

This Opinion is not a
Precedent of the TTAB

Mailed: October 29, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Engine 15 Brewing Co., LLC

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Serial No. 86038803

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Daniel Christopherson of Lehrman Beverage Law, PLLC,
for Engine 15 Brewing Co., LLC.

Leigh Caroline Case, Trademark Examining Attorney, Law Office 118,
Thomas G. Howell, Managing Attorney.

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Before Bucher, Kuczma and Masiello,
Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Engine 15 Brewing Co., LLC (hereinafter “Applicant”) seeks registration on the
Principal Register of the mark **NUT SACK DOUBLE BROWN ALE** (*in standard
character format*) for “beer” in International Class 32.¹

¹ Application Serial No. 86038803 was filed on August 15, 2013, based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as May 9, 2012. No claim is made to the exclusive right to use the terms “Nut” and “Double Brown Ale” apart from the mark as shown.

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(a) of the Trademark Act, 15 U.S.C. § 1052(a), because the mark includes immoral or scandalous matter. She maintains that the term "Nut Sack" is a term that is offensive to a substantial composite of the general public.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. Both Applicant and the Trademark Examining Attorney filed appeal briefs.

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, deceptive, or scandalous matter; ...

In order to refuse registration under this provision of the Act, the United States Patent and Trademark Office "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 Fox*, 702 F.3d 633, 105 USPQ2d 1247, 1248 (Fed. Cir. 2012) (internal quotations omitted, citing *In re Mavety Media Group Ltd.*, 33 F.3d 1367, 31 USPQ2d 1923, 1925 (Fed. Cir. 1994) and *In re Riverbank Canning Co.*, 95 F.2d 327, 37 USPQ 268 (CCPA 1938)). The USPTO may prove that a mark is scandalous and refuse registration by establishing that the mark is "vulgar." *In re Manwin/RK Collateral Trust*, 111 USPQ2d 1311 (TTAB 2014); *In re Star Belly Stitcher, Inc.*, 107 USPQ2d

2059, 2060 (TTAB 2013) (“*Star Belly Stitcher*”) (stating that “the statutory language ‘scandalous’ has been considered to encompass matter that is ‘vulgar,’ defined as ‘lacking in taste, indelicate, morally crude’”) (quoting *In re Runsdorf*, 171 USPQ 443, 444 (TTAB 1971)). 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 (citing *In re Mavety Media*, 31 USPQ2d at 1925).

Where the meaning of a mark is ambiguous, 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. Moreover, in *Mavety Media*, the Federal Circuit pointed out that reliance on a dictionary’s designation of a term as “vulgar” is not always warranted:

The *Runsdorf* case tellingly highlights the inherent fallibility in defining the substantial composite of the general public based solely on dictionary references. 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.

31 USPQ2d at 1927.

Because our decision must be based upon the facts developed in the record, we turn to the evidence properly made of record by the Trademark Examining Attorney

and Applicant. We note that while the applied-for mark as used by the Applicant is the five-word phrase “Nut Sack Double Brown Ale,” the alleged evidence of vulgarity goes only to the disputed two-word term, “Nut Sack.” Record evidence establishes that the term “nut sack” is a slang term used as a synonym for the scrotum:

[nut sack](#)

Male scrotum.

“She smacked on my nut sack.”

by [x](#) January 22, 2003

[nut sack](#)

The *derogatory term* for the hair covered skin that forms a supportive bag like like [*sic*] structure for the Gonads.

“Dude guess what!”

“what man?”

“My nut sack fuckin itches!”

by [Cody Shearman](#) January 22, 2007

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nutsack Noun

1. (*slang, vulgar*) The scrotum; ballsack.

3

Nutsack definition Noun:

nutsack (plural nutsacks) (*slang, vulgar*) The scrotum; ballsack.

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nutsack in English

(*slang, vulgar*) The scrotum; ballsack.

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² <http://www.urbandictionary.com/define.php?term=nutsack>, as accessed by the Trademark Examining Attorney on November 25, 2013.

³ Definition from Wiktionary, the free dictionary, <https://en.wiktionary.org/wiki/nutsack>, as accessed by the Trademark Examining Attorney on June 13, 2014.

⁴ <http://www.web-definition.com/dictionary/n/nu/nutsack/>, as accessed by the Trademark Examining Attorney on June 13, 2014.

⁵ <https://en.glosbe.com/en/en/nutsack>, as accessed by the Trademark Examining Attorney on June 13, 2014.

Applicant responds to these entries by pointing out that collaborative websites such as Urban Dictionary and Wiktionary/Wikipedia suffer from problems of questionable reliability. Additionally, citing to the “Terms of Use” of the www.web-definition.com website, Applicant notes that content on this site is drawn “primarily from the public domain and Wikipedia.” As to the probative value of the “glosbe” website, Applicant informs us that glosbe’s “[programming] team is small, it consists of two friends. We are located in Poland; we speak Polish and some English.”

The Trademark Examining Attorney does corroborate these wiki online sites with entries from two slang dictionaries:

nutsack n. the scrotum. – usually considered vulgar
Racehoss 85: *Using her long fingernails, she ripped his nutsack.*

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nutsack (n.)

1. the scrotum ...
2. a derog. description.

2002 ... *“If you have any more stupid fucking questions, why don’t you ask your little nutsack New York Lawyer?”* 2004 Mad mag. Jan. 24: *“Every wack job, nimrod and nut sack slither out of the woodwork.”*

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Both of these entries confirm that the term “nut sack” refers to the scrotum, with the Random House entry suggesting that this usage is “usually considered vulgar.” The Green’s entry introduces a secondary connotation for this term, namely as a “derogatory” insult for a person.

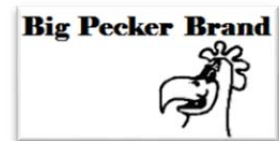
⁶ 2 *RANDOM HOUSE HISTORICAL DICTIONARY OF AMERICAN SLANG*, 1997, at 697.

⁷ 2 *GREEN’S DICTIONARY OF SLANG*, 2010, at 1905.

In the face of these entries, Applicant maintains that the term “Nut Sack” has an innocuous connotation that is likely to be attributed to the mark as a whole by members of the public. As to the word “Nut” alone, Applicant argues that

... the phrase, as used by Applicant, confers the connotation that the product contains a great deal of nut flavor. Applicant respectfully asserts that the connotation of the word NUT ... will be readily understood by the consumer as relating to nut brown style of ales. ... Applicant respectfully submits that the product does indeed have a strong nut flavor, as reviewers describe the product as “nutty” or “very nutty.”

On this point, we acknowledge that the term “Nut” alone has an innocuous connotation when used in connection with a “Nut Brown Ale.” This descriptive usage makes it less likely that purchasers would attribute a vulgar connotation to the words in this mark. *See In re Hershey*, 6 USPQ2d 1470, 1472 (TTAB 1988) (**BIG PECKER BRAND** found not to be scandalous; “We fully recognize that the bird design may be removed at any time, but the specimens do serve to buttress the applicant’s contention that the mark is not intended to refer to male genitalia but, rather, refers to the more common meaning of a bird’s beak. Moreover, we think the inclusion of the bird design would make it less likely that purchasers would attribute any vulgar connotation to the word mark”)



Partial specimen from *In re Hershey*

In the context of the mark at bar, the word “Nut” will clearly describe a flavor or style of ale, rather than being an obvious reference to testicles. This likely interpretation is reinforced by the final three words of the applied-for mark. The terms “Double” and “Brown Ale” also have specific meanings relating to beer

products. The term “Double” is an indication that a specific beer possesses a particularly strong flavor, emphasizing the fact that Applicant’s product is a very nutty flavored ale. Further, the record shows that Applicant’s product is indeed classified as an “American Brown Ale.”

Of course, the Trademark Examining Attorney’s evidence points to the two word term, “Nut Sack.” As to the term “Sack” alone, Applicant argues that this word indicates that the product includes a whole “sackful,” or a strong amount of nut flavor:

Applicant respectfully submits that a “sack” is often used during the brewing process in order to keep large particulates out of the end product while sugars and flavors are extracted. During this process, the grains, hops, and other brewing ingredients necessary to create the nut-flavored beer are kept in a porous sack, allowing hot water and extracted sugars to seep out of the sack while spent grains are retained within the sack. While Applicant does not technically employ a sack of nuts in the making of the beer in question, given the resulting strong nutty flavor of the beer, consumers may be inclined to believe that such a sack had indeed been used in the brewing process.

Applicant would have us believe that the word “Sack” in the disputed mark might suggest a “sackful of flavor” or an obscure reference to possible historical craft methods for brewing ale. We find this argument is not persuasive, particularly in light of the readily understood meanings of the term “Nut Sack” in the common parlance.

Applicant and the Trademark Examining Attorney point to a small number of trademark applications and registrations in support of their respective positions.

For example, Applicant points to copies of three third-party registrations containing variations on the disputed term “Nut sack”:

KnuttSak	for “underwear” in International Class 25; ⁸
NutSac	for “all-purpose sport bags; all-purpose athletic bags; all-purpose carrying bags; backpacks, book bags, sports bags, bum bags, wallets and handbags; bags for sports; canvas shopping bags; carry-all bags; carry-on bags; diaper bags; duffel bags; duffel bags for travel; messenger bags; reusable shopping bags; sports bags; tote bags” in International Class 18; ⁹ and
NUTSACK	for “laundry detergent” in International Class 3. ¹⁰

In response, the Trademark Examining Attorney points to copies of recent refusals the United States Patent and Trademark Office has issued under Section 2(a) of the Act, e.g., of **THE NUTSACK** for “canvas bags for storage of nuts”¹¹ and **NUT SAC** for “beer; beer, ale, lager, stout and porter.”¹² Certainly, each case must be decided on its own set of facts, but these few, seemingly conflicting examples of actions taken by different Trademark Examining Attorneys are not determinative either way.

To be clear, we are asked to determine whether the phrase “Nut Sack Double Brown Ale” is immoral or scandalous to a substantial composite of the general public in the context of the marketplace as applied to only the goods identified in

⁸ Registration No. 3124345 issued on August 1, 2006; renewed.

⁹ Registration No. 3685506 issued on September 22, 2009.

¹⁰ Registration No. 3814876 issued on July 6, 2010.

¹¹ Application Serial No. 86048794 was filed on August 27, 2013, refused as scandalous in December 2013 and abandoned in July 2014.

¹² Application Serial No. 85912726 was filed on April 23, 2013, refused as scandalous in October 2013 and abandoned in May 2014.

the instant application. *McGinley*, 211 USPQ at 637; and *In re Riverbank Canning Co.*, 95 F.2d 327, 37 USPQ 268 (1938).

We find from the foregoing that the record is mixed on the question of whether the term “Nut Sack” within the phrase “Nut Sack Double Brown Ale” is immoral or scandalous in light of contemporary attitudes and in the commercial context in which beer is marketed and consumed. For decades now this tribunal has observed that contemporary attitudes toward coarse language are more accepting than they had been in earlier eras. *Cf. In re Tinseltown, Inc.*, 212 USPQ 863 (TTAB 1981) (Nonetheless, the term “Bullshit” for attaché cases, handbags, purses, belts, and wallets is still found scandalous).

Given the mental images the term “Nut Sack” will likely raise, the weight of the dictionary entries suggests that using this indelicate term may well raise eyebrows at a formal dinner party. On the other hand, in seeking to apply the extremely broad “vulgarity” standard to a slang term, we think it wise to bear foremost in our minds the governing language of the statute (“immoral,” “scandalous”) as well as all relevant guidance provided by our reviewing courts as to what these words mean (e.g., “shocking ...; disgraceful; offensive; disreputable; ... giving offense to the conscience or moral feelings; ... calling out [for] condemnation”). We observe that many slang terms come into the lexicon because the formally correct, clinical word for the thing itself is deemed uncomfortably potent. This seems to be particularly true with respect to parts of the human body, in which case speakers adopt the slang terms precisely because they seem less intense, less indelicate, than the

formally correct or technical terminology. Cases of alleged scandalous matter under Section 2(a) of the Lanham Act are rarely simple binary decisions, but involve various shades of grey. With this background, we find that some terms, such as “Nut Sack” appearing within “Nut Sack Double Brown Ale” may seem somewhat taboo in polite company, but are not so shocking or offensive as to be found scandalous within the meaning of the statute.

This conclusion is heightened in the context of Applicant’s chosen mark for beer. This is an adult beverage, the consumption of which is commonly associated with the relaxation of inhibitions. As seen above, there is a totally innocuous reason for selecting the word “Nut” in the context of a “Nut Brown Ale.” We conclude that beer drinkers can cope with Applicant’s mark without suffering meaningful offense. Moreover, the consumer of this product who conjures up body parts or insults is nonetheless still likely to see the mark as an attempt at humor.

Hence, we believe the evidence of record fails to establish that the term “Nut Sack” as used within this composite mark creates for the mark in its entirety a term that is immoral or scandalous within the meaning of Section 2(a) of the Act.

Decision: The refusal to register Applicant’s mark **NUT SACK DOUBLE BROWN ALE** under Section 2(a) of the Lanham Act is hereby reversed.