

**THIS DISPOSITION
IS NOT CITABLE AS
PRECEDENT OF THE
TTAB**

Mailed:
April 28, 2006

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

BPR Health International

Serial No. 76575239

Mark Harrison of Venable LLP for BPR Health International.

James T. Griffin, Trademark Examining Attorney, Law Office
103 (Michael Hamilton, Managing Attorney).

Before Holtzman, Zervas and Kuhlke, Administrative
Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

An application was filed by BPR Health International
to register the mark SPRAY PHARMACY (in standard character
form) for the following goods in International Class 5:

housemark for a full line of homeopathic
preparations for human use; homeopathic
preparations for the treatment of respiratory
conditions; stress fatigue and emotional
conditions; skeletal and connective tissue
conditions; digestive and intestinal conditions;
neurological conditions; blood and circulatory
conditions; skin conditions; infectious diseases;
eye conditions; allergic conditions; urological
conditions; female conditions; dental conditions;

organ therapy; balancing the immune system and hormone production; viral infections; bacterial infections; inflammation; chronic disorders; degenerative disorders; environmental pollution and detoxification conditions; pain, headache, migraine and neuralgia; low energy levels due to viral infections or imbalances of glandular functions; insomnia; smoking withdrawal; caffeine withdrawal; weight loss; bedwetting; motion sickness; all for human use.¹

Applicant has disclaimed the word SPRAY apart from the mark as shown.

The examining attorney has finally refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that applicant's mark, if applied to applicant's goods, would be merely descriptive of such goods. As evidence in support of his refusal, the examining attorney has submitted (i) two dictionary definitions of "pharmacy," one from *Bartleby.com* which defines "pharmacy," as, inter alia, "[a] place where drugs are sold; a drugstore" and the other from *Merriam-Webster OnLine* which defines "pharmacy" as, inter alia, "pharmacopoeia"; (ii) a dictionary definition of "pharmacopoeia" also from *Merriam-Webster OnLine*, namely, "a collection or stock of drugs"; and (iii) printouts of "ten registrations which have the descriptive word PHARMACY

¹ Application Serial No. 76575239, filed February 12, 2004, alleging a bona fide intention to use the mark in commerce.

disclaimed." See Office actions of May 14, 2004 and November 26, 2004. The examining attorney also submitted with his May 14, 2004 Office action a printout of applicant's web page at www.sprayology.com, which shows various spray bottles and contains the statement, "[t]he oral sprays in this breakthrough group replenish the body's supply of energy to relieve temporarily the sy[m]ptoms of aging and burnout."²

Applicant has appealed the final refusal. Both applicant and the examining attorney have filed briefs. Applicant did not request an oral hearing.

Applicant contends that "while the term SPRAY may be descriptive of the fact that applicant's goods are offered in a spray form, the term PHARMACY is not descriptive of any ingredient, quality, characteristic, function, feature, purpose or use of the applicant's goods." Brief at p. 2. Further, applicant maintains that the examining attorney employs a multi-step analysis to conclude that the applicant's mark is descriptive; that one must first "find a dictionary definition for the term PHARMACY ... review the

² In response to the examining attorney's request for information about the meaning of the mark with respect to applicant's goods, applicant replied, "[t]he significance of the mark as applied to the products is that the products are 'oral sprays.'" See response filed November 12, 2004. Applicant also submitted a copy of a page from its web site stating, inter alia, "Spray Your Way to Health..."

various dictionaries until one finds a dictionary in which the term PHARMACY is defined as PHARMACOPOEIA ... look up the definition of PHARMACOPOEIA ... [and] scan down the list of definitions for PHARMACOPOEIA until one arrives at the definition of 'a collection of drugs.'" *Id.* at pp. 2 - 3. Additionally, applicant attached to its brief a copy of a dictionary definition of "pharmacopoeia" from *Webster's New World College Dictionary*, (4th ed. 1999) which has the designation "[Obs.]" next to the definition "a stock of drugs." Applicant contends that "Obs." is an abbreviation for "obsolete." In view of this definition, applicant maintains that the examining attorney relies on an "obsolete definition of PHARMACOPOEIA"; that "the average consumer would not even be aware of its existence, much less its definition"; and that "applicant's mark is SPRAY PHARMACY, not SPRAY PHARMACOPOEIA." *Id.* at p. 3; reply at p. 2. With respect to the examining attorney's reliance on third party registrations, applicant notes that TBMP § 1209.03(c) provides that "third-party registrations are 'not conclusive' on the question of descriptiveness"; and that "[n]either the applicant nor the Examining Attorney has any knowledge as to why disclaimers were entered in those third-party registrations." *Id.* at p. 4.

The examining attorney argues that SPRAY has been disclaimed and that PHARMACY "is merely descriptive of not just pharmacies themselves, but also of goods sold in a pharmacy, pharmacy items." He notes the ten registrations with the disclaimer of PHARMACY for various Class 5 goods; that "[m]any of the ... registrations are for preparations for treating the same conditions"; and that the registrations show that "the Office has treated ... [PHAMARCY] as descriptive in the past ... and that other parties using the term PHARMACY ... have acknowledged the descriptiveness of the term for such goods." Brief at p. 5. As examples, the examining attorney cites the following registrations:

Reg. No. 1799935 for BDI's MINI PHARMACY [which] includes sleep aids, appetite suppressants, diet aids and pain killers; Reg. No. 2042245 for PHARMACY CLASSICS [which] includes analgesics, motion sickness medication, sleep disorder medication and eye drops; and Reg. No. 2538961 for MELALEUCA PHARMACY [which] lists allergy relief medication, oral and topical analgesics, anti-inflammatories and athlete's foot preparations. *Id.*

Additionally, the examining attorney notes the dictionary definitions of record that define "pharmacy" as "pharmacopoeia," and the definition of "pharmacopoeia" as "a collection or stock of drugs." Brief at p. 4. To rebut applicant's argument that the cited definition of

"pharmacopoeia" is "obsolete," the examining attorney submitted with his brief four additional dictionary definitions of "pharmacopoeia," three of which bear copyright notices the same year or later than the dictionary definition relied on by applicant, and "none of which show 'a collection or stock of drugs' to be an obsolete definition." *Id.*

A term is deemed to be merely descriptive of goods or services, within the meaning of Trademark Act Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods or services. *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); and *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with

those goods or services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use; that a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). It is settled that "[t]he question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods or services are will understand the mark to convey information about them." *In re Tower Tech Inc.*, 64 USPQ2d 1314 (TTAB 2002). See also *In re Home Builders Association of Greenville*, 18 USPQ2d 1313 (TTAB 1990); and *In re American Greetings Corporation*, 226 USPQ 365 (TTAB 1985). As the Board has explained:

... the question of whether a mark is merely descriptive must be determined not in the abstract, that is, not by asking whether one can guess, from the mark itself, considered in a vacuum, what the goods or services are, but rather in relation to the goods or services for which registration is sought, that is, by asking whether, when the mark is seen on the goods or services, it immediately conveys information about their nature.

In re Patent & Trademark Services Inc., 49 USPQ2d 1537, 1539 (TTAB 1998).

Applicant has stated that its goods are "oral sprays" and has disclaimed the term SPRAY apart from the mark as

shown. Also, we take judicial notice of the definition of "spray" from *The American Heritage Dictionary of the English Language*, online version as "1. Water or other liquid moving in a mass of dispersed droplets, as from a wave. 2. a. A fine jet of liquid discharged from a pressurized container. b. A pressurized container; an atomizer. c. Any of numerous commercial products, including paints, cosmetics, and insecticides, that are dispensed from containers in this manner."³ As it appears in applicant's mark, SPRAY identifies a feature or characteristic of applicant's goods, i.e., that they are in pressurized containers or are administered in the form of a fine jet of liquid discharged from a pressurized container.

With respect to the word PHARMACY, the examining attorney and applicant disagree on whether it is merely descriptive as applied to applicant's goods. We find that PHARMACY does merely describe a feature or characteristic of applicant's goods under both definitions of PHARMACY in the record.

Under the *Bartleby.com* definition of "pharmacy," i.e., "[a] place where drugs are sold; a drugstore," PHARMACY

³ The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

conveys the meaning of a business establishment where applicant's full line of homeopathic preparations for human use are collected and sold for retail sale. This meaning merely describes the nature of applicant's operations. See *In re The Computer Store, Inc.*, 211 USPQ 72 (TTAB 1981) ("THE COMPUTER STORE" for computers and computer book outlet services). See also 2 J. Thomas McCarthy, *Trademarks and Unfair Competition* § 11:16 (4th ed. database updated 2006) ("A mark is 'descriptive' if it is descriptive of ... the provider of the goods or services."); and TMEP §1209.03(q) and cases cited therein.

PHARMACY is merely descriptive also under the definition submitted by the examining attorney from *Merriam-Webster OnLine*, i.e., a pharmacopoeia. Because applicant's goods are certainly part of, or form a pharmacopoeia, the word "pharmacy" describes a feature of applicant's goods.

As noted above, applicant has challenged the examining attorney's use of the *Merriam-Webster OnLine* definition, arguing that "a multi-step reasoning process" is necessary "to conclude that the term PHARMACY may be defined as 'a collection or stock of drugs.'" Brief at p. 2. Implicit in applicant's argument is the assumption that prospective purchasers would not know the definition of

"pharmacopoeia," and that they would require a dictionary; and/or that the definition "a collection or stock of drugs," is obsolete, or, at a minimum, not well known. In view of the multiple dictionary definitions in the record submitted by the examining attorney showing the definition "collection or stock of drugs" or the like without the designation "obs." or "obsolete," or any other designation indicating that the definition is rare or not commonly understood, we are not persuaded by applicant's argument.⁴ Rather, we find that no imagination or perception is required from prospective purchasers in understanding "pharmacy" as meaning "a collection or stock of drugs."

Further, the record contains a number of registrations which contain a disclaimer of the word "pharmacy" for goods identified as pharmaceutical preparations for a variety of purposes, nutritional supplements, ointments, and/or dietary supplements.⁵ While applicant and the examining attorney dispute the significance to be accorded to these

⁴ We take judicial notice of these dictionary definitions too, which the examining attorney has attached to his brief. See *University of Notre Dame du Lac, supra*.

⁵ Applicant, in its reply, states, "[t]here are, in fact, several third-party registrations in which the term PHARMACY has not been disclaimed, and that the Examining Attorney conveniently omitted to mention." Reply at p. 1. We do not further consider applicant's reference to these registrations because, pursuant to Trademark Rule 2.142(d), the record on appeal should be complete prior to the filing of the notice of appeal and the Board does not ordinarily consider additional evidence filed thereafter.

third party registrations, "third party registrations [may be used to] show the sense in which [a] word is used in ordinary parlance and may show that a particular term has descriptive significance as applied to certain goods or services." *Institut National Des Appellations D'Origine v. Vintners International Company*, 958 F.2d 1574, 22 USPQ2d 1190 (Fed. Cir. 1992). Thus, while the third-party registrations alone do not conclusively establish that the term "pharmacy" is merely descriptive of the identified goods, when we consider the dictionary definition of "pharmacy" along with the fact that several registrations for goods identical or similar to applicant's goods contain a disclaimer of PHARMACY, we find that PHARMACY is merely descriptive of a feature or characteristic of the goods.

We next consider whether the mark as a whole is merely descriptive and not just its individual elements. As the Federal Circuit, our primary reviewing court, stated in *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004):

The PTO may properly consider the meaning of 'patents' and the meaning of '.com' with respect to the goods identified in the application. However, if those two portions individually are merely descriptive of an aspect of appellant's goods, the PTO must also determine whether the mark as a whole, i.e., the combination of the individual parts, conveys any distinctive source-

identifying impression contrary to the descriptiveness of the individual parts.

Whether a term which is created by combining two or more unregistrable words may achieve registration depends on whether, in combination, a new and different commercial impression is achieved and/or the term so created imparts a bizarre or incongruous meaning as used in connection with the goods or services. See *In re National Shooting Sports Foundation*, 219 USPQ 1018 (TTAB 1983).

Applicant does not suggest that the combination of the individual terms evokes a new and unique commercial impression, and we do not find that it does. We find that the mark in its entirety is merely the sum of its merely descriptive components and is equally merely descriptive in connection with applicant's identified goods. Nothing requires the exercise of imagination or thought in order for prospective users of applicant's goods to perceive readily the merely descriptive significance of SPRAY PHARMACY as it pertains to applicant's goods. Rather, SPRAY PHARMACY immediately describes, without conjecture or speculation, a feature or characteristic of applicant's goods, namely, that applicant's goods are in pressurized containers or are administered in the form of a fine jet of

Ser No. 76575239

liquid discharged from a pressurized container, and are provided within a pharmacy, or are part of a pharmacopoeia.

Decision: The refusal to register is affirmed.