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PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re H & H Wholesale Services, Inc.

Serial No. 76585926

Arnold S. Weintraub of The Weintraub Group, P.L.C. for
H & H Wholesale Services, Inc.

Barbara A. Gaynor, Trademark Examining Attorney, Law Office
115 (Tomas V. Vlcek, Managing Attorney).

Before Quinn, Hairston and Grendel, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

H & H Wholesale Services, Inc. has filed an
application to register EASY TEST as a mark for goods
ultimately identified as "glucose assay strips for use by
patients or healthcare professionals at home or in clinical
settings for monitoring blood glucose levels."¹

¹ Serial No. 76585926, filed April 9, 2004, alleging a bona fide
intention to use the mark in commerce. The word TEST is
disclaimed apart from the mark as shown.

The trademark 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 the identified goods, would be merely descriptive of them.

When the refusal was made final, applicant appealed. Applicant and the examining attorney have filed briefs. We affirm the refusal to register.

The examining attorney maintains that "[t]he proposed mark is merely descriptive because the applicant's 'glucose assay strips' are an 'easy test' for determining blood glucose levels." (Brief at unnumbered 3). It is the examining attorney's position that the mark sought to be registered EASY TEST combines two descriptive terms EASY and TEST and that the composite term is therefore descriptive. In addition, the examining attorney argues that the evidence of record demonstrates that the term "easy test" has been used in a descriptive manner in the medical field and in connection with glucose monitoring devices and tests. In support of the refusal, the examining attorney submitted definitions of "easy" and "test". The former word is defined as meaning, among other things, "[c]apable of being accomplished or acquired with ease, posing no difficulty" and "[f]ree from worry,

anxiety, trouble, or pain." The latter word is defined as meaning, among other things, "[a] physical or chemical change by which a substance may be detected or its properties ascertained." The American Heritage Dictionary of the English Language (4th ed. 2000). In addition, the examining attorney submitted a definition of the word "assay" as meaning "[a] laboratory test to find and measure the amount of a specific substance." Prostate Cancer Glossary (On-line edition). We also judicially notice that the word "assay" is defined as meaning "determination of the amount of a particular constituent of a mixture, or of the biological or pharmacological potency of a drug." Dorland's Illustrated Medical Dictionary (27th ed. 1988). In further support of the refusal, the examining attorney submitted Nexis excerpts which she maintains show use of the term "easy test" in the medical field. The following are representative examples:

The DEXA is a type of X-ray, but it has a very low dose of radiation. It is an easy test that requires no medications, injections or special preparations.
(Springfield News-Leader; November 12, 2002);

Women fearing bone loss can now receive osteoporosis testing at Republic Medical Clinic. The clinic can perform a safe, easy test to assess risk. The test takes less than five minutes and is painless and radiation-free.
(Spokesman Review; May 4, 2002);

The development of genetic tests in recent years has sparked calls from medical ethicists for restriction of their use. That call has been given increased urgency by the creation of a relatively easy test for a gene mutation for breast cancer, a relatively common and well-publicized disease.

(Newsday; June 20, 1996); and

Senior Solutions will be offering free vision screening on Saturday, from 9 a.m. - 12 p.m., at the Hampton Medical Atrium on Montauk Highway, Hampton Bays. An ophthalmologist will be screening for glaucoma with a quick and easy test.

(Newsday; February 19, 1996).

The examining attorney also submitted printouts of pages from third-party websites which she maintains show use of the term "easy to use" or "easy test" in connection with glucose monitoring devices and tests. The following are excerpts from each of the websites:

Accu-Chek Advantage/Accu-Chek Sensor System
A small, discreet easy-to-use blood glucose meter designed for patients. Accu-Chek Advantage is the top-selling meter.

Customer Benefits

-Easy to Use

With just two simple steps, you get an accurate result

<http://www.roche-diagnostics.com/products>

Optium™ users do it where they like

Accurate blood glucose testing wherever life takes you

Easy to use wherever you are

Take blood from anywhere on any finger - just touch the tip or the top surface of the test strip to a drop of blood.

So using Optium™ is easy. Even if your hands are shaky, or you can't find a flat surface.

<http://www.diabetesnow.co.uk/products/optium.asp>

HEALTHY RETURNS DIABETES PROGRAM

How can a diabetic take control?

-An important test is an HbA1c. This test tells you an average of your blood sugars over the last 12 months. This is very important to know because it tells you if your blood sugar is under control. You do NOT have to fast, or go without eating to get this test. Ask your doctor if you have had the test and ask him the results. You should have this test every year, and more often if your doctor tells you to. This is an easy test, done by taking a tube of blood from your arm.

<http://www.gatewayhealthplan.com>

Urine tests

Urine tests for sugar are not as accurate as blood tests. Urine testing for sugar should not be done, unless, for some reason, blood testing is impossible. A urine test for ketones is another matter. This is an easy test that is very important when your diabetes is out of control or when you are sick.

<http://www.endocrine.com.sg>

Diabetes Management

Metrika Alc Now Monitor is a single-use tester for hemoglobin Alc. It is the first disposable Alc monitor for home-use. Just use it once and throw it away, It is known as the "gold standard" indicator of diabetes management. Lab-like accuracy, and fast results in 8 minutes, using one drop of blood. This easy test uses simple steps with no venipuncture required. Hemoglobin Alc testing gives you an average of your blood glucose levels for the last 2-3 months.

<http://www.medicalmailorder.com>

Applicant, in urging reversal of the refusal to register, contends that:

A review of the references cited by the Examiner shows that the words "Easy Test" are not associated with any goods. Rather, the term

"easy test" is used in association with the testing procedure of diabetes. Where the test goods, i.e., monitors, are being described in ads, the common phrase is "easy-to-use." It is submitted that there is a significant difference between "easy-to-use", in describing the efficacy by which the diabetes monitoring device is implemented, and the fact that testing, per se, is "easy."
(Brief at unnumbered 2).

Applicant also submitted a copy of a third-party registration for the mark EASY TEST for "inert plastic strips to which are attached reagent papers for glucose assays for use by patients and healthcare professionals at home or in clinical settings" (Registration No. 1,795,715 which is now cancelled). Applicant argues that this is evidence that the Office considered EASY TEST to be suggestive rather than descriptive.

A term is merely descriptive within the meaning of Section 2(e)(1) of the Trademark Act if it immediately conveys knowledge of a significant quality, characteristic, function, feature or purpose of the goods with which it is used, or intended to be used. 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). The question of whether a particular term is merely descriptive must be determined not in the abstract or on the basis of guesswork, but in relation to the goods for which

registration is sought, the context in which the term is used, or is intended to be used, and the impact that it is likely to make on the average purchaser of such goods. In re Abcor Development Corp., supra; and In re Bright-Crest, Ltd., 204 USPQ 591 (TTAB 1979).

We acknowledge applicant's point that the Nexis and Internet evidence primarily shows use of the term "easy test" as referring to medical tests and procedures, rather than as referring to the devices used in such tests and procedures. Nonetheless, the dictionary definitions alone show the descriptive nature of the mark EASY TEST as a whole. The word "test" is descriptive of applicant's glucose assay strips inasmuch as the strips are used to ascertain the properties of blood glucose. In this regard, we note that applicant has disclaimed the word TEST. Further, the word "easy" has a descriptive connotation insofar as it indicates that the test may be "accomplished with ease." Thus, based on the normal meanings of the words "easy" and "test," as they would be understood in connection with glucose assay strips for monitoring blood glucose levels, we find that EAST TEST merely describes a feature or characteristic of applicant's goods. Specifically, it immediately and directly informs purchasers that applicant's glucose assay strips provide an

"easy test" of blood glucose levels. Any manufacturer of glucose assay strips for monitoring blood glucose levels should be free to tout its products as an "easy test."

The prior registration for the mark EASY TEST does not compel us to reach a different result in this appeal. While uniform treatment under the Trademark Act is an administrative goal, the Board's task in an ex parte appeal is to determine, based on the record before us, whether applicant's mark is merely descriptive. As often noted by the Board, each case must be decided on its own merits. We are not privy to the record of the third-party registration and, moreover, the determination of registrability of that particular mark by the examining attorney cannot control our decision in this case. See *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ["Even if some prior registrations had some characteristics similar to [applicant's application], the PTO's allowance of such prior registrations does not bind the Board or this court."]

Decision: The refusal to register under Section 2(e)(1) is affirmed.