

**THIS OPINION IS A
PRECEDENT OF THE
TTAB**

Mailed:
May 13, 2010
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Anpath Group, Inc.

Serial No. 77004809

Lauri S. Thompson of Greenberg Traurig, LLP for Anpath Group, Inc.

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

Before Quinn, Hairston and Bucher, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Anpath Group, Inc. seeks registration on the Principal Register of the mark **ANPATH** (*in standard character format*) for "all purpose disinfectant cleaning preparations for household, commercial and industrial use" in International Class 5.¹

¹ Application Serial No. 77004809 was filed by EnviroSystems, Inc. on September 21, 2006 based upon applicant's allegation of a *bona fide* intention to use the mark in commerce. On May 6, 2008, this application was assigned to Anpath Group, Inc. according to the Assignment Division of the United States Patent and Trademark Office, at Reel 3772, Frame 0684. The statement of use was filed on August 19, 2008.

The Trademark Examining Attorney refused registration on the ground that the proffered specimens are unacceptable as evidence of trademark use because they do not show the involved mark functioning as a trademark for the goods identified in the Notice of Allowance dated March 27, 2007. Trademark Act Sections 1, 2 and 45, 15 U.S.C. §§ 1051, 1052 and 1127.

After the Trademark Examining Attorney made the refusal final, applicant appealed to this Board. We affirm the refusal to register.

Applicant's original specimen shown below, identified as a "scanned pamphlet," was submitted on August 19, 2008 with applicant's Statement of Use:

Multi-Purpose Limited Disinfectant & Deodorizing Cleaner

Kills >99.9% of MRSA

ENVIROTRU

A gentle method
Meets EPA Requirements For Toxicity Category IV

Kills bacteria
Requires no protective clothing, gloves or special ventilation
Compatible with hard, non-porous surfaces
Non-flammable

NO SPECIAL HANDLING REQUIREMENTS

For Use in:
Households
Day Care
Schools
Office Buildings
Laboratories
Health Clubs
Aircraft
Trains
Buses and Cars
Ships and Boats
Non-food contact surfaces in food preparation areas

EnviroTru® is a multi-purpose, ready-to-use, effective limited disinfectant cleaner deodorizer for use on hard, non-porous, precleaned surfaces. EnviroTru® will disinfect precleaned surfaces, when used as directed on counter tops, walls, tables, chairs, exterior toilet surfaces, sinks, tubs, showers, floors, hand rails, door knobs, veterinary care surfaces, cabinets, faucets, appliances, and telephones. It is especially useful in laboratories, non-food contact surfaces in food preparation areas, health club facilities, day care centers, schools and households. It can also be used on aircraft, trains, automotive forms of transportation, ships and boats, whether commercial or military. EnviroTru® has passed AMS 1452A, AMS 1453 and Boeing D6-7127 specifications for non-corrosion and materials compatibility.

EnviroSystems, Inc.
116 Morlake Drive, Suite 201
Mooresville, NC 28117
www.envirosti.com

A wholly owned subsidiary of Anpath Corp. Inc.
Anpath.

MS-0209-08LL-00

ENVIROTRU
Multi-Purpose Limited Disinfectant & Deodorizing Cleaner

PACKAGING

Product #	Product Description	Bottles/Case	Shipping Weight	Case Dimension
0250220	EnviroTru® Spray Bottles, 22oz.	12	18.5 lbs. (8.3kg)	14.0" x 9.0" x 11.5" (35.6cm x 22.9cm x 29.2cm)
0250010	EnviroTru® 1 Gallon Containers	4	35.0 lbs. (15.8kg)	12.3" x 12.8" x 12.8" (31.2cm x 32.5cm x 32.5cm)
0250650	EnviroTru® 5 Gallon Containers	1	43.0 lbs. (19.4 kg)	16.0" x 10.0" x 10.0" (40.6cm x 25.4cm x 25.4cm)
0250550	EnviroTru® 55 Gallon Drums	1	485 lbs. (219kg)	23.5" (round) x 36.0" (59.7cm (round) x 91.4cm)

CLAIMS AND TEST RESULTS (EPA Reg #70791-2)

Disinfectant	Effective in:	
Limited Disinfectant	5 mins	Escherichia coli, Escherichia coli O157:H7, Pseudomonas aeruginosa, Salmonella enterica, Salmonella typhi, Shigella sonnei
	10 mins	Campylobacter jejuni, Klebsiella pneumoniae, Legionella pneumophila
Sanitizer	5 mins	Klebsiella pneumoniae, Methicillin Resistant Staphylococcus aureus (MRSA), Staphylococcus aureus, Vancomycin Resistant Enterococcus faecalis (VRE)

ACTIVE INGREDIENT:
Parachlorometastyrene..... 0.20%
Other ingredients..... 99.80%

FOR USE AS A:
DISINFECTANT • CLEANER and/or DEODORIZER • NON-FOOD CONTACT SANITIZER

For more information on EnviroTru® call: 1-800-374-0017

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When the Trademark Examining Attorney rejected the specimen on the basis that it was an advertisement for the goods, applicant argued that this pamphlet is provided to customers in conjunction with the product, and contains a toll-free telephone number for ordering product from applicant. After the final refusal, along with its Request for Reconsideration and a Notice of Appeal, applicant submitted a verified substitute specimen, shown at right, identified by applicant as "product ordering information."

Statute and Rules

We turn first to review the statutory definition of "use in commerce."

Use in commerce. The term "use in commerce" means the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. For purposes of this chapter, a mark shall be 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 the goods or their sale, and

(B) the goods are sold or transported in commerce,

...

Trademark Act § 45 (15 U.S.C. § 1127). The statute and attendant regulations² focus on actual affixation of the mark (e.g., a close physical association - either on the goods or on tags, labels and/or containers for the goods).

²

SPECIMENS

§ 2.56 Specimens.

(a) An application under section 1(a) of the Act, an amendment to allege use under § 2.76, and a statement of use under § 2.88 must each include one specimen showing the mark as used on or in connection with the goods, or in the sale or advertising of the services in commerce.

(b)(1) 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 impracticable to place the mark on the goods, packaging for the goods, or displays associated with the goods.

37 C.F.R. § 2.56.

In addition to the requirement that a trademark for goods performs its function of identifying the source of the goods to the consuming public, the rules also require that the specimen of use demonstrates a sufficient association between the trademark and the identified goods. *In re Bright of America, Inc.*, 205 USPQ 63, 71 (TTAB 1979). Applicant's "pamphlet" and its "product ordering information" do not purport to show affixation of the mark on "a label, tag, or container for the goods." 37 C.F.R. § 2.56. At no point does applicant argue that these proffered specimens function as labels affixed to industrial containers for the goods or that they are part of shipping documents that accompany the goods. *In re Ultraflight Inc.*, 221 USPQ 903 (TTAB 1984) [first page of the manual having assembly instructions for hang-glider contained the mark, and was deemed to be acceptable as affixation of the mark to the goods themselves].

Yet as applicant points out, the statutory definition is expanded beyond affixation, and includes "displays associated" with the goods, *In re Marriott*, 459 F.2d 525, 173 USPQ 799 (CCPA 1972), and applicant argues that its specimens should be treated as such. As discussed below, decisions under this Lanham Act provision have for decades found "point-of-purchase" or "point-of-sale" displays to be

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