

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: July 11, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re BPI Sports, LLC

Serial No. 86414907

Adam C. Underwood of Carey Rodriguez Milian Gonya LLP for BPI Sports, LLC.

Eric Sable, Trademark Examining Attorney, Law Office 117 (Helen Bryan-Johnson, Managing Attorney).

Before Cataldo, Adlin and Pologeorgis, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

BPI Sports, LLC (“Applicant”) seeks a Principal Register registration for the proposed mark BEST PROTEIN, in standard characters and with PROTEIN disclaimed, for “dietary and nutritional supplements.”¹ The Examining Attorney refused registration on the ground that Applicant’s proposed mark is merely descriptive of the identified goods under Section 2(e)(1) of the Trademark Act. After

¹ Application Serial No. 86414907, filed October 4, 2014 based on Applicant’s allegation of an intent to use the proposed mark in commerce under Section 1(b) of the Trademark Act.

the refusal became final, Applicant appealed and filed a request for reconsideration which was denied. Applicant and the Examining Attorney filed briefs.

A mark is deemed to be merely descriptive, within the meaning of Section 2(e)(1), if it immediately conveys knowledge of a quality, feature, function, characteristic or purpose of the goods for which it is used. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) (quoting *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009)); and *In re Abcor Development*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A mark need not immediately convey an idea of each and every specific feature of the goods in order to be considered merely descriptive; rather, it is sufficient that the mark describes one significant attribute, function or property of the goods. *In re Chamber of Commerce of the United States of America*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); and *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). Whether a mark is merely descriptive is determined not in the abstract, but in relation to the goods for which registration is sought, the context in which it is being used on or in connection with the goods, and the possible significance that the mark would have to the average purchaser of the goods because of the manner of its use. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (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, 1316-17 (TTAB 2002).

When two or more merely descriptive terms are combined, the determination of whether the composite mark also has a merely descriptive significance turns on whether the combination of terms evokes a new and unique commercial impression. If each component retains its merely descriptive significance in relation to the goods, the combination results in a composite that is itself merely descriptive. *See e.g., In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370 (Fed. Cir. 2004) (PATENTS.COM merely descriptive of computer software for managing a database of records that could include patents, and for tracking the status of the records by means of the Internet); *In re Petroglyph Games, Inc.*, 91 USPQ2d 1332 (TTAB 2009) (BATTLECAM merely descriptive for computer game software); *In re Carlson*, 91 USPQ2d 1198 (TTAB 2009) (URBANHOUSING merely descriptive of real estate brokerage, real estate consultation and real estate listing services); *In re Tower Tech*, 64 USPQ2d at 1314 (SMARTTOWER merely descriptive of commercial and industrial cooling towers); *In re Sun Microsystems Inc.*, 59 USPQ2d 1084 (TTAB 2001) (AGENTBEANS merely descriptive of computer programs for use in developing and deploying application programs); *In re Putman Publishing Co.*, 39 USPQ2d 2021 (TTAB 1996) (FOOD & BEVERAGE ONLINE merely descriptive of news and information services in the food processing industry).

Here, the Examining Attorney relies on following dictionary definitions of the proposed mark's constituent terms:

BEST—“of the most excellent, effective, or desirable type or quality”²

² http://oxforddictionaries.com/us/definition/american_english/best


PROTEIN—“any of numerous, highly varied organic molecules ... necessary in the diet of all animals ...”³

Office Action of January 23, 2015. He also relies on evidence that protein is a common, heavily promoted ingredient in dietary and nutritional supplements, many of which include the term “protein” in their names, including but not limited to the following:

The image displays two screenshots of e-commerce product pages. The top screenshot shows two products: 'MLO Super High Protein Powder' and 'NOW Foods Pea Protein'. The 'MLO Super High Protein Powder' page features a product image, a 4.5/5 star rating, and a description stating '24 Grams Of Protein Per Serving Now With 10% More Protein'. The 'NOW Foods Pea Protein' page shows a 4.5/5 star rating, a price of \$17.99 (25% off from \$24.99), and a list of benefits including 'Non-GMO Vegetable Protein' and '100% Pure, 24g Protein'. The bottom screenshot shows the 'Life Extension Iron Protein Plus 300 MG' product page, featuring a product image, a price of \$21.00 (25% off from \$28.00), and a 'Life Extension' logo.

³ <http://dictionary.reference.com/browse/protein?r=66>

Id. Applicant’s own “fact sheets,” submitted in response to the Examining Attorney’s information request under Trademark Rule 2.61(b) and reproduced below, are similar in that the term PROTEIN is prominently featured and is among the ingredients in Applicant’s supplements:



The advertisement features a tub of BPI Sports Best Protein. The tub is labeled "NEW! BEST IS THE NEW STANDARD" and "LOADED WITH PROTEIN ISOLATES". It also lists "ADVANCED 100% WHEY PROTEIN FORMULA" and "5.5g" of protein per serving. The tub is shown next to a fact sheet titled "What's in BPI Sports Best Protein?".

What's in BPI Sports Best Protein?		
4 Servings - Chocolate Brownie		
4 Servings	Chocolate Brownie	
Serving Size 2 Heaping Tablespoons (32 grams)		
Servings Per Container Approx. 4		
Amount Per Serving		
Calories	120	
Calories from Fat	15	
% Daily Value *		
Total Fat	2 g	3%
Saturated Fat	1 g	5%
Trans Fat	0 g	
Cholesterol	40 mg	13%
Sodium	200 mg	8%
Total Carbohydrate	3 g	1%
Dietary Fiber	1 g	4%
Sugars	2 g	
Protein	24 g	48%
Vitamin A	0%	
Vitamin C	0%	
Calcium	15%	
Iron	2%	


What's in BPI Sports Best Protein?		
5 Lbs. - S'mores		
5 Lbs.	S'mores	
Serving Size 1 Scoop (32 grams)		
Servings Per Container Approx. 28		
Amount Per Serving		
Calories	120	
Calories from Fat	15	
% Daily Value *		
Total Fat	1.5 g	2%
Saturated Fat	1 g	5%
Trans Fat	0 g	
Cholesterol	40 mg	13%
Sodium	140 mg	6%
Total Carbohydrate	3 g	1%
Dietary Fiber	0 g	0%
Sugars	2 g	
Protein	24 g	48%
Vitamin A	0%	
Vitamin C	0%	
Calcium	15%	
Iron	2%	

Office Action Response of July 17, 2015. In fact, as indicated in the “What’s in BPI Sports Best Protein” materials to the right, “Protein” is by far the product’s principal ingredient by weight.

Finally, the Examining Attorney relies on evidence that the compound term “best protein” is often used not as the name of particular supplements or their source, but instead to describe them. For example, the following uses of the compound term “best protein” are all from different websites:

ProBible Sign Up | Sign In

HOME GUYISM LIFE GIRLS SPORTS COLLEGE MUSIC ENTERTAINMENT GEAR BROTIPS SHOP




NEED FOR SPEED
NOVEMBER 3, 2015
PC COMING SPRING 2016
BUY NOW

The 10 Best Protein Powders, Reviewed and Graded

BY ALEX HERNEY 8BULLET 03.18.13


Depending on one's budget, how motivated you are at a particular time (aka how close you are to summer) and your swine friend's latest suggestion, there can be a myriad of decisions to make.



fitnessfixation HOME NUTRITION HEALTH BEAUTY LIFESTYLE

Home > Supplements > Best Protein Powder for Women

Best Protein Powder for Women



Supplements are a great addition to your fitness regime. Protein powders are especially important for boosting your muscle growth and ensuring your body recovers quickly from the workout. Unfortunately, some women are quite shy when it comes to using protein powders.

Which Is The Best Protein Powder For You?

Now, it is important to know which kind of protein is best to be used by a person. It depends on a variety of factors that determine what would be the best intake for muscle building. The factor would be:

- The age of the user
- Weight of the body
- What a person wants to achieve
- The usual daily food intake
- How quick the results are required
- The Workout routine



Which is the best protein powder for you?

All these factors are important to decide about the type of protein a person should choose.

ProteinPowder

HOME CYBER MONDAY 2015 ABOUT REVIEWS PROTEIN FOR WEIGHT LOSS TIPS AND TRICKS

Best Protein Powder 2014 – 2015 Reviews & Buying Guide

Table of Contents [show]



CYBER MONDAY: DEAL OF THE DAY!



The Best Protein Bars: Strong Food for a Strong Body

When you're too busy to scrutinize labels, grab one of these and get more protein.

October 3, 2014

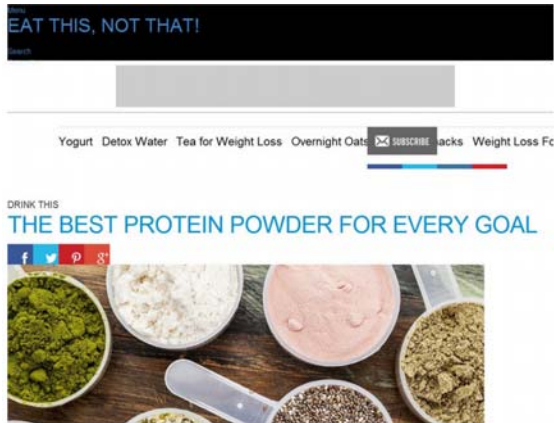


PinIt

YOU'RE NOT A NUMBER. BUT YOUR HEALTH MAY DEPEND ON FOUR OF THEM.

Cigna

Get WH To Go



-Adam

What Is the Best Protein Powder?

By Kurtis Frank and Sol Orwell

With the endless supplemental protein options available, how do you know what's best for you? Easy—just read this overview. It provides a breakdown of the benefits of each type of protein powder, and how it can work in your diet.

Whey

Whey protein is the most popular form of supplemental protein, and is derived from milk. During the process of cheese making, the

Scooby's Workshop Home Fitness & Bodybuilding Workouts

Home Blog

Top 5 Best Protein Powders in America

There are hundreds of protein powders out there, in my opinion, here are the five best in the USA based upon quality, low cost, taste, muscle building ability, and health – see "What is the best protein powder?" section below. Please see also:

- Best protein powders in the EU (Europe)
- Best protein powders in the UK (United Kingdom)
- Best protein powders in Australia and New Zealand

	Mfg	Percent Protein	Size	Grams Protein in tub	Price	Cost per 30g serving	Filtering	Ingredients
	Jarrow	77%	2 Lb	702g	\$20.69	\$0.88	ultra-filtered	whey, lecithin
	Now Foods	91%	5 Lb	2025g	\$65	\$0.96	micro filtered	whey, lecithin

Search this website...

Website Contents

- Question For Scooby?
- Workout Plans (28)
- Basics (67)
- Exercises (58)
- Nutrition (95)
- Losing Weight And Sixpack Abs (49)
- Supplements (22)
- Cardio (21)
- Teens (11)
- Health Issues (40)
- Fitness Tools (14)
- Books (5)
- Success Stories (15)
- Hall of Shame!
- Advanced Bodybuilding (7)
- Bodybuilding Myths (14)
- Pseudo-Trolling (12)
- About Scooby (58)
- Self Improvement (13)
- Support Scoobysworkshop
- Joint!

POPSUGAR - Fitness - Healthy Eating Top - Plant-Based Protein Powder Comparison

The 11 Best Protein Powders You Can Buy

by Jenny Sugar 10/14/15 13.8K Shares [f](#) [t](#) [p](#) [g](#)

Like us on Facebook [f](#) Like 744,250 people like this. Be the first of your friends.

PHOTO 6 OF 12 | [View On One Page](#)



2015's 10 Best Protein Powders



Build More Muscle Mass with a Protein Powder that Works

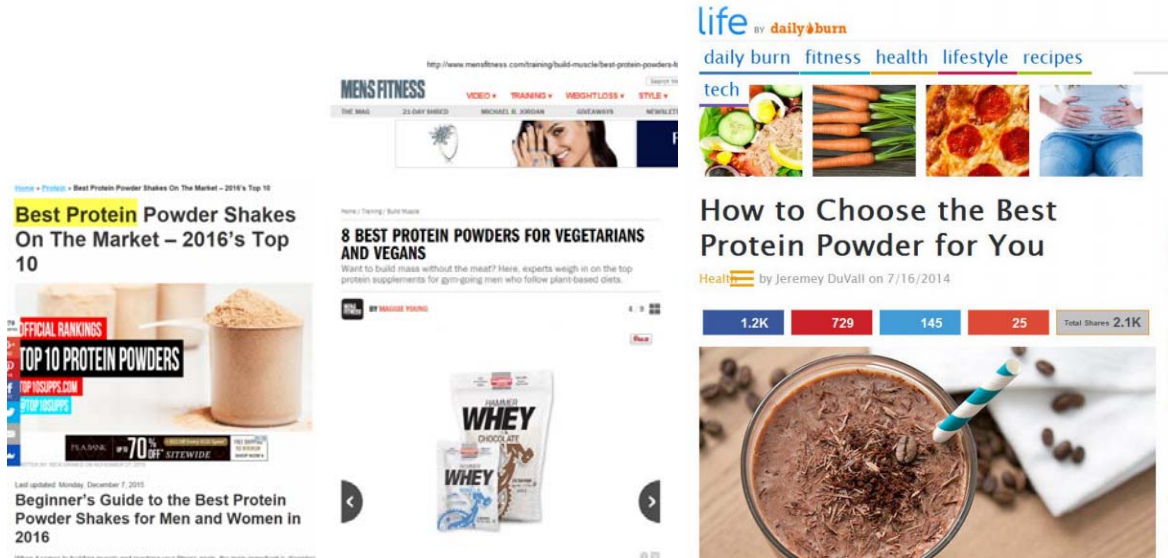
Protein is essential to muscle growth and recovery. Some people can get all of their protein from whole foods, but if you're like the rest of us, you enjoy the convenience, low-cost and effectiveness of a protein powder.

Related Pages:

- All Protein Powders
- Best Muscle Building Ingredients
- How to Recover Fast From a Hard Workout
- 10 Best Protein Powders For Women

All protein powders work, but some are more effective (and tastier) than others and we'll help you find the best protein powder out there for you. Below you'll find our experts' top 10 protein powders list. The best protein powder supplements we recommend, we back each one with a 60 day money back guarantee.

If you're a woman, check out the 10 Best Protein Products For Women list for products specifically formulated for women.



Denial of Request for Reconsideration of December 7, 2015.

This evidence leaves no doubt that BEST PROTEIN is merely descriptive. The proposed mark merely describes Applicant's supplements as the "best," or "most excellent, effective, or desirable" supplements containing "protein," or "highly varied organic molecules ... necessary in the diet of all animals," including humans. The evidence reveals that protein is a common and desirable ingredient in supplements, Applicant's identification of "dietary and nutritional supplements" encompasses supplements containing protein, and where, as here, a proposed mark identifies a product's ingredient(s), it is merely descriptive. *In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1576 (Fed. Cir. 2015) ("The Board found that the relevant consumer, knowing that the goods are supplements containing nopal cactus juice, would understand the mark NOPALEA to convey information that the goods contain ingredients from the *Nopalea* cactus ...Substantial evidence supports the Board's findings, and its conclusion that 'nopalea' is merely descriptive of TriVita's goods.").

Applicant does not and cannot deny that “protein” is merely descriptive, because in response to the Examining Attorney’s information request under Trademark Rule 2.61(b), Applicant stated “The question of whether the goods contain protein is answered in the affirmative. BEST PROTEIN goods contain whey protein isolate” Office Action Response of July 17, 2015 and Ex 2. In addition, Applicant voluntarily disclaimed the word “protein.” *Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1762 (TTAB 2013), *aff’d* 565 Fed. Appx. 900 (Fed. Cir. 2014); *Bass Pro Trademarks LLC v. Sportsman’s Warehouse Inc.* 89 USPQ2d 1844, 1851 (TTAB 2008).

It is settled that laudatory terms, including the term “best,” are generally merely descriptive. *See In re Boston Beer Co., L.P.*, 198 F.2d 1370, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999) (finding THE BEST BEER IN AMERICA for beer to be “a common, laudatory advertising phrase which is merely descriptive of Boston Beer’s goods. Indeed, it is so highly laudatory and descriptive of the qualities of its product that the slogan does not and could not function as a trademark to distinguish Boston Beer’s goods and serve as an indication of origin.”); *In re Best Software Inc.*, 58 USPQ2d 1314 (TTAB 2001) (finding, in connection with application to register BEST! SUPPORTPLUS PREMIER and BEST! SUPPORTPLUS for computer consultation services, “that the words ‘BEST’ and ‘PREMIER’ are merely descriptive laudatory words which should be disclaimed”); *Taylor Bros., Inc. v. The Pinkerton Tobacco Co.*, 231 USPQ 412 (TTAB 1986) (observing that AMERICA’S BEST CHEW for chewing tobacco is merely descriptive); *In re Wileswood, Inc.*, 201 USPQ 400, 402 (TTAB 1978)

(finding AMERICA'S BEST POPCORN and AMERICA'S FAVORITE POPCORN merely descriptive of popcorn, stating that "the two expressions in question amount to nothing more than trade puffery or self-laudatory expressions of applicant's product and would be so understood").

The 12 websites reproduced above which purport to list the "best protein" powders offered by various sources identify the specific powders listed by their respective trademarks. In these lists, "best protein" merely describes the quality and type of powder, not the powder's source. The article entitled "The Best Protein Bars: Strong Food for a Strong Body" does essentially the same thing with protein bars. In other words, "best protein" does not function as a source identifier, but instead describes a type of product offered by many sources.

Applicant analogizes this case to *In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) and argues that the composite term BEST PROTEIN is not merely descriptive even if its individual components are.

...the Examiner negates to mention that the cited Oxford Dictionary also states that "best" is defined to mean "most enjoyable" and "most appropriate, advantageous, or well advised." Applicant submits that consumer (sic) can simply find that Applicant's product is a "most enjoyable" dietary and nutritional supplement or a "most appropriate" or "well advised" dietary and nutritional supplement; neither of which would merely describe "the desirable quality of the goods" as asserted by the Examiner. As such, Applicant respectfully submits that the relevant public (i.e., the consumers) would actually require at least some imagination and/or forethought to determine the applied-for mark's meaning in relation to the goods covered and thus the applied-for mark "BEST PROTEIN" is at the very least suggestive ... the individual words "best" and "protein" may have ordinary meanings when used alone,

however the combination of those two descriptive terms into a suggestive phrase convert those words into a distinctive mark used for “*dietary and nutritional supplements*” in class 05.

Applicant’s Appeal Brief at 4-5. We are not persuaded. Because each of the possible meanings Applicant attributes to the term are merely descriptive in relation to the goods, the proposed mark is merely descriptive. *In re RiseSmart, Inc.*, 104 USPQ2d 1931, 1934 (TTAB 2012); TMEP § 1213.05(c) (2015). And there is no evidence whatsoever that “best protein” has a double meaning, making *Colonial Stores* inapposite. In fact, when the terms “best” and “protein” are combined “the mark as a whole, i.e., the combination of the individual parts,” does not convey “any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.” *In re Oppedahl & Larson*, 71 USPQ2d at 1372. To the contrary, from “the perspective of a prospective purchaser or user” of Applicant’s supplements, “because ... the combination of the terms does not result in a composite that alters the meaning of [any] of the elements ... refusal on the ground of descriptiveness is appropriate.” *In re Petroglyph Games*, 91 USPQ2d at 1341.

Finally, Applicant’s reliance on a number of Principal Register registrations which also contain the word PROTEIN for supplements (including SYMPLY PROTEIN, EASY PROTEIN, PERFORMANCE PROTEIN, etc.) is misplaced. In *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001), the Federal Circuit affirmed a requirement that THE ULIMITATE BIKE RACK be disclaimed, finding that substantial evidence supported the Board’s finding that “consumers will immediately regard THE ULTIMATE BIKE RACK as a laudatory descriptive phrase

that touts the superiority of Nett Designs' bike racks." *Id.* at 1566. In doing so, the Court found that third-party registrations including the term ULTIMATE did not rebut the Board's finding, stating "[e]ven if some prior registrations had some characteristics similar to Nett Designs' application, the PTO's allowance of such prior registrations does not bind the Board or this court." *Id.*; *see also In re Datapipe, Inc.*, 111 USPQ2d 1330, 1336 (TTAB 2014) ("Although the United States Patent and Trademark Office strives for consistency, each application must be examined on its own merits. Neither the Trademark Examining Attorney nor the Board is bound to approve for registration an Applicant's mark based solely upon the registration of other assertedly similar marks for other goods or services having unique evidentiary records.")

Decision: The refusal to register Applicant's proposed mark under Section 2(e)(1) of the Trademark Act is affirmed.