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ejs

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB 4/18/00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **InterHealth Nutritionals Incorporated**

Serial No. 75/175,348

James C. Weseman of The Law Offices of James C. Weseman for
InterHealth Nutritionals Incorporated.

John D. Dalier, Trademark Examining Attorney, Law Office
105 (Thomas G. Howell, Managing Attorney).

Before Seeherman, Hohein and Rogers, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

InterHealth Nutritionals Incorporated has appealed
from the refusal of the Trademark Examining Attorney to
register the mark ACTIVIN and design, as shown below, for
"chemicals used in the manufacture of nutritional
supplements" in Class 1; "nutritional supplements" in Class
5; and "processed foods containing nutritional supplements"

in Class 29.¹ Applicant has described its mark as follows:

"The mark consists in part of a stylized representation of the letter "V" comprising a stylized representation of a bunch of grapes."



Registration was finally refused pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. 1052(e)(1), on the grounds that applicant's mark is deceptively misdescriptive of the identified goods.²

Applicant and the Examining Attorney have filed briefs, and both appeared at an oral hearing before the Board.

¹ Application Serial No. 75/175,348, filed October 1, 1996, asserting a bona fide intention to use the mark in commerce.

² In the final refusal the Examining Attorney previously handling this case also stated that the identification of goods in Class 30 "is still unacceptable as indefinite" and made final the requirement for an acceptable identification of goods. However, in its application applicant identified its goods as being only in Classes 1, 5 and 29, as indicated above, and this identification was never amended. Further, the Examining Attorney stated, in the final Office action, that "the identification of goods in Classes 1, 5, and 29 are acceptable." Thus, the Examining Attorney's requirement for an acceptable identification of goods in Class 30, a class which is not the subject of the instant application, has been given no further consideration.

The test for deceptive misdescriptiveness has two parts. First, it must be determined if the matter sought to be registered misdescribes the goods. If so, it must be determined if it is also deceptive, that is, if anyone is likely to believe the misrepresentation. **In re Quady Winery Inc.**, 221 USPQ 1213, 1214 (TTAB 1984).

It is the Examining Attorney's position that ACTIVIN and design is deceptively misdescriptive of applicant's goods because, as applicant has acknowledged, the goods do not contain activin, which, according to the definition submitted by the Examining Attorney, is "a non-steroidal regulator... that is synthesized in the pituitary gland and gonads and stimulates the secretion of follicle-stimulating hormone." Dorland's Illustrated Medical Dictionary, © 1994.

Further, the Examining Attorney asserts that consumers are likely to believe this misrepresentation because activin is a known hormone, and that hormones in general have been used as dietary supplements. In support of his refusal, he has made of record excerpts from various computer data bases and certain third-party registrations.

An article in the September 15, 1995 issue of "Science" discussing experiments with chick embryos in connection with left-right symmetry in vertebrates (the

placement of internal organs on the correct side of the body), discusses activin as follows:

The gene is thought to be a receptor for activin, a hormone known to play a role in tissue differentiation.

...Activin or an activinlike molecule might be triggering cAct-RIIa expression while also suppressing Shh expression on the right side.

The Examining Attorney has also submitted numerous excerpts, some examples of which are noted below, from the National Library of Medicine MEDLINE database which refer to activin:

Pituitary follistatin regulates activin-mediated production of follicle-stimulating hormone during the rat estrous cycle.
"Endocrinology," July 1997

A wide variety of biological effects have been ascribed to activin. Initially identified and purified as a gonadal hormone stimulating the production and release of FSH from the pituitary, activin is also implicated in the stimulation of erythroid differentiation, as a modulator of follicular granulosa cell differentiation, as a mesodermalizing factor in both amphibian and avian early...
"Ann NY Acad. Sci" April 24, 1997

Although activins and inhibins regulate follicle-stimulating hormone (FSH) synthesis, no factor has been identified that...
"Science," August 30, 1996

In addition, the Examining Attorney has made of record several excerpts from the NEXIS data base which refer to hormones being used as dietary supplements:

Vitamins and minerals have long been popular, but the burgeoning interest in herbs and other dietary supplements, including hormones such as DHEA and melatonin, is a relatively recent phenomenon.

"The Dallas Morning News," November 28, 1997

Where there is evidence that a dietary supplement may work, the effect is usually limited to a specific condition - such as St. John's wort for depression, ginkgo for dementia or the hormone melatonin to prevent jet lag.

"The Washington Post," November 25, 1997

They're also one of the main reasons every mall in America has a nutritional supplement store, selling everything from herbs to hormones to extracts from exotic sea creatures.

"Men's Health," November 1997

Matthew Patsky, an analyst with the investment firm of Adams, Harness & Hill in Boston, follows the broad field of dietary supplements, which includes vitamins, minerals and herbs, hormones like melatonin and hard-to-classify substances like shark cartilage.

"The New York Times," October 26, 1997

In the past year or so, herbal extracts and hormone-based dietary supplements such as Melatonin and DHEA have gone mainstream.

"The Denver Post," March 30, 1997

Finally, the Examining Attorney has submitted several third-party registrations which he asserts show "hormones" listed as ingredients in dietary or nutritional supplements. A close reading of the identifications, however, shows that in most of the registrations "hormones" are listed as a separate item from dietary supplements. We do note, though, that the registration for the mark MELATONIN EXTRA is for dietary food supplements containing hormone preparation, herbs, vitamins and minerals;³ and the registration for the mark MELAPURE is for nutritional supplements, vitamins and minerals containing the ingredient melatonin.⁴

After carefully reviewing the evidence of record, we must agree with applicant that the record fails to demonstrate that applicant's mark is deceptively misdescriptive of its identified goods.

Although applicant's goods do not contain activin, we find that consumers would not be deceived by the mark into believing that activin is an ingredient in the goods.

It appears that activin is a specialized hormone that is not generally known by the public at large. All of the references to this term, save one, were taken from

³ Registration No. 2,050,003.

⁴ Registration No. 2,046,687.

technical journals found in the specialized MEDLINE data base, or were from a medical dictionary. The only reference that was taken from the NEXIS data base was the article in "Science," and the technical nature of that article makes it clear that it was not intended for reading by the general public.

Moreover, applicant's mark is not simply ACTIVIN, but a highly stylized mark in which the "V" has been replaced by the design of a bunch of grapes. The visual impact of the mark is ACTI VIN, and the connotation of the mark, as used in connection with applicant's various nutritional supplements, suggests products that stimulate activity, or make one more active, because of a connection with grapes or grape vines. As such, we think consumers will regard ACTIVIN as a coined term.

Accordingly, we find that the general consumer would not assume from applicant's mark that its goods contain the hormone activin.

We are not persuaded by the Examining Attorney's argument that because hormones, particularly melatonin and DHEA, have been used in dietary supplements, consumers would assume that applicant's goods contain the hormone activin. As stated above, there is no evidence in this record that consumers would even know that activin is a

hormone, let alone that they would conclude, simply because two specific hormones have been used as nutritional supplements, that any and all hormones would be used as nutritional supplements.⁵

As for scientists and knowledgeable consumers, who would be aware of the hormone activin, they are not likely to believe that applicant's products contain this substance. As indicated above, activin is a hormone that stimulates the secretion of follicle-stimulating hormone and plays a role in tissue differentiation. There is no evidence whatsoever that this hormone has been, or could be, used as a dietary or nutritional supplement.

Scientists would realize that such a hormone would not be in any of the goods identified in applicant's application, and therefore would not be misled by the use of applicant's mark for nutritional supplements, or chemicals used in the manufacture of nutritional supplements, or processed foods containing nutritional supplements.

⁵ In this connection, one of the NEXIS excerpts indicates that it is only because the hormone melatonin is also found in some foods that it is, by law, considered a dietary supplement.

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Decision: The refusal of registration is reversed.

E. J. Seeherman

G. D. Hohein

G. F. Rogers
Administrative Trademark Judges
Trademark Trial and Appeal Board