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Mailed: September 30, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Unigene Laboratories, Inc.

Serial No. 78679380
Serial No. 78679390
Serial No. 78679397

Charles P. LaPolla, Esq. of Ostrolenk, Faber, Gerb & Soffen, LLP for Unigene Laboratories, Inc.

Dominic Fathy, Trademark Examining Attorney, Law Office 108 (Andrew Lawrence, Managing Attorney).

Before Quinn, Grendel and Wellington, Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

On July 27, 2005, Unigene Laboratories, Inc. filed applications to register the following marks:

SECRAPEP (in standard character format) for:
Biochemical preparations in the nature of bio-technology based preparations for medical and veterinary purposes in International Class 5;[1] and

ENTERIPEP (in standard character format) for:
Bio-technology based delivery agents that facilitate the delivery of pharmaceuticals for medical and veterinary purposes in International Class 5;[2] and

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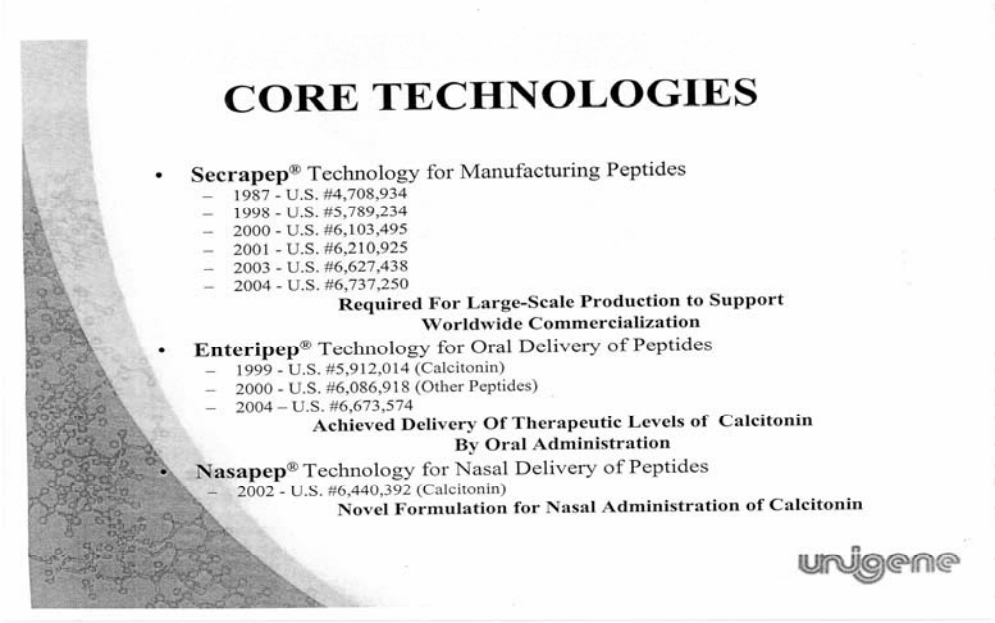
[1] Application Serial No. 78679380. Notice of Allowance was mailed on May 30, 2006.
[2] Application Serial No. 78679397 (filed on July 27, 2005). Notice of Allowance was mailed on April 4, 2006.

NASAPEP (in standard character format) for:

> Bio-technology based delivery agents that facilitate the delivery of pharmaceuticals for medical and veterinary purposes in International Class 5.[3]

The applications were based upon applicant's allegation of a *bona fide* intention to use the mark in commerce. The applications were published for opposition and a notice of allowance subsequently issued with respect to each application.

Applicant filed a statement of use for each application; in doing so, applicant attached the same specimen of use and alleged the same date (September 12, 2006) of first use anywhere and first use in commerce. The specimen appears as follows:



[3] Application Serial No. 78679380 (filed on July 27, 2005). Notice of Allowance was mailed on April 4, 2006.

In each application, the trademark examining attorney issued a refusal on the ground that the specimen submitted was not acceptable to show use of the mark in connection with the identified goods. Specifically, he stated that the specimen "comprises what appears to be an advertisement for the applicant's goods" and, as such, is not acceptable.

Applicant filed responses wherein it argued against the refusal. Specifically, in each case, applicant essentially argued that the specimen "constitutes an appropriate display associated with the goods at their point-of-sale"; that the display "has been projected on a wall at a trade show booth where perspective purchasers were in a position to place orders for the goods"; and therefore "the specimen...constitutes a point-of-sale presentation in the same manner as a banner, shelf talker window display, menu or similar device as permitted under TMEP 904.06."[4] Moreover, applicant argued that because of "the nature of the goods,...[i]t has to be anticipated that point-of-purchase displays would be the natural form of specimen for such goods in view of the microscopic and intangible nature of such bio-technology based goods."[5]

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[4] These arguments were made in applicant's June 20, 2007 response for application Serial No. 78649380, but nearly identical arguments were made in its responses in the other two applications.
[5] *Id.*

The examining attorney, however, was not persuaded by applicant's arguments and issued a final refusal to register for each application.

Applicant filed notices of appeal and requests for reconsideration. The examining attorney denied the requests for reconsideration and maintained the refusal to register the three marks based on the ground that specimen was not acceptable for the identified goods. Applicant and the examining attorney thereafter filed briefs.

Applicant's appeals in the three referenced applications are hereby consolidated and shall be decided in this single opinion.

As a preliminary matter, we address the examining attorney's objection to evidence applicant submitted for the first time with its appeal brief.[6] Specifically, applicant submitted printouts from the Wikipedia online

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[6] In its reply brief, applicant notes the examining attorney's objection. Applicant does not withdraw its submission of the evidence, but requests that we take judicial notice of the definition of "peptide" from the *Merriam-Webster Online Dictionary* (2008). It is well settled that the Board may take judicial notice of dictionary definitions. *See, e.g., Hancock v. American Steel & Wire Co. of New Jersey,* 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953); *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); and *Marcal Paper Mills, Inc. v. American Can Co.,* 212 USPQ 852, 860 n.7 (TTAB 1981). This includes online reference works which exist in printed format or have regular fixed editions. See *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006). Accordingly, the "peptide" definition has been considered.

encyclopedia website concerning "peptide." The Examining Attorney objects to this evidence as untimely and, "as it is a Wikipedia article, that the examining attorney has not had the opportunity to rebut." Examining Attorney's Brief, (unnumbered) p. 4. The Examining Attorney's objection is well taken. The record must be complete prior to appeal, subject to certain exceptions not relevant here. *See 37 C.F.R. § 2.142(d).* Applicant's submission here is clearly late. Furthermore, as the examining attorney alluded to, we will not take judicial notice of evidence from Wikipedia or other sources which are available only online. *See In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1791 n.3 (TTAB 2002). *See also In re IP Carrier Consulting Group*, 84 USPQ2d 1028 (TTAB 2007) (Wikipedia evidence only admissible when there is an opportunity to verify its accuracy). Accordingly, we have not considered the Wikipedia evidence. Nonetheless, we note that, even if we had considered it, we would not decide the case differently.

We turn then to the merits of the appeal. The sole issue for consideration is whether the specimen submitted by applicant with its statements of use is acceptable to show use of the mark in connection with the identified goods. Narrowing the issue further, in its brief, applicant states "[t]he sole issue presented by this appeal

is whether the specimen submitted...may be construed as a point-of-sale display associated with the goods." Brief, p. 2. In this regard, we note that Trademark Rule 2.56(b)(1) provides:

> A trademark specimen is a label, tag, or container for the goods, or a display associated with the goods. The Office may accept another document related to the goods or the sale of the goods when it is not possible to place the mark on the goods or packaging for the goods.

Trademark Rule 2.88(b)(2), applicable to this application because applicant filed its specimen with its Statement of Use, requires a specimen of the mark as actually used in commerce, and specifically refers to Rule 2.56 for the requirements for specimens.

Further, Section 45 of the Trademark Act states, in pertinent part, that a mark is deemed to be in use in commerce

> (1) on goods when –
>
> (A) it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with goods or their sale, …

Applicant argues that the specimen is a display associated with the goods; applicant notes that it has repeatedly advised the examining attorney that "the display [of the specimen] was projected on a wall at trade shows

where prospective purchasers were in a position to place orders for the goods." Brief, p. 1. Applicant states that "[w]ith sales representatives in close proximity to the projection, it is ***inevitable*** that the projection is designed to act as a banner intended to stimulate sales." Brief, p. 3 (emphasis in original). Applicant asserts that the latter statements regarding use of the specimen at trade shows is supported by a declaration (signed by applicant's counsel) at the end of its request for reconsideration.

The examining attorney, on the other hand, contends that the specimen fails to meet the criteria (previously set forth in case law) to be considered displays associated with the goods. She argues specifically that the specimen, in all three applications, does not show an appropriate relationship with the goods and notes there is no information relating to the sale of goods, such as price, ordering information, or a picture of the goods. She also disputes applicant's contention that there are sales representatives nearby or otherwise call attention to purchasers that a product is available for sale.

The TMEP sets out factors to consider when determining whether a specimen is a display associated with the goods.

> A display must be associated directly with the goods offered for sale. It must bear the trademark prominently. However, it is not necessary that the display be in close proximity to the goods. *See In re Marriott Corp.*, 459 F.2d 525, 173 USPQ 799 (C.C.P.A. 1972); *Lands' End Inc. v. Manbeck*, 797 F. Supp. 511, 24 USPQ2d 1314 (E.D. Va. 1992).
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> Displays associated with the goods essentially comprise point-of-sale material, such as banners, shelf-talkers, window displays, menus and similar devices.
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> These items must be designed to catch the attention of purchasers and prospective purchasers as an inducement to make a sale. Further, the display must prominently display the trademark in question and associate it with, or relate it to, the goods. *In re Osterberg*, 83 USPQ2d 1220 (TTAB 2007); *In re Morganroth*, 208 USPQ 284 (TTAB 1980) (purported mark was so obfuscated on the specimen that it was not likely to make any impression on the reader). The display must be related to the sale of the goods such that an association of the two is inevitable.
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> TMEP § 904.03(g) (5th ed. rev. September 2007).

Applicant also cites to, and relies heavily on, the Board's decision in *In re Shipley Co.*, 230 USPQ at 694 (TTAB 1985). The Board, reversing the examining attorney's refusal in that case, found that applicant's use of its mark at a trade show booth amounted to a point of sale display and demonstrated use of applicant's mark on the identified goods. In that case, the applicant not only submitted pictures showing applicant's mark being used on its trade show booth, but also submitted a declaration from

applicant's marketing communications director averring that:

> [A]t all trade shows where [applicant] has such a booth, [applicant's] sales personnel are at the booth at all times during the show promoting and selling [applicant's] products, and though products are not always in close proximity to the booth, point of sale materials such as product literature, banners, displays, etc., are at the booths and . . . the display of the identified trademark at the booth is intended to catch the attention of purchasers and prospective purchasers as an inducement to consummate the sale of chemicals for use in the fabrication of printed circuit boards.

In *Shipley*, the Board made absolutely clear that decisions regarding this type of specimen to show use for goods were to be made on a case-by-case basis and depended heavily on the evidence submitted. "In holding this use to be a display associated with the goods, we do not intend to establish a broad rule that any and all signs bearing a mark establish use in commerce for any and all goods...Here, the proof, that is, the circumstances of use shown in the specimens and explained in the declaration supporting them, convince us that applicant's use is a 'display associated" with the goods.'" 230 USPQ at 694.

The present record differs significantly from that in *Shipley* and we are not able conclude, on this record, that applicant's specimen amounts to a point of purchase display. For each application, applicant only submitted

the specimen above which its *counsel* states, albeit under signature of a declaration, is projected on a wall at trade shows. There is no evidence showing the manner in which the specimen is used. Specifically, there is no photograph of the actual trade show exhibit or projection of the specimen or a declaration by someone with personal knowledge attesting to the manner in which the specimen was used. As to the "declaration" of applicant's counsel, this no probative value because there is nothing in the declaration, or elsewhere in the record, to suggest that applicant's counsel has personal knowledge of how the specimen was being projected or that sales representatives were present at the trade show booths.

The specimen, on its face, falls short of amounting to a point of purchase display. As the examining attorney correctly notes, there is no association of applicant's marks with the identified goods. Moreover, applicant's marks are followed immediately by "technology for nasal delivery of peptides," or "technology for manufacturing peptides," or "technology for oral delivery of peptides." The use of the term "technology" certainly obfuscates whether the mark is even identifying goods. Indeed, we find it very likely that this language may lead one to believe that the mark is identifying a process, method or

procedure. Also, noticeably absent in the specimen is any inducement for the consumer to purchase any goods; there is no information regarding price or how one may even begin to purchase applicant's identified goods, not even a telephone number or an address.

Applicant alternatively argues that, in view of the nature of the identified goods, the specimen should be considered acceptable as "another document related to the goods or the sale of the goods," citing to TMEP § 904.03(k) (5th ed. rev. September 2007). Applicant explains that its goods are a "bio-technology based preparation, microscopic and intangible in nature, and submits that they are akin to natural gas or chemicals that are transported in tankers, both are which are also intangible in nature." Brief, p. 5.[7]

The TMEP section cited by applicant specifically states that the examining attorney may accept another document related to the goods "when it is not possible to place the mark on the goods, packaging, or *displays associated with the goods*." (emphasis added). Any reliance by applicant on this section must therefore be

[7] Brief filed in Serial No. 78679380. Same essential argument, if not verbatim, was made in applicant's reply briefs filed with respect to the other two applications.

based on an assumption that the specimen is not a point of purchase display. See *In re Genitope Corporation*, 78 USPQ2d 1819, 1822 (TTAB 2006) ("If applicant is asserting that the nature of its product precludes it from creating a display associated with the goods that satisfies the requirements of the Trademark Act, as it has been interpreted by case law, then applicant may not be able to rely on a display associated with the goods as its evidence of trademark use, but rather would have to submit evidence of a different manner of use.").

Although we have found that applicant's specimen is not a point of purchase display, we are not able to conclude, as applicant requests in its alternative argument, that such use is impractical. Indeed, the record in the *Shipley* case demonstrated that an applicant may use point of purchase displays to show use of a mark on goods highly similar in nature to those of applicant herein.[8] In any event, applicant here has not demonstrated that its goods are of such a nature that traditional trademark use is not practical. The record is unclear as to how applicant actually transports or delivers its goods to its

[8] In Shipley, applicant's goods were identified as "biopharmaceutical preparations used to treat cancer in humans, namely, individualized cancer treatments prepared specifically for each individual patient from whom tumor tissue has been received."

consumers. If they are delivered in laboratory containers, then it is likely that these containers could be labeled or affixed somehow with applicant's marks. Although applicant has submitted a definition of "peptide" and argues that peptides are "not pills...do not take a shape or form...," applicant's goods are not peptides. Applicant's goods, as applicant describes them, are biochemical preparations and delivery agents to be used either with or in the manufacturing of peptides. Without any further evidence, we are not able to accept applicant's contention that its goods are of such a nature that traditional trademark use is not practical. *In re Settec, Inc.,* 80 USPQ2d 1185 (TTAB 2006) (A mere assertion of impracticability does not suffice to establish that traditional trademark use is impracticable).

In summary, we conclude that the specimen submitted by applicant with its statements of use is not acceptable to show use of the mark in connection with the identified goods in all three applications. Contrary to applicant's contention, we find that the specimen is not a display associated with the goods. Moreover, applicant has not demonstrated that its goods are of such a type that it is not possible for applicant to make trademark use by placing the mark packaging or displays associated with the goods.

Decision: The refusal of registration in all three applications is affirmed.