Terrestrial, etc.*, pp. 23, London, George Redway, 1884

28 <sup>7</sup> *The Annual Phallus Festival in Greece*, (<http://www.spiegel.de/international/europe/0,1518,553070,00.html>). Der Spiegel, English edition, Retrieved on the 16-08-2011

<sup>8</sup> *The Mara Kannon National Shrine*, (<http://www.japanvisitor.com/index.php?cID=368&pID=1284>) . Retrieved 16-08-2011

1 phallic in nature, does not mean it is a penis. One may invoke the symbol of strength, the  
2 phallus, without it being a literal tallywhacker.

3 Representations of the phallus are commonplace in our culture. The contemporary tower  
4 and high-rise are a direct effort to echo the symbolism of the phallus and the obelisk.<sup>9</sup>

5 Internationally, it would appear that modern architecture purposely seeks to emulate the phallus.  
6 (Exhibit E). Even the Vatican is rife with phallic imagery. (Exhibit F). Should the Examiner  
7 miss the obvious analogue to the Applicant's mark, the photo also contains an obelisk in the  
8 forefront surrounded by a great many pillars – no doubt to symbolize the dominance of The Holy  
9 See's Church. In fact, the shape of Saint Peter's Square is in the exact shape of a phallus.  
10 (Exhibit G). Phallus shaped structures are so commonplace that it is certain that every city of  
11 any note on Earth has at least one specimen.  
12

13  
14 In the United States, aside from the obvious phallic representation of the Washington  
15 Monument in Washington D.C. (a symbol of honor for our first President), genital-like structures  
16 are commonplace and why would they not be in the most Alpha of nations. For instance, the  
17 famed Cathedral of Learning at the University of Pittsburgh is affectionately dubbed "The  
18 Phallus of Learning" by students. (Exhibit H).  
19

20 Should the Examiner's decision be upheld, the PTO would have to consider any  
21 trademark incorporating images of the State of Florida to barred under the new phallus  
22 prohibition. Aside from the obvious shape of the State of Florida – referred to as "America's  
23 wang" in The Simpson's episode # 245 - The Florida State House in Tallahassee has, according  
24 to the (faulty) decision of the Examiner, the profile of an erection.<sup>10</sup> The Applicant has provided  
25 an exhibit of the State House containing two "circular design[s] at the base of design" and a large  
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27

28 <sup>9</sup> Hargrave Jennings, *Phallicism, Celestial and Terrestrial, etc.*, pp. 23, London, George Redway, 1884.

<sup>10</sup> Groening, Matt, & Jen Kamerman. (2000). *Kill the Alligator and Run*. In James L. Brooks, *The Simpsons*. Los Angeles: 20<sup>th</sup> Century Fox Television.

1 shaft rising high into the air between them. (Exhibit I). While many people are regularly  
2 shocked at the events taking place in Tallahassee, there are no reported incidents of visitors to  
3 the State House suffering from seizures or screaming condemnation at the Florida State Capitol  
4 (at least not because of its architecture). Not even the “Sunshine State’s” notoriously socially  
5 conservative politicians have sought to change the building.  
6

7         We could go on forever in our survey of American phallic structures: The Coit Tower of  
8 San Francisco (Exhibit J), the Sunsphere in Knoxville (Exhibit K) and the Municipal Tower in  
9 Seattle (Exhibit L) among them. We use the phallus as a symbol of power, and prior to now, no  
10 government official has sought to disfavor such expression. The fact is, towers are, by  
11 definition, phalluses. Even the very building in which the USPTO expresses the phallic code.  
12 (Exhibit M). This newfound aghast reaction to the phallus is decidedly shocking.  
13

#### 14         **4. The Dome**

15         Should the Examiner place emphasis on the dome-like “design at the top” the Applicant  
16 can also offer voluminous evidence supporting the propriety of its Mark. Where the PTO sees a  
17 bell-end, the Applicant sees a frequent architectural device. The Nebraska State Capitol  
18 possesses a dome-like “shape of the design at the top.” (Exhibit N). Coit Tower in San Francisco  
19 fits within the Examiner’s curious definition of genitals, with its bell-like head. (Exhibit O). The  
20 iconic shape of One Hanson Place in Brooklyn, NY conspicuously and proudly proclaims its  
21 shaft and domed head. (Exhibit P).  
22  
23

24         Perhaps the best evidence the Applicant can provide to sure-up its position that the design  
25 is not scandalous is the proposed Tower of Invincibility. (Exhibit Q). The very basis for  
26 rejection the Examiner provides completely and accurately describes the Tower of Invincibility –  
27 “*While the applicant has indicated in the drawing description that the design is of a “tower,” the*  
28 *mark clearly identifies male genitalia because of the circular design at the base of the design and*

1 *the shape of the design at the top.*” The Tower of Invincibility will be built “as a permanent  
2 monument celebrating freedom, sovereignty, and peace in America.”<sup>11</sup> The mere thought of it  
3 brings the memorable song from *Team America, World Police* to the Red, White, and Blue  
4 Mind. The only thing scandalous in this case is the bizarre and arbitrary rejection of the Mark,  
5 and in this context it is as if we are reading a graphic account of the forcible castration of an  
6 American Bald Eagle.  
7

8 Corbin Fisher employs the imagery of an educational institution and towers of this nature  
9 have been used at campuses throughout the world. In fact, the pristine and serene campus of  
10 Stanford University is adorned with the very tower in which the Applicant based its own Mark,  
11 complete with the same “*shape of the design at the top.*” (Exhibit R). Surely it is not the  
12 position of the Examiner that only educational institutions with a certain pedigree are allowed the  
13 use of phallic clock towers.  
14

### 15 **III. THE ALLEGEDLY OBJECTIONAL MARK IS NOT SCANDALOUS**

16 The Examiner will note that the mark must be examined in the context of the current  
17 attitudes of the day.<sup>12</sup> It is under the lens of the moral values and mores of *contemporary* society  
18 in which the words must be viewed.<sup>13</sup>  
19

20 The fact is that when Section 2(a) was written, it was a different day and age. In 1905,  
21 matters of public morality were still reeling from neo-Puritanical Victorian influence. While  
22 America took a brief vacation back to those days during the collective insanity under “The Bush  
23 Years,” we certainly have grown up a bit since John Ashcroft covered up the breast of Lady  
24 Liberty. The moral values and mores of contemporary society have undoubtedly grown to  
25

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27 <sup>11</sup> Tower of Invincibility, (<http://www.towerofinvincibilitydc.org/>). Retrieved 16-08-2011.

28 <sup>12</sup> *In re Mavety Media Group Ltd.*, 33 F.3d 1367, 31 USPQ2d 1923 (Fed. Cir. 1994).

<sup>13</sup> *In re Thomas Laboratories, Inc.*, 189 USPQ 50, 52 (TTAB 1975) stating: “It is imperative that fullest consideration be given to the moral values and conduct which contemporary society has deemed to be appropriate and acceptable.”

1 tolerate line-art of a clock tower that is allegedly phallic in nature.<sup>14</sup> If Americans can tolerate  
2 anything, the Applicant believes that they can tolerate line-art without an attack of the vapors.

3 **1. The Relevant Marketplace**

4 Even if the Mark were *immoral* or *scandalous*, this determination should only be made  
5 “in the context of the marketplace as applied to goods or services described in the application.”<sup>15</sup>  
6  
7 Therefore, even if the Examiner believes that *phallic imagery* is still of such talismanic power  
8 that it would shock a substantial portion of the American public (a superstition that is dispelled  
9 above), then the Examiner could simply look at the *relevant* marketplace – instead of the  
10 marketplace as a whole. This approach is long-embraced in Trademark Law.<sup>16</sup> And, this  
11 approach is in line with other forms of regulation of expression. For example, in *Ginsberg v.*  
12 *New York*, the United States Supreme Court affirmed the conviction of a shopkeeper who sold  
13 pornography to a child.<sup>17</sup> However, this case embraced the notion that the marketplace in  
14 general (including children) could tolerate a bar to certain types of expression, while the  
15 marketplace consisting only of adults would not tolerate such restrictions.<sup>18</sup> The very same  
16 perspective was embraced by *Reno v. ACLU*.

19 *We are persuaded that the CDA lacks the precision that the First Amendment*  
20 *requires when a statute regulates the content of speech. In order to deny minors*  
21 *access to potentially harmful speech, the CDA effectively suppresses a large*  
22 *amount of speech that adults have constitutional right to receive and to address to*  
23 *one another. That burden on adult speech is unacceptable if less restrictive*  
24 *alternatives would be at least as effective in achieving the legitimate purpose that*  
*the statute was enacted to serve.*

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25 <sup>14</sup> For argument regarding the scandalous-less connotation associated with the term *boner* see section (B)(1) above.

26 <sup>15</sup> Quotation is from the Examiner’s initial rejection, but it cites the following cases: *In re Mavety Group Ltd.*, 33  
F.3d 1367, 1371, 31 USPQ2d 1923, 1925 (Fed. Cir. 1994); *In re Wilcher Corp.*, 40 USPQ2d 1929, 1930 (TTAB  
1996).

27 <sup>16</sup> See *In re Hershey*, 6 USPQ2d 1470 (“to determine whether a designation is properly refused as scandalous, the  
28 mark must be considered in the context of the marketplace as applied to the goods or services described in the  
application.”).

<sup>17</sup> 390 U.S. 629 (1968).

<sup>18</sup> *Id.* at 631.



1 With this in mind, if the Examiner is uncomfortable determining that we have, as a  
2 nation, embraced phallic imagery, then the Examiner may narrow the relevant marketplace to the  
3 internet and further restricted to adult entertainment on the internet.

4 **a. The adult internet community tolerates phallic imagery more than other**  
5 **segments of society.**

6 In the alternative, if the Examiner would like to narrow the marketplace from America in  
7 general to simply the American internet user, the Examiner will find that *phallic imagery* is even  
8 more accepted on the internet than in the IRL world. Given the relevant channels of trade in the  
9 descriptions of goods and services pursuant to the Applicant's application, the contours of the  
10 marketplace should be comfortably demarcated far from any territory where a potential viewer  
11 would find his use of *phallic imagery* to be scandalous.

13 **Production of DVDs, videotapes and television programs featuring adult**  
14 **entertainment; Providing an online adult website featuring photographs and**  
15 **videos in the field of adult entertainment; entertainment services in the**  
16 **nature of providing a website on the global computer networks featuring**  
17 **information in the field of adult entertainment; providing an online website**  
18 **of information comprising adult material and viewing thereof, and other**  
19 **adult entertainment related material.**

20 As illustrated in the description of goods and services, the Applicant's expressive activity  
21 is transmitted to a limited marketplace of consumers consisting of a consensual audience, all  
22 over the age of 18 years, desirous of receiving and enjoying the message conveyed by works  
23 relating to human sexual interest and sensual subtleties. In order to enter the site, the user will  
24 have to acknowledge the warning similar to the one present on the Applicant's sister site  
25 CorbinFisher.com:

26 *"This website contains images of naked men engaging in sex acts,*  
27 *including gay, sexually-oriented material. Leave now if you are offended*  
28 *by such material, or if you are under the age of 18, or if you live in a*  
*community where viewing or possessing adult material is illegal."*

1 This information is provided for a dual purpose – to demonstrate the fact that the relevant  
2 marketplace and channels of trade are constrained by the conditions above (herein the  
3 “Conditions”) and to demonstrate that this is not a mark that is distributed to a general audience,  
4 nor that it requires protection outside of the audience and marketplace delineated by the  
5 Conditions.

6  
7 It is well-established that determinations under trademark law hinge upon the definition  
8 of the relevant marketplace or “channels of trade.”<sup>19</sup> To enter the channel of trade for the  
9 Applicant’s goods and services, a potential customer will have ample fair warning that he or she  
10 is about to enter a realm of sexual expression. The relevant marketplace – limited by the  
11 description of services – is essentially the “red light district” of the online media world. In that  
12 realm, websites deal with sexual topics in a graphic and often degrading manner. Men are  
13 depicted as being used by other men, with an entire genre of adult entertainment devoted to man-  
14 on-man sex. This relevant marketplace is a marketplace where homosexual passion is found. In  
15 the relevant marketplace, a Google search for “gay porn” brings up 30,200,000 web pages  
16 devoted to the subject.<sup>20</sup> This marketplace can certainly handle line-art.

## 17 18 19 **2. The Relevant Marketplace Conclusion**

20 The fact is that in the United States, *phallic imagery* is hardly shocking. However, if the  
21 Examiner narrows the relevant marketplace to the internet, then *phallic imagery* lack any shock  
22 value. If the relevant marketplace is narrowed further to the world of adult entertainment, then a  
23 true penis is downright vanilla, to say nothing for this particular piece of inoffensive line-art. In  
24

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25  
26 <sup>19</sup> See, e.g., *M2 Software, Inc. v. M2 Communs., Inc.*, 450 F.3d 1378, 1383 (Fed. Cir. 2006) (no likelihood of  
27 confusion when identical marks were used to brand products in different channels of trade); *PC Club v. Primex*  
28 *Techs., Inc.*, 32 Fed. Appx. 576, 577 (Fed. Cir. 2002) (degree of care potential consumer will exercise when  
purchasing one product over another can mitigate likelihood of confusion); *Bell Laboratories, Inc. v. Colonial*  
*Products, Inc.*, 644 F. Supp. 542, 544 (D. Fla. 1986) (marketing channels used is operative to the likelihood of  
confusion analysis); *University of Georgia Athletic Association v. Laite*, 756 F.2d 1535 (11<sup>th</sup> Cir. 1985) (same).

<sup>20</sup> <http://www.google.com/search?hl=en&q=gay+porn&aq=f&aqi=g10&aql=&oq=>

1 *Sable Communications v. FCC*, the Supreme Court held unconstitutional a complete prohibition  
2 on the creation of “obscene or indecent communication” on the grounds that children needed to  
3 be protected from hearing such communications. The justification was that this restriction went  
4 too far, since it denied adults (the relevant market) access to the communication on order to  
5 shield the irrelevant market (children). Should the adult entertainment community have its  
6 commercial speech governed by the sensibilities of the 700 Club-watching public? Why not the  
7 other way around? The 700 Club is shocking and reprehensible to many, but if the First  
8 Amendment means anything, it means that the government must remain neutral in such  
9 determination.  
10

11  
12 Based on the above facts, and following the above-cited authority, the Examiner should  
13 find that the Applicant’s mark is generally accepted as a non-scandalous mark. In the  
14 alternative, the Examiner could find that on the internet, phallic imagery is neither scandalous  
15 nor immoral. Furthermore, as a fallback position, the Examiner should find that phallic imagery  
16 is neither scandalous nor immoral in the context of the relevant sub-market of online adult  
17 subject matter.  
18

#### 19 **IV. CONCLUSION**

20 The Applicant respectfully requests that the Applicant’s Mark proceed to registration on  
21 the Principal Register.

22 Date: August 17, 2011.

23 /s/ Marc J. Randazza  
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# EXHIBIT A



# EXHIBIT B



*Famous Photography*

# EXHIBIT C





# EXHIBIT D



# EXHIBIT E





# EXHIBIT F





# EXHIBIT G





# EXHIBIT H



# EXHIBIT I





# EXHIBIT J



# EXHIBIT K





# EXHIBIT L





# EXHIBIT M





# EXHIBIT N





# EXHIBIT O



# EXHIBIT P



# EXHIBIT Q





# EXHIBIT R

