

This Opinion is Not a
Precedent of the TTAB

Mailed: October 30, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board

—
In re Mens LLC

—
Serial Nos. 90122228 and 90122279

—
John J. Bamert of Bamert Regan for Mens LLC.

Hyun-Jung Oh, Trademark Examining Attorney, Law Office 129,
Pamela Y. Willis, Managing Attorney.

—
Before Goodman, Coggins and Thurmon, Administrative Trademark Judges.

Opinion by Thurmon, Administrative Trademark Judge:

Mens LLC (“Applicant”) seeks registration on the Principal Register of the mark

MENS, in standard characters, for the following goods and services:

dietary and nutritional supplements; vitamins; medicated
skin care preparations, in International Class 5;

online retail store services featuring skin care
preparations, dietary and nutritional supplements,
vitamins, in International Class 35;¹

¹ Application Serial No. 90122228, filed August 18, 2020, based on an intent to use the mark in commerce, pursuant to Section 1(b) the Trademark Act, 15 U.S.C. § 1051(b). This application includes the goods identified in International Class 5 noted above and the International Class 35 services noted above.

and

medicated hair care preparations; pharmaceuticals for the treatment of erectile dysfunction, in International Class 5;

online retail store services featuring hair care preparations and pharmaceuticals for the treatment of erectile dysfunction; pharmaceutical services, namely, processing online prescription orders in retail pharmacies; doctor referral services, namely, connecting patients with appropriate healthcare professionals and resources, in International Class 35.²

The Examining Attorney refused registration of the mark in both applications for failure to function as a mark under Sections 1, 2, 3 and 45 of the Act, 15 U.S.C. §§ 1051, 1052, 1053 and 1127, and for being merely descriptive of the goods and services under Section 2(e)(1) of the Act, 15 U.S.C. § 1052(e)(1). Applicant appealed and the Examining Attorney moved to consolidate, which we granted. The consolidated appeals are fully briefed and ready for decision. We affirm the refusals under Section 2(e)(1). We do not reach the failure to function refusals.

I. Preliminary Matter – Objection to Evidence Submitted with Brief

The Examining Attorney objected to evidence Applicant submitted with its Appeal Brief. This evidence included screenshots from its website, from online dictionaries, and other materials.³ Because Applicant submitted the same materials with its

² Application Serial No. 90122279, filed August 18, 2020, based on used in commerce pursuant to Section 1(a) of the Act, 15 U.S.C. § 1051(a). Applicant claims first use anywhere and in commerce of September 15, 2018 for the International Class 5 goods and the International Class 35 services identified above.

³ 6 TTABVUE (Applicant’s brief, with approximately 180 pages of attached evidence); 11 TTABVUE 4 (Examining Attorney brief with objection). Citations to the prosecution file refer to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system in .pdf format. Citations to briefs refer to the actual page number, if available, as well as TTABVUE, the Board’s online docketing system. The number preceding “TTABVUE” corresponds to the

Request for Reconsideration, which makes the materials of record in this proceeding, the Examining Attorney's objection as moot.⁴ Nonetheless, we remind Applicant that it is not helpful to submit the same evidence more than once, as doing so only complicates the process of resolving the case. *In re Lorillard Licensing Co.*, 99 USPQ2d 1312, 1315 (TTAB 2011) (attaching evidence from record to brief is duplicative, unnecessary, and discouraged).

II. Section 2(e)(1) – Merely Descriptive – Analysis

Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1), precludes registration of a mark on the Principal Register which, when used in connection with the applicant's goods and services, is merely descriptive of them. A mark is "merely descriptive" within the meaning of Section 2(e)(1) "if it immediately conveys information concerning a feature, quality, or characteristic of the goods or services for which registration is sought." *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017) (citing *In re Bayer A.G.*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). Conversely, a mark is suggestive if it "requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods or services." *In re Franklin Cty. Historical Soc'y*, 104 USPQ2d 1085, 1087 (TTAB 2012) (citing *In re MBNA Am. Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003)). *See*

docket entry number; the number(s) following "TTABVUE" refer to the page number(s) of that particular docket entry. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

⁴ The Examining Attorney argued that the included Latin dictionary, with a definition of "mens" was new evidence. 11 TTABVUE 4. That is incorrect, as Applicant submitted that definition with its Response to Office Action dated April 5, 2022, at 19. The other materials attached to Applicant's Brief were submitted with its Request for Reconsideration.

also Earnhardt v. Kerry Earnhardt, Inc., 864 F.3d 1374, 123 USPQ2d 1411, 1413 (Fed. Cir. 2017) (contrasting merely descriptive from suggestive marks).

In these consolidated appeals, Applicant provided the following responses to a Request for Information issued by the Examining Attorney:

Question: Are applicant's goods for or applicant's services include [sic] goods intended for men?

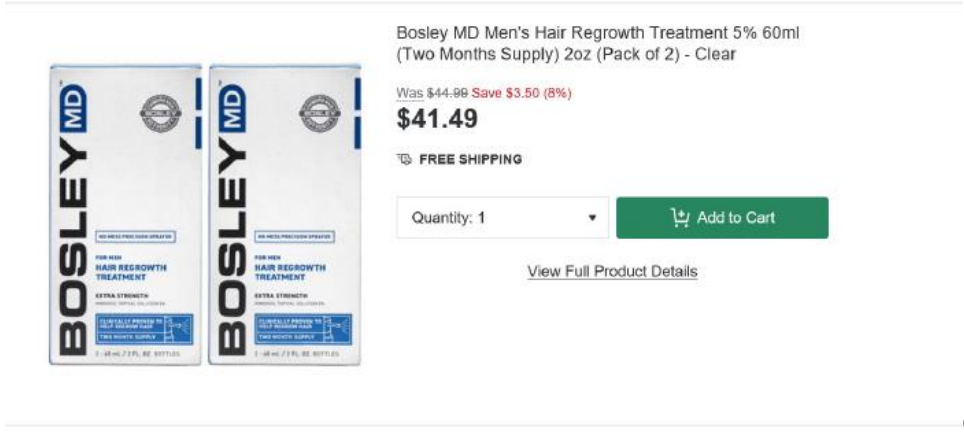
Answer: Yes.

Question: Who is [sic] the typical consumers of applicant's goods and services?

Answer: Consumers that are interested in wellness products for male health and wellness.⁵

As we noted above, a mark is merely descriptive "if it immediately conveys information concerning a feature, quality, or characteristic of the goods or services" *In re N.C. Lottery*, 123 USPQ2d at 1709. Some of Applicant's goods and services are intended for men, and some are male wellness products. Men, male, men's and variants on these words are widely used descriptively within the same market segment in which Applicant operates or intends to operate. The Examining Attorney provided ample evidence of this, with just a sampling provided below.

⁵ Response to Office Action dated May 21, 2021 at 7 (same response filed in both applications).



Bosley MD Men's Hair Regrowth Treatment 5% 60ml (Two Months Supply) 2oz (Pack of 2) - Clear

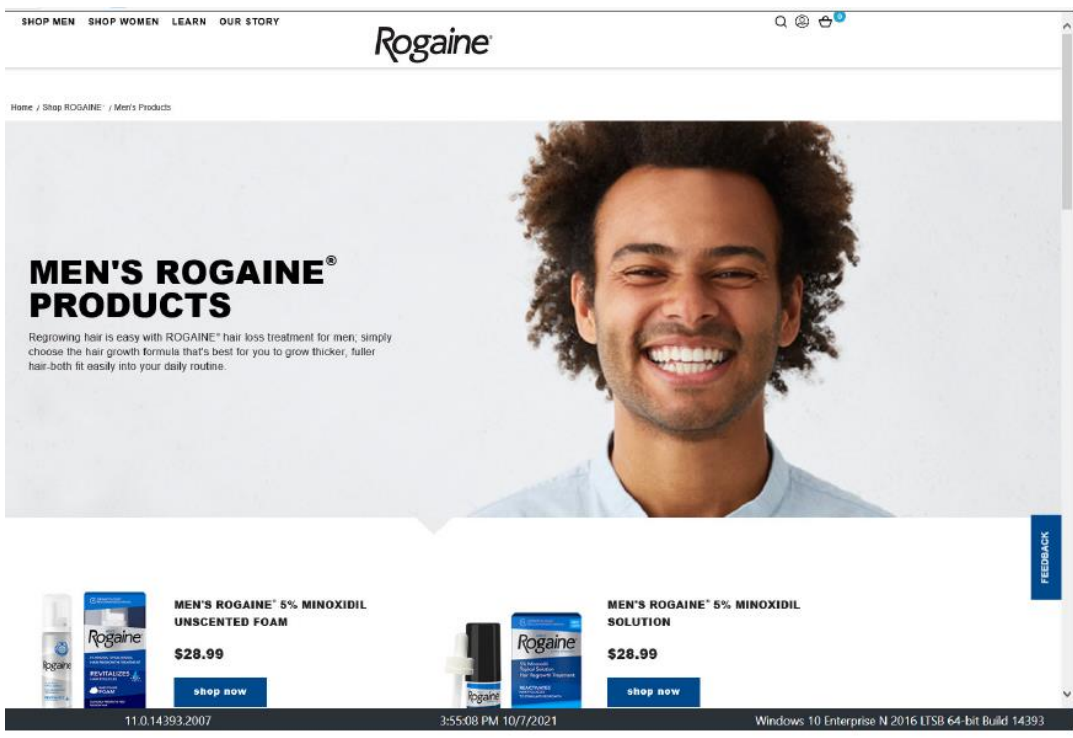
Was \$44.99 Save \$3.50 (8%)
\$41.49

FREE SHIPPING

Quantity: 1 [Add to Cart](#)

[View Full Product Details](#)

6



SHOP MEN SHOP WOMEN LEARN OUR STORY

Rogaine

Home / Shop ROGAINE / Men's Products

MEN'S ROGAINE® PRODUCTS

Regrowing hair is easy with ROGAINE® hair loss treatment for men, simply choose the hair growth formula that's best for you to grow thicker, fuller hair—both fit easily into your daily routine.

MEN'S ROGAINE 5% MINOXIDIL UNSCENTED FOAM
\$28.99 [shop now](#)

MEN'S ROGAINE 5% MINOXIDIL SOLUTION
\$28.99 [shop now](#)

11.0.14.393.2007 3:55:08 PM 10/7/2021 Windows 10 Enterprise N 2016 LTSB 64-bit Build 14393

7

⁶ Office Action dated October 7, 2021 at 50.

⁷ *Id.* at 49.

HEALTHY MALE
Generations of healthy Australian men

About us News The Male Subscribe Contact us SEARCH

For men & boys Partner's guide For health professionals Resources Men's health

Erectile dysfunction

Home > Men's health > Erectile dysfunction

Download this page

ON THIS PAGE

- What is erectile dysfunction?
- Symptoms of erectile dysfunction
- Causes of erectile dysfunction
- Diagnosis of erectile dysfunction
- Treatment of erectile dysfunction
- Health effects of erectile dysfunction
- What to do about erectile dysfunction
- Questions I should ask my doctor about erectile dysfunction
- References
- Resources

Erectile dysfunction

[More resources](#)

What is erectile dysfunction?

The majority of Australian men aged over 45 have some form of erectile dysfunction, but it's much less common if you're healthy than if you have a chronic disease, are overweight, smoke cigarettes or don't exercise.


Erectile dysfunction becomes more likely as you age. If you're under 40 and have erectile dysfunction, you're among up to 10% of men in your age group who are affected. If you're 85 or older and have erectile dysfunction, you're like nearly all men your age.


Symptoms of erectile dysfunction

If you have erectile dysfunction, you might:


- Have difficulty getting or keeping an erection
- Experience problems engaging in sexual intercourse due to your penis not being hard enough.

⁸ Office Action dated June 3, 2022 at 5.

Free shipping over \$99*  Lowest Price Guaranteed

 Search All Star Health

Vitamins & Supplements Sports Nutrition Weight Loss Herbs Specialty Formulas Healthy Kitchen Equipment Accessories Bath & Body



Picture may be of different size or flavor.

Biomed Health Bao Shi Advanced Men's Restorative Hair Nutrients 120 vcaps

MSRP: \$37.99
Our Price: \$25.99

[Add To Cart »](#)
[Save for later →](#)

Product Details User Reviews

Bao Shi Advanced Men's Restorative Hair Nutrients Description from Biomed Health
Advanced Men's Restorative Hair Nutrients, inspired by wisdom of herbal medicine, is a premium proprietary herbal formula of specific ingredients in unique ratios, targeting multiple factors to improve hair growth and quality.

- Saw palmetto as DHT blocker
- Stimulates natural hair growth
- Nourishes hair follicles and scalp
- Helps reduce graying

9

⁹ *Id.* at 8.



Hover your mouse over the image to zoom in

One-A-Day Multivitamin Supplement for Women, bee-tee-ning01-mtt1069, For Men, 1, 1

Visit the ONE A DAY store
★★★★★ 25,752 reviews | 207 questions answered
Amazon's Choice in ONE A DAY Multivitamin Supplements

Recommended price: \$16.89 Details
Price: **US\$ 14.67** (US\$ 0.07 / Count) Receive fast and FREE delivery with Amazon Prime
Save: \$2.13 (13%)

Get \$50 off instantly: Pay \$0.00 \$14.67 upon approval for the Amazon Rewards Visa Card. No annual fee.

Available at a lower price from other sellers who might not offer free Prime shipping.

Primary supplement type	Multivitamins
Brand	ONE A DAY
Item form	Tablet
Age range (description)	Adult
Taste	Unflavored

About this article

- With 25% DV plus vitamin D Centrum men under 50 (700 IU vs 600 IU)
- Contains lycopene, a cell-protecting antioxidant
- Contains calcium, magnesium, potassium, and vitamin C to help maintain normal blood pressure
- plated in chromium and B vitamins for the release of energy from food
- Please read all label information on delivery

10

Home > Shop > Vitamins > Multivitamins > Multivitamins for Men

CVS Health Men's Multivitamin & Multimineral Tablets, 120CT

★★★★★ 4.6 (39)



11

¹⁰ Office Action dated October 7, 2021 (90122228) at 46.

¹¹ *Id.* at 47.

The screenshot shows the GNC website's product page for men's multivitamins. At the top, the GNC logo and navigation menu are visible. The main banner features the headline "OUR BEST MEN'S MULTIVITAMINS" and a sub-headline stating that GNC Mega Men multivitamins are crafted with over 85 years of science-backed innovation. Two bottles of GNC Mega Men Sport and Mega Men are displayed. Below the banner, a paragraph of text explains that eating right all the time isn't easy, but with a men's multivitamin from GNC Mega Men, you can get your full daily values of key vitamins and minerals in just seconds. To the right, a section titled "PROVEN RESULTS" includes a photo of a man and text stating that the multivitamins are backed by science and feature a vitamin and mineral blend clinically proven to help you feel better. A "SHOP NOW" button is located at the bottom right of the page.

Applicant's position that the marks are not merely descriptive is based primarily on the argument that MENS, as used on Applicant's goods and services, will be understood as a double-entendre, where the Latin meaning of "mens" (i.e., mind) provides the alternative meaning.¹³ We reject this argument because it is legally

¹² *Id.* at 48.

¹³ 6 TTABVUE 10-13. Applicant also argues that evidence of third party uses of "men's" with generic terms such as "multivitamin" do not support the refusal, because without the generic term (e.g., multivitamin), "the mark MENS on its own fails to convey general information about the Applicant's goods or services." This argument misstates the nature of the inquiry under Section 2(e)(1). We do not conduct the merely descriptiveness analysis in a vacuum, but as consumers would in the real world, that is, with an understanding of what the goods and services are. *See In re Chamber of Comm. of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re Bright-Crest Ltd.*, 204 USPQ 591, 593 (TTAB 1979); *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) ("the Board must consider the mark in relation to the goods for which it is registered"). When viewed in the proper context, there is no question consumers of men's healthcare goods and services, like hair loss or erectile dysfunction treatments, would

misplaced. Though the argument is interesting—going into mental health issues that relate to male erectile dysfunction and noting the Latin meaning is known within the legal community—it fails to account for all the goods and services.¹⁴ Even if this argument had merit, it would not be enough because it relates to only one type of goods identified in the appealed applications: male erectile dysfunction treatment.

Applicant also identifies wellness supplements in the applications, and there is no evidence or argument that all supplements for men involve the mind or mental health. Applicant identifies hair loss treatment, also, and it does not suggest that male baldness is caused primarily by the mind. The Section 2(e)(1) standard is met if the mark is merely descriptive of **any** of the goods or services. *See, e.g., In re Quik-Print Copy Shops, Inc.*, 616 F.2d 523, 205 USPQ 505, 507 (CCPA 1980) (“Registration will be denied if a mark is merely descriptive of any of the goods or services for which registration is sought.”).

The argument also fails because it doesn’t address all the relevant consumers. To the extent there is factual merit to Applicant’s argument about the Latin meaning of “mens,” Applicant does not suggest that all of its customers will understand this meaning. In other words, even if we exclude all the lawyers and consumers who like to watch lawyers on television—another of Applicant’s arguments apparently meant

understand “mens” as describing something about the goods or services. Indeed, the proposed mark identifies the intended consumers of the goods and services. To suggest otherwise is to ignore reality.



¹⁴ We do not evaluate the factual merits of Applicant’s argument, nor will we comment on the various materials it submitted in support of this argument. The argument fails for legal reasons, as we explain above, regardless of its factual accuracy.

to expand the consumer group to which the Latin argument might apply—there will still be a lot of men left outside the group covered by Applicant’s argument. What do those consumers understand when they encounter the mark MENS for men’s products? If they don’t get the Latin angle, then only the directly descriptive meaning is left. Just as a mark is merely descriptive if it merely describes any of the goods or services, it is also merely descriptive if a substantial segment of the relevant consumers understand the mark as describing any of the goods or services. *Borinquen Biscuit Corp. v. M.V. Trading Corp.*, 443 F.3d 112, 78 USPQ2d 1454, 1459 (1st Cir. 2006) (evaluating descriptiveness from the perspective of Spanish speaking consumers).

Applicant makes much of the fact that the proposed mark is MENS, with no apostrophe. According to Applicant, this makes all the difference. Once again, we disagree. The Board often takes judicial notice of dictionary definitions and we do so here to put the “missing apostrophe” argument to rest.¹⁵ At least two leading dictionaries indicate that “mens” is an alternative presentation of the possessive “men’s”, as shown below:

¹⁵ The Board may take judicial notice of dictionary definitions, including definitions in technical dictionaries, translation dictionaries and online dictionaries which exist in printed format or that have regular fixed editions. *In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.23 (TTAB 2013).

men's

or mens [menz] [SHOW IPA](#)  

noun, plural **men's**.

1. a range of sizes in even and odd numbers for garments made for [men](#).
2. a garment in this size range.

[SEE MORE](#)

16

Definition of 'men's'

men's

in American English

(menz)

NOUN

Word forms: plural **men's**

1. a range of sizes in even and odd numbers for garments made for men
2. a garment in this size range
3. the department or section of a store where these garments are sold

Also: mens

17

These dictionaries show “mens” as an alternative version of the possessive “men’s.” The evidence of third party uses of “men’s” with the same type of goods and services Applicant offers and intends to offer, therefore, is equally probative of the descriptiveness of the variation “mens.”

This is hardly a surprising result. When a person asks for directions to the “men’s room” or asks about “men’s erectile dysfunction treatments” it is impossible to

¹⁶ Dictionary.com based on the RANDOM HOUSE UNABRIDGED DICTIONARY (2023), accessed October 20, 2023, <https://www.dictionary.com/browse/mens>.

¹⁷ Collins English dictionary, accessed October 20, 2023, <https://www.collinsdictionary.com/us/dictionary/english/mens#:~:text=Definition%20of%20'men's'&text=1.,garment%20in%20this%20size%20range>.

determine whether the person is saying men's or mens. The apostrophe is grammatically significant, but it is not pronounced, making the two variants identical when spoken. "Punctuation, such as quotation marks, hyphens, periods, commas, and exclamation marks, generally does not significantly alter the commercial impression of the mark." TRADEMARK MANUAL OF EXAMINING PROCEDURE § 807.14(c) (July 2022); *see also Peterson v. Awshucks SC, LLC*, 2020 USPQ2d 11526, at *51 (TTAB 2020) (finding omission of periods after a person's initials did not materially alter the impression created by the mark).

Finally, we note that misspellings of descriptive terms are also deemed descriptive if consumers are likely to equate the misspelled version with the known version.

Indeed, the Restatement of Unfair Competition addresses this issue:

The misspelling or corruption of an otherwise descriptive word will not ordinarily alter the descriptive character of the designation. In many instances the contrivance will not overcome the ordinary meaning of the term, and prospective purchasers will thus continue to understand the designation in a purely descriptive sense. Indeed, in some instances the alteration may go entirely unnoticed by a significant number of consumers. If the altered form is phonetically equivalent to the original word, its aural significance will also remain merely descriptive. Recognition of exclusive rights in variants and corruptions of descriptive words also imposes a risk of liability on subsequent users of the original words. See § 21, Comment c. Thus, unless the alteration is sufficient to avoid encumbering use of the original word, the variation remains descriptive.

Restatement (Third) of Unfair Competition (June 2017 update), § 14, Comment a.

This Board and our primary reviewing court have applied this rule in a number of cases, and we hold it is applicable here, where the word "mens" is used as a

misspelling of the possessive form men's. Other examples of application of this rule include:

In re Quik Print, 205 USPQ2d 507, n.9 (“There is no legally significant difference here between ‘quik’ and ‘quick’”);

In re Carlson, 91 USPQ2d 1198, 1203 (TTAB 2009) (“URBANHOUSING in standard character form, will be immediately and directly perceived by consumers as the equivalent of the admittedly descriptive term URBAN HOUSING, rather than as including the separate word ZING.”);

In re Organik Tech. Inc., 41 USPQ2d 1690, 1694 (TTAB 1997) (“ORGANIK, which is the phonetic equivalent of the term ‘organic,’ is deceptive”); and,

Hi-Shear Corp. v. Nat'l Auto. Parts Ass'n, 152 USPQ 341, 343 (TTAB 1966) (HI-TORQUE “is the phonetic equivalent of the words ‘HIGH TORQUE’”).

The same logic applies here. When a prospective customer hears of Applicant's MENS hair loss treatment or its MENS supplements, the customer will immediately understand that these products are intended for men. When the proposed mark is spoken, it is merely descriptive. When written, it is likely to be understood as a misspelling or variant of the possessive “men's.”

For all the reasons given above, we find the proposed mark MENS is merely descriptive for the men's health and wellness goods and services identified in Applicant's two pending applications. The guidance from the Restatement is worth noting here, because granting trademark protection to the mark MENS for these goods and services would encumber the use of the word “men's” within this market

Serial Nos. 90122228, 90122279

segment. The proposed mark, therefore, in the words of the Restatement, “remains descriptive.”

Decision: The Section 2(e)(1) refusal is affirmed as to each class of goods and services in Application Serial Numbers 90122228 and 90122279.