

This Opinion is Not a
Precedent of the TTAB

Mailed: June 4, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board

In re Bharat Biotech International Limited

Serial Nos. 87570858 and 87570862

John M. Mueller of Baker & Hostetler LLP
for Bharat Biotech International Limited.

Benjamin Roth, Trademark Examining Attorney, Law Office 122,
John Lincoski, Managing Attorney.

Before Cataldo, Adlin and Pologeorgis, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Bharat Biotech International Limited seeks Principal Register registrations for the proposed marks ZIKAVAX and ZICAVAC (each in standard characters) for “vaccine formulations” in International Class 5.¹ The Examining Attorney refused registration of both marks under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that each mark is merely descriptive of the identified goods. After the refusals became final, Applicant appealed, Applicant and

¹ Application Serial Nos. 87570858 (the “858 Application”) and 87570862 (the “862 Application”), respectively, each filed August 16, 2017 under Section 1(b) of the Trademark Act, based on an alleged intent to use each mark in commerce.

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the Examining Attorney filed briefs and at the Examining Attorney's request, the appeals were consolidated.

I. The Record

The Examining Attorney relies on a dictionary definition which indicates that "vax" means "a vaccine or vaccination," and an entry in All Acronyms indicating that "vac" also means "vaccine." June 14, 2018 Office Action in '858 Application TSDR 6 (printout from "oxforddictionaries.com")²; June 14, 2018 Office Action in '862 Application TSDR 5 (printout from "allacronyms.com").

These definitions are supported by evidence of widespread third-party use of both VAX and VAC to refer to vaccines. The following examples, among several others, show third-party use of VAX:

The image is a screenshot of a webpage. At the top, there is a red header for the "NEW YORK POST" with a search bar and navigation links. Below the header, there are several small thumbnail images with text. A large purple banner for "jet.com" advertises "Free shipping over \$35." Below this, there is a "TRENDING NOW ON NYPOST.COM" section featuring a large article titled "I was an anti-vax crackpot — until this happened" by Jane Ridley, dated September 20, 2016. The article text mentions a study by the American Academy of Pediatrics and a parent's decision to vaccinate. To the right of this article is a "FierceBiotech" section with a header "Attend the FierceBiotech 3rd Drug Development Forum!" and a main article titled "GlaxoSmithKline jumps into clinic with swine flu vax; AGI and Axcan terminate GERD partnership;" by John Carroll, dated August 14, 2009. The article text mentions "GlaxoSmithKline has begun human trials of a new swine flu vaccine".

² The Oxford Dictionary definition is in "British and World English." Because the "world" encompasses the United States, and because the definition is corroborated by and consistent with the third-party, United States uses of record, we have considered the definition.

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How the Anti-Vaxxers Are Winning

By PETER J. HOTEZ FEB. 6, 2017

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Measles is one of the most contagious and most lethal of all human diseases. A single person infected with the virus can infect more than a dozen unvaccinated people. Measles is the leading cause of death in children under 5 years of age in the United States and we begin to see a reversal of several decades in steady public health gains. The first blow will be measles outbreaks in America.

Meeting Coverage > CCC

Two-Step Plan Boosts Flu Vax Rate for Kids with IBD

— Administration went from 10% in 2015-2016 to 58% in 2016-2017

by Ed Susman, Contributing Writer, MedPage Today
January 21, 2018

This article is a collaboration between MedPage Today® and:



LAS VEGAS -- A simple two-step procedural change dramatically increased the percentage of pediatric patients with inflammatory bowel disease (IBD) who received the flu vaccine, researchers reported here.

Action Points

▼

Influenza vaccine administration increased from 10% in the 2015-2016 season to 58% in the 2016-2017 flu season (P<0.01), according to Claire Keith, MD, of Children's of Alabama in Birmingham, and colleagues.

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Once again, Florida Health Care Plans is offering FREE flu shots to Members. Become an FHCP Flu Fighter today by visiting any of our FHCP facilities or your Primary Care Physician during regular business hours (click here to find the closest to you).

Don't forget to call our flu hotline (1-866-281-5812) for any questions or concerns that you have about the flu vax.

Below, we've provided some background on the flu shot from the Centers for Disease Control and Prevention. For more on the subject, click here.

What is the flu shot?

The flu shot is a vaccine given with a needle, usually in the arm. The seasonal flu shot protects against the three or four influenza viruses that research indicates will be most common during the upcoming season.

Who should get vaccinated this season?

<https://www.fhcp.com/news/2017/october/free-flu-shots-for-fhcp-members/>



Voices for Vaccines

PARENTS SPEAKING UP FOR IMMUNIZATION

Home About Vaccines Tools Why I Choose Blog Join Us Support

From Anti-Vax to Pro-Vax

One Mom's Journey



When my oldest child was born in 2005, we faithfully followed the immunization schedule, knowing nothing of the controversy until a several months later, when I discovered internet forums. I have always been into natural health and foods, so when I first learned about all of the scary-sounding ingredients in vaccines, I was alarmed. And then when my son (eight months old at the time) came down with a mild case of pertussis, I was angry that he got all of his shots "for nothing."

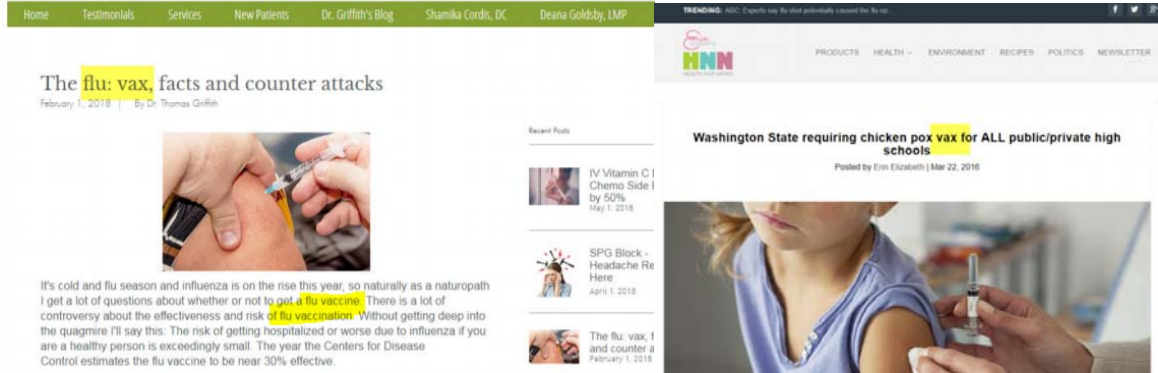
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The flu: vax, facts and counter attacks

February 1, 2018 | By Dr. Thomas Griffith




It's cold and flu season and influenza is on the rise this year, so naturally as a naturopath I get a lot of questions about whether or not to **get a flu vaccine**. There is a lot of controversy about the effectiveness and risk of **flu vaccines**. Without getting deep into the quagmire I'll say this: The risk of getting hospitalized or worse due to influenza if you are a healthy person is exceedingly small. The year the Centers for Disease Control estimates the flu vaccine to be near 30% effective.

Recent Posts

- IV Vitamin C | Chemo Side I by 50% May 1, 2018
- SPG Block - Headache Re Here April 1, 2018
- The flu: vax, I and counter a February 1, 2018

Washington State requiring chicken pox vax for ALL public/private high schools

Posted by Erin Elizabeth | Mar 22, 2016



November 21, 2017 Office Action in '858 Application TSDR 13-38 (printouts from “nytimes.com,” “nypost.com” and “voicesforvaccines.org”); June 14, 2018 Office Action in '858 Application TSDR 7-17 (printouts from “fhcp.com,” “medpagetoday.com,” “docgriffith.com,” “healthnutnews.com” and “fiercebitech.com”). The following examples, among several others, show third-party use of VAC:



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Mum Confession: I'm Coming Out As Anti-Vac

But does it mean what you think it means?

By Oceana Setaysha 4 days ago



At SAHM, we love to hear from our audience, even when their views don't necessarily align with our own.

Recently we received this letter from an anonymous mum in our community, on her decision to come out as **anti vac**. We wanted to share it with you.

The Sisterhood

Home About the Blog

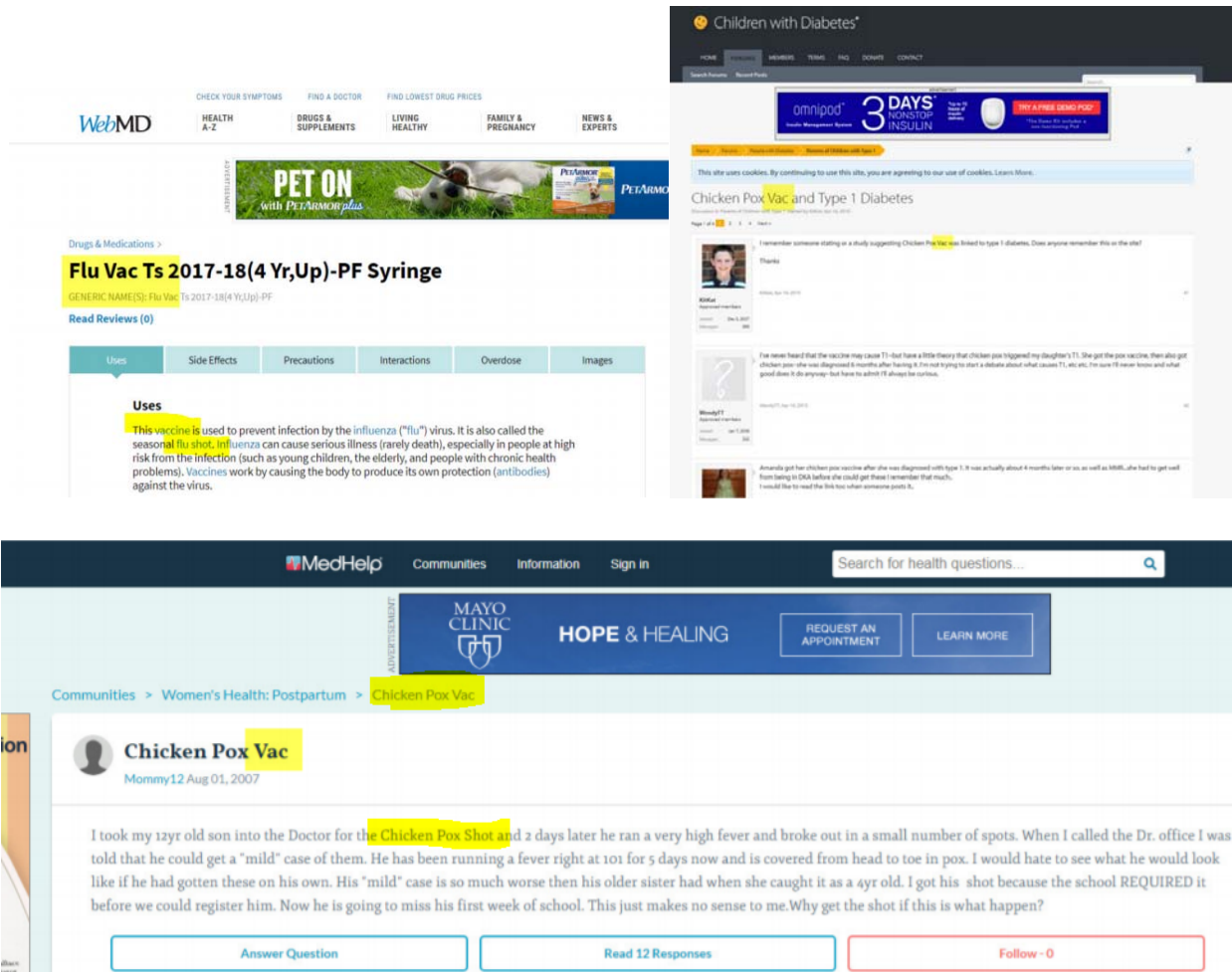
Why Is Anti-Vac the New Black?

August 19, 2013 | By Elissa Strauss

Jewish or Jew-ish? Like us on Facebook!

you should be, too, as a parent, a Jew and a fellow citizen.

For this reason, I find myself increasingly baffled by the **anti-vaccine movement** that seems to



November 21, 2017 Office Action in '862 Application TSDR 23-36 (printouts from “foward.com” and “stayathomemommy.com”); June 14, 2018 Office Action in '862 Application TSDR 6-13 (printouts from “webmd.com,” “childrenwithdiabetes.com” and “medhelp.org”).

The Examining Attorney also relies on information about the Zika virus. According to the National Institute of Allergy and Infectious Diseases (“NIAID”), the Zika virus, a member of the flavivirus family, was discovered in the Zika forest, and is transmitted to humans through mosquito bites. November 21, 2017 Office Actions in both applications TSDR 6 (printout from “niaid.nih.gov”). While the virus typically

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causes only mild or no symptoms, it “can be transmitted from an infected pregnant woman to her baby during pregnancy and can result in serious birth defects, including microcephaly.” *Id.* The NIAID website reported in 2017 that NIAID was developing “multiple vaccine candidates to prevent Zika virus infection.” *Id.*

II. Arguments

Applicant argues that the proposed marks are suggestive rather than merely descriptive because they would require thought and imagination to determine the goods for which Applicant intends to use the terms. 4 TTABVUE 7 (both cases) (Applicant’s Appeal Briefs at 3). Specifically, the proposed marks do “little more than locate the goods as possibly in the realm of vaccination formulations.” *Id.* at 9 (Applicant’s Appeal Briefs at 5).

The Examining Attorney counters that both of Applicant’s marks merely “combine the name of a virus, or novel misspelling thereof, with widely used abbreviations of the word ‘vaccine’ for ‘vaccine formulations.’” 8 TTABVUE 4 (both cases) (Examining Attorney’s Appeal Brief at 3). Moreover, the Examining Attorney points out that the record establishes that “consumers of vaccines are accustomed to seeing the name of a virus paired with abbreviations for the word ‘vaccine’ to describe vaccines used to prevent such virus,” i.e. “flu vax,” “chicken pox vax,” “flu vac” and “chicken pox vac.” *Id.* at 11 (Examining Attorney’s Appeal Brief at 10). Thus, according to the Examining Attorney, both of Applicant’s proposed marks are composite terms which are themselves merely descriptive, because “they each immediately inform the consumer that Applicant’s goods are vaccines with the feature or purpose of preventing the Zika virus.” *Id.* at 5 (Examining Attorney’s Appeal Brief at 4).

III. Analysis

The record leaves no doubt that both ZIKAVAX and ZICAVAC are merely descriptive, because they immediately convey knowledge of a quality, feature, function, characteristic or purpose of the goods for which Applicant intends to use the terms. *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) (quoting *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987)); *In re Abcor Dev.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). More specifically, we agree with the Examining Attorney’s cogent analysis: both terms “combine the name of a virus, or novel misspelling thereof, with widely used abbreviations of the word ‘vaccine’ for ‘vaccine formulations.’”

When the name of the Zika virus, or a slight variation thereof, is combined with abbreviations for the term “vaccine,” 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 LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (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). To the contrary, from “the perspective of a prospective purchaser or user” of Applicant’s vaccine formulations, “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, Inc.*, 91

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USPQ2d 1332, 1341 (TTAB 2009) (BATTLECAM merely descriptive for computer game software).

While ZICA and the word “Zika” are not identical, as the Examining Attorney correctly points out, Applicant’s slight misspelling of “Zika” does not make ZICA non-descriptive. *Nupla Corp. v. IXL Mfg. Co.*, 114 F.3d 191, 42 USPQ2d 1711, 1716 (Fed. Cir. 1997) (“Nupla’s mark [CUSH-N-GRIP], which is merely a misspelling of CUSHION-GRIP, is also generic as a matter of law”); *In re Quik-Print*, 205 USPQ at 507 n.9 (finding QUIK-PRINT merely descriptive of printing and copying services, stating “[t]here is no legally significant difference here between ‘quik’ and ‘quick.’”); *In re Carlson*, 91 USPQ2d 1198, 1203 (TTAB 2009) (“applicant’s applied-for mark, 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 Ginc UK Ltd.*, 90 USPQ2d 1472, 1475 (TTAB 2007) (“The generic meaning of ‘togs’ is not overcome by the misspelling of the term as TOGGS in applicant’s mark. A slight misspelling is not sufficient to change a descriptive or generic word into a suggestive word.”).³

³ This is perhaps especially so here because ZICA would likely be pronounced the same as ZIKA. In fact, while sometimes a “c” may be pronounced as an “s” rather than a “k,” that is in our experience atypical when the “c” is followed by an “a” as it is here. More importantly, in the context of Applicant’s proposed composite marks, which include known abbreviations for “vaccine” and are to be used for “vaccine formulations,” we would expect relevant consumers to pronounce ZICA the same way as ZIKA, a virus. In any event, there is no evidence of record that ZICA would be pronounced differently than ZIKA.

Similarly, Applicant's use of abbreviations for the term "vaccine" does not make the proposed marks non-descriptive. Indeed, the definitions and third-party uses establish that "vaccine" is commonly abbreviated to VAX or VAC. This type of evidence often supports a finding that an abbreviation is itself merely descriptive. *In re Well Living Lab Inc.*, 122 USPQ2d 1777, 1779 (TTAB 2017), *aff'd* 749 Fed. Appx. 987 (Fed. Cir. 2018) (finding, based on dictionary definitions and usage examples, that LAB is an abbreviation of "laboratory," and that WELL LIVING LAB is merely descriptive of research, testing and development in the field of wellness); *In re Thomas Nelson, Inc.*, 97 USPQ2d 1712, 1715 (TTAB 2011) ("A word, term, or letters that are a recognized abbreviation for the goods in the application is merely descriptive."). Here, the widespread use of VAX and VAC to mean "vaccine," and the evidence that these abbreviations, when preceded by a virus name, refer to a vaccine against that virus, establishes that ZIKAVAX and ZICAVAC are both merely descriptive.

The record also belies Applicant's claim that the proposed marks do "little more than locate the goods as possibly in the realm of vaccine formulations." To the contrary, the proposed marks immediately describe the goods as Zika vaccines, because "[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 USPQ 2d 1314, 1316-17 (TTAB 2002). Here, someone who knows that Applicant offers vaccine formulations will immediately

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know that the formulations bearing the proposed marks are intended to provide immunity or protection against the Zika virus. Of course, Applicant's identification of goods ("vaccine formulations") itself makes clear that ZIKAVAX and ZICAVAC are merely descriptive. *See, In re Taylor & Francis (Publishers) Inc.*, 55 USPQ2d 1213, 1215 (TTAB 2000) (PSYCHOLOGY PRESS & Design found merely descriptive of nonfiction books in the field of psychology, in part because the applicant's "identification of goods expressly states that the series of non-fiction books upon which applicant uses its mark are 'in the field of psychology.' The word PSYCHOLOGY therefore is merely descriptive of the subject matter of applicant's books, as identified in the application").

IV. Conclusion

Because the record reveals that Applicant's proposed marks ZIKAVAX and ZICAVAC are nothing more than the name of a virus (or a slight misspelling thereof) combined with known abbreviations for "vaccine," the terms are merely descriptive of a characteristic, feature, function or purpose of Applicant's vaccine formulations.

Decision: The refusals to register Applicant's proposed marks under Section 2(e)(1) of the Trademark Act are affirmed.