

ESTTA Tracking number: **ESTTA564185**

Filing date: **10/09/2013**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85532448
Applicant	Manwin IP S.A R.L.
Applied for Mark	MOMSBANGTEENS
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Submission	Appeal Brief
Attachments	85-532,448 - Brief for Appellant (5603155).PDF(86282 bytes)
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Application of:)	BRIEF FOR APPELLANT
)	
Manwin/RK Collateral Trust)	Law Office No.: 103
)	(571) 272-9207
Serial No.: 85/532,448)	
)	Trademark Examining Attorney:
Filed: February 2, 2012)	Carolyn P. Cataldo
)	
Classes: 41)	Date: October 9, 2013
)	
Trademark: MOMSBANGTEENS)	
)	
)	

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I. Introduction.

Appellant, Manwin/RK Collateral Trust (hereinafter “Appellant”), hereby appeals from the Examining Attorney’s refusal to register the mark MOMSBANGTEENS on the grounds of likelihood of confusion. *See* Denial of Request for Reconsideration. Appellant disagrees with the Examining Attorney’s factual and legal conclusions, and respectfully requests that this Board reverse the Examining Attorney’s decision.

II. Statement of Facts.

On February 2, 2012, Appellant’s predecessor filed an application to register MOMSBANGTEENS. Appellant’s associated services are “Entertainment services, namely, providing a web site featuring photographic, audio, video and prose presentations featuring adult-oriented subject matter” (Class 41).

On May 17, 2012, the Examining Attorney issued an Office Action refusing registration based on Trademark Act Section 2(a) of the Trademark Act, because the applied-for mark allegedly consists of or includes immoral or scandalous matter. 15 U.S.C. §1052(a). Appellant filed a response explaining why MOMSBANGTEENS was not barred from registration, but on January 11, 2013, the Examining Attorney made her refusal final. Appellant requested reconsideration, citing additional reasons why registration should be allowed, but on August 8, 2013, the Examining Attorney denied that request.

III. Argument.

The Examining Attorney has refused registration of Appellant’s mark MOMSBANGTEENS on a single ground, that it allegedly consists of or comprises immoral or

scandalous matter under Section 2(a). The burden of proving that a mark is scandalous rests with the United States Trademark Office. *In re Mavety Media Group, Ltd.*, 33 F.3d 1367, 1371, 31 U.S.P.Q.2d 1923 (Fed. Cir. 1994). The undersigned respectfully disagrees that the Examining Attorney has met said burden.

A. As A Factual Matter, America Does Not Find The Term “MOMSBANGTEENS” To Be Immoral Or Scandalous.

Under Section 2(a), to be considered “scandalous,” a mark must be “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 the context of the marketplace as applied to goods or services described in the application. *In re Mavety*, 33 F.3d at 1371. The mark must be examined in the context of the current attitudes of the day. *Id.* at 1369; *see also In re Thomas Laboratories, Inc.*, 189 U.S.P.Q. 50, 52 (T.T.A.B. 1975) (“[I]t is imperative that fullest consideration be given to the moral values and conduct which contemporary society has deemed to be appropriate and acceptable.”). To the extent that the Examining Attorney contends that the term “bang” itself is immoral or scandalous, Appellant contends that she is in error because “bang” is a perfectly acceptable and non-offensive word, and even when there is some connection to sexual intercourse, “bang” is hardly viewed as being shocking or scandalous. Moreover, with response to the Examining Attorney’s conclusion that as a whole “the applied-for mark describes in vulgar fashion the act of older women having intercourse with younger persons between the ages of 13 and 19,” Appellant submits that the public does not deem sexual intercourse engaged in by older women to be vulgar.¹

¹ All performers on Appellant’s website are over the age of 18. *See* Ex. 8 to Response to Office Action.

1. Dictionary Definitions Are Not Dispositive.

The Examiner puts emphasis on the fact that one possible definition of “bang” is vulgar.

The Federal Circuit has, however, eschewed consideration of such labels:

While a standard dictionary may indicate how the substantial composite of the general public defines a particular word, the accompanying editorial label of vulgar usage is an arguably less accurate reflection of whether the substantial composite considers the word scandalous. Such labels are subject not only to differences in opinion among the respective publication staffs of particular dictionaries, but also to the potential anachronism of those opinions.

In re Mavety, 33 F.3d at 1373. Therefore, a handful of dictionary definitions of “bang” are not persuasive evidence that a substantial composite of the relevant community would view MOMSBANGTEENS as immoral or scandalous. This is borne out by the existence of a plethora of dictionary definitions attached to the Office Action that do not find “bang” to be scandalous. (See Exhibit to Office Action.)

2. The Examining Attorney Fails To Account For Alternative Definitions Of The Term “Bang.”

To the extent that the Examining Attorney contends that “bang” is *per se* immoral or scandalous, Appellant contends that the Examining Attorney fails to give its alternate meanings adequate weight. As stated by the Court of Appeals for the Federal Circuit in *In re Mavety*, 33 F.3d at 1373-74:

...[I]n addition to the vulgar definitions of “tail,” the standard dictionaries cited by the Examiner and the Board in this case also set forth nonvulgar definitions of “tail,” such as buttocks or the hindmost or rear end, that are equally applicable to define “tail” in the context of an adult entertainment magazine. In view of the existence of such an alternate, non-vulgar definition, the Board, without more, erred in concluding that in the context of the adult entertainment magazine, the substantial composite of the general public would necessarily attach to the mark BLACK TAIL the

vulgar meaning of “tail” as a female sexual partner, rather than the admittedly non-vulgar meaning of “tail” as rear end. In the absence of evidence as to which of these definitions the substantial composite would choose, the PTO failed to meet its burden of proving that Mavety’s mark is within the scope of Section 1052(a) prohibition.

As there are numerous alternative and equally applicable meanings of the term, the asserted refusal cannot be sustained. As specific evidence of its general acceptability and versatility in a non-suggestive context , we refer to various uses of “bang,” namely in the following:

- “Big Bang Theory” is a highly popular situation comedy television series broadcast by CBS that is the recipient of multiple awards.
- “Bang!” is a card game with a “Wild West” theme.
- “Chitty Chitty Bang Bang” is a 1968 movie recently released on DVD.
- “Kiss Kiss Bang Bang” is a 2005 movie starring Robert Downey Jr. and Val Kilmer.

See Group Exhibit 1 to Response to Office Action. These examples allude to a variety of different uses for the word “bang” and demonstrate that the word itself would not offend or shock general consumers in the United States in the year 2013.

3. “Bang” Is Frequently Used In Mainstream Media.

As further evidence of its acceptability, we refer to various uses of “bang” as either overt or implicit references to sexual intercourse in the mainstream media, none of which are deemed scandalous, shocking or offensive:

- “She Bangs” is a 2000 song by the recording artist Ricky Martin which reached Number 12 on the Billboard Hot 100 chart.

- “Cook to Bang: The Lay Cook’s Guide to Getting Laid” is a 2010 book published by Macmillan, advertised as “everyman’s guide to cooking your way into your date’s bed.”
- “Let’s Go Bang” is the title and lead single of an album by the recording artist and actress Jennifer Love Hewitt, released in 1995 by Atlantic Records.
- “Bang” is a men’s cologne introduced in 2010 by the fashion designer Marc Jacobs, accompanied by a provocative advertising campaign.
- “Mac Bangs Dennis’ Mom” is the title of a 2006 episode of the television comedy series “It’s Always Sunny In Philadelphia,” shown on the FX Network and starring Danny DeVito.
- “Chelsea Chelsea Bang Bang” is the title of a 2010 book by the author, comedian, and talk-show personality Chelsea Handler, described as “min[ing] her family, her sex life, her career, and her distinctively outrageous worldview to bring readers an outrageous no-holds-barred account of life on the ridiculous side.”

See Group Ex. 2 to Response to Office Action. These examples evidence that “bang,” even if used to reference or suggest sexual intercourse, does not offend or shock general consumers in the United States in the year 2013. See *In re Thomas Laboratories, Inc.*, 189 U.S.P.Q. at 52 (“[I]t is imperative that fullest consideration be given to the moral values and conduct which contemporary society has deemed to be appropriate and acceptable.”).²

² The Examining Attorney contends that “when viewing the plain language in the identification in the context of adult-themed websites some of which include the use of minors or individuals resembling minors, the mark is vulgar or scandalous as it serves to describe sexual acts between adults and teenagers.” Final Office Action at 3. Appellant submits that its website does *not* use “minors or individuals resembling minors;” that its website states that *all* performers on Appellant’s website are over the age of 18, see Ex. 8 to Response to Office Action; and that its applied-for identification is “entertainment services, namely, providing a web site featuring photographic, audio, video and prose presentations featuring *adult*-oriented subject matter” (emphasis added). As such, the law enforcement and children’s advocacy materials attached to the Final Office Action are irrelevant.

4. Given Its Multiple Meanings And Common Usage In the Mainstream Media, It Is Not Surprising There Are Numerous Third Party Registrations For “Bang” Derivative Marks.

As set forth above, the moral values and mores of contemporary society in the United States is not offended by the words “bang.” Indeed, the Trademark Office itself has issued numerous registrations for “bang” related marks, including:

- Reg. No. 3,885,808 for BANG YOU LATER (for “Entertainment services, namely, providing a web site featuring non-downloadable adult-themed photographs and videos”)
- Reg. No. 4,213,824, for BANG (for “Retail store services featuring magazines, books, DVDs, and adult novelty items”)
- Reg. No. 3,965,466 for BATTLE BANG (for “Entertainment services, namely, an on-going adult television series”)
- Reg. No. 3,158,753 for THE BANG (for “Entertainment in the nature of on-going television programs in the field of adult entertainment”)
- Reg. No. 2,810,145 for BANGBUS (for “Entertainment services, namely, providing adult entertainment photography and motion picture films on-line via the Internet.”)
- Reg. No. 3,310,838 for BANG BUS (for “Entertainment Services namely providing a website featuring, photographic, audio, video and prose presentations featuring adult entertainment.”)
- Reg. No. 3,751,866 for BANG BROS NETWORK (for “Entertainment services, namely, providing images, graphics, video, photographs and text in the field of adult entertainment via a global computer network.”)
- Reg. No. 3,751,869 for BANG BROS WORLD WIDE (for “Entertainment services, namely, providing images, graphics, video, photographs and text in the field of adult entertainment via a global computer network.”)
- Reg. No. 3,966,924 for BANGO (for “Adult sexual aids, namely, vibrating rubber rings for the penis, vibrators, condoms.”)
- Reg. No. 2,923,488 for BANGBROS (for “Entertainment services, namely, providing images, graphics, video, photographs and text in the field of adult entertainment via a global computer network.”)

See Group Exhibit 3 to Response to Office Action; Group Exhibit A to Request for Reconsideration. As such, there is precedent for not finding the word scandalous “per se,” and these third party registrations evidence that the relevant marketplace’s view – in this case, that the word “bang” is not immoral, scandalous, or vulgar. See *In re Thomas Laboratories, Inc.*, 189 U.S.P.Q. at 52.

5. The General Consuming Public Does Not Find The Act of Older Women Engaging In Sexual Intercourse With Younger Men To Be Vulgar.

In today’s world, not only does the general consuming public find the concept of older women having sexual intercourse with younger men to be acceptable, there are numerous commonly accepted terms to refer to this scenario. The word “milf” is a reference to an attractive and sexually active older woman, see Ex. 4 to Response to Office Action, and the term itself is featured prominently in popular culture, for example, in the *American Pie* series of movies. See Ex. 5 to Response to Office Action. Likewise, a “cougar” is an older woman who engages in sexual relations with younger men, and in that context is the title of a television show, see Ex. 6 to Response to Office Action, “Cougar Town,” that originally aired on ABC. See Ex. 7 to Response to Office Action.

B. Even If “MOMSBANGTEENS” Were Deemed Immoral Or Scandalous To The General Public, It Is Not Immoral Or Scandalous In The Relevant Marketplace.

Even if the term MOMSBANGTEENS were considered immoral or scandalous by some people in the public at large, the Trademark Office’s determination should only be made in the context of the marketplace as applied to services described in the application. *In re Mavety*, 33 F.3d at 1371; see also *In re Hershey*, 6 U.S.P.Q.2d 1470, 1471 (T.T.A.B. 1998) (“to determine whether a designation is properly refused as scandalous, the mark must be considered in the

context of the marketplace as applied to the goods or services described in the application”). Therefore, even if “bang” or MOMSBANGTEENS would shock a substantial portion of the American public, which as set forth above is not the case, the inquiry should not end there, as the Examining Attorney should look to the relevant marketplace rather than the American public as a whole.

Here, the services of the proposed mark are limited to the sphere of adult entertainment. Appellant’s mark is, therefore, seen by a subset of consumers, namely, an adult audience seeking adult content with an adult vocabulary. As that segment of the population is comfortable with and has an active interest in consuming adult-oriented materials, that marketplace would consider the word “bang” or the mark MOMSBANGTEENS to be rather tame. Moreover, a potential consumer of Appellant’s services will have ample warning that he is entering a world containing potentially explicit content. For example, prior to entering Appellant’s website, the user must agree to all of the following terms:

Please read and comply with the following conditions before you continue:

This website contains information, links, images and videos of sexually explicit material (collectively, the "Sexually Explicit Material"). Do NOT continue if: 1) you are not at least 18 years of age or the age of majority in each and every jurisdiction in which you will or may view the Sexually Explicit Material, whichever is higher (the "Age of Majority), 2) such material offends you, or 3) viewing the Sexually Explicit Material is not legal in each and every community where you may view it.

By choosing to enter this website you are affirming under oath and penalties of perjury pursuant to Title 28 U.S.C. 1746 and other applicable statutes and laws that all of the following statements are true and correct:

1.I have attained the Age of Majority in my jurisdiction;

2.The sexually explicit material I am viewing is for my own personal use and I will not expose any minors to the material;

3.I desire to receive/view sexually explicit material;

4.I believe that as an adult it is my inalienable constitutional right to receive/view sexually explicit material;

5.I believe that sexual acts between consenting adults are neither offensive nor obscene;

6.The viewing, reading and downloading of sexually explicit materials does not violate the standards of any community, town, city, state or country where I will be viewing, reading and/or downloading the Sexually Explicit Materials;

8.I understand that my use of this website is governed by the website's Terms which I have reviewed and accepted, and I agree to be bound by such Terms.

11.All performers on this site are over the age of 18, have consented being photographed and/or filmed, have signed model release and provided proof of age, believe it is their right to engage in consensual sexual acts for the entertainment and education of other adults and I believe it is my right as an adult to watch them doing what adults do;

12.The videos and images in this site are intended to be used by responsible adults as sexual aids, to provide sexual education and to provide sexual entertainment;

14.I understand that providing a false declaration under the penalties of perjury is a criminal offense; and

15.I agree that this agreement is governed by the Electronic Signatures in Global and National Commerce Act (commonly known as the "E-Sign Act"), 15 U.S.C. 7000, et seq, and by choosing to click on "I Agree. Enter Here" and indicating my agreement to be bound by the terms of this agreement, I affirmatively adopt the signature line below as my signature and the manifestation of my consent to be bound by the terms of this agreement.

See Ex. 8 to Response to Office Action, www.momsbangteens.com. The relevant marketplace, limited by the description of services, is essentially the red light district of the internet. Those consumers of would not find MOMSBANGTEENS to be immoral or scandalous. Rather, in this marketplace, the word “bang” is tame, as is the concept of sexual activity occurring between older women and younger, eighteen or nineteen-year-old men.

IV. Conclusion.

For all of the reasons set forth above, and in the record below, Appellant respectfully requests that the Board reverse the Examining Attorney’s refusal to register MOMSBANGTEENS.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that this correspondence is being transmitted electronically through ESTTA pursuant to 37 C.F.R. § 2.195(a) on October 9, 2013.

/s/ Alexa L. Lewis

Alexa L. Lewis