

This Opinion is not a  
Precedent of the TTAB

Mailed: March 23, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Internet Promise Group LLC*

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Serial No. 85892404

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Internet Promise Group LLC, appearing *pro se*.

Esther Queen, Trademark Examining Attorney, Law Office 111,  
Robert L. Lorenzo, Managing Attorney.<sup>1</sup>

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Before Bucher, Wolfson, and Masiello,  
Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Internet Promise Group LLC (“Applicant”) seeks registration on the Principal Register of the mark EAR NATURAL (in standard characters) for

a packaging with a dropper that contains limited quantity  
of mustard oil, for dropping oil drops in the ear canal, for  
cure of middle ear infection, without use of antibiotics

in International Class 5.<sup>2</sup>

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<sup>1</sup> The current Examining Attorney was not the original attorney in this application but was assigned the application after issuance of the final Office Action.

<sup>2</sup> Application Serial No. 85892404 was filed on April 2, 2013, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), having determined that the applied-for mark immediately informs consumers of the function of the goods and is thus merely descriptive within the meaning of Section 2(e)(1). After the Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.<sup>3</sup>

As a preliminary matter, we address the Examining Attorney's requirement for a definite identification of goods. In the initial Office Action, the Examining Attorney refused registration on the ground that the identification of goods did not identify the goods using their common commercial or generic name. In response to the refusal, Applicant offered to amend the identification of goods to:

A single-use sachet with a dropper, the sachet capable of being heated to a temperature of 110 degrees Fahrenheit and contains limited amount of mustard oil for use in treating middle ear infections.

This proposed amendment was rejected as failing to properly name the goods, the former Examining Attorney contending that the goods "are not a packaging or droppers but the mustard oil ear drops."<sup>4</sup> In the brief, the current Examining Attorney reiterates that the essence of the goods is the mustard oil rather than the sachet with a dropper, but does not make this the basis of the refusal. Instead, the refusal is based on the argument that the amended identification seeks to

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<sup>3</sup> Applicant filed a main trial brief, and a reply brief that essentially duplicates its main brief. This is inappropriate. The purpose of a reply brief is to provide the applicant with an opportunity to respond to arguments made by the Examining Attorney, and not to allow reiteration of the same arguments and authorities as were presented in the main brief.

<sup>4</sup> Office Action dated January 31, 2014.

“impermissibly broaden[] the scope of the original identification by removing the method of use (‘dropping oil drops in the ear canal’) and removing the limiting language ‘without the use of antibiotics.’”<sup>5</sup>

We agree that the essence of the product is the mustard seed oil that is contained within a dropper, and not the dropper itself. The original identification of goods, however, is not indefinite on that basis. As to the argument that the amendment seeks to impermissibly broaden the goods, we do not find Applicant’s proposed amendment to go beyond the scope of the original identification by its failure to specifically include the method of application (i.e., by being dropped into a patient’s ear). The goods as listed in the original application were already so limited in the method by which they could be applied; “oil” combined with a “dropper” for “treating middle ear infections” (in the proposed identification) would be understood to be ear drops for application to the ear canal.<sup>6</sup> Thus, the failure to specify “for dropping oil drops in the ear canal” is not fatal to the amendment. On the other hand, the original identification also specified that the goods did not contain antibiotics. Applicant’s amendment eliminates this characteristic, and it is not implied by the statement that the dropper contains mustard oil. Thus, the proposed amendment is unacceptable on this basis. Because the proposed amendment is unacceptable, the goods remain as originally listed. To be clear, the goods are not

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<sup>5</sup> 6 TTABVUE at 10.

<sup>6</sup> Moreover, the Examining Attorney’s first Office Action suggested that Applicant consider amending the identification of goods to “Ear drops consisting of a packaging with a droppers [sic] containing limited quantity of mustard oil for use in treating middle ear infection without antibiotics.” This suggested language does not include specific reference to the method of application.

medical devices, i.e., droppers, but rather the herbal/botanical mustard oil preparation itself, for the cure of a middle ear infection without use of antibiotics, sold in packaging that incorporates a dropper. With this understanding of the nature of the goods, we turn to the Section 2(e)(1) refusal.

Trademark Act § 2(e)(1) prohibits registration of a mark which is merely descriptive of the applicant's goods or services. A term is deemed to be merely descriptive of goods or services if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012). *See also In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828 (TTAB 2007); and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods and/or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or feature about them.

Applicant argues that “even with any degree of thought and imagination, the mark EAR NATURAL does not enable an objective person to reach a conclusion as to the nature of the goods.” Applicant argues that since the goods are designed to cure middle ear infections only, and the word EAR is commonly understood to refer to the outer ear and not the inner ear, multiple reasoning steps are required to perceive that the word EAR refers to the goods. With respect to the term NATURAL, Applicant argues that the term has no meaning in connection to a

human ear, and is incongruous in that the term has “a large number of different meanings and or abstract meanings, such as natural thought, and as a figure of speech, as naturally speaking.”<sup>7</sup>

As there is no definition for “ear” in the record, we take judicial notice that THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE defines “ear” as “the vertebrate organ of hearing, responsible for maintaining equilibrium as well as sensing sound, and divided in mammals into the external ear, the middle ear, and the inner ear.”<sup>8</sup> Because Applicant’s goods are directed to ailments of the middle ear, and the definition of “ear” encompasses the middle ear, purchasers encountering Applicant’s mark will immediately understand that Applicant’s mustard oil preparation is for use in connection with the ear, including the middle ear. In this regard, the record evidence shows that the public has been exposed to postings that recommend liquids (such as mustard oil) that are applied by being dropped into the ear canal to cure ear aches as well as to massaging oil preparations that are applied to the outside of the ear.<sup>9</sup> Even those prospective purchasers whose first thought upon encountering the mark in the context of the goods is only to the outer, external ear, will immediately perceive that the goods are designed to treat

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<sup>7</sup> 4 TTABVUE 10-11.

<sup>8</sup> At <https://www.ahdictionary.com>. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

<sup>9</sup> The online article “Natural Remedies for Ear Infections,” discusses both natural ear ache remedies such as mullein garlic oil (drops) and essential oils to massage to the outside of the ear. Online at Mommypotamus, <http://www.mommypotamus.com>, attached to Office Action dated January 31, 2014, at 26 and 28.

ailments of one's ear. Thus, it is of little consequence to the public's likely perception of the mark that Applicant's goods are designed to cure middle ear infections only, because the word "ear" in the mark directly describes the body part that is being treated by Applicant's mustard oil preparation and prospective purchasers will readily understand this without any mental gymnastics or need for multi-stage reasoning.

As for the term NATURAL, it immediately tells consumers that the goods are free of artificial ingredients. The term "natural" is defined as "not altered, treated, or disguised,"<sup>10</sup> and "being in accordance with or determined by nature; existing in or produced by nature: not artificial."<sup>11</sup> By its definition, the term "natural" directly applies to mustard oil, which is a natural ingredient obtained from mustard seeds.<sup>12</sup> The Merriam-Webster online dictionary even notes the medicinal qualities of mustard oil "especially in liniments and medicinal plasters." We may also consider the meaning of the term NATURAL based on third-party use and registrations. The Examining Attorney has placed nine third-party registrations in the record that include a disclaimer of the word NATURAL in connection with herbal or botanical supplements used as natural remedies. These show that the USPTO has treated the

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<sup>10</sup> From Yahoo Education at <http://education.yahoo.com>, attached to Office Action dated July 16, 2013.

<sup>11</sup> At <http://www.merriam-webster.com>, attached to Office Action dated July 16, 2013. We have disregarded the definitions from the Collins dictionary because they were taken from the "English," rather than the "American English" database. At <http://www.collinsdictionary.com>.

<sup>12</sup> See The American Heritage Dictionary of the English Language, definition of "mustard oil." Further, Merriam-Webster online dictionary notes the medicinal qualities of mustard oil "especially in liniments and medicinal plasters."

word as having descriptive significance. *Institut National Des Appellations D'Origine v. Vintners International Co.*, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992) (“Such third party registrations show the sense in which the word is used in ordinary parlance and may show that a particular term has descriptive significance as applied to certain goods or services.”). *See also, In re Box Solutions Corp.*, 79 USPQ2d 1953, 1955 (TTAB 2006) (“[T]hird-party registrations can be used in the manner of a dictionary definition to illustrate how a term is perceived in the trade or industry”); *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987) (“[T]hird party registrations are of use only if they tend to demonstrate that a mark or a portion thereof is suggestive or descriptive of certain goods and hence is entitled to a narrow scope of protection”). *See for example:*

ALTA NATURAL (Reg. No. 2763421, the word “Natural” disclaimed) for various vitamin and mineral supplements and nutritional and herbal supplements, namely, salmon oil, shark liver oil, seal oil;

WOOHOO NATURAL (Reg. No. 3976971, the word “Natural” disclaimed) for dietary and nutritional supplements;



(Reg. No. 4304549, the term “Natural Healthy” disclaimed) for alginate dietary supplement; cod liver oil; flaxseed oil dietary supplements; and

NATURAL PAIN ADVANTAGE (Reg. No. 4386956, the term “Natural Pain” disclaimed) for dietary and nutritional supplements for pain relief.

In addition, a number of websites contain homeopathic advice for curing ear aches or infections with remedies described as “natural.” For example, the online article entitled “Kids’ Ear Infections: A Home Remedy?” discusses “natural remedies

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for ear infections,” recommending some basic essential oils for the purpose.<sup>13</sup> An online article entitled “An Unbelievable Natural Ear Infection Remedy”<sup>14</sup> recommends different possible curatives such as vitamin C, Chinese herbal preparations, breast milk, and urine as remedies for ear infections. Commenting on this article, a reader notes that “mustard oil works wonders too.” Notably, both these online articles are followed by numerous reader postings discussing these and other types of remedies described as “natural,” such as garlic and olive oil, designed to cure ear infections, and some specifically discount the use of antibiotics. To be clear, Internet printouts are not competent evidence for the truth of the statements they contain. The Internet articles and the related commentary are probative only of the fact that the websites exist, that the public has been exposed to them, and that (as shown on their face) numerous third parties have posted comments recommending remedies described as “natural” for the treatment of ear infections. *See, e.g., Swiss Watch Int’l Inc. v. Fed’n of the Swiss Watch Indus.*, 101 USPQ2d 1731 (TTAB 2012) (Internet printouts acceptable to show only that statements were made or the information was reported in the webpages); *Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066 (TTAB 2011); *In re Fitch IBCA, Inc.*, 64 USPQ2d 1058, 1060 (TTAB 2002) (because website content is accessible by the consuming public, it constitutes evidence that the public may be exposed to statements appearing therein); TBMP § 1208.03 (2014).

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<sup>13</sup> “Kitchen Stewardship” at Google’s cache of <http://www.kitchenstewardship.com> from January 18, 2010. Following the article are 120 postings from readers.

<sup>14</sup> Google’s cache of <http://wholenewmom.com>. March 29, 2013, which includes 132 readers’ comments.



Based on the above, we find that consumers will readily perceive that the term NATURAL in Applicant's mark refers to the non-artificial ingredient mustard seed oil in the product as well as to the function of the goods, i.e., to cure ear infections without the use of antibiotics. Contrary to Applicant's argument, other definitions of the term "natural" are immaterial to our inquiry as the determination of whether a term is merely descriptive is made only in relation to the goods for which registration is sought. That is, we do not consider the mark in the abstract but rather in the context of the involved goods (or services). *See In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979) ("[T]he fact that a term may have meanings other than the one the Board is concerned with is not controlling on the question."). We must consider how Applicant's potential customers are likely to perceive the mark EAR NATURAL in connection with a mustard seed oil curative contained in ear droppers and used to treat middle ear infections. Having determined that both "ear" and "natural" are merely descriptive terms for the goods, we find the composite term EAR NATURAL is also merely descriptive, as there is nothing suggestive or otherwise non-descriptive in the combination. Applicant's argument that the mark is incongruous because the terms are not used in a common sequence is unpersuasive. Even if the phrase is invented, the order of the words, in this case, does not obscure their meaning. While Applicant may be the first to juxtapose the words "ear" and "natural" in this manner, the resultant phrase does not create a separate commercial impression apart from the component elements of the mark such that its significance is suggestive rather than merely descriptive. It is well-settled that the fact that an applicant may be the first (or even only) user of a

merely descriptive or generic designation does not justify registration if the only significance conveyed by the term remains merely descriptive. *See In re Carlson*, 91 USPQ2d 1198, 1202 (TTAB 2009) (URBANHOUSING as a whole is merely descriptive); *In re BetaBatt Inc.*, 89 USPQ2d 1152, 1156 (TTAB 2008) (DEC for batteries descriptive even though applicant is only user of term); *In re Sun Microsystems, Inc.*, 59 USPQ2d 1084, 1087 (TTAB 2001). The composite EAR NATURAL immediately conveys information about the function and composition of the goods. Applicant's additional argument, that a human ear "has nothing to do with the word NATURAL," has no relevance (besides being unsupported by any record evidence) because the human ear is the subject of Applicant's natural treatment. Accordingly, the term EAR NATURAL, when used in connection with a formulation made from mustard seed oil that is used to cure middle ear infections, forthwith conveys the idea of an ear treatment made from natural ingredients.

*Decision:* The refusal to register Applicant's mark EAR NATURAL for "a packaging with a dropper that contains limited quantity of mustard oil, for dropping oil drops in the ear canal, for cure of middle ear infection, without use of antibiotics" under Trademark Act § 2(e)(1) is affirmed.