

This Opinion is not a
Precedent of the TTAB

Mailed: February 1, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re BPI Sports

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Serial No. 87199476

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

Alicia Collins Edwards, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

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Before Cataldo, Adlin and Goodman,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

BPI Sports dba BPI Health (“Applicant”) seeks registration on the Principal Register of the mark CREATINE GUMMIES (in standard characters) for “Dietary and nutritional supplements containing creatine” in International Class 5.¹

The Trademark Examining Attorney has refused registration of Applicant’s mark on the ground that it is merely descriptive of the identified goods under Section 2(e)(1)

¹ Application Serial No. 87199476 was filed on October 11, 2016, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

of the Trademark Act, 15 U.S.C. § 1052(e)(1). When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

I. Legal Standard

Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), prohibits the registration of a mark which, when used on or in connection with the applicant's goods, is merely descriptive of them. "A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); *see also In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). Descriptiveness is analyzed in relation to an applicant's identified goods, "the context in which the [term] is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use"; that a term may have other meanings in different contexts is not controlling. *In re Bayer*, 82 USPQ2d at 1831. Descriptiveness is not considered in the abstract. *Id.* The question is whether someone who knows what the goods are will understand the term to convey information about them. *DuoProSS Meditech Corp. v. Inviro Medical Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012).

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, 1372 & 1374 (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).

II. Arguments

The Examining Attorney argues that the composite term CREATINE GUMMIES requires no imagination, thought, or perception to discern that Applicant's goods are dietary and nutritional supplements in the form of gummies that contain creatine.

Applicant, on the other hand, argues that the composite CREATINE GUMMIES is too vague and nebulous to describe a significant feature or characteristic of the goods. Applicant contends that, at most, the term suggests "creative candies" which is not descriptive of the product. Applicant asserts that multi-stage reasoning is required to determine what the goods are and that the term CREATINE GUMMIES creates an effect of surprise in the mind of the consumer because gummies generally are candies for children and do not commonly contain creatine, which is harmful to children. Applicant also argues that the term is unique and incongruous because it is contradictory to the purpose of dietary and nutritional supplements.

III. Evidence

Applicant's goods are identified as "Dietary and nutritional supplements containing creatine." A dietary supplement is defined as "a product taken orally that contains one or more ingredients (such as vitamins or amino acids) that are intended to supplement one's diet and are not considered food." Merriam-Webster dictionary, merriam-webster.com.² See also Wikipedia.com:

A dietary supplement is intended to provide nutrients in order to increase the quantity of their consumption, or to provide non-nutrient chemicals which are claimed to have a biological beneficial effect. Supplements as generally understood include vitamins, fiber, minerals, fatty acids, or amino acids among other substances. July 19, 2017 Response to Office Action at 32, Dietary Supplement. Wikipedia.com.

Both Applicant and the Examining Attorney offered evidence regarding the meaning of the terms gummy (gummi) or gummies, and creatine.

The definition of "gummy" in its adjective form:

Gummy
1 :viscous, sticky
2 a: consisting of or containing gum
b: covered with gum

February 21, 2018 Request for Reconsideration, at 7. Merriam-Webster Dictionary, merriam-webster.com.

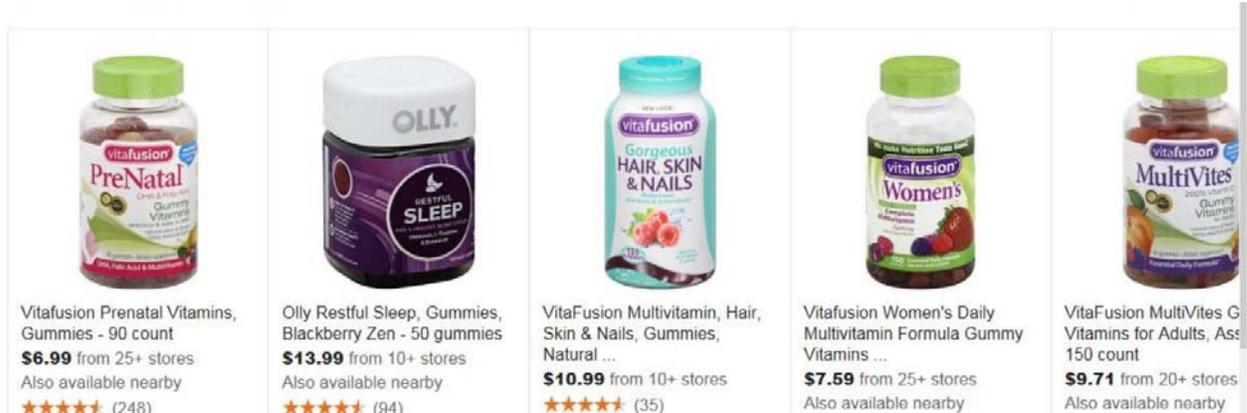
1. Of resembling, or of the consistency of gum
2. Covered with or clogged by gum
3. Exuding gum

² We take judicial notice of the dictionary definition of dietary supplement. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

July 19, 2017 Response to Office Action at 8-9. Random House Dictionary (2017), Dictionary.com.

The Examining Attorney submitted eight third-party registrations for dietary and nutritional supplements or vitamin supplements with disclaimers of the term “gummies.” August 22, 2017 Office Action at 2-23. “Third-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 Box Solutions Corp.*, 79 USPQ2d 1953, 1955 (TTAB 2006). Although not controlling, these registrations “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 Co.*, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992) (third-party registrations found to be “persuasive evidence”).

A Google search for “gummy supplements” included the following results:





January 20, 2017 Office Action at 2.

Search results for a Google image search for the term “gummies” returned results for candy as well as results for vitamin and nutritional supplements.³ The vitamins and supplements shown in the results include the following:



February 21, 2018 Request for Reconsideration at 15-16.

³ As evidence of lack of descriptiveness, Applicant argues that “A Google Image search for “gummies” gives around 300 results with only approximately 25 related to adult nutritional supplements presented under the form of gummies, and only 1 within the first 50 results.” But the placement of the results based on the search algorithm does not make the descriptive use of gummies or gummy for vitamins or supplements any less probative. The question is not how often a term is used descriptively in connection with uninvolved goods or services, but rather whether it is descriptive of the involved products or services.



Id. at. 16-18.



Id. at 17-18.

A Wikipedia entry titled “Gummi Candies” includes a sub-section titled “Vitamin Gummies:”

“There are also several multi-vitamin gummi bears, usually marketed for children, such as Flintstones Chewable Vitamins. These form of vitamins give off nutrients and protein for those that do not swallow pills or need various supplements to stay healthy. February 21, 2018 Request for Reconsideration at 22. wikipedia.com.

Excerpts from stories about gummy supplements include:

These gummy supplements are loaded with good-for-your-tresses ingredients, such as biotin and vitamin C, and promise to plump skin and smooth strands. ... Currently most gummies on the market do contain plenty of extra sugar to make them fun to eat. Kinonen, Sarah “What’s the Deal with Gummy Supplements Are they Safe?,” September 6, 2016, people.com. March 21, 2018 Denial of Reconsideration at 2-6.

While you may be too old to enjoy Flinstones Gummies vitamins, these adult-friendly versions are just as fun, tasty and colorful as their kid counterparts—and pack essential nutrients grown-ups need.⁴ Nuñez, Alana, “The 5 Best Chewable Vitamins or Supplements for Adults,” shape.com. March 21, 2018 Denial of Reconsideration at 8-10.

[S]hoppers are looking to formats like gummies because they like taking vitamins and minerals in fun and easy delivery methods. ... innovative delivery platforms such as gummies ... provide an appreciated departure from consumers’ routine. ... To meet the needs of consumers seeking clean label gummies, MegaFood is on the path to creating its own line of gummy supplements. Olivo, Lisa “Focus on Gummy Supplements,” June 29, 2017, nutraceuticalsworld.com. March 21, 2018 Denial of Reconsideration at 12-22.

The most concerning factors about gummy vitamins is that with any candy-like supplement, there is a risk of overconsumption ... The desire for companies to make them taste more like candy, makes it harder to pack an effective amount of vitamins and minerals into the gummies. “Do Gummy Vitamins Actually Work? 3 Nutritionists Hash it Out.” April 10, 2015, updated December 6, 2017, Teen Vogue, huffingtonpost.com. March 21, 2018 Denial of Reconsideration at 22-24.

Articles regarding creatine supplements:⁵

⁴ The products listed include: NatureMade Calcium Adult Gummies, One a Day Women’s VitaCraves Gummies, and Hydroxycut Gummies.

⁵ Both the Examining Attorney and Applicant submitted articles discussing creatine supplements. Although Applicant did not include the URL and date for two of the Internet

Those involved in the bodybuilding/strength training world – trainers and athletes alike – would know the importance of proper supplementation. One of the more successful supplements to hit the shelves would be creatine. In its various forms ... creatine has been recognized by the scientific community and the hard training athlete as a product that delivers on its promise of improved strength and enhanced muscle size. Robson, David, “Creatine Why Use It? Scientific Support to Back its Benefits,” last updated January 2016, bodybuilding.com. January 20, 2017 Office Action at 4.

Creatine supplements are commonly used by athletes because of their effectiveness in high-intensity training. People take creatine because it allows the body to produce more energy, and with more energy you can lift one or two more reps or 5 more pounds and your muscles will get bigger and stronger. Nordqvist, Joseph, “Creatine: What are the Benefits and Health Risks?” November 1, 2016, medicalnewstoday.com. January 20, 2017 Office Action at 3, 5.⁶

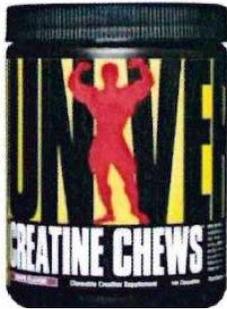
Creatine is an amino acid that is produced by your body, and it is also found in dietary sources ... Creatine supplements are used by body builders and competitive athletes to help them increase lean muscle mass and enhance performance. Pritchard, Joseph, “Is Creatine a Safe Supplement for Teenagers,” October 3, 2017, livestrong.com. February 21, 2018 Request for Reconsideration at 25-26.

Creatine is an amino acid that may help athletes build lean muscle mass. Although the University of Maryland Medical Center states that creatine supplements are generally safe when taken properly, you should consult your doctor before taking creatine. Mitchell, Stephanie, “Does Creatine Help You Get Ripped Abs?” September 11, 2017. February 21, 2018 Request for Reconsideration at 28-29.

articles it submitted, the Examining Attorney did not object, so we have considered them. *In re I-Coat Company, LLC*, 126 USPQ2d 1730, 1733 (TTAB 2018).

⁶ Applicant submitted an excerpt of the same article. July 19, 2017 Response to Office Action at 6.

A Google search for “creatine gummies” showing two creatine supplements in chewable form:



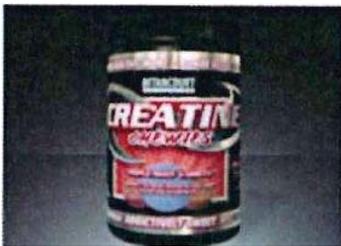
Universal Nutrition Creatine Chews Grape 144 Chews - Creatine

\$12.78 from 5+ stores

46 product reviews

Universal Nutrition · Supplements · Magnesium · Creatine · Chews

Other options: Orange (\$11)



Betancourt Nutrition Creatine Chewie Variety 160 tablets

\$25.99 from 2 stores

Weight Control · Supplements · Protein · BCAA · Creatine · Chewable

February 21, 2018 Request for Reconsideration at 36-37.

IV. Analysis

Based on the evidence of record, the applied-for mark CREATINE GUMMIES is merely descriptive of Applicant’s “dietary and nutritional supplements containing creatine.” Applicant’s arguments as to the multiple meanings for “gummies” and that consumers may mistake “creatine” for “creative” suggests that the terms, both separately and in combination, should be viewed in the abstract. But, as noted, the question of whether a term is merely descriptive must be determined in relation to the identified goods. “It is well settled that so long as any one of the meanings of a term is descriptive, the term may be considered to be merely descriptive.” *In re Chopper Industries*, 222 USPQ 258, 259 (TTAB 1984); *see also*, *In re IP Carrier*

Consulting Group, 84 USPQ2d 1028, 1034 (TTAB 2007); *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).⁷

Because “creatine” identifies an ingredient in Applicant’s goods, it is merely descriptive. *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1375 (Fed. Cir. 2018) (citing *In re Gyulay*, 3 USPQ2d at 1009); *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’s identification of goods is essentially a concession that “creatine” is merely descriptive. *Cf. In re Johanna Farms, Inc.*, 222 USPQ 607, 609 (TTAB 1984) (the “term ‘yogurt’ is concededly the name of the goods. That fact is uncontrovertible where, as here, the same term has been used in the identification of goods for which registration is sought.”). The record shows that producers of creatine supplements use “creatine” in the supplement name which also supports a descriptiveness finding. *Real Foods*, 128 USPQ2d at 1375 (evidence of the term “thins” being used in marks for competitors’ similar snack food products, (such as “Pita Thins,” and “Wheat Thins”), is relevant evidence of descriptiveness).

⁷ As indicated, Applicant submitted a number of dictionary definitions for “Gummy” and a Wikipedia entry for gummi candy. Applicant also submitted a Wikipedia entry for “Gummy,” a Korean singer, as well as a website printout for Haribo gummi bears. We do not find the definitions or the portion of the Wikipedia article relating to gummi candy, the website relating to gummi bears, or the Wikipedia article relating to the stage name of singer “Gummy” probative when considered in connection with the goods.

Additionally, the Internet articles provided by both the Examining Attorney and Applicant show that creatine may be offered as a type of dietary and nutritional supplement, further establishing the descriptiveness of the term in relation to Applicant's goods.

The term "gummies" in Applicant's mark describes the chewable form of Applicant's vitamins/supplements, similar to gummy candy. The third-party registrations evidence the descriptive significance of the word "gummies" for vitamins and dietary and nutritional supplements. The Google searches showing third-party use of "gummy" and "gummies" by producers of dietary and nutritional supplements, and the use of the term "gummy" or "gummies" in articles relating to dietary and nutritional supplements further establish that the term "gummies" and its singular form "gummy" are at best merely descriptive of dietary and nutritional supplements.

Thus, the combined term CREATINE GUMMIES describes a dietary or nutritional supplement in gummy form that contains creatine. The combination of the two individual terms does not evoke a new and unique commercial impression apart from their descriptive meaning.

It is not relevant that there is no evidence of any use of the term CREATINE GUMMIES in the marketplace.⁸ Although evidence of competitors' use of the applied-for mark would be relevant evidence of the mark's descriptiveness, the opposite is not true, i.e., the lack of such evidence does not show that a mark is not merely

⁸ Applicant argues that "creatine" is not widely used in the marketplace. However, the Office is not required to show widespread use in order to establish that a term is merely descriptive.

descriptive. It is well-established that where an applicant is the first and only user of a descriptive term, that does not make the term registrable. *See In re Acuson*, 225 USPQ 790, 792 (TTAB 1985). “There is no requirement that the Office prove actual competitor use or need; it is well established that even if an applicant is the only user of a merely descriptive term, this does not justify registration of that term.” *In re Carlson*, 91 USPQ2d 1198, 1203 (TTAB 2009); *see also In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1514 (TTAB 2016).

Applicant also argues that the online articles relating to supplements do not use the term “gummies” in the title as the name of the product and that this shows a lack of descriptive use of the plural “gummies” for dietary and nutritional supplements. However, there is sufficient evidence in the record showing use of both the singular “gummy” and the plural “gummies” to refer to vitamin and nutritional supplements.

The record, as discussed, establishes that Applicant’s proposed mark is merely descriptive of ingredients, properties and qualities of its dietary and nutritional supplements. For the foregoing reasons, on consideration of all of the evidence of record, including parts we have not mentioned, we find that Applicant’s applied-for mark, CREATINE GUMMIES, is merely descriptive under Section 2(e)(1). 15 U.S.C. § 1052(e)(1).

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