

This Opinion is not a
Precedent of the TTAB

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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 Left Nut Brewing Company, Inc.
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Serial No. 85935569
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Peter E. Morgan of Briskin, Cross & Sanford, LLC,
for the Left Nut Brewing Company, Inc.

Ellen Awrich, Trademark Examining Attorney, Law Office 116,
Christine Cooper, Managing Attorney.

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Before Bergsman, Shaw and Greenbaum,
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

The Left Nut Brewing Company, Inc. (“Applicant”) seeks registration on the Principal Register of the mark LEFT NUT BREWING CO.¹ in standard characters for “beers,” in International Class 32. Applicant disclaimed the wording “BREWING CO.”

¹ Application Serial No. 85935569 was filed on May 17, 2013, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1(b).

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(a) of the Trademark Act, 15 U.S.C. § 2(a), on the ground that the applied-for mark consists of immoral or scandalous matter.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal resumed. We reverse the refusal to register.

I. Preliminary Matter

Before proceeding to the merits of the refusal, we address a preliminary matter. Applicant, in its brief, objected under Trademark Rule 2.142 to evidence submitted by the Examining Attorney with her response to the Applicant's request for reconsideration filed with Applicant's appeal.² Applicant states that it did not address the evidence inasmuch as the Examining Attorney "did not make such evidence part of the record or allow Applicant to respond to the same prior to the appeal."³

The Examining Attorney's evidence is properly of record and has been considered by the Board. "When a timely request for reconsideration of an appealed action is filed (with or without new evidence), the examining attorney may submit, with his or her response to the request, new evidence directed to the issue(s) for which reconsideration is sought." TBMP § 1207.04; *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1201 (TTAB 2009) (evidence submitted in response to a request for reconsideration that is filed with notice of appeal is part of the application record).

² 1 TTABVUE.

³ Applicant's Br. at 4; 10 TTABVUE 5.

II. Section 2(a) refusal

Section 2 of the Trademark Act provides in pertinent part that:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—

(a) Consists of or comprises immoral . . . or scandalous matter. . . .

15 U.S.C. § 1052(a). The Patent and Trademark Office may prove that a mark is scandalous and refuse registration by establishing that the mark is “vulgar.” *In re Fox*, 702 F.3d 633, 105 USPQ2d 1247, 1248 (Fed. Cir. 2012) (citing *In re Boulevard Entm’t, Inc.*, 334 F.3d 1336, 67 USPQ2d 1475 (Fed. Cir. 2003)); *In re Star Belly Stitcher, Inc.*, 107 USPQ2d 2059, 2060 (TTAB 2013). This demonstration must be made in the context of contemporary attitudes, in the context of the marketplace as applied to the goods described in the application, and from the standpoint of not necessarily a majority, but a substantial composite of the general public. *In re Fox*, 105 USPQ2d at 1248.

Dictionary definitions alone may be sufficient to establish that a proposed mark comprises scandalous matter, where multiple dictionaries indicate that a word is vulgar, and the Applicant’s use of the word is limited to the vulgar meaning of the word. *In re Boulevard Entm’t*, 67 USPQ2d at 1478 (holding 1-800-JACK-OFF and JACK OFF scandalous, where all dictionary definitions of “jack-off” were considered vulgar). Where the meaning of a mark is ambiguous, however, mere dictionary evidence of a possible vulgar meaning may be insufficient to establish the vulgarity of the mark. *In re Fox*, 105 USPQ2d at 1248.

We also note that, in cases under Section 2(a), the Federal Circuit has approved of publication of marks where the Board may have doubt that the record supports a finding that a mark is scandalous. See *In re Mavety Media Group Ltd.*, 33 F.3d 1367, 31 USPQ2d 1923, 1928 (Fed. Cir. 1994) (vacating the Board's affirmance of a refusal and noting its preference for the approach taken by the Board in *In re In Over Our Heads Inc.*, 16 USPQ2d 1653, 1654-55 (TTAB 1990)).

Although the applied-for mark is the LEFT NUT BREWING CO., the refusal to register is directed to the term "left nut." Accordingly, our analysis under Section 2(a) focuses on this term.

To support the refusal, the Examining Attorney submitted dictionary definitions of all of the words in the mark. The following definition from the Merriam-Webster online dictionary submitted by the Examining Attorney is representative of the definitions of "nut":⁴

NUT *noun* \ 'nʌt \

Definition of NUT

- 1 a (1) :** a hard-shelled dry fruit or seed with a separable rind or shell and interior kernel **(2) :** the kernel of a nut
b : a dry indehiscent one-seeded fruit with a woody pericarp
- 2 a :** a hard problem or undertaking
b : CORE, HEART
- 3 :** a perforated block usually of metal that has an internal screw thread and is used on a bolt or screw for tightening or holding something
- 4 :** the ridge in a stringed instrument (as a violin) over which the strings pass on the upper end of the fingerboard
- 5 :** a small lump (as of butter)
- 6 a :** a foolish, eccentric, or crazy person

⁴ Office Action of September, 5, 2013, pp. 10-12; Merriam-Webster (2010), www.merriam-webster.com

- b** : ENTHUSIAST <a movie *nut*>
- 7** *plural* : NONSENSE —often used interjectionally
- 8** *slang* : a person's head
- 9** *usually vulgar* : TESTIS
- 10** : the amount of money that must be earned in order to break even

Four other dictionary definitions provided by the Examining Attorney also indicate via usage notes that “nut” is considered to be vulgar when used to refer to a testicle:

- Yahoo! Education (2009), <http://education.yahoo.com/reference/dictionary/nut>, 8. *Vulgar Slang* A testicle;⁵
- Wordsmyth (2013), <http://www.wordsmyth.net>, definition 6: (often pl.; vulgar slang) a testicle;⁶
- Webster’s New World College Dictionary (2010), <http://www.yourdictionary.com/nut>, 7. b. the testicles: a vulgar usage;⁷ and
- The American Heritage® Dictionary of the English Language, 5th ed. (2013), <http://www.yourdictionary.com>, 8. *Vulgar Slang* A testicle.⁸

Because the term “left nut” does not appear in standard dictionaries, the Examining Attorney included the following definition of “left nut” from the Urban Dictionary, urbandictionary.com, a crowdsourced online dictionary:⁹

1. left nut – n. a part of one’s anatomy that one would sacrifice to experience something exceptional
2. left nut – The back seat of a car directly behind the driver. The seat behind shotgun is known as right nut....
3. Left Nut – The act of beating someones [sic] ass, without using any effort. You use as much effort as your left nut.
4. Left Nut – The position of a passenger in the back seat of a vehicle directly behind the driver
5. left nut – An insult to one, usually stupid or retarded, always sagging, or sticking out.

⁵ Office Action of September, 5, 2013, pp. 10-12.

⁶ *Id.*, pp. 17-18.

⁷ Office Action of September, 8, 2014, pp. 4-5.

⁸ *Id.*, pp. 5-6.

⁹ Office Action of September, 5, 2013, pp. 19-24.

6. left nut – the left testicle
a left wing screwball
anyone of the political left

The Examining Attorney also introduced a number of Internet articles and other web site excerpts which use the term “left nut” in various contexts:¹⁰

- *The DMV Can Suck my Left Nut*, theonion.com, the title of a commentary on renewing a driver’s license at the department of motor vehicles;
- *Alan Simpson’s Advice to Reporter: “Grab Your Left Nut For Luck,”* huffingtonpost.com, the title of an article discussing quotations from former U.S. Senator Alan Simpson;
- *Should I Get a 2nd Opinion On My Sore Left Nut?*, metafilter.com, a question posed on a self-help question and answer web site discussing when to seek medical help;
- *Top Five Things You’d Give Your Left Nut To Do*, epictv.com, the title of an article on extreme sports trends on a website featuring travel and adventure videos;
- *I would Give My Left Nut To Play Ball And Party With This Year’s Phillie Phanatic Fantasy Camp Roster*, barstoolsports.com, the title of an article on a sports web site discussing the merits of a fantasy baseball roster;
- *What game would you give your left nut (or ovary) to see remastered?*, bungie.net, the title of a thread in an online computer gaming forum;
- “Grab your left nut, make your right one jealous,” metrolyrics.com, lyrics from the song *Just Lose It* by musical artist Eminem;
- “At one point or other, most of us have said something like, ‘I’d give my left nut if I could....’”, talkingaboutmenshealth.com, a statement in an article about surgical errors;
- “Hey left nut? ... What right nut? ... Who’s the penis between us?”, www.someecards.com, a joke appearing on an electronic greeting card; and
- “*Lance Armstrong Exchanged Left Nut for Steroids ... the former champion traded his left nut in exchange for steroids ... [mailed] his left testicle through Fed Ex.*”, bsgossip.com, an article discussing cyclist Lance Armstrong’s cancer and steroid use.

¹⁰ Office Action of March 12, 2015, pp. 2-38.

Based on the foregoing evidence, the Examining Attorney argues that “[w]hen ‘LEFT NUT’ is considered as a unit, the meaning is clearly limited to the vulgar meaning referring to the left testicle,”¹¹ and is thus scandalous under Section 2(a).

Applicant’s arguments against the refusal to register are essentially two-fold. First, Applicant argues that the Examining Attorney impermissibly burdened Applicant with proving that the mark is not vulgar. Second, Applicant argues that the evidence of record shows that the mark is not vulgar in that it has a number of non-vulgar meanings, similar marks have previously registered, and such anatomical references are not *per se* vulgar.

Applicant’s first argument is unavailing. The U.S. Patent and Trademark Office has the burden of proving that a trademark falls within the prohibition of Section 2(a). *Mavety*, 31 USPQ2d at 1925. But if such a showing is made, the burden of rebuttal shifts to Applicant. *In re Squaw Valley Dev. Co.*, 80 USPQ2d 1264, 1267, 1271 (TTAB 2006). Whether a mark comprises scandalous matter is a conclusion of law made by the Board based upon underlying factual inquiries. *Mavety*, 31 USPQ2d at 1926.

In support of her refusal, the Examining Attorney submitted numerous dictionary definitions of the term “nut” which included usage notes describing the term as vulgar when referring to the testicles, as well as a definition of the term “left nut” from the Urban Dictionary and a number of excerpts from the Internet showing use of the term “left nut” referring to the left testicle. Applicant submitted

¹¹ Examining Attorney’s Br. at 8; 12 TTABVUE 9.

evidence in support of registration showing that “nut” has non-scandalous meanings when used in connection with beer, and that marks comprising anatomical references, including several “nut” marks, have previously registered.

Applicant argues that the Examining Attorney impermissibly burdens it with proving that the mark is not vulgar because the Examining Attorney stated that “there is no evidence that the applicant uses ‘NUT’ to mean anything other than the vulgar meaning . . . thus expressly burden[ing] the applicant with proving a non-vulgar use.”¹² Applicant misapprehends the nature of the shifting burden of proof. Once the Examining Attorney arguably showed that “left nut” is vulgar by way of the dictionary definitions and Internet excerpts, it became Applicant’s burden to show that “left nut” is not vulgar. It is not improper for the Examining Attorney to contend that, based on the evidence, “left nut” is *prima facie* vulgar under *Mavety*, and Applicant’s showing has not rebutted the Examining Attorney’s evidence. Moreover, it is the Board, not the Examining Attorney or the Applicant, that decides whether a *prima facie* showing has been made, or whether Applicant has rebutted such a showing. *See Star Belly Stitcher*, 107 USPQ2d at 2062.

Applicant’s second argument, that the evidence does not support a finding that the mark is not vulgar, is more persuasive. The evidence of record from both the Examining Attorney and Applicant shows that “left nut” has a number of different meanings and is not always vulgar, even when sometimes referring to a testicle.

¹² Applicant’s Br. at 6; 10 TTABVUE 7.

The Urban Dictionary definition of “left nut” submitted by the Examining Attorney shows that the term has a number of meanings. “Left nut” can, of course, refer to the left testicle. It also can be a figure of speech used to describe the lengths to which someone might go to attain something of great value. It can refer to a passenger’s position in an automobile, i.e., behind the driver. And it can refer to a member of the “political left” or a “left wing screwball.”¹³ Only the first of these meanings is arguably vulgar and, therefore, immoral or scandalous under Section 2(a).

Similarly, the Internet excerpts submitted by the Examining Attorney present a mixed picture of the vulgarity of the term “left nut.” In one excerpt, former U.S. Senator Alan Simpson tells a reporter to “Grab Your Left Nut For Luck.” In four of the excerpts, the term is used as a figure of speech for something of great value. In two excerpts, the term “left nut” is used in a strictly anatomical or medical sense to refer to the left testicle. In only three of the excerpts, the onion.com article, the lyrics by Eminem, and the someecard.com card, is the term used in what could be considered a primarily vulgar form.

Finally, Applicant points to a number of arguably equally-suggestive “nut” marks which have registered, including:

- MY HUSBAND’S NUTS, in typed form, for “candied, shelled, roasted and seasoned” nuts and almonds;¹⁴

¹³ <http://www.urbandictionary.com>; Office Action of September, 5, 2013, pp. 19-24.

¹⁴ Reg. No. 2984922, issued August 16, 2005; Applicant’s response of March 4, 2014, p. 45. Applicant’s reliance on Application Ser. No. 85894817 for the mark MY MOM’S NUTS is misplaced inasmuch as pending applications have no probative value. *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1193 n.8 (TTAB 2007)

- SMELL MY NUTS, in standard characters, for scented candles;¹⁵
- MY FAMILY'S NUTS, in standard characters, for “candied, shelled, roasted and seasoned nuts;”¹⁶ and
- HAVE SOME GUTS. . .CHECK YOUR NUTS, in standard characters, for wristbands.¹⁷

These registrations suggest that, as Applicant argues, “anatomical references alone are not vulgar.”¹⁸

On balance, we find that the evidence does not establish that the term “left nut” is vulgar. Although the usage notes to “nut” show that it is vulgar when referring to the testicles, “nut” and “left nut” have a number of other non-vulgar meanings. Moreover, “left nut” has been used to refer to the left testicle by senators and web-authors with no evidence of offense or disapproval, and the Office has registered similarly-suggestive “nut” marks. Accordingly, we find that the term “Left Nut” within the applied-for mark “Left Nut Brewing Co.” is not vulgar and thus not immoral or scandalous within the meaning of Section 2(a) when used on beers.

Decision: The refusal to register Applicant’s mark LEFT NUT BREWING CO. under Section 2(a) of the Lanham Act is reversed.

¹⁵ Reg. No. 3079622, issued April 11, 2006; Applicant’s response of March 4, 2014, p. 48.

¹⁶ Reg. No. 3410469, issued April 8, 2008; Applicant’s response of March 4, 2014, p. 50.

¹⁷ Reg. No. 4024170, issued September 6, 2011; Applicant’s response of March 4, 2014, p. 67.

¹⁸ Applicant’s Br. at 15; 10 TTABVUE 16.