

**This Opinion is Not a
Precedent of the TTAB**

Mailed: January 13, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Comfort Revolution, LLC
—

Serial No. 86564234
—

Michael J. Doherty of Doherty IP Law Group LLC
for Comfort Revolution, LLC.

Brian P. Callaghan, Trademark Examining Attorney, Law Office 108,
Andrew Lawrence, Managing Attorney.

—

Before Kuhlke, Shaw and Ritchie, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Comfort Revolution LLC (Applicant) seeks registration on the Principal Register of the standard character mark EGGCRATE for “Mattress toppers; Mattresses; Pillows,” in International Class 20.¹

The Trademark Examining Attorney has refused registration of Applicant’s mark on the ground that EGGCRATE is merely descriptive of Applicant’s goods under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1).

¹ Application Serial No. 86564234, filed on March 14, 2015, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

When the refusal was made final, Applicant appealed. The Examining Attorney and Applicant filed briefs. We affirm the refusal to register.

Mere Descriptiveness

A mark is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it immediately conveys information of a quality, feature, function, or characteristic of the goods or services in connection with which it is used, or intended to be used. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012). *See also In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015). The determination of whether a mark is merely descriptive must be made “in relation to the goods [or services] for which registration is sought, the context in which it 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.” *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)). It is not necessary, in order to find a mark merely descriptive, that the mark describe each feature of the goods or services, only that it describe a “single feature or attribute” of the goods or services. *Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219; *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987).

The Examining Attorney contends that EGGCRATE describes the shape or form of the identified goods and that it is “a term of art in the bedding products industry

used to denote bedding products, such as mattress toppers and pillows that feature an egg-crate design or pattern.” Ex. Att. brief, 6 TTABVUE 5.

In support of his position that the term EGGCRATE is merely descriptive of the applied-for goods, the Examining Attorney relies on the dictionary definition of “eggcrate” as being “of or resembling a horizontal construction divided by vertical partitions into cell-like areas.”² In addition, the Examining Attorney submitted evidence in the form of third-party webpages showing non-proprietary use of the term EGGCRATE in connection with mattress toppers, mattresses and pillows that feature an “eggcrate” design or pattern characterized by a horizontal construction divided by vertical partitions into cell-like areas. Ex. Att. brief, 6 TTABVUE 6. A few examples are reproduced below:³



² Infoplease based on RANDOM HOUSE UNABRIDGED DICTIONARY (1997) (<http://dictionary.infoplease.com>), May 21, 2015 Office action at 2.

³ May 21, 2015 Office action at 4, 9, 11, 17, 19, 22, 25, 26, 28.



EVA Medical Eggcrate
Foam Mattress Pad -
Thickness 3 Inches (Twin
Size)
★★★★☆ 89
\$39.99

Foam Eggcrate Mattress Overlay



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Allegro ID: 191439

✓ [New Lower Price]



Eggcrate Foam Topper

Please Select Foam Type:

Please Select Size:

Please Select Thickness:



HOME GUIDES

How to Install Eggcrate Foam on a Bed

by Drue Tibbits

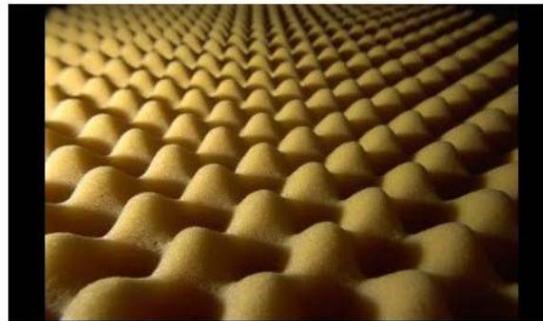
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Pad



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You Sleep



An eggcrate foam mattress topper provides an extra layer of cushioning.

An eggcrate foam mattress topper can help ensure a good night's sleep. Also called convoluted foam, these mattress toppers are covered in egg-shaped bumps that provide a soft sleeping surface that promotes air circulation. The foam's peak-and-valley design can improve blood flow by decreasing pressure on the skin, especially at pressure points such as hips and shoulders. According to The Better Sleep Council, an eggcrate foam

The screenshot shows the Sears website interface. At the top, there is a search bar with the text 'Find something great.' and a navigation menu with links for 'Store Locator', 'Gift Cards', 'Gift Registry', 'Sears Credit Card', 'My Orders', and 'Customer Service'. Below the search bar is a horizontal navigation bar with categories: 'Appliances', 'Auto', 'Baby', 'Clothing & Shoes', 'Electronics', 'Fitness', and 'Home'. The main content area displays the product title 'Acc U Rate Egg Crate Convoluted 3 Inch Foam Mattress Pad / Topper' and a star rating of 0 reviews. Below the title is a large image of the mattress pad, which has a yellow and white egg-crate pattern.



Ergonomic Contour Support Pillow



SleepEasy Support Pillow (Eggcrate Style)
Item# 100S



Original Contour Pillow - Standard

by Contour Products

★★★★☆ 22 customer reviews | 5 answered questions

Sale: \$24.95 & FREE Shipping on orders over \$35. [Details](#)

Only 9 left in stock.

Sold by ContourLiving and Fulfilled by Amazon. Gift-wrap available.

Want it tomorrow, May 22? Order within **1 hr 36 mins** and choose **One-Day Shipping** at

- Original Contour Pillow design from Contour Products
- Two layer foam support
- Aligns spine and helps neck soreness
- top layer **egg-crate type foam pad** allows air circulation to keep you cooler at night

Eggcrate Mattresses & Cushions

Nursing Care » Pads, Mattresses & Flotation » Eggcrate Mattresses & Cushions

View As:  

Show only Best Sellers

 <p>HUDISS6020FVB Cushion Mattress Convoluted 2 Full 4/cs Hudi 222.60 cs</p>	 <p>HUDISS6020QVB Cushion Mattress Convoluted 2 Queen 3/cs Hudi 208.69 cs</p>	 <p>LX7-1630E Cushion Wheelchair Eggcrate 3X18X16 Lumex 18.00 ea</p>
 <p>BIOC11760-CC Mattress Eggcrate 2 Foam 33X72 18/cs Bioclinic 512.72 cs</p>	 ★ <p>DMI552-8002-0000 Mattress Eggcrate 2 Foam 33X72 Duro Med 21.45 ea</p>	 ★ <p>DMI552-8003-0000 Mattress Eggcrate 3 Foam 33X72 Duro Med 27.45 ea</p>

The record also includes a customer referring to mattress toppers as “egg crates.”⁴

In response to this evidence, Applicant simply argues that the term “EGGCRATE is indefinite or susceptible to multiple connotations.” App. brief, 4 TTABVUE 3. Specifically, Applicant points to a definition of “eggcrate” as “having rectangular cells that direct and diffuse light <an eggcrate ceiling shuts out direct

⁴ “I was very disappointed in this product ... I have had other egg crates in the past and they were firm and thick.” Amazon (www.amazon.com), May 21, 2015 Office action at 8.

view of fluorescent lamps,”⁵ and contends that “eggcrate” is “primarily used to describe ceiling fixtures that are used in the lighting industry.”⁶ *Id.*

As is well established, the fact that “a term may have other meanings in different contexts is not controlling.” *In re Franklin Cnty. Historical Soc’y*, 104 USPQ2d 1085, 1087 (TTAB 2012). Applicant’s argument does not take into account the perception of the consumer as to meaning in the context of Applicant’s goods, *i.e.*, what meaning is relevant to mattress toppers, mattresses and pillows. *In re RiseSmart Inc.*, 104 USPQ2d 1931, 1933 (TTAB 2012); *In re Chopper Indus.*, 222 USPQ 258, 259 (TTAB 1984). As noted above, in our analysis of the proposed term EGGCRATE we must consider “the context in which it 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.” *Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219. Applicant’s broad identification encompasses mattress toppers, mattresses and pillows with “eggcrate” surfaces. *See Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219. *See also In re Bayer Aktiengesellschaft*, 82 USPQ2d at 1832 (Internet evidence may be considered for purposes of evaluating a trademark). This record clearly shows that “eggcrate” immediately, without doubt, describes a feature of the goods, namely, that their surface is shaped like an “eggcrate.”

⁵ MERRIAM-WEBSTER (www.merriam-webster.com) December 1, 2015 Response at 2.

⁶ Applicant also argues that its proposed mark is not generic. During examination the Examining Attorney provided an advisory that he cannot recommend registration under Section 2(f) based on acquired distinctiveness or on the Supplemental Register because “eggcrate” appears to be generic in connection with the applied-for goods. This was simply an advisory; no generic refusal was made, as such, that issue is not before the Board.

Decision: The refusal to register Applicant's EGGCRATE as merely descriptive under Section 2(e)(1) is affirmed.