

THIS OPINION IS NOT A PRECEDENT OF THE TTAB
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Oral Hearing Held: January 21, 2020

Mailed: February 5, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board

In re Antsy Labs LLC aka Antsy Labs

Serial No. 87157508

Daniel P. Mullarkey and Monica M. Gutierrez of Polsinelli PC,
for Antsy Labs LLC aka Antsy Labs.

Lourdes Ayala, Trademark Examining Attorney, Law Office 106,
Mary Sparrow, Managing Attorney.

Before Shaw, Pologeorgis, and Dunn,
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

Antsy Labs LLC aka Antsy Labs (“Applicant”) seeks registration on the Supplemental Register of the designation FIDGET CUBE (in standard characters; CUBE disclaimed) for “stress relief exercise toys” in International Class 28.¹

The Trademark Examining Attorney refused registration on the Supplemental

¹ Application Serial No. 87157508, filed on August 31, 2016. The application was originally filed seeking registration on the Principal Register based on an allegation of use in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. 1051(a), claiming August 15, 2016 as the date of first use and August 30, 2016 as the date of first use in commerce. On February 26, 2018, Applicant amended its involved application to seek registration on the Supplemental Register.

Register under Trademark Act Sections 23(c) and 45, 15 U.S.C. § 1091(c) and 1127, on the ground that the designation FIDGET CUBE is the generic name of Applicant's identified goods and thus incapable of distinguishing Applicant's goods.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal resumed. The appeal is fully briefed. An oral hearing was held on January 21, 2020. We affirm the refusal to register.²

I. Genericness - Applicable Law

A mark proposed for registration on the Supplemental Register must be capable of distinguishing the applicant's goods or services. 15 U.S.C. § 1091. "Generic terms do not so qualify." *In re Emergency Alert Sols. Grp., LLC*, 122 USPQ2d 1088, 1089 (TTAB 2017); *see also Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1372 n.3 (Fed. Cir. 2018) (citing *In re Am. Fertility Soc'y*, 188 F.3d 1341, 51 USPQ2d 1832, 1833 (Fed. Cir. 1999)); *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1810 (Fed. Cir. 2001) (generic terms "are by definition incapable of indicating a particular source of the goods or services").

The Office must demonstrate a term is generic by "clear evidence" of generic use. *See In re Hotels.com LP*, 573 F.3d 1300, 91 USPQ2d 1532, 1533 (Fed. Cir. 2009). "[R]egistration is properly refused if the word is the generic name of any of the goods or services for which registration is sought." *In re Cordua Rests., Inc.*, 823 F.3d 594,

² All TTABVUE and Trademark Status and Document Retrieval ("TSDR") citations reference the docket and electronic file database for the involved application. All citations to the TSDR database are to the downloadable .PDF version of the documents.

118 USPQ2d 1632, 1638 (Fed. Cir. 2016) (quoting 2 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 12:57 (4th ed. 2016)).

A generic term “is the common descriptive name of a class of goods or services.” *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1830 (Fed. Cir. 2015) (citing *H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986)). There is a two-part test used to determine whether a designation is generic: (1) what is the genus (class or category) of goods or services at issue?; and (2) does the relevant public understand the designation primarily to refer to that genus of goods or services? *Princeton Vanguard*, 114 USPQ2d at 1803 (citing *Marvin Ginn*, 228 USPQ at 530); *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1462 (TTAB 2014). “The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question.” *Marvin Ginn*, 228 USPQ at 530.

Any term that the relevant public uses or understands to refer to the genus of goods, or a key aspect or subcategory of the genus, is generic. *Royal Crown Co., Inc. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1046-47 (Fed. Cir. 2018). “[A] term is generic if the relevant public understands the term to refer to part of the claimed genus of goods or services, even if the public does not understand the term to refer to the broad genus as a whole.” *Cordua*, 118 USPQ2d at 1638 (holding CHURRASCOS, a word that is generic for a type of grilled meat, to be generic for restaurant services because it referred to a key aspect of those services); *see also In*

re Nordic Naturals, Inc., 755 F.3d 1340, 111 USPQ2d 1495 (Fed. Cir. 2014) (CHILDREN’S DHA generic for DHA supplements for children); *In re Northland Aluminum Prods., Inc.*, 777 F.2d 1556, 227 USPQ 961 (Fed. Cir. 1985) (BUNDT generic for ring cake mixes, *i.e.*, the subcategory “bundt cakes.”).

“Evidence of the public’s understanding of the term may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers and other publications.” *Royal Crown*, 127 USPQ2d at 1046 (quoting *In re Merrill Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987)); *see also Cordua*, 118 USPQ2d at 1634; *Princeton Vanguard*, 114 USPQ2d at 1830; *In re Reed Elsevier Props. Inc.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007) (finding third-party websites competent sources for determining what the relevant public understands mark to mean).

A. What is the Genus of the Goods at Issue?

Our first task is to determine the proper genus. In defining the genus, we commonly look to the identification of goods or services in the application. *See Reed Elsevier*, 82 USPQ2d at 1380; *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991) (a proper genericness inquiry focuses on the identification set forth in the application or certificate of registration); *In re Serial Podcast, LLC*, 126 USPQ2d 1061, 1063 (TTAB 2018) (proper genus generally is “set forth by the recitation of services in each subject application.”). Accordingly, we find that the genus of goods at issue in this case is adequately defined by Applicant’s identification

of goods, namely, “stress relief exercise toys.” Applicant does not dispute that this is how the genus is defined, but itself refers to the genus as “stress relief toy or fidget toy.”³

B. Who are the Relevant Purchasers?

The second part of the test is whether the term sought to be registered is understood by the relevant public primarily to refer to that genus of goods or services. “The relevant public for a genericness determination is the purchasing or consuming public for the identified goods.” *Frito-Lay N. Am., Inc. v. Princeton Vanguard LLC*, 124 USPQ2d 1184, 1187 (TTAB 2017) (citing *Magic Wand*, 19 USPQ2d at 1552); *Sheetz of Del., Inc. v. Doctor’s Assocs. Inc.*, 108 USPQ2d 1341, 1351 (TTAB 2013). Because there are no restrictions or limitations to the channels of trade or classes of consumers for Applicant’s identified goods, the relevant consuming public consists of the public at large, namely, ordinary consumers who purchase stress relief exercise toys.

C. How does the Relevant Public Perceive the Designation FIDGET CUBE?

The Examining Attorney argues that the designation FIDGET CUBE refers to a specific type or subcategory of a stress relief exercise toy.⁴ In support of her argument, the Examining Attorney submitted the following evidence showing use of the

³ Applicant’s Brief, 12 TTABVUE 9.

⁴ Examining Attorney’s Brief, p. 7, 14 TTABVUE 8.

designation FIDGET CUBE in connection with Applicant's identified goods. The evidence is summarized below:

1. Dictionary Definitions

The constituent elements of Applicant's applied-for mark are defined as follows:⁵

"Fidget" is defined as:

"uneasiness or restlessness as shown by nervous movements;"

"to make a lot of small movements because you are nervous, bored, etc."

"to cause to move or act nervously."

"Cube" is defined as:

"the regular solid of six equal square sides."

2. Plain Copies of Third-Party Registrations⁶

- i. Registration No. 4249782, registered November 27, 2012 on the Principal Register for the standard character mark PARKE'S FIDGET FELLOW (FIDGET disclaimed) for "plush toys for use in mental and physical therapy." The underlying application of this third-party registration was filed on April 4, 2012, claiming April 1, 2009 as both the date of first use and first use in commerce.

⁵ December 12, 2016 Office Action, TSDR pp. 11-15 and 19-20 (www.merriam-webster.com).

⁶ *Id.*, TSDR pp. 6-10.

Additionally, Applicant submitted status and title copies of three pending applications and six live registrations where the designation "fidget cube(s)" is employed as the name of the goods set forth in the identification of goods in each application and registration. Applicant also submitted two lists of third-party pending applications and live registrations for marks that include the term FIDGET. These lists do not serve to introduce the applications and registrations into evidence and thus have minimal probative value. *See In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1405 n.17 (TTAB 2018) ("[T]he list does not include enough information to be probative. The list includes only the serial number, registration number, mark, and status (live or dead) of the applications or registrations. Because the goods are not listed, we do not know whether the listed [applications or] registrations are relevant.").

- ii. Registration No. 4626442, registered March 20, 2014 on the Supplemental Register for the standard character mark THE ULTIMATE FIDGET (FIDGET disclaimed) for “Therapeutic stimulation device, namely, hand-held multi-movement apparatus designed to provide sensory feedback for children when touched for the purpose of providing additional sensory input to maintain attention and lessen distraction.” The underlying application of this third-party registration was filed on June 7, 2013, claiming May 12, 2012 as both the date of first use and first use in commerce.

3. Online Product Reviews⁷

- Do you have to keep your hands busy to think straight? **Fidget Cube** is a little device that lets you click, flip, roll and slide its different buttons so you can stay calm. You can nab one for \$19 on Kickstarter, and it’s supposed to ship in December, though every crowdfunded project seems to get delayed.

For some, that requires mediation and the ensuring sense of zen. For the others, it’s background music. But I think best while stroking my beard or twiddling a trinket. **Fidget Cube** could fill the void no matter what sensation I’m seeing. (www.techcrunch.com/2016/09/08/fidget-cube).

⁷ December 12, 2016 Office Action, TSDR pp. 27-31; September 2, 2017 Office Action, TSDR p. 21, November 4, 2018 Final Office Action, TSDR pp. 4-49, 58-70, and June 1, 2019 Denial of Request for Reconsideration, 6 TTABVUE 8-10, 7 TTABVUE 2-8, 8 TTABVUE 7-10, 9 TTABVUE 2-10 and 10 TTABVUE 2-10.

In her November 4, 2018 Final Office Action, the Examining Attorney provided a URL address and an abstract of the purported contents of the websites www.pickedreviews.com, www.guidr.com, and www.geek.com solely in the body of the office action without attaching a screenshot of the actual websites as exhibits to the office action. TMEP Section 710.01(b) provides, inter alia, that when

[M]aking Internet evidence part of the record, the examining attorney must both (1) provide complete information as to the date the evidence was published or accessed from the Internet, and its source (e.g., the complete URL address of the website), and (2) download and attach the evidence to the Office action. *See Safer Inc. v. OMS Invs. Inc.*, [94 USPQ2d 1031, 1039 (TTAB 2010)]. If an examining attorney fails to do so, and the applicant objects, the material will not be considered. *See In re Mueller Sports Medicine, Inc.*, 126 USPQ2d 1584, 1587 (TTAB 2018). If, on the other hand, an examining attorney fails to satisfy these

- Fidget Spinner vs. **Fidget Cubes** - **Fidget cubes** serve almost the same purpose as fidget spinners except they do not spin. They provide the fidgeter with various buttons and clicking objects. **Fidget cubes** are good for people who enjoy clicking pens or pressing buttons. (www.bestfidgetspinner.com).
- A fidgeter's dream toy, **Fidget Cube** is a tiny palm-sized toy that includes six separate functions, including a clicker, a switch flip, a joystick glider, a circular wheel, a roller click bell and gear rollers, and a special side modeled after a traditional worry stone – all strategically placed as tools to help you relax and focus on the tasks in front of you. Easily one of our favorite picks on the list. **Fidget Cube** has something for everyone. (www.coolmaterial.com/feature/best-fidget-toy-options).
- The stress relief **fidget cube** is a non-motorized, no battery cube with six sides, like a die. The user can enjoy manipulating each side, including rolling a ball, spinning a wheel, flipping a switch, pressing buttons, and rubbing a circle. The tactile feel is designed to provide relaxation for people with ADHD or any other disorder which decreases attention or increases anxiety. There is enough functionality in these little cubes to spark some interest in the mechanical makeup of the cube. They are small and discreet. Depending on the **fidget cube** you get, there may be minimal noise from the clicking.” (www.spacerails.net/best-fidget-tools-keep-child-maybe-focused).

requirements, but the applicant fails to object, the Board may consider the website for whatever probative value it may have. *See id.* at 1586.

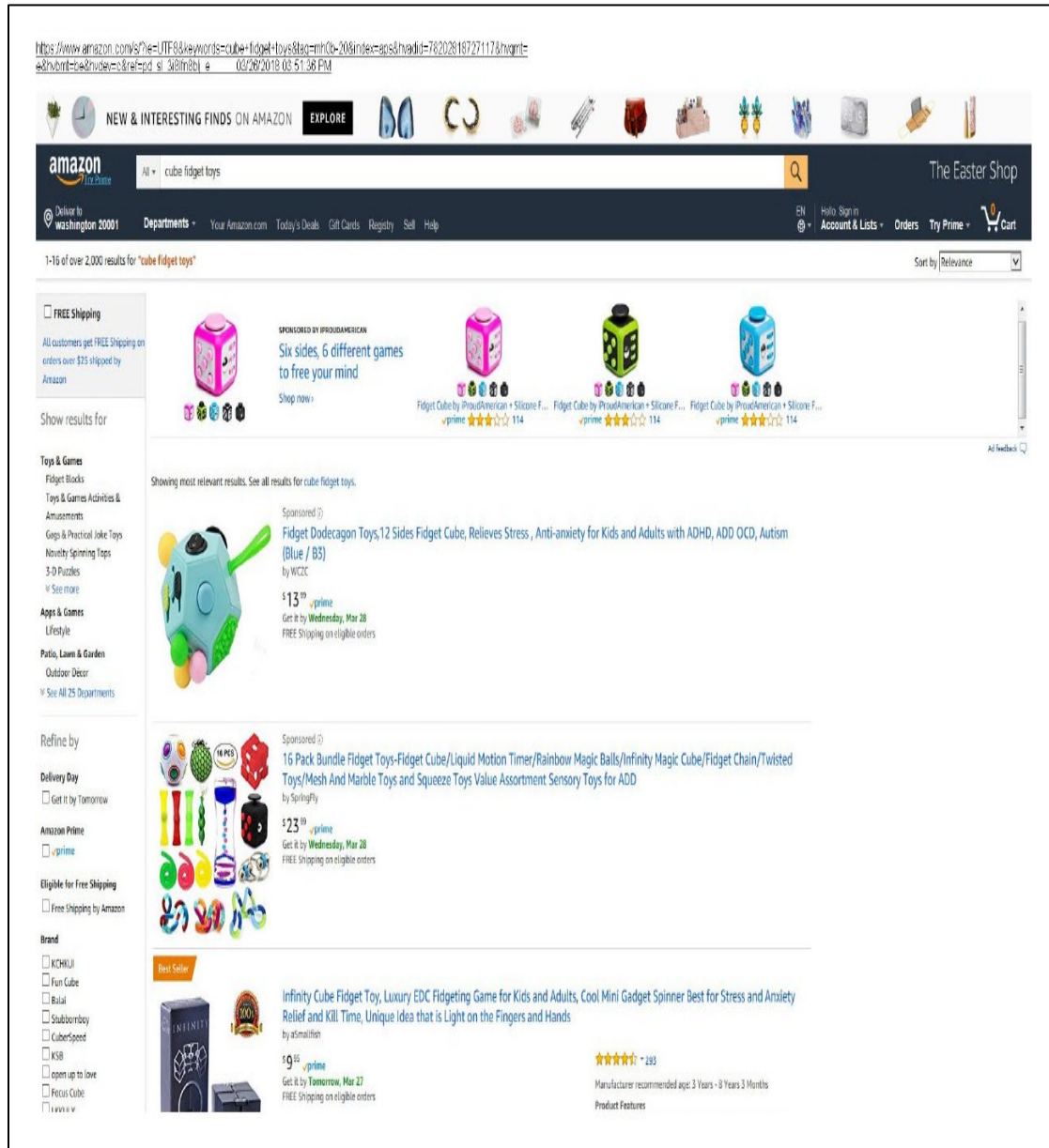
Because the Examining Attorney did not attach screenshots of the three websites as exhibits to her final office action and since Applicant did not object on such grounds, we have given these three websites whatever probative value they have.

- Fidget spinners are massively popular for scatterbrained thinkers in schools and workplaces. This has led them to be labeled as a distraction, which is ironic considering they are typically used to promote focus. Instead of bringing a noisy fidget spinner to your next lecture or work meeting, consider a **fidget cube** or die instead. These polygonal toys offer a different sensory stimulant on each side. You'll find buttons to press, switches to flick, wheels to crank, joysticks to twiddle, and more. Some users report that giving their restless hands something to play with helps relieve symptoms of ADHD, anxiety, depression, and autism. Others claim that fidget dice are instead just cheap trinkets. Either way, those people have one thing right, because they are quite inexpensive. If you've got excess energy to burn, consider giving one of our favorite **fidget cubes** a try. (www.heavy.com/social/2017/05/top-best-fidget-cube-dice-sensory-toy-for-adhd-anxiety-autism)
- There are a wide variety of **fidget cubes** available now, which all feature cubes that fit in your hand that have several different activities and add-ons to help sustain a quiet moment. Some are mainly puzzle cubes, where you can move around different sections to make different shapes. Others have a variety of switches, buttons, and joysticks to click and move. Some **fidget cubes** actually have more sides than a cube to fit more fidget buttons and switches. Less expensive **fidget cubes** tend to be made of plastic while more expensive ones often feature metal. Most also produce minimal, if any, noise. (www.bestreviews.com/-best-fidget-cubes).
- If you've ever been caught chewing on your nails, rigorously clicking a pen, or flicking your foot in dire stress, you are not alone! No matter how embarrassing or uncontrollable the situation is, 'fidgeting' is actually quite healthy for stress relief. Usually, the common fidgeting habits may be seen as annoying or irritating to fellow colleagues and friends. The good news is that the latest additions to these fidgeting toys are seen as simple 'cool' devices that have literally taken the world by storm! Initially designed to help increase the focus and attention span, and also for those with ADD, ADHD, autism and OCD related issues, these cubes and spinners are now one of the most popular toys on the markets. Every kid has them or wants them more than anything! So, what are these **fidgeting cubes**? Let's have a look at the top nine best **fidget cubes** and the guide that follows with all you need to know about this latest frenzy! (www.productexpert.com/best-fidget-cube-on-amazon).

- **Fidget cubes** and spinners are ultra-popular now, and cost anywhere from a dollar to twenty. Fidget cubes . . . are covered in buttons, knobs and switches. Fidget spinners . . . are flat and spin on ball bearings like a gyroscope. But a lot of electronics have fidgety features, and you may not even realize it. (www.cnet.com/pictures/the-best-fidgety-gadgets-that-arent-fidget-spinners-or-cubes).
- The **fidget cube** is a handheld toy that aims to relieve stress, help you focus and occupy your hands. All sides of the cube have different types of buttons. Some are pushed, some are pulled and some are rubbed. (www.superiorthan.com/superior/Fidget-Spinner-vs-Fidget-cube-2083).
- If you can't seem to keep yourself still and need something, anything, to occupy your hands, the sudden explosion of **fidget toys** is just what you need. While they make somewhat dubious claims about their therapeutic benefits, there's no denying the satisfaction of spinning a tiny toy, or clicking and fussing with switches and buttons, while you're otherwise idle. It just feels right. Below we've compiled a list of the best fidget spinners and best **fidget cubes** you can buy right now. And if you aren't interested in dropping \$20 or more on a simple fidget toy, we've also included a few ultra-cheap fidget spinners and cheap **fidget cubes** that will still get the job done (and likely make a little but more noise while doing it). (www.sea.ign.com/toys/114989/news/the-best-fidget-spinners-and-fidget-cubes).
- Best **fidget toys** are tools that have been known to improve concentration often in people suffering from ADHD, autism or anxiety. Two and a half decades ago, these toys were unknown to many people. Over the years, their popularity has grown and continues to grow. **Fidget toys** come as spinners, as **fidget cubes** among other shapes and each has a different mode of operation. They can be spun, twisted, pressed, rolled, rubbed or switched. It all depends on the type of **fidget toy** that you have. Others are versatile and combine all the above operations in one device. **Fidget cubes** are a good example. (www.fidgetsguide.com/best-fidget-toys).

4. Online Retailer Advertisements⁸

i. www.amazon.com (Representative Sample)



⁸ March 27, 2018 Office Action, TSDR pp. 5-11, 19-31, and 36-48; November 4, 2018 Final Office Action, TSDR pp. 52-58; June 1, 2019 Denial of Request for Reconsideration, 5 TTABVUE 7-14.

https://www.amazon.com/s?ie=UTF-8&keywords=cube+fidget+toys&tag=mh0b-20&index=aps&hvadid=78202818727117&hvqmt=e&hvbmt=be&hvddev=c&ref=pd_sl_3i8im8bl_e 03/26/2018 03:51:36 PM

☐ LKKULY
☐ WIMMail
☐ Dahlanega
☐ Andychi
☐ Pullison(TM)
☐ kepeak
☐ Ganono

Toys Age Range
☐ Birth to 24 Months
☐ 2 to 4 Years
☐ 5 to 7 Years
☐ 8 to 13 Years
☐ 14 Years & Up

Toys Interest
 Animals & Nature
 Fantasy & Sci-Fi
 Fashion
 Occupations
 Sports
 Transportation

Number of Puzzle Pieces
☐ 24 & Under
☐ 25 to 99
☐ 100 to 499
☐ 500 to 999
☐ 1,000 to 1,999
☐ 2,000 to 2,999
☐ 3,000 & Above

Apps by Fire Tablet Model
☐ Fire HD 10 (7th Generation)
☐ Fire HD 8 (7th Generation)
☐ Fire 7 (7th Generation)
☐ Fire HD 8 (6th Generation)
☐ Fire HD 10 (5th Generation)
☐ Fire HD 8 (5th Generation)
☐ Fire
☐ Fire HDX 8.9
☐ Fire HD 7
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☐ Kindle Fire HDX
☐ Kindle Fire HD
☐ Kindle Fire HD 8.9"
☐ Kindle Fire HD (Previous Generation)
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Avg. Customer Review
☒ 5 Stars & Up
☐ 4 Stars & Up
☐ 3 Stars & Up
☐ 2 Stars & Up
☐ 1 Star & Up

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Best Fidget Cube By Zippi. Prime Desk Toy. Reduce Anxiety And Stress Relief For Autism, ADD, ADHD & OCD. (Wood Color)
by Zippi

\$9.85 **prime**
Get it by **Wednesday, Mar 28**
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More Buying Choices
\$7.85 (2 new offers)

★★★★★ 275
Manufacturer recommended age: 5 Years and up
Product Features
... See why Amazon customer rated Zippi Fidget Cube 5 stars!

Best Seller

Best Fidget Cube By Zippi. Prime Desk Toy. Reduce Anxiety And Stress Relief For Autism, ADD, ADHD & OCD. (Black Green)
by Zippi Toys

\$6.70 **prime**
Get it by **Wednesday, Mar 28**
FREE Shipping on eligible orders

More Buying Choices
\$4.70 (2 new offers)

★★★★★ 82
Product Features
... quality of our Fidget Cube that Your purchase comes with ...

14 Pack Bundle Sensory Toys-Fidget Cube/Bike Chain/Liquid Motion Timer/Rainbow Magic Balls/Twisted Fidget Toys/Mesh And Marble Toy/Soybeans Squeeze Grape Ball/Stretch Toy for ADD ADHD Stress Relax
by SpringFly

\$22.99 **prime**
Get it by **Tomorrow, Mar 27**
FREE Shipping on eligible orders

★★★★★ 48
Product Features
... It Is Anti-Stress Cube, Bike Chain Fidget Toy Smooth Rolling ...

Ratoop Fidget Cube Relieves Stress and Anxiety Attention Toy for Work/Class/Home, Black/Green
by Ratoop

\$1.83 ~~\$4.05~~
FREE Shipping on eligible orders

More Buying Choices
\$1.83 (8 new offers)


★★★★★ 990
Manufacturer recommended age: 12 Years and up
Product Features
... meeting all toy safety standards), our fidget cubes are strong ...

https://www.amazon.com/s?ie=UTF8&keywords=cube+fidget+toys&tag=mh0b-20&index=aps&hvadid=78202818727117&hvqmt=ad&hvdnt=cue&hvs=c&ref=pd_sl_3d0mndc1_e_03/28/2018 03:51:36 PM

★ ★ ★ ★ ★ & Up
★ ★ ★ ★ ★ & Up
★ ★ ★ ★ ★ & Up


International Shipping enables more
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Condition
New
Used



JOEYANK New Version Fidget Finger Toy - Infinity Cube, Fidget cube for Stress and Anxiety relief/ADHD, Ultra Durable
by JOEYANK
\$17.55 prime
Get it by **Tomorrow, Mar 27**
FREE Shipping on eligible orders


★★★★★ 125
Save \$2.00 with coupon
Promotion Available See Details
Manufacturer recommended age: 12 Years and up
Product Features
... Edc focus toys: Great for fidget, anxiety, adhd, autism, staying awake ...



Maxboost Fidget Cube 6 Sides Stress Releaser Ball [2-Pack, Black] Anti-anxiety Depression Dice Prime Focus Toy for Children, Students, Adults [5-clicker Edition] Great for Work, Class, Home
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★★★★★ 456
Product Features
... to focus on your work. Our fidget cubes are strong, durable and safe ...

2 PACK




CuberSpeed Rainbow Ball Magic cube Fidget toy puzzle Magic Rainbow ball puzzle Fun fidget
by CuberSpeed
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Save more with monthly Subscribe & Save deliveries.
\$6.79 prime
Get it by **Tomorrow, Mar 27**
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More Buying Choices
\$6.79 (2 new offers)

★★★★★ 194
Manufacturer recommended age: 14 Years and up
Product Features
... keep anyone busy for long periods of time. Best-selling Fun fidget toys ...



Sponsored
Magic Star Cube, SHONCO 2 in 1 Combo Infinity Cube Toy Transforming Geometric Puzzle 3D Assembly Fidget Stress Anxiety Relief Magic Puzzle Cubes for Kids and Adults
by SHONCO
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Get it by **Wednesday, Mar 28**
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★★★★★ 24



Sponsored
TAKAGISM Fidget Toy Cube Relieves Stress and Anxiety for Children and Adults (usa flag)
by TAKAGISM
\$6.99 prime
Get it by **Wednesday, Mar 28**
FREE Shipping on eligible orders

★★★★★ 14

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Helect H1037 Fidget Cube Toy Relieves Stress and Anxiety
★★★★★ 26 customer reviews
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In Stock.
Want it tomorrow, March 27? Order within 20 hrs & mins and choose **One-Day Shipping** at checkout. Details
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- Helect Fidget Cube Designed to improve a sense of calm, reduce stress and anxiety, develop focus and concentration, and promote comfort and relaxation with various features
- Suitable for children and adults, especially for those with extra energy, ADD/ADHD, OCD, autism, or high stress / anxiety levels
- Featuring 6 sides for you to click, roll, spin, flip, glide and breathe
- Made with high-quality ABS plastic and silicone, standing up to everyday fidgeting wear and tear
- Package includes: 1x Fidget Cube, life-time warranty card

New (1) from \$5.99 & FREE shipping on orders over \$25.00. Details

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Bestomz 4 pack liquid motion timer desktop for sensory play, fidgeting, ca...
★★★★★ 90
\$17.99 prime
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Frequently bought together

ii. www.bestdeals.com

https://www.bestdeals.today/cube-fidget?origin=bing&utm_source=bing&utm_medium=cpc&utm_content=BingYahoo&utm_campaign=276338153& Bingcampid=276338153& Bingadgroupid=121605894& Bingadid=78003771703673& Bingbidmatchtype=b& Bingdevice=c& Bingmatchtype=p& Bingorderitemid={OrderItemID}& Bingquerystring=what%20are%20fidget%20cubes?& Bingtargetid=kwd-78003771703673& loc=190& appid=168& me=p& dest=1& sys_id=21242& dist=bingyahoo& tm=cube%20fidget

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Buy how & save on top restaurants, spas, fitness, goods, travel, events & more!
Local, Goods & Getaways · Concerts and Live Events · Discover 300K+ Deals
Types: Beauty & Spa, Food & Drink, Travel
Great Restaurant Deals · Electronics, Goods & More
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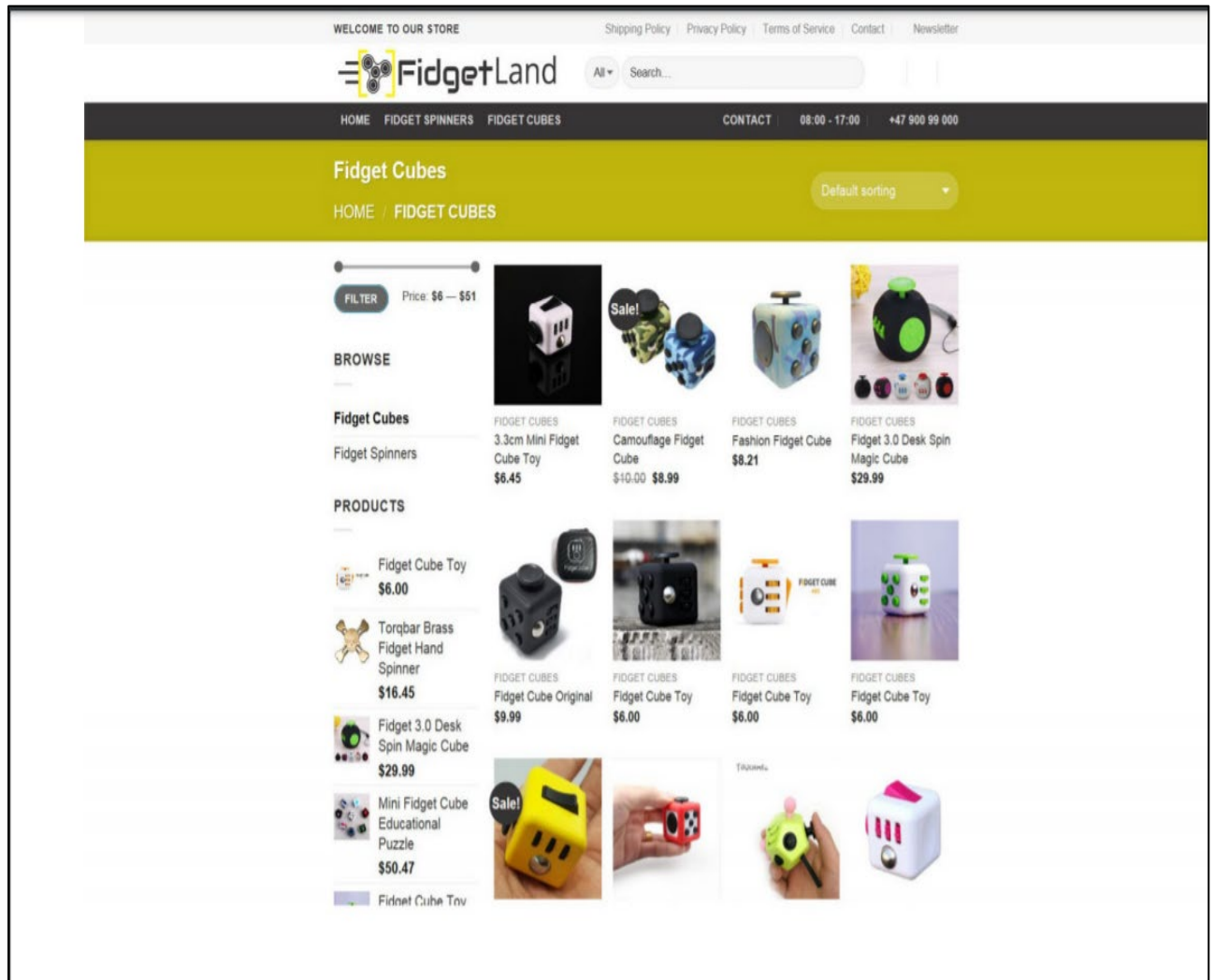
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iii. www.fidgetland.com



iv. www.asseenontvandbeyond.com

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Description

Fidget Cube - The Original Stress Relief Toy

The Fidget Cube is a high quality, addictive desk toy that helps you focus. You can fidget at home, work or class. Fidget Cube is great for all ages. It's a great way to relieve stress and anxiety allowing you to focus on the work you need to get done. It makes a great gift for any fidgety friends. It's highly addictive! It's very quiet so you can fidget without disrupting others. They are a wonderful tool for anybody that has ever felt stressed, anxious and needed away to release that energy without being disruptive.

Each cube has 6 sides:

- Flip
- Click
- Spin
- Roll
- Breathe

Click. 3 buttons that click audibly

Glide. Joystick glides smoothly across the surface

Flip. Switch rocks back and forth

Breathe. 2 silenced buttons for sneaky fidgeting

Roll. Modeled after worry stones, ancient tools used for anxiety relief

Spin. Tactile gears

Spin. Rotating dial

Clickable ball and socket for quiet and loud fidgeting

The Fidget Cube comes in several colors which you can choose from the dropdown box above:

Serial No. 87157508

v. www.kmart.com

<http://www.kmart.com/generic-fcube-blackgreen-fidget-cube-anxiety-stress-relief-c-SPM12025280032>
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generic Fidget Cube Anxiety Stress Relief Adults Kids Gift Focus Attention Therapy Toy

Description Specifications



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Description Item # SPM12025280032 Model # Fcube-BlackGreen

[Fidget Cube Anxiety Stress Relief Adults Kids Gift Focus Attention Therapy Toy](#) - Black and Green Color

Fidget Cube Stress Relief Focus Attention Anxiety Toy - Black and Green. The fidget cube is the ultimate tool to help concentration. Keep focus high and anxiety low whether at home, in class, traveling, or even at work. No more fidgeting with balls or clicking pens repeatedly for stress relief. Anybody who has trouble keeping their attention on one task or who cannot keep hands still will love this product. Many people fidget in other ways as well. Tapping a foot, knee shaking, biting nails or lips can all be considered fidgeting. Now get a way to focus attention and reduce anxiety in a more discreet manner, without driving friends or loved ones crazy. Okay, so you may fidget, but never let anybody tell you to stop. Many studies have shown that allowing students to fidget in school were able to

vi. www.fidgettoyworld.com

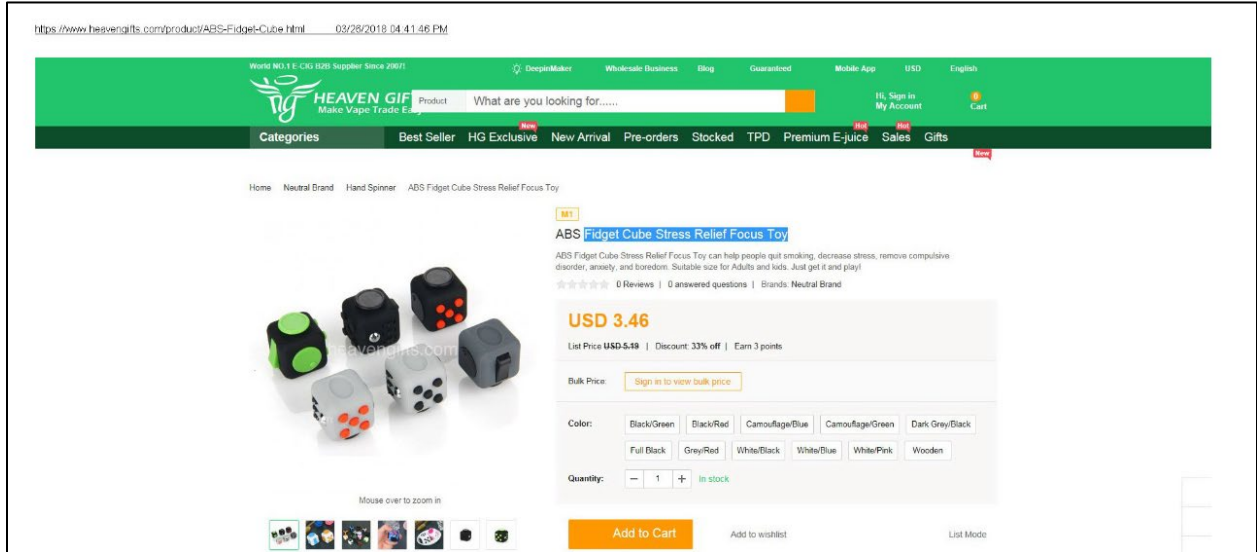
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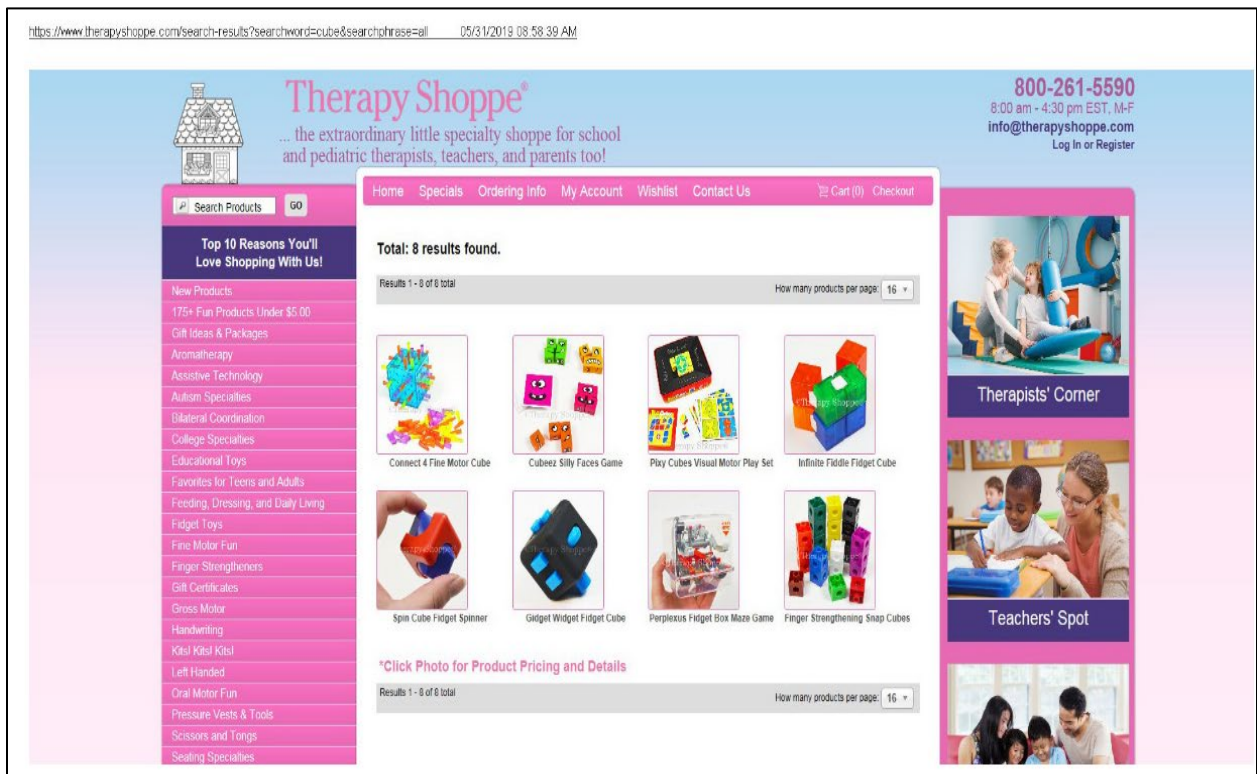
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vii. www.heavengifts.com



viii. www.therapypshoppe.com



5. Online Articles

i. www.coolmaterial.com⁹

<http://www.coolmaterial.com/feature/best-fidget-toy-options/> 29/02/2017 09:29:07 AM



Fidget Cube

A fidgeter's dream toy, Fidget Cube is a tiny palm-sized fidget toy that includes six separate functions, including a clicker, a switch flip, a joystick glider, a circular wheel, a roller click ball and gear rollers, and a special side modeled after a traditional worry stone—all strategically placed as tools to help you relax and focus on the tasks in front of you. Easily one of our favorite picks on the list, Fidget Cube has something for everyone. [\\$20](#)

ii. www.fidgetcircle.com¹⁰

<https://www.fidgetcircle.com/fidget-cubes/> 03/26/2018 03:55:04 PM

FIDGET CIRCLE

FIDGET SPINNERS FIDGET TOYS FIDGET CUBES

Fidget Cubes: What are They and Which Cube is for You?

[f](#) [t](#) [p](#) [G+](#)

What is a Fidget Cube?

A fidget cube, sometimes also referred to as a stress cube, fidget dice or fidget box, is a [fidget toy](#) in the shape of a die. A fidget cube typically has 6 sides each featuring a unique sensory fidgeting tool on each face. The original Fidget Cube was the brainchild of brothers Mark and Matthew McLachlan, who created it with the intention of providing the ultimate fidget gadget to help people with their concentration, focus and stress relief. Since the launch of original fidget



[p](#) [G+](#)

⁹ September 2, 2017 Office Action, TSDR p. 22.

¹⁰ March 27, 2018 Office Action, TSDR pp. 12-18.



<https://fidgetcircle.com/fidget-cubes/> 03/28/2018 03:55:04 PM

help people with their concentration, focus and stress relief. Since the launch of original fidget cube many different variations of the cube have emerged with varying fidget options in differing sizes and shapes. The fidget cube also likely influenced the emergence of [fidget spinners](#) another fidget toy aimed at fidgeters.



How the Fidget Cube Craze Started

The term fidget cube started to take off with the launch of the Kickstarter campaign by brothers Mark and Matthew McLachlan. The brothers were asking for \$15000 funding for their fidget cubes, but ended up raising a staggering \$6.1 million, making it one of the most successful Kickstarter campaigns of all time. It wasn't long until others caught onto this new phenomenon and soon several similar fidget cubes and dice emerged. Users looking for fidget cubes can now select from a huge offering from 100s of different online vendors around the world.





Different Types of Fidget Cubes

Original 6 Sided Fidget Cube:



<https://fidgetcircle.com/fidget-cubes/> 03/28/2018 03:55:04 PM

The original cube features a six sided die with 6 unique [fidget](#) options. These include the following: an on/off-style switch, gears and a rolling ball, a small joystick, a spinning disc, a rubbing pad, and depressible buttons.



12 Sided Fidget Cube (Dodecagon):

The newer 12 sided cube is a larger version that builds on the original fidget cube. Whilst it is larger in size you also get 6 additional fidget options. The 12 sided fidget cube also includes a lanyard so it can be hung on your keychain.



Fidget Cube 3.0:

A slightly larger 6 sided fidget cube compared with the original. The fidget options are also slightly different to the original and the finish is in a smooth silicon.

Mini Fidget Cube:

There are now several mini/nano variants of the fidget cube. The mini versions are smaller than the original cubes with similar fidgeting functions on each face of the dice.

Fidget Pads:

An offshoot product with similar functions, just in a different form. The fidget pads are shaped

iii. www.techcrunch.com¹¹

https://techcrunch.com/2016/08/08/fidget-cube/ 12/12/2016 10:11:53 AM

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Fidget Cube is a brilliantly useless toy for nervous fiddling


Posted Sep 8, 2016 by Josh Constance (@joshconstance)

Do you have to keep your hands busy to think straight? Fidget Cube is a little device that lets you click, flip, roll, and slide its different buttons so you can stay calm.


Design that moves you. Active Steel. Holidays Offers Up to 25% off Walk, run, swim & sleep.

¹¹ December 12, 2016 Office Action, TSDR pp. 27-31.


https://techcrunch.com/2016/08/08/fidget-cube/ 12/12/2016 10:11:59 AM




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You can nab one for \$19 on Kickstarter, and it's supposed to ship in December, though every crowdfunded project seems to get delayed

Your startup's next pivot? Should you quit your job? Is this the house you want to buy? Sometimes solving tough puzzles in your life requires a focus that can only come from neutralizing the outside world

For some, that requires meditation and the ensuing sense of zen. For others, it's background music. But I think best while stroking my beard or twiddling a trinket. Fidget Cube could fill the void no matter what sensation I'm seeking.

Fidget Cube will need some impressively sturdy industrial design to not break under the bashing it's sure to get. But if it holds up, it could become an indispensable desk companion.





Click.

No need to click that pen anymore. You'll find 1 clicker buttons, and 2 silver buttons on this side design to satisfy the clicker in each of us.

Spin.

Looking for a creative project? Take this cube for a spin.

Glide.

You don't have to be a genius to enjoy the visually satisfying gliding action of this gadget.

Think you want to sleep. With up to 8 month battery life, give the activity tracker that inspires anyone to go the extra mile.

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LOCATION
Brooklyn, NY

CATEGORIES
Crowdsourcing, Crowdfunding, Finance

FOUNDERS
Perry Chen

WEB SITE
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iv. www.tomsguide.com¹²

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GADGETS REFERENCE

Fidget Cubes: What They Are and Where to Buy Them

by [DON REISINGER](#) Jun 14, 2017, 9:20 AM

If you've heard of [fidget spinners](#), you know that the neat little gadgets, which spin around to help you relieve stress, are all the rage. But they're not alone. In fact, another gadget, called a fidget cube, has become quite popular.



Unlike a fidget spinner, which can do just one thing, the fidget cube has several different interaction points, allowing you to flip a switch, press buttons, twirl components and much more. But the fidget cube is still not a known quantity to everyone. Here's what you need to know.


What is a fidget cube and why is it so popular?

Like the fidget spinner, the fidget cube is a small, handheld gadget that provides you with a series of sensory tools across its six sides. The original fidget cube, from a company named Antsy Labs, has a rolling ball, on-off switch, joystick and spinning disc, among other components. The fidget cube is also small enough to easily hold in one hand, so you can play with it while you're on the phone, talking to friends or doing something else.

¹² March 26, 2018 Office Action, TSDR pp. 31-32.

-23-

<https://www.tomsguide.com/us/last-day-of-june-game,news-25312.html> 03/26/2018 04:08:06 PM



Like the fidget spinner, the fidget cube is designed to help you take your mind off stressful thoughts. While there's no health data to support claims that these devices can help those with ADD, some people say fidget cubes reduce some of their compulsions to fidget.

The fidget spinner is widely viewed as a gadget for children, allowing them to spin it and perform tricks with it. However, the fidget cube has attracted an older audience of adults who like the idea of using it throughout the day.

MORE: [Best Reviewed Fidget Spinners on Amazon](#)

How does a fidget cube work?

Fidget cubes are about as simple a gadget as you can find. You break it out of the box and start interacting with the functions on its sides — that's it.

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1 Best Father's Day Tech Gifts for 2017

It's a Fidget Spinner, It's an iPhone Case, It's

v. www.spacerails.com¹³

Some sets also include spinner tops for pencils.

Stress Relief Fidget Cube Toy

The stress relief fidget cube is a non motorized, no battery cube with six sides, like a die.

The user can enjoy manipulating each side, including rolling a ball, spinning a wheel, flipping a switch, pressing buttons, and rubbing a circle.

The tactile feel is designed to provide relaxation for people with ADHD or any other disorder which decreases attention or increases anxiety.

There is enough functionality in these little cubes to spark some interest in the mechanical makeup of the cube.

They are small and discreet. Depending on the fidget cube you get, there may

<https://spacerails.net/best-fidget-tools-keep-child-maybe-focused/>

11/04/2018 08:00:50 AM

be minimal noise from the clicking.

¹³ November 4, 2018 Final Office Action, TSDR pp. 10-17.

vi. www.philemore.us¹⁴



Sound familiar? It describes the current wave of fidget cubes and fidget spinners to a tee. By 2005 one finds references online to **fidget toys** as a developmental tool, useful for treating **sensory processing disorder**. Three years later, **Gizmodo** covered a USB-powered fidget toy “designed to replace doodling as a time-wasting activity in the office... The game’s bleeping and repetitiveness may either de-stress you, or distress you: but you’ll have to find that out for yourself.”

By 2011, fidget toys were well established as a means of treating those with sensory input issues. Katie Wetherbee asked whether they really “work” to help students focus and manage behavior in a **blog** posted that year. “Special education professionals agree that the effectiveness of fidget toys largely depends on the needs of the child,” she writes, going on to cite Dr. Sherri McClurg. “[Dr. McClurg explains that] fidget toys may fill a sensory need for students on the spectrum, and also can reduce tension and nervousness in kids who struggle with anxiety. Students with ADHD, however, may become focused on the fidget toy to the exclusion of the class discussion or activity.” Also in 2011, the **Friendship Circle blog** defined fidget toys as “self-regulation tools to help with focus, attention, calming, and active listening.” The upshot seems to be that the toy might help you focus and might reduce your stress... or might simply become something you’re obsessed with playing with. I imagine that’s true for kids on the spectrum just as it is for adults trapped in office work that bores them.

Who Needs Fidget Toys?

Five years ago, fidget toys were being touted as a means of helping those with Aspergers, ADHD, and other special needs. Hanna Bogen (a speech-language pathologist and social-cognitive specialist in Los Angeles, CA) wrote about the “fidget toy awakening,” saying that

vii. www.yourkidstable.com¹⁵



II. Applicant's Arguments and Analysis

In traversing the refusal, Applicant argues that it was the first to use the designation FIDGET CUBE in connection with its identified goods.¹⁶ Such first use, however, does not substantiate the exclusion of others from using the designation if it is or has become the generic name of the goods. "[T]he fact that [a party] may be the first or only user of a generic designation . . . does not justify registration if the only significance conveyed by the term is that of the category of goods." See *In re Empire Tech. Dev. LLC*, 123 USPQ2d 1544, 1549 (TTAB 2017) (quoting *In re Greenliant Sys. Ltd.*, 97 USPQ2d 1078, 1083 (TTAB 2010)). The law does not permit "anyone to obtain a complete monopoly on use of a descriptive [or generic] term simply

¹⁴ June 1, 2019 Denial of Request for Reconsideration, 7 TTABVUE 3-8.

¹⁵ *Id.*, 7 TTABVUE 10.

¹⁶ Applicant's Appeal Brief, pp. 2, 5, and 9, 12 TTABVUE 3, 6 and 10.

by grabbing it first.” *KP Permanent Make-Up, Inc. v. Lasting Impressions, Inc.*, 543 U.S. 111, 72 USPQ2d 1833, 1838 (2004) (citation omitted).

Applicant relies on the Board’s decision in *In re Trek 2000 Int’l Ltd.*, 97 USPQ2d 1106 (TTAB 2010) to support its argument that because Applicant was the first to adopt and use the phrase FIDGET CUBE in commerce and immediately sought federal trademark protection for the mark that was not in the public domain at the time of adoption and use, and has successfully policed its mark, its applied-for mark cannot be generic.¹⁷ Moreover, Applicant argues that “[a] generic finding at the outset without giving Applicant the time to establish trademark rights for an arguably descriptive term usurped by the knock-off market is contrary to public policy.”¹⁸

Applicant’s reliance on the *Trek* decision is misplaced. This case is easily distinguishable on its facts. In *Trek*, the Board held that “where the evidence does not show that competitors use the designation in issue, this may create doubt, depending upon the totality of the record, as to whether a term primarily refers to a genus of goods such that ‘sellers of competing brands cannot compete effectively without using the name to designate the product they are selling.’” *Trek*, 97 USPQ2d at 1109 (quoting *Ty Inc. v. Softbelly’s Inc.*, 353 F.3d 528, 69 USPQ2d 1213, 1215 (7th Cir. 2003)); *see also KP Permanent Make-Up*, 72 USPQ2d at 1838 (“[T]here [is] no indication that the [Lanham Act] was meant to deprive commercial speakers of the ordinary utility of descriptive words”). The record in *Trek* showed “use of the term

¹⁷ *Id.* at p. 11, 12 TTABVue 12.

¹⁸ *Id.*

THUMBDRIVE or THUMB DRIVE to refer to a genus of goods” but also showed “the origin of the term as a trademark and extensive use of the term as a trademark,” the applicant’s use “of other terminology as the name of the goods, e.g., ‘external storage device,’” successful efforts by the applicant to police the misuse of its claimed mark as a generic term, and no use of the term by competitors “after ten years of these products being on the market” *Id.* at 1112-13. The Board concluded, on the totality of that record, that “the evidence of generic use is offset by applicant’s evidence that shows not only a significant amount of proper trademark use but also trademark recognition’ by third parties.” *Id.* at 1113 (quoting *In re Am. Online Inc.*, 77 USPQ2d 1618, 1623 (TTAB 2006)).

Unlike the record in *Trek*, the record here does not show a significant amount of trademark use by Applicant or trademark recognition by third parties. In fact, the record demonstrates extensive third-party use of the designation FIDGET CUBE as the generic name of a particular type of stress-relieving toy after Applicant began using such designation in commerce. Moreover, while Applicant argues that its policing efforts have caused third parties to cease use of the designation FIDGET CUBE, the record indicates otherwise.

Applicant had the obligation, once it started using its applied-for FIDGET CUBE mark in commerce, to educate the public promptly to use some name other than the term it wants to call its mark. *See generally* 2 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 12.25 (5th ed. 2019 update) and cases cited therein. The obligation arises in part from the need of prospective competitors to use

a generic term when marketing their own versions of goods with the same attributes. As the Federal Circuit has explained, “[t]o allow trademark protection for generic terms, i.e., names which describe the genus of goods being sold, even when they have become identified with a first user, would grant the owner of the mark a monopoly, since a competitor could not describe his goods as what they are.” *In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987).

Applicant also argues that because the designation FIDGET CUBE, when viewed in its entirety, is not found in the dictionary, it cannot be generic for its identified goods.¹⁹ Applicant is mistaken. The fact that a word or term is not found in the dictionary is not controlling on the question of registrability when the word or term has a well-understood and recognized meaning, as the evidence of record demonstrates. *See In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110 (Fed. Cir. 1987) [SCREENWIPE held generic for wipes that clean computer and television screens although not found in dictionary]; *In re Gen'l Permanent Wave Corp.*, 118 F.2d 1020, 49 USPQ 184, 186 (CCPA 1941) (“Because appellant has combined two common English words [VAPER MARCEL], which in combination are not found in the dictionaries, is wholly immaterial.”); *In re Planalytics, Inc.*, 70 USPQ2d 1453, 1456 (TTAB 2004) (GASBUYER held merely descriptive, no dictionary definition of term); *In re Tower Tech Inc.*, 64 USPQ2d 1314 (TTAB 2002) (SMARTOWER merely descriptive, no dictionary definition of term); *see also* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1209.03(b) (October 2018). The evidence of record

¹⁹ *Id.* at p. 12, 12 TTABVue 13.

clearly shows the wording FIDGET CUBE being used generically for stress relief exercise toys by a number of third parties.

Further, Applicant contests the competence and diversity of the evidence submitted by the Examining Attorney in support of the genericness refusal for several reasons. First, Applicant maintains that the Internet materials submitted by the Examining Attorney were retrieved by employing the BING search engine instead of GOOGLE and because purportedly only 32% of the consuming public employ the BING search engine (as compared to 65% who use GOOGLE), the Internet evidence retrieved by the Examining Attorney is somehow unreliable.²⁰ We are not persuaded by this argument. Even assuming that only 32% of the consuming public employs the BING search engine, we find that is not an inconsequential amount of the purchasing public being exposed to the Internet material submitted by the Examining Attorney. Moreover, Applicant did not submit any evidence to demonstrate that the same search results retrieved via the BING search engine would not also be retrieved by employing the GOOGLE search engine.

Applicant also argues that the articles provided by the Examining Attorney showing use of the designation FIDGET CUBE as the generic name for a type of stress-relieving toy are “blog websites [with] no evidence that consumers even read the blogs.”²¹ Additionally, Applicant maintains that the owners of some of these

²⁰ Applicant’s May 3, 2019 Request for Reconsideration, p. 3 and accompanying Exhs. D and F, 4 TTABVUE 11, 44-65 and 70-105.

²¹ Applicant’s Appeal Brief, pp. 12-13, 12 TTABVUE 14-15.

websites get paid through Amazon as an affiliate advertising program.²² The fact that the Examining Attorney has not submitted evidence to demonstrate how many relevant consumers have viewed the website evidence she has submitted or that some of the websites get paid by Amazon as part of an advertising program does not detract from the fact that these websites employ the designation FIDGET CUBE as the generic name for stress-relieving toys. Further, in assessing the record, we bear in mind the practicalities of the limited resources available to USPTO examining attorneys. *See, e.g., In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003) (Federal Circuit was “mindful of the reality that the PTO is agency of limited resources”); *Cf. In re Loew’s Theatres, Inc.*, 769 F.2d 764, 226 USPQ 865, 868 (Fed. Cir. 1985) (the examining attorney “does not have means” to undertake the research, such as a marketing survey, necessary to prove that the public would actually make the goods/place association asserted).

We also are not persuaded that all of this type of website evidence which may have user-generated content must be accorded limited probative value. As previously noted, the Board regularly accepts website evidence to demonstrate that a term is merely descriptive or generic. *See Reed Elsevier*, 82 USPQ2d at 1380 (third-party websites are competent sources to show what the relevant public would understand a term to mean, and “they provide substantial evidence to support the Board’s findings.”); *see also In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007) (“Internet evidence is generally admissible and may be considered for purposes

²² Applicant’s Reply Brief, p. 3 and accompanying Exh. B, 15 TTABVUE 4 and 9-10.

of evaluating a trademark”) (citations omitted). Further, we are unaware of and Applicant has not cited to any precedential decision that articulates a blanket prohibition on evidence taken from Internet forums or blogs. *See Real Foods Pty Ltd.*, 128 USPQ2d at 1378 fn. 7 (noting Board consideration of evidence of “over 16,000 Facebook 'likes' and [that] its products have been featured on several blogs.”). Moreover, while some of the articles submitted by the Examining Attorney may be characterized as blogs, most of the articles do not constitute individual blogs. Notwithstanding, it is undisputed that these forums or blogs are publicly available and therefore provide additional insight into the public’s perception of Applicant’s applied-for FIDGET CUBE mark and the corresponding identified goods as used in the marketplace.

Applicant repeatedly argues that the majority of the evidence submitted by the Examining Attorney demonstrates that Applicant is the creator of the FIDGET CUBE and that relevant consumers would view the majority of the evidence as showing trademark use by Applicant of that term. The evidence of record, however, belies such an argument. Of all the evidence submitted by the Examining Attorney, there are only four examples that directly reference Applicant. These examples are summarized below:

- An online article from www.techcrunch.com dated September 8, 2016 and entitled “Fidget Cube is a brilliantly useless toy for nervous fiddling” that states the following:²³

²³ December 12, 2016 Office Action, TSDR pp. 27-31.

Do you have to keep your hands busy to think straight? Fidget Cube is a little device that lets you click, flip, roll and slide its different buttons so you can stay calm.

You can nab one for \$19 on Kickstarter, and it's supposed to ship in December, though every crowdfunded project seems to get delayed.

- An online article from www.fidgetcircle.com entitled "Fidget Cubes: What are They and Which Cube is for You?" which states as follows:²⁴

The original Fidget Cube was the brainchild of brothers Mark and Matthew McLachlan, who created it with the intention of providing the ultimate fidget gadget to help people with their concentration, focus and stress relief.

The term fidget cube started to take off with the launch of the Kickstarter campaign by brothers Mark and Matthew McLachlan. The brothers were asking for \$15000 funding for their fidget cubes, but ended up raising a staggering \$6.1 million, making it one of the most successful Kickstarter campaigns of all time. It wasn't long until others caught onto this new phenomenon and soon several similar fidget cubes and dice emerged. Users looking for fidget cubes can now select from a huge offering from 100s of different online vendors around the world.

- An online article from www.heavy.com entitled "Top 10 Best Fidget Cubes and Dice 2018" which states "the build and design [of a particular fidget cube manufactured by a third-party] match that of about 90% of the available options out there. **These all replicate the original Fidget Cube made by Kickstarter entrepreneurs Matthew and Mark McLachlan of Antsy Labs.**"²⁵

²⁴ March 27, 2018 Office Action, TSDR pp. 12-18.

²⁵ November 28, 2018 Final Office Action, TSDR pp. 18-29.

- An online article from www.nickjrparents.com entitled “Can’t Stop the feeling? The Fidget Cube may be your favorite thing ever!” which states as follows:

The Fidget Cube was first conceived in 2012 by Matthew and Mark, who started their company, Antsy Labs, in order to develop it. The Fidget Cube went through dozens of prototypes before being launched on Kickstarter in its current guise”²⁶

We do not find that the references to Applicant in the foregoing articles demonstrate that the designation FIDGET CUBE is being used as a source indicator or brand name for Applicant’s goods. Instead, we find that these articles attribute the creation of a new type of stress-relieving toy to Applicant. While we recognize that Applicant also submitted online articles referencing Applicant as the creator of the Fidget Cube from the websites www.kickstarter.com, www.adweek.com, www.polygon.com, and www.pickedreviews.com, as well as a Wikipedia article for “Fidget Cube,”²⁷ these articles similarly do not demonstrate trademark or brand name usage of the designation FIDGET CUBE with Applicant’s identified goods. Instead, as with the Examining Attorney’s evidence, these websites merely state that Applicant was the creator or inventor of the original version of the product known as a fidget cube.

Even if we assume that some of the evidence does demonstrate trademark usage, such evidence is limited and is nonetheless overwhelmed by the remaining evidence,

²⁶ June 1, 2019 Denial of Request for Reconsideration, 6 TTABVue pp. 8-10.

²⁷ June 12, 2017 Response to Office Action, Exh. C-E, TSDR pp. 17-57; September 27, 2018 Response to Office Action, Exh. D, TSDR p. 50-52; and May 3, 2019 Request for Reconsideration, Exh. B, TSDR pp. 28-38.

particularly the online retailer advertisements, which does show the designation FIDGET CUBE as the generic name for a type of stress-relieving toy.

Applicant also contends that the Examining Attorney's evidence is "replete with references to 'fidget dice', 'infinity cube', 'fidget box', 'stress cube', "stress block," and "dodecahedron," all alternative names for similar products.²⁸ As such, Applicant argues that competitors do not need to use the designation FIDGET CUBE in describing their product. The fact that there may exist different generic descriptors for the same product is of no consequence. Indeed, there can be more than one generic term for a particular genus of goods or services. Any term that the relevant public understands to refer to the genus is generic. *See In re 1800Mattress.com IP LLC*, 586 F.3d 1359, 92 USPQ2d 1682, 1685 (Fed. Cir. 2009) ("We also disagree with Dial-A-Mattress's assertion that there can only be one generic term, which is 'online mattress stores.' Instead, any term that the relevant public understands to refer to the genus of 'online retail store services in the field of mattresses, beds, and bedding' is generic."); *see also In re Trek 2000 Int'l Ltd.*, 97 USPQ2d at 1109 ("It is well established that the availability of other words for competitors to use does not, by itself, transform a generic term into capable matter.").

Moreover, Applicant has not submitted any evidence regarding its policing efforts of its applied-for FIDGET CUBE mark (except for the domain name dispute discussed below). Even if such evidence were submitted, it appears, based on the record, that these efforts have been overwhelmed by the adoption by competitors and by the public

²⁸ September 27, 2018 Response to Office Action, TSDR p. 10.

in general of this designation in a generic sense. Further, the fact that a certain number of Applicant's competitors may have acknowledged Applicant's exclusive rights in the designation FIDGET CUBE does not convince us that the term functions as a trademark for Applicant's identified goods. In this case, we find that even if Applicant's competitors may have agreed to discontinue use of the designation FIDGET CUBE upon threat of legal action by Applicant, such action shows a desire by those competitors to avoid litigation, rather than demonstrating the distinctiveness of the wording. *See In re Wella Corp.*, 565 F.2d 143, 196 USPQ 7, n.2 (CCPA 1977); *In re Consolidated Cigar Corp.*, 13 USPQ2d 1481, 1483 (TTAB 1989). *Cf. In re Cree, Inc.*, 818 F.3d 694, 118 USPQ2d 1253, 1259 (Fed. Cir. 2016) (because it is cheaper to take a license than defend a patent infringement action, licenses are often entered into to avoid litigation).

Applicant also maintains that it has already been established that it has trademark rights in its FIDGET CUBE applied-for mark. Specifically, Applicant references a domain name dispute proceeding between Applicant and a third-party that registered the domain name www.fidgetcube.co. Applicant submitted the June 6, 2018 arbitration decision from the World Intellectual Property Organization (WIPO) domain name dispute where the sole panel member found, inter alia, that Applicant has common law trademark rights in the designation FIDGET CUBE.²⁹ In this regard, the Board notes that courts have found that a WIPO decision has no

²⁹ September 27, 2018 Response to Office Action, p. 4, TSDR p. 11 and accompanying Exh. H, TSDR pp. 80-91.

collateral estoppel or res judicata effect and is entitled to no deference from the court. *Barcelona.com, Inc. v. Excelentísimo Ayuntamiento De Barcelona*, 330 F.3d 617, 67 USPQ2d 1025, 1029 (4th Cir. 2003)³⁰. *Accord Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 68 USPQ2d 1641, 1650 (2d Cir. 2003); *Dluhos v. Strasberg*, 321 F.3d 365, 65 USPQ2d 1842, 1846-1847 (3d Cir. 2003); *Sallen v. Corinthians Licenciamentos LTDA*, 273 F.3d 14, 60 USPQ2d 1941 (1st Cir. 2001). Accordingly, Applicant's reliance on this WIPO decision to substantiate its trademark rights in the designation FIDGET CUBE is unavailing.

The record is replete with evidence demonstrating use of the designations “fidget toy” and “fidget spinners” as the generic name and subcategory, respectively, of stress relief exercise toys.³¹ Applicant acknowledges as much.³² This evidence demonstrates that the relevant consuming public has become accustomed to associating the term “fidget” in the generic sense in relation to these types of stress relief toys. Here, Applicant has merely added the term “CUBE” to the word “FIDGET,” which it has disclaimed. Such disclaimer in an application seeking registration on the Supplemental Register, as is the case here, appears to be an acknowledgment by Applicant that the term CUBE is highly descriptive, if not generic, of its identified

³⁰ The case held “[T]he UDRP makes no effort at unifying the law of trademarks among the nations served by the Internet. Rather, it forms part of a contractual policy developed by ICANN for use by registrars in administering the issuance and transfer of domain names. Indeed, it explicitly anticipates that judicial proceedings will continue under various nations' laws applicable to the parties.” *Barcelona.com, Inc.*, 67 USPQ2d at 1030.

³¹ See generally evidence submitted with September 2, 2017 Office Action; see also September 27, 2018 Response to Office Action, Exh. C, TSDR pp. 43-49.

³² Applicant's Appeal Brief, p. 8, 12 TTABVue 9.

goods.

Keeping the foregoing in mind, when a mark consists of two or more words, as does Applicant's mark, "the Board cannot simply cite definitions and generic uses of the constituent terms of a mark ... in lieu of conducting an inquiry into the meaning of the disputed phrase as a whole to hold a mark ... generic." *In re Am. Fertility Soc'y*, 51 USPQ2d at 1836. "An inquiry into the public's understanding of a mark requires consideration of the mark as a whole." *Princeton Vanguard, LLC*, 114 USPQ2d at 1831.

Here, however, the evidence of record reflects widespread generic use of the designation FIDGET CUBE as a whole. In addition, the third-party generic use of FIDGET CUBE suggests that nothing about the combination of words makes the whole any greater than the sum of its parts. *See Princeton Vanguard, LLC*, 114 USPQ2d at 1831.

The evidence discussed above includes strong evidence from a variety of sources establishing that "fidget cube" is a type of stress relief exercise toy or fidget toy. As such, we find that a "fidget cube" is a category or sub-genus of such toys. Although some of the evidence submitted by both the Examining Attorney and Applicant may show trademark use of the designation FIDGET CUBE, and some of the evidence may actually be discussing Applicant's FIDGET CUBE product, considering the totality of the evidence of record, we find that the Examining Attorney has established prima facie that members of the relevant public primarily use or understand "fidget cube" to be a reference to this sub-genus of goods. "The mere fact

that a record includes evidence of both proper trademark use and generic use does not necessarily create a mixed record that would overcome an examining attorney's evidence of genericness." *In re Am. Online Inc.*, 77 USPQ2d at 1623. It would be unusual in cases such as this where an applicant has been using an allegedly generic term for some period of time for there not to be some evidence showing good trademark use. Here, this evidence is limited. On the other hand, the totality of the evidence strongly supports the Examining Attorney's position that the term is generic and Applicant has not rebutted that evidence.

D. Conclusion

Taken as a whole, the evidence of record establishes that the relevant public would understand the designation FIDGET CUBE to refer to a particular type or subgenus of a stress relief exercise toy. As such, the term is generic "and should be freely available for use by competitors." *In re Cent. Sprinkler Co.*, 49 USPQ2d 1194, 1199 (TTAB 1998). *See generally Cordua*, 118 USPQ2d at 1635; *Marvin Ginn*, 228 USPQ at 530; *In re 1800Mattress.com*, 92 USPQ2d at 1685.

Decision: The refusal to register Applicant's applied-for FIDGET CUBE mark on the Supplemental Register on the ground that the designation is the generic name of the subgenus or subcategory of Applicant's identified goods under Sections 23(c) and 45 of the Trademark Act is affirmed.