

Applicant has submitted a better version of the protocol originally submitted. This protocol is shipped with every package containing the product and has been shipped to 7 States as of now. The product is shipped to laboratories to test the product and provide feedback.

The following are applicant's responses to the questions in the nonfinal office action: (1) Identify the particular good(s) listed in the application for which the specimen(s) was submitted to show use of the mark: Transfection reagent for scientific uses.

(2) Was the specimen created for submission with this application? If so, specify the date each specimen was created. If applicant obtained the image(s) of the goods shown in the specimen(s) from a third-party website, provide the URL of the website and a digital copy of relevant webpage(s) for each image: The specimen was not created for submission with this application.

(3) Provide information about and examples of how applicant's goods appear in the actual sales environment: The product consists of tubes containing transfection reagents.

(5) For each category of sales environment specified in response to questions (3) and (4), specify when the goods bearing the mark were first available for purchase within the United States, the date of the first sale of the goods to or within the United States, and whether the goods are still for sale to or within the United States in that environment: The goods were transported prior to the filing of the statement of use. According to 15 U.S.C. §1127, "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

In applicant's case, the goods were transported in commerce with the specimen protocol included in the shipping container. The legislative history of the TLRA makes it clear that the meaning of "use in the ordinary course of trade" will vary from one industry to another. The report of the House Judiciary Committee stated that: While use made merely to reserve a right in a mark will not meet this standard, the Committee recognizes that "the ordinary course of trade" varies from industry to industry. Thus, for example, it might be in the ordinary course of trade for an industry that sells expensive or seasonal products to make infrequent sales. Similarly, a pharmaceutical company that markets a drug to treat a rare disease will make correspondingly few sales in the ordinary course of its trade; the company's shipment to clinical investigators during the Federal approval process will also be in its ordinary course of trade.

In applicant's situation, the goods were shipped to investigators in various States in the ordinary course of its biotechnology trade. The report of the Senate Judiciary Committee stated: The committee intends that the revised definition of "use in commerce" be interpreted flexibly so as to encompass various genuine, but less traditional, trademark uses, such as those made in test markets ... .

Applicant provides transfection reagents for scientific uses and prior to any sales the product must be tested before it will be allowed to be sold. In return, the applicant receives valuable analysis information in compensation.

(6) For the goods identified in response to question (1), specify the dollar amount of sales with or within the United States and provide at least three invoices or other supporting documentation that show payments or other consideration made, redacting personal or private information of buyers as necessary: there are no dollar amount of sales because of the nature of the business and the product.