

This Opinion is not a
Precedent of the TTAB

Mailed: October 19, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Capsim Management Simulations, Inc.

Serial No. 88410843

Brett M. Tolpin of Tolpin & Partners PC
for Capsim Management Simulations, Inc.

Janet Lee, Trademark Examining Attorney, Law Office 124,
Lydia M. Belzer, Managing Attorney.

Before Kuhlke, Heasley, and Johnson,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Applicant, Capsim Management Simulations, Inc., has applied to register the standard character mark CAPSIMOPS on the Principal Register for goods in International Class 9: “**Downloadable computer software for application and database integration in the educational field,**” and services in International Class 42:

Providing temporary use of **non-downloadable computer software for application and database integration in the educational field;** Software as a service (SAAS) services featuring educational software for engaging in business simulations, building and managing a virtual business, allowing for project collaboration and providing metrics for which to determine success and rank for students and teachers in the field of

business education; providing a website featuring non-downloadable software that enables teachers and students to build and manage a virtual business, allow for project collaboration and provide metrics for which to determine success and rank.¹

The application was approved for publication on February 14, 2020. After a notice of allowance issued, Applicant filed a statement of use, supported by a specimen, on January 17, 2021. The Examining Attorney accepted the specimen for Applicant's Class 42 services, but refused registration as to the Class 9 goods on the ground that the specimen did not show the mark used in connection with the identified goods. Applicant responded by submitting a second set of specimens on August 19, 2021, but the Examining Attorney, unmoved, made the refusal final as to the Class 9 goods. Applicant then submitted two more sets of specimens—the third on December 7, 2021, accompanying its request for reconsideration, and the fourth on February 28, 2022, supporting another request for reconsideration filed concurrently with its appeal to the Board. The Examining Attorney denied both requests for reconsideration, finding the specimens wanting, and this appeal proceeded.

The issue is whether any of Applicant's four sets of specimens shows use of its CAPSIMOPS mark as to its Class 9 goods, "downloadable computer software for application and database integration in the educational field."

We reverse the refusal to register based on the fourth set of specimens.

¹ Application Serial No. 88410843 was filed on May 1, 2019, based on a declared intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b) (emphasis added).

Citations to the prosecution file refer to the USPTO's Trademark Status & Document Retrieval ("TSDR") system and identify the documents by title, date, and page in the downloadable .pdf version. References to the briefs and other materials in the appeal record refer to the Board's TTABVUE online docketing system.

I. Applicable Law

Although Section 1(b) of the Trademark Act permits an applicant to begin the registration process having only a “bona fide intention” to use a mark in commerce, 15 U.S.C. § 1051(b), the Act ultimately requires it “to show that the mark is being used in commerce before obtaining a registration on the mark.” *M.Z. Berger & Co. v. Swatch AG*, 787 F.3d 1368, 114 USPQ2d 1892, 1898 (Fed. Cir. 2015). *See In re MN Apparel LLC*, 2021 USPQ2d 535, *8 (TTAB 2021) (“The Trademark Act ‘provides for registration of a mark based on use of the mark in commerce.’”). To this end, an applicant must, on filing a statement of use under Section 1(d), include one or more specimens showing the mark as actually used in connection with the goods or services identified in the application. 15 U.S.C. § 1051(d); Trademark Rules 2.56, 2.88, 37 C.F.R. § 2.56, 2.88. *See In re Fallon*, 2020 USPQ2d 11249, *2 (TTAB 2020); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 904.07(a) (July 2022).

The predecessor to our primary reviewing Court explained the purpose of specimens:

An important function of specimens in a trademark application is, manifestly, to enable the PTO to verify the statements made in the application regarding trademark use. In this regard, the manner in which an applicant has employed the asserted mark, as evidenced by the specimens of record, must be carefully considered in determining whether the asserted mark has been used as a trademark with respect to the goods named in the application.

In re Bose Corp., 546 F.2d 893, 192 USPQ 213, 216 (CCPA 1976) *quoted in In re Gulf Coast Nutritionals, Inc.*, 106 USPQ2d 1243, 1246 (TTAB 2013) and 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19:61.50 (5th ed. March 2022) (“***Use Proven by a Specimen Must Precede Registration.*** It is fundamental to United States

trademark registration practice that use must precede registration. Without use, there is no ‘trademark’ to be recorded on the federal register of marks. The filing of a specimen with the Patent and Trademark Office (USPTO) is the way the applicant proves this use.”).

Specimens thus serve to demonstrate an applicant’s use of its mark in commerce. “A mark is deemed in use in commerce on goods when, among other things, ‘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.’ [15 U.S.C.] § 1127 (emphasis added).” *In re Siny Corp.*, 920 F.3d 1331, 2019 USPQ2d 127099, *2 (Fed. Cir. 2019). To constitute a display associated with the goods, a specimen must show use of the mark directly associated with the goods and such use must be of a point-of-sale nature. Trademark Rule 2.56(b)(1), 37 C.F.R. § 2.56(b)(1). To be “of a point-of-sale nature,” the use must be calculated to consummate a sale. *In re U.S. Tsubaki, Inc.*, 109 USPQ2d 2002, 2009 (TTAB 2014) *quoted in In re Yarnell Ice Cream, LLC*, 2019 USPQ2d 265039, *15-16 (TTAB 2019). That is, it must “must contain sufficient practical information about the goods and a way to order the goods, so as to put the prospective customer at the point of purchase.” *MN Apparel*, 2021 USPQ2d 535, at*16-17.

A specimen that does not put the prospective purchaser at the point of purchase is mere advertising, which does not suffice to show use of a mark in commerce on goods. *In re Siny Corp.*, 2019 USPQ2d 127099, at *2-3 (“Mere advertising is not enough to qualify as such a display”); *In re Anpath Grp., Inc.*, 95 USPQ2d 1377, 1380 (TTAB 2010) (“[I]n view of the legislative history leading up to the enactment of the

Lanham Act, and the case law interpreting the Act, a clear ‘line of demarcation’ has been drawn between mere advertising materials, which have been found unacceptable as specimens showing use of a mark for goods, and point-of-purchase promotional materials which have been found acceptable as a display associated with the goods.”). *See generally* TMEP § 904.04(b) (“Advertising material is generally not acceptable as a specimen for goods.”).

“[W]hether a specimen is mere advertising or whether it is a display associated with the goods is a question of fact which must be determined in each case based on the evidence in that particular case.” *In re Valenite Inc.*, 84 USPQ2d 1346, 1350 (TTAB 2007) *quoted in In re Siny Corp.*, 2019 USPQ2d 127099, at *3.

II. Applicant’s Specimens

A. Applicant’s First Specimen

Applicant’s first specimen consisted of pages from its website, Capsim.com.² The webpages described Applicant’s business simulation software, which permits students to practice business decision-making under the supervision of their instructors. For example:

² The full URLs are: <https://www.capsim.com/simulations/> and <https://www.capsim.com/blog/capsimops-an-effective-way-to-bringoperations-to-life/>.



CapsimOps: An effective way to bring operations to life

Capsim is excited to introduce CapsimOps™ - a business simulation that focuses on the importance of strategic operational decision-making and enables learners to experience how those decisions permeate across the various departments of an organization.

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CapsimOps was created for instructors who:

- Teach Operations or Supply Chain Management and want to give students an immersive and active learning experience
- Use a business simulation but want more depth and focus on operations
- Want students to experience the cross-functional impacts of operational decision-making

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³ Applicant's Jan. 17, 2021 Statement of Use at 1-2.

Welcome to the CapsimOps Product Tour.

Fill out the form below to access the tour.


First Name

Email

Institution

Job Title

Phone Number



Complexity: Advanced

Market Segments: 2

Products: 1 - 4

International Market: No

Scoring Method: 5-star

Ideal Courses: Operations & Supply Chain Management

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⁴ Applicant's Jan. 17, 2021 Statement of Use at 6, 8.

FEATURES

Simplify the learning experience.

Our simulations boast an intuitive and streamlined user experience with a plethora of features to guide participants so you can focus more time and energy on the things that matter most to you.

Participant Experience	Instructor Experience
<p>Streamlined Onboarding Gets participants ready to make informed business decisions in as little as 45 minutes.</p>	<p>Automated Debriefs Highlight critical information from every round to guide future decision-making.</p>
<p>User-centered Design Offers an intuitive and streamlined interface to make decision-making a breeze.</p>	<p>Integrated Gradebook Provides easy access to individual participant results to capitalize on learning opportunities.</p>
<p>Real-time Alerts Keep participants from making critical errors and falling into common pitfalls.</p>	<p>LMS Integration Streamlines administration and boosts productivity with Single Sign-On (SSO).</p>
<p>Auto-recalculation Provides participants with the immediate impact of their decisions.</p>	<p>User-centered Design Ensures accessibility standards are met to answer the learning needs of every participant.</p>

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The Examining Attorney accepted the specimen for Applicant’s services in Class 42, but not for Applicant’s Class 9 downloadable software goods. She reasoned that:

A display specimen for downloadable software (1) must show use of the mark directly associated with the goods and (2) such use be of a point-of-sale nature. 37 C.F.R. §2.56(b)(1). To show use of a point-of-sale nature, a specimen generally must provide sufficient information to enable the user to download or purchase the software from a website. *See* TMEP §904.03(e) (citing *In re Azteca Sys., Inc.*, 102 USPQ2d 1955, 1957 (TTAB 2012)).

In this case, the specimen does not provide the means to enable the user to download or purchase the software from the website. ...

Accordingly, such material is mere advertising, which is not acceptable as a specimen for goods.⁶

⁵ Applicant’s Jan. 17, 2021 Statement of Use at 16-17.

⁶ Feb. 19, 2021 Office Action at 1-2.

On appeal, the Examining Attorney maintains that the website specimen “showed the mark being used in connection with a non-downloadable software.”⁷ We agree.

The Board, with its primary reviewing Court’s express approval, has long recognized that webpages displaying goods and their trademarks and providing for the on-line ordering of such goods can constitute electronic displays associated with the goods. *In re Sones*, 590 F.3d 1282, 93 USPQ2d 1118, 1121-22 (Fed. Cir. 2009) (citing *In re Dell Inc.*, 71 USPQ2d 1725, 1727 (TTAB 2004)). As the Board has explained:

Such uses are not merely advertising, because in addition to showing the goods and the features of the goods, they provide a link for ordering the goods. In effect, the website is an electronic retail store, and the webpage is a shelf-talker or banner which encourages the consumer to buy the product. A consumer using the link on the webpage to purchase the goods is the equivalent of a consumer seeing a shelf-talker and taking the item to the cashier in a brick and mortar store to purchase it.

In re Dell, 71 USPQ2d at 1727, *quoted in In re Sones*, 93 USPQ2d at 1123.

The TRADEMARK MANUAL OF EXAMINING PROCEDURE accordingly sets forth three criteria that must be satisfied:

A web page that displays a product can constitute a ‘display associated with the goods’ if it:

- (1) contains a picture or textual description of the identified goods;
- (2) shows the mark in association with the goods; and
- (3) provides a means for ordering the identified goods.

TMEP § 904.03(i), *quoted in In re MN Apparel*, 2021 USPQ2d 535, at *18-19.

In this regard, the TMEP also specifically addresses Applicant’s identified type of goods: downloadable computer software:

⁷ Examining Attorney’s brief, 8 TTABVUE 2.

For downloadable computer software, an applicant may submit a specimen that shows use of the mark on an Internet website. Such a specimen is acceptable only if it creates an association between the mark and software and provides sufficient information to enable the user to download or purchase the software from the website. ... **If the website simply advertises the software without providing a way to download, purchase, or order it, the specimen is unacceptable.**

TMEP § 904.03(e) (emphasis added) (citing *inter alia In re Dell*, 71 USPQ2d at 1727; *In re Osterberg*, 83 USPQ2d 1220, 1224 (TTAB 2007); *In re Azteca Sys., Inc.*, 102 USPQ2d 1955 (TTAB 2012)).

In this case, Applicant’s webpage specimen used the CAPSIMOPS mark and described the software’s function—providing a business decision-making simulation for students and instructors. It even offered a “tour” of the CAPSIMOPS software.⁸ But it did not refer to the **downloadable** software; its specimen description for its Class 9 goods was “Applicant’s website promoting and offering the **services**.”⁹ Moreover, as in *Siny*, Applicant’s specimen did not provide the potential purchaser with the information normally associated with ordering a product of that kind. *In re Siny*, 2019 USPQ2d 127099, *3 (quoting the Board: “if virtually all important aspects of the transaction must be determined from information extraneous to the web page, then the web page is not a point of sale.”). Nor did it provide the potential purchaser a means for completing a purchase. *Id.* at 3n.1 (“Unlike the webpages of some electronic marketplaces, the Webpage Specimen at issue in this case does not make the goods available for purchase through the webpage.”). In short, the specimen did not place the prospective purchaser at the point of purchase, in a way calculated to consummate a sale. Trademark Rule 2.56(b)(1); *MN Apparel*, 2021 USPQ2d 535,

⁸ Applicant’s Jan. 17, 2021 Statement of Use at 6, 8.

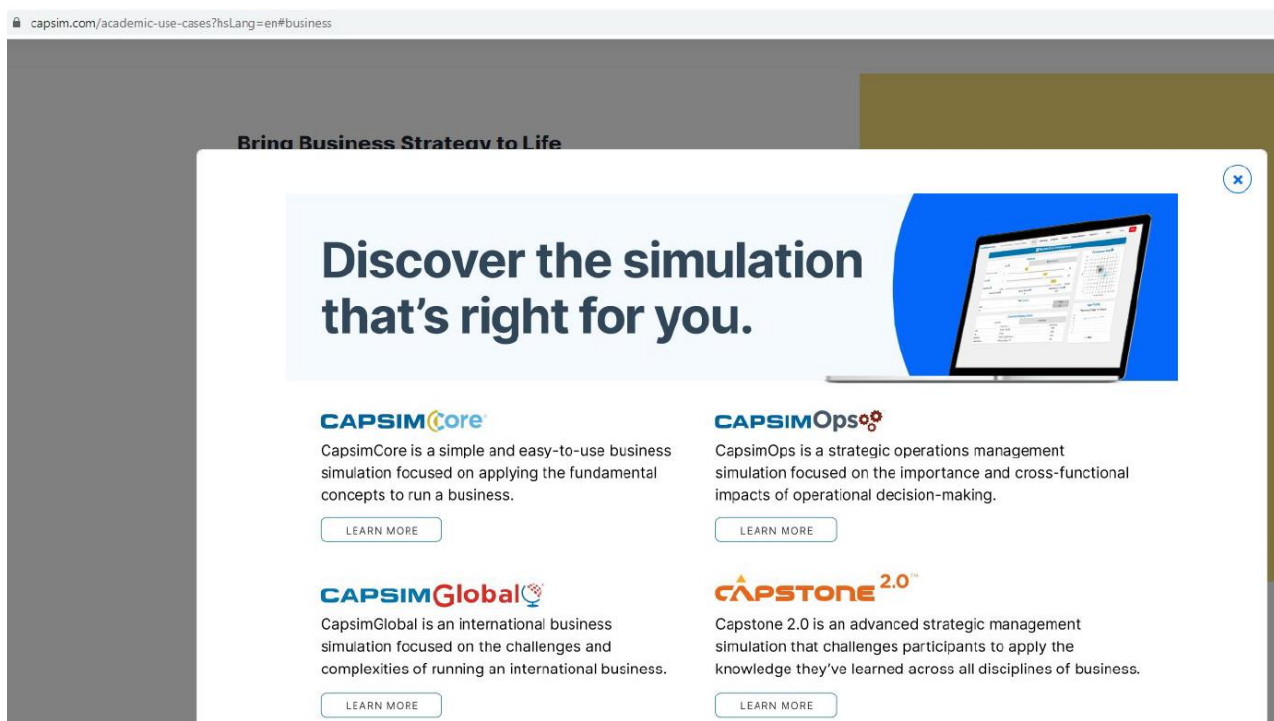
⁹ Applicant’s Jan. 17, 2021 Statement of Use at TSDR 2 (emphasis added).

at*16-17. It therefore failed to constitute a display associated with the goods sufficient to demonstrate use of the mark in commerce under the Trademark Act. 15 U.S.C. § 1127.

B. Applicant's Second and Third Specimens

Applicant then submitted "Screen shots of the consumer facing software along with URL contained on top left Corner."¹⁰

As the Examining Attorney notes, however, the first two screenshots appear to be additional webpages from Applicant's website:¹¹



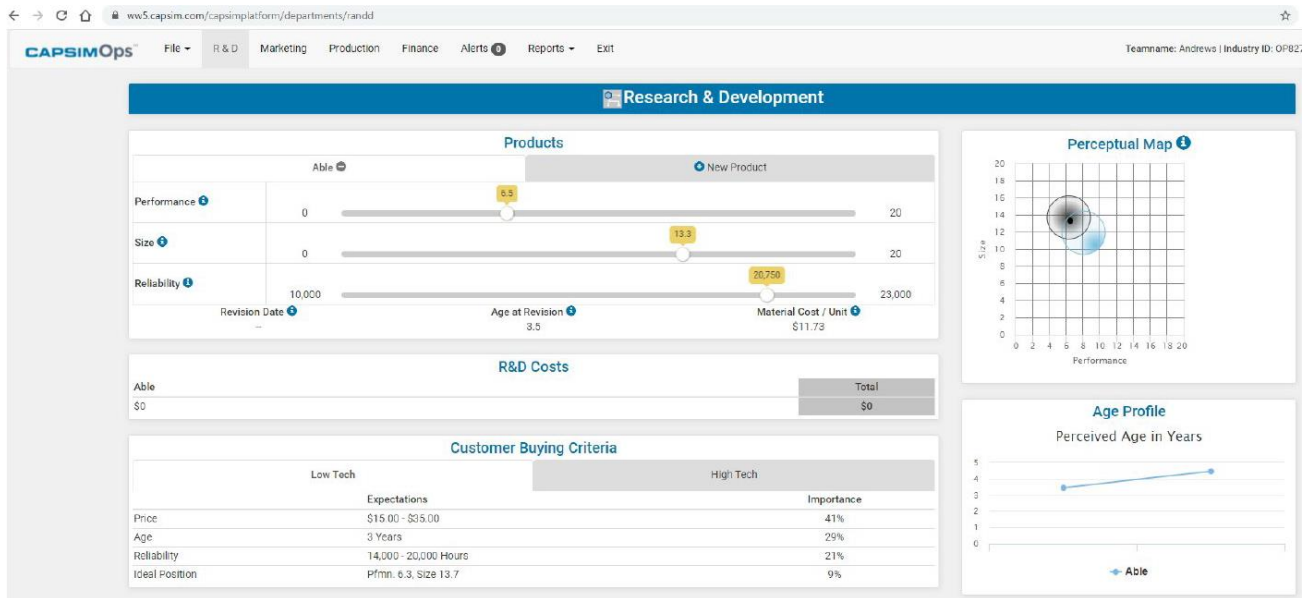
¹⁰ Aug. 19, 2021 Response to Office Action at 2.

¹¹ Examining Attorney's brief, 8 TTABVue 3.



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The last screenshot is more consistent with consumer-facing business simulation software:



12 Aug. 19, 2021 Response to Office Action at 6.

As the Examining Attorney rightly observes, however, these did not overcome the refusal: “Applicant was previously refused registration in International Class 009 because the submitted specimens did not show the mark being used in connection with downloadable software.”¹³

We agree. The webpages do not indicate that the software to which they refer is downloadable. While they do appear to offer pricing information and a way to select the CAPSIMOPS software, they once again fail to “cross the line from mere advertising to an acceptable display **associated with the goods.**” *In re Siny*, 2019 USPQ2d 127099, at *4 (emphasis added). *See also In re Kohr Bros., Inc.*, 121 USPQ2d 1793, 1793 (TTAB 2017) (“The sole issue in this appeal is whether the specimen submitted by Applicant with its Statement of Use is an acceptable specimen to show use of the mark **in connection with the identified goods.**”).

As for the “consumer-facing software” screenshot, “an acceptable specimen might be a photograph or screenshot of a computer screen displaying the identifying trademark while the computer program is in use.” *In re Minerva Assocs., Inc.*, 125 USPQ2d 1634, 1639 (TTAB 2018). In *Minerva*, the applicant’s specimen displayed “screenshots of Applicant’s mark appearing on the log-in and search screens viewable by Applicant’s customers utilizing the downloaded software.” *Id.* The Board accordingly found that the specimen “shows the applied-for mark used in connection with the goods in Class 9 and would be perceived as a trademark identifying the source of those goods.” *Id.* (citing TMEP § 904.03(e)).

¹³ Aug. 31, 2021 Office Action at 1.

In this case, however, Applicant’s screenshot of the consumer-facing software has, in its words, a “URL contained on top left Corner.”¹⁴ As the Examining Attorney correctly deduces, “the last screenshot shows the mark being used in an online environment as evidenced by the URL displayed on top of the page.”¹⁵ That is more consistent with Applicant’s non-downloadable software as a service than its Class 9 downloadable software.

With its December 7, 2021 request for reconsideration, Applicant submitted a third specimen it described as a “point of sale display comprising [an] online order form for software on Applicant’s website” at “https://ww5.capsim.com/registrationapp”¹⁶



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¹⁴ Aug. 19, 2021 Response to Office Action at 2.

¹⁵ Examining Attorney’s brief, 8 TTABVUE 3-4.

¹⁶ Dec. 7, 2021 request for reconsideration at 1-2.

¹⁷ *Id.* at 6.

The webpage is entitled “CAPSIM” (and design), followed by the wording “Undergraduate Business Learning” and “Welcome to Capsim Management Simulations Student Registration.”¹⁸

But once again, as the Examining Attorney correctly found, “[t]he submitted specimen shows that applicant’s software may be purchased but does not show that the software is downloadable. In fact, it appears to be an online registration form for students to participate in some type of simulation training.”¹⁹ We agree with the Examining Attorney’s reasoning: the specimen satisfies some of the elements required of a webpage display. It identified the CAPSIMOPS software, contained pricing information and provided a means to purchase the software. But it failed to associate the mark with the Class 9 goods: downloadable software.

Hence, the first through third specimens failed to demonstrate use of the mark associated with the identified goods.

C. Applicant’s Fourth Set of Specimens

We find, however, that Applicant’s fourth set of specimens suffices to show use of its CAPSIMOPS mark in commerce in connection with its identified goods.

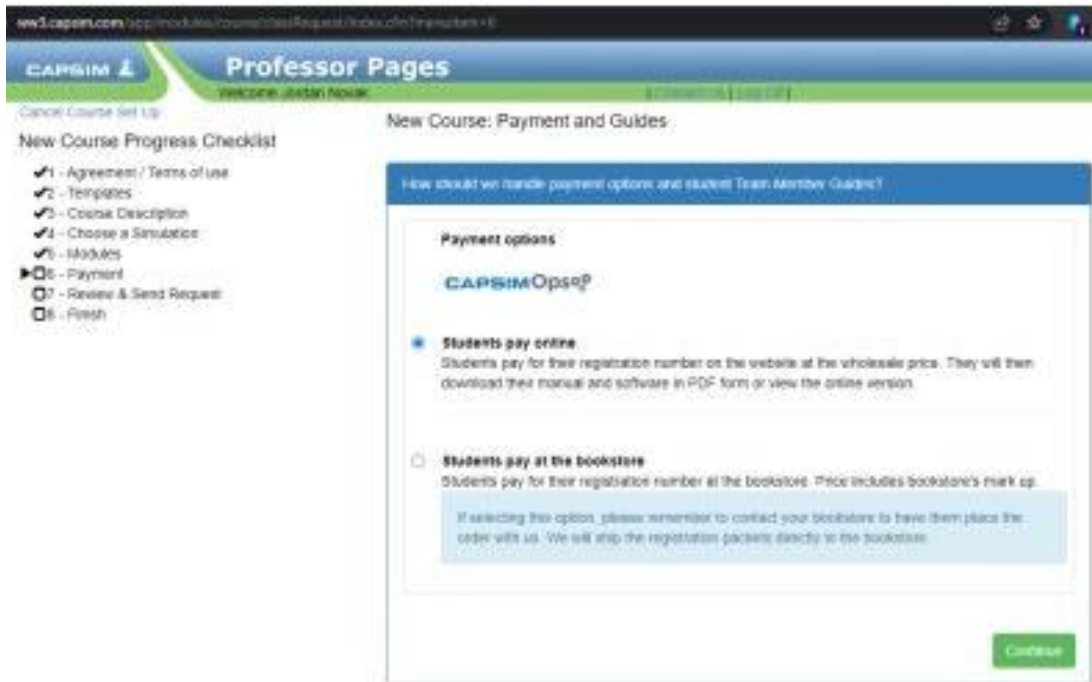
When it filed its appeal to the Board, Applicant filed another request for reconsideration with another set of substitute specimens. As before, the specimens displayed pages from Applicant’s website displaying the CAPSIMOPS mark, describing its business simulation software, stating its price, and offering a “shopping cart” means of purchasing it. It added what appear to be screenshots from the

¹⁸ *Id.*

¹⁹ Dec. 27, 2021 Office Action denying Applicant’s first request for reconsideration at 1.

CAPSIMOPS software (without a URL), a student's receipt evidencing his payment for the software, and his "Certificate of Completion" of the CAPSIMOPS simulation.²⁰

Most pertinent was the following screenshot from Applicant's website:



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Under the mark CAPSIMOPS, it states:

- **Students pay online**
Students pay for their registration number on the website at the wholesale price. They will then download their manual and software in PDF form or view the online version.

The Examining Attorney acknowledges that this refers to downloadable, as well as online, software: "The fourth set of specimens submitted on February 28, 2022 consists of screenshots of the purchase and payment webpage that shows the mark

²⁰ Specimens accompanying Applicant's Feb. 28, 2022 second request for reconsideration at 1-22.

²¹ *Id.* at 2.

being used in connection with a downloadable educational software for business simulation and downloadable manual.”²²

The Examining Attorney raises a new objection, however, that those are not Applicant’s identified Class 9 goods: “downloadable computer software for application and database integration in the educational field.” Rather, she contends:

When a consumer purchases the CAPSIMOPS software, they would be purchasing a business simulation software to educate students or oneself in business, not for “application and data integration”. Although “application and data integration” might be a background feature of the business simulation software in order for the simulation software to function, **that is not the function of the software that is being marketed and purchased by the consumer.**²³

It would seem that this objection, if meritorious, could have been raised earlier in the prosecution history to afford Applicant a greater opportunity to answer this concern. Applicant nonetheless answers:

Here, the end user is faculty and student. The student inputs data which integrates with the business simulation software (i.e. application software) and allows the faculty, who logs onto the database to evaluate the student data inputted in the application software. ...

The Applicant’s position is that two things can be true at once, that the business simulation software contains the necessary feature required for students and faculty to engage in meaningful interactive online learning through the application (software) and database integration. This desirable software application data integration feature is critical to selling the educational (business) software, particularly as marketed to faculty that can access the data and interact with the student in a remote setting.²⁴

²² Examining Attorney’s brief, 8 TTABVUE 4. *See also* March 15, 2022 Office Action (response to second request for reconsideration) at 1.

²³ Examining Attorney’s brief, 8 TTABVUE 6 (emphasis added). *See also* March 15, 2022 Office Action (response to second request for reconsideration) at 1.

²⁴ Applicant’s brief, 9 TTABVUE 3. Applicant adds that it owns five registrations, including Reg. No. 5429038 for CAPSIMCORE for nearly identical goods and services in Classes 9 and 42. *Id.* at 3. *See* Applicant’s Jan. 15, 2020 Response to Office Action ex. B, at 24-35. Although the Board decides each appeal on its own merits, *In re MCDM Prods., LLC*, 2022 USPQ2d 227, *16-17 (TTAB 2022), and is not bound by decisions of examining attorneys, *In re Int’l*

We agree with Applicant. As we noted at the outset of this opinion, the Examining Attorney accepted Applicant’s specimens as to its Class 42 services, which include, *inter alia*, “providing temporary use of non-downloadable **computer software for application and database integration in the educational field....**” (Emphasis added.) Applicant’s Class 9 downloadable software has the same desirable features as its non-downloadable software, in the same educational field. Both offer “**computer software for application and database integration in the educational field.**”

By either means, students can use an application, or “app”, “a software application, often a small, specialized program for mobile devices,”²⁵ to gain access to a database, “a large amount of information stored in a computer in an organized way that allows individual pieces of information to be found quickly,”²⁶ whereby the students and instructors can integrate their answers and evaluations.²⁷

Watchman, Inc., 2021 USPQ2d 1171, *29-30 (TTAB 2021), we accept Applicant’s argument that its CAPSIMOPS mark is associated with both its goods and services, just as with its CAPSIMCORE mark.

²⁵ Dictionary.com based on the RANDOM HOUSE UNABRIDGED DICTIONARY (2022), accessed 10/17/2022. “The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).” *Int’l Dairy Foods Ass’n v. Interprofession du Gruyère and Syndicat Interprofessionnel du Gruyère*, 2020 USPQ2d 10892, * 17 n. 115 (TTAB 2020).

²⁶ MacmillanDictionary.com, accessed 10/3/22.

²⁷ “Database integration is the process used to aggregate information from multiple sources—like social media, sensor data from IoT, data warehouses, customer transactions, and more—and share a current, clean version of it across an organization. Database integration provides the home base, to and from which all shared information will flow.” Talend.com, accessed 10/3/22. *See also* <https://www.webopedia.com/definitions/database-integration/>: “Database integration consolidates data from multiple sources to provide businesses with more comprehensive views and opportunities to use that data.” “Database integration as a web

Applicant's website promotes the app's "LMS Integration," as a desirable feature, which "Streamlines administration and boosts productivity with Single Sign-On (SSO)."²⁸ ("LMS" denotes a Learning Management System, which provides a user interface operated by instructors and students. A learning management system provides an instructor with a way to create and deliver content, monitor student participation, and assess student performance.)²⁹ The application and data integration are marketed to the relevant consumers: instructors and students, and are the very purpose for purchasing its goods. Applicant's specimen provides sufficient information about them to help the relevant consumers consummate a purchase at the point of sale.

application allows different users to edit data that connects to a web page." Jan. 12, 2021, accessed 10/16/2022.

Applicant attached to its brief on appeal an article defining "application software." Applicant's brief, ex. F, 6 TTABVUE 50-51. The Examining Attorney objected that this definition was not made part of the record prior to the appeal. Examining Attorney's brief, 8 TTABVUE 2 (citing Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d)). Since this appeal concerns definitions of technical terms, which were not defined in the course of prosecution, we find this information instructive, and have further relied on the above definitional information, which we consider *sua sponte*. See *In re Omniome, Inc.*, 2020 USPQ2d 3222 *2 n.17 (TTAB 2019); TMEP § 710.01(c) (July 2022) ("The Board may take judicial notice of dictionary definitions, including 'online dictionaries that exist in printed format or regular fixed editions,' which were not made of record prior to appeal, and may do so either *sua sponte* or upon request of the applicant or examining attorney.").

²⁸ Applicant's Jan. 17, 2021 Statement of Use at 16-17.

²⁹ <https://www.techtarget.com/searchcio/definition/learningmanagement-System>, accessed on August 4, 2022. See Applicant's reply brief, 9 TTABVUE 4-8. Again, given the technical nature of the subject matter, and the absence of definitions in the prosecution history, we exercise our discretion to consider this information, as it sheds light on the meaning of Applicant's identified goods. See generally *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1410 (TTAB 2010) ("Where, as here, applicant's description of goods provides basic information, and the goods are of a technical nature, it is entirely appropriate to consider extrinsic evidence to determine the specific meaning of the description of goods.") (citing *In re Trackmobile Inc.*, 15 USPQ2d 1152, 1154 (TTAB 1990) (considering extrinsic evidence where description of goods is somewhat vague)).

III. Conclusion

Applicant's fourth set of specimens satisfies all three elements in TMEP § 904.03(i): Applicant's mark is displayed in association with a description of its goods, at a point of purchase where the potential purchaser is afforded sufficient information and means to consummate a purchase. The fourth set of specimens thus demonstrates Applicant's use of the mark in commerce in connection with its goods, as required by 15 U.S.C. §§ 1051(d) and 1127, as well as Trademark Rules 2.56 and 2.88, 37 C.F.R. § 2.56, 2.88.

Decision: The refusal to register Applicant's mark as to its Class 9 goods is reversed.