IS YOUR BRAND NAUGHTY OR NICE? THE NEW SANTA AT THE TRADEMARK OFFICE

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I met my wife in high school. On our first date, I took her to an X-rated movie. She loved it. So did the Academy of Motion Picture Arts and Sciences, which awarded it the Oscar for Best Picture.

And within twelve months, the rating for *Midnight Cowboy* had dropped from X to R. That's just one example of how tastes change over time. What once was obscene—such as James Joyce's *Ulysses*—is now passé. This evolution in tastes has even reached the corridors of the stodgy U.S. Patent and Trademark Office (USPTO), which is good news for companies seeking trademarks with which to appeal to a younger, hipper audience.

First, some background: TRADEMARKS

Under Section 2(a) of the Trademark Act, an application must be rejected if the trademark consists of "immoral" or "scandalous" matter, *i.e.*, matter that would offend "a substantial composite of the general public." Over the years, that standard has produced a colorfully amusing set of rejections, ranging from a rather candid trademark sought by a phone sex company to a clever double entrendre for a brand of lollipops the applicant described as "chocolate suckers molded in the

shape of a rooster."

But late last year the Trademark Trial and Appeal Board (the "Board") approved two applications to register trademarks featuring what had long been deemed a "scandalous" term for a part of the male anatomy.

Nut Sack Double Brown Ale

First up was Engine 15 Brewing Company, a microbrewery that sought to register the trademark NUT SACK DOUBLE BROWN ALE. Here's the label for their ale:

The examining attorney refused registration on the ground that "nut sack" was "scandalous." On appeal, the Board agreed that "nut sack" was a slang term for the male scrotum and conceded that dictionary entries for "nut sack" suggested that the term was "indelicate," "may well raise eyebrows at a formal dinner party" and "may seem somewhat taboo in polite company." Nevertheless, it noted that (a) "nut" was a beer flavor and (b) "contemporary attitudes toward coarse language are more accepting than they been in earlier eras."

In an impressively nuanced take on modern language, the Board observed "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."

In allowing the trademark to register, the Board stressed that the trademark was for a brand of beer: "This is an adult beverage, the consumption of which is commonly associated with the relaxation of inhibitions. * * * We conclude that beer drinkers can cope with Applicant's mark without suffering meaningful offense."

Left Nut Brewing Co.

Just two weeks later, the Board ruled on another "nutty" appeal, this one to register LEFT NUT BREWING CO by a microbrewery of that name. As before, the examining attorney had refused the application on the ground that the mark was scandalous. On appeal, the Board first looked at

dictionary definitions—often a source of evidence on the issue of vulgarity—and conceded that "nut" is a vulgar term for testicle. But because there was no standard dictionary definition for "left nut," the Board turned to *Urban Dictionary*, where the first definition made clear that the term referred to the "left testicle": "a part of one's anatomy that one would sacrifice to experience something exceptional."

Surveying the "left nut" landscape, the Board reviewed various mainstream articles, including one in the Huffington Post about former U.S. Senator Alan Simpson that was entitled *Alan Simpson's Advice to Reporter: "Grab Your Left Nut for Luck."* As the Board explained in approving the application, "'left nut' has been used to refer to the left testicle by senators and web-authors with no evidence of offense or disapproval."

The Slants

And trademark registration opportunities may be expanding on yet another front. *In re Tam* involved the rejection of an Asian-American music band's application to register their name, THE SLANTS. That rejection was based on the other provision of Section 2(a) of the Trademark Act, namely, the one that bans registration of "disparaging" trademarks. But on the appeal last year, the Federal Circuit ruled that Section 2(a)'s ban on "disparaging" trademarks is unconstitutional.

The Trademark Office may yet ask the Supreme Court to review that ruling, but for now it has conceded—in connection with the appeal of the refusal to register FUCT as "scandalous and immoral"—that the Federal Circuit's reasoning in *In re Tam* also requires elimination of the Lanham Act's prohibition on the registration of scandalous and immoral marks.

All of which suggests the Trademark Office is growing more receptive to companies seeking to appeal to a younger generation of consumers through edgier brand names.

But then again, the Washington Redskins' trademark appeal is still pending. Stay tuned.